BROWN BAG SEMINAR

Thursday, August 21, 2014

(third Thursday of each month)
Noon - 1 p.m.

633 17th Street

12th Floor Conference Room (note different location for this month)

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation
Free

This outline covers ICAP and appellate decisions issued from

July 12, 2014 through August 15, 2014

Contents

Industrial Claim Appeals Office decisions

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-905-434-02

IN THE MATTER OF THE CLAIM OF

MATTHEW BOLERJACK,

Claimant,

v.

FINAL ORDER

WATER EDGE POND SERVICE SPECIALIST LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated February 11, 2014, that determined the claimant was responsible for his termination from employment and, therefore, denied and dismissed his request for temporary total disability (TTD) benefits, and that ordered the respondents liable for the medical treatment provided by Dr. Ray, but only for the period from May 29, 2013, until June 10, 2013, on the basis he no longer is a current treating provider. To the extent the ALJ ordered that Dr. Ray is no longer an authorized treating provider and the respondents are not liable for any further medical benefits with Dr. Ray after June 10, 2013, we set that ruling aside and otherwise affirm the ALJ's order.

The claimant worked as a "pond specialist" for the respondent employer, and his job duties included building ponds. The claimant would lift heavy rock, wood, stones, and other materials to make landscaping features. At the time he was hired, the claimant was provided with an Employee Manual (Manual). The Manual covered the topic of "Substance Abuse," which provides that "being under the influence of illegal drugs, alcohol, or substances of abuse on Company property is prohibited" and "working while under the influence of prescription drugs that impair performance is prohibited." The Manual also provided that an employee may be subject to discipline, up to and including immediate termination for "working or reporting to work, conducting Company business or being on Company property while under the influence of an illegal drug or alcohol, or in an impaired condition."

On November 6, 2012, the claimant was working on a job in Conifer. The job required the claimant to move two tons of granite. The only way to the pond was down a stairway, and the claimant repeatedly transported the granite using a wheelbarrow. At one point that day, the wheelbarrow began to tip and the claimant attempted to steady it. When doing so, the claimant felt a significant discomfort in his back. The claimant did not report his injury right away. Rather, after about two weeks, the claimant's back did not get better, and so on November 19, 2012, he contacted his supervisor, Mr. Glamos, and described the incident that happened on November 6, 2012.

Mr. Glamos provided the claimant a referral for treatment at HealthOne Occupational Medicine Centers (HealthOne). The claimant saw Dr. Basow for evaluation on November 19, 2012. Dr. Basow diagnosed the claimant with a lumbar strain and placed him on work restrictions of no lifting over 20 pounds and no repetitive bending. Dr. Basow also prescribed physical therapy and ibuprofen.

The claimant also provided a urine specimen for drug testing analysis at HealthOne on November 19, 2012. The specimen tested positive for THC/marijuana. The specimen was reviewed by Medical Review Officer, Dr. Burgess, who explained that the claimant had a level of 2,620 nanograms per milliliter, which is a very high level and indicates the claimant is a regular, heavy user of marijuana. Dr. Burgess further explained that in the 25 years he has been a Medical Review Officer, the claimant's 2,620 nanograms per milliliter result is in the top 1% of positive tests he has reviewed and in the top 10 results he has seen. Dr. Burgess stated that with this high level, that attention, coordination, balance, judgment, and cognitive abilities would be affected. He characterized the claimant as impaired at this level.

As a result of failing the drug test, the claimant was terminated on December 7, 2012. The claimant explained to his supervisor that he never had used marijuana while at work and that he had a marijuana card for shoulder pain. He further reported that he did use marijuana for pain relief after his day's work and during the weekends before reporting to work.

The respondent insurer eventually mailed a copy of the Notice of Contest to the claimant on December 14, 2012. The reason given for the Notice was that the respondent insurer alleged that the injury/illness was not work-related. A December 17, 2012, appointment that the claimant had with Dr. Basow was canceled due to the facility closure. Another appointment for December 20, 2012, also was canceled, and it was noted "no insurance."

After receiving notice that the respondent insurer was denying compensability of his claim, the claimant decided not to return to Dr. Basow for further treatment or to

physical therapy because he lacked insurance coverage. Since the claimant continued to have back pain, though, he began treating with Dr. Ray on May 29, 2013. The last day of treatment with Dr. Ray was on June 10, 2013.

A hearing ultimately was held on the issues of compensability, medical benefits, average weekly wage, temporary total disability (TTD) benefits, whether the claimant is responsible for his termination of employment and resulting wage loss, and whether the respondents were entitled to a fifty percent reduction in compensation due to the willful failure to obey a safety rule. The ALJ found that the claimant had proven he suffered a compensable injury within the course and in the scope of his employment. The ALJ further found that after terminating the claimant's employment and denying compensability, the respondents did not provide the claimant with medical treatment. Thus, the ALJ held the respondents waived the right to object to Dr. Ray as an authorized treatment provider and the respondents, therefore, were liable for the treatment Dr. Ray provided to the claimant from May 29, 2013, through June 10, 2013. The ALJ further held that since the claimant stopped treating with Dr. Ray as of June 10, 2013, then Dr. Ray no longer is a current treatment provider for the claimant. The ALJ concluded that since the claimant continues to have symptoms from his November 6, 2012, incident, then the respondents are liable for the continued medical treatment recommended by Dr. Basow and his authorized referrals. The ALJ also held that the claimant violated the respondent employer's substance abuse policy on November 19, 2012, and, therefore, he was responsible for his termination. Thus, the ALJ concluded that the claimant is barred from recovering TTD benefits effective December 7, 2012.

I.

On appeal, the claimant argues that while the ALJ properly found the right of selection of authorized treating physician under §8-43-404, C.R.S. passed to the claimant, there is nothing in the record to support the ALJ's additional finding that "the de facto authorization [then] passed to the respondents' designated provider," Dr. Basow. The claimant argues that he did not relinquish or concede that the right of selection had passed back to the respondents. We agree with the claimant that Dr. Ray remains an authorized treating provider, and that the respondents are liable for medical benefits for Dr. Ray's reasonable and necessary treatment of the claimant's industrial injury after June 10, 2013. To the extent the ALJ ruled to the contrary, we set that ruling aside.

Section 8-43-404, C.R.S. provides the employer or insurer the statutory right, in the first instance, to select a physician to treat the industrial injury. If the physician selected by the respondents refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, with the result being that the physician selected by the claimant is authorized to treat the injury. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo.

App. 1988).*; Tellez v. Teledyne Waterpik,* W.C. No. 3-990-062 (March 24, 1992), *aff'd., Teledyne Water Pic v. Industrial Claim Appeals Office,* (Colo. App. 92CA0643, Dec. 24, 1992)(NSOP); *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996).

Initially, the respondents assert that the claimant's argument regarding Dr. Ray is not currently reviewable because the ALJ's order does not deny any medical benefits to the claimant. We disagree with the respondents' argument and conclude that this portion of the ALJ's order is final and reviewable. While the ALJ's order grants the claimant medical benefits from Dr. Ray for the period of May 29, 2013, through June 10, 2013, it also appears to deny the claimant any further medical benefits with Dr. Ray after June 10, 2013. Thus, the respondents' argument notwithstanding, this portion of the ALJ's order is final and reviewable. Section §8-43-301(2), C.R.S.

Next, in her order, the ALJ essentially found that because Dr. Basow refused to treat the claimant for his industrial injury, that the respondents failed to designate a provider and they waived the right to object to Dr. Ray as an authorized treating provider. The ALJ also found that the last medical record for treatment with Dr. Ray was for June 10, 2013. The ALJ ruled that since the hearing was held on October 29, 2013, then this demonstrated that Dr. Ray no longer was a current treatment provider for the claimant. It is true, as the ALJ found, that Dr. Ray's last treatment was for June 10, 2013. This, however, does not demonstrate, as a matter of law, that Dr. Ray is no longer a current treating provider. Similarly, this does not demonstrate that Dr. Ray is deauthorized as a treating provider to the extent such an inference can be made from the ALJ's ruling. We further note that the record is devoid of any evidence that any Medical Utilization Review under §8-43-503, C.R.S. was performed to deauthorize Dr. Ray, or that there was any specific agreement by the parties to deauthorize Dr. Ray as a provider. Rather, as explained above, once the respondents' authorized treating physician, Dr. Basow, would not treat the claimant for non-medical reasons, then the right of selection passed to the claimant. Section 8-43-404, C.R.S.; *see Ruybal v. University Health Sciences Center, supra.; Tellez v. Teledyne Waterpik, supra; Buhrmann v. University of Colorado Health Sciences Center, supra*. Once the claimant selected Dr. Ray, then Dr. Ray remained an authorized treating physician, and the respondents are liable for the medical treatment he provided and provides to the claimant to the extent such treatment is reasonable and necessary to treat the claimant's industrial injury. Section 8-42-101, C.R.S. Thus, to the extent the ALJ ruled that Dr. Ray no longer is an authorized treating provider and the respondents are not liable for medical benefits from Dr. Ray after June 10, 2013, for reasonable and necessary treatment of the claimant's industrial injury, we set that ruling aside as not supported by the facts or law. Section 8-43-301(8), C.R.S.

II.

Next, the claimant argues that the ALJ erred in terminating TTD benefits. The claimant contends that his violation of the respondent employer's Manual cannot be used for the alternative purpose of denying TTD benefits. The claimant reasons that since he used marijuana to deal with the pain from his work injury, and his intoxicated state was a proximate cause of his injury, this means his termination is the result of the injury producing activity, and TTD benefits are therefore warranted. Thus, the claimant contends that the respondents' request for a penalty under §8-42-112.5, C.R.S. instead should be heard. We disagree.

If a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *See Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001). On the other hand, if the ALJ is persuaded that the claimant's wage loss is not contributed to by his work injury, but is the result of non-industrial factors, then the claimant will not be entitled to TTD benefits. Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.

Here, the ALJ did not find or rule that the claimant's industrial injury contributed to some degree to his subsequent wage loss. Rather, there is record support for the ALJ's ruling that the claimant's wage loss was the result of non-industrial factors, or the claimant's being "impaired" when he arrived at the Company property on November 19, 2012. Depo. of Dr. Burgess at 29; Findings of Fact at 5 ¶10; Conclusions of Law at 13, 14. Section 8-43-301(8), C.R.S. Additionally, it is true that the ALJ credited Dr. Burgess' testimony that the claimant's level of 2,620 nan7ograms per milliliter was high enough to affect his attention, coordination, balance, and judgment. Nevertheless, the ALJ did not find that the claimant's intoxicated state contributed to, or was a proximate cause of, his industrial injury on November 6, 2012. Depo. of Dr. Burgess at 29; Findings of Fact at 4-5 ¶8; Conclusions of Law at 13. We further note that in her order, the ALJ explicitly recognized that the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). This, however, was not the case here. Consequently, we are not persuaded that the ALJ erred in ruling that the claimant is not entitled to TTD benefits on the basis that he was responsible for his termination from employment, and that non-industrial factors caused his wage loss effective December 7, 2012. Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued February 11, 2014, is set aside to the extent the ALJ ordered that Dr. Ray is no longer an authorized treating provider and the respondents are not liable for any further medical benefits with Dr. Ray

after June 10, 2013, for reasonable and necessary treatment of the claimant's industrial injury. Otherwise, we affirm the ALJ's order.

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

7/29/2014 by KG .

MATTHEW BOLERJACK, 5702 S LOGAN ST APT # C, CENTENNIAL, CO, 80121 (Claimant)
WATER EDGE POND SERVICE SPECIALIST LLC, C/O: JEFFREY GLAMOS, 3333 S BANNOCK ST #340, ENGLEWOOD, CO, 80110 (Employer)
PINNACOL ASSURANCE, C/O: GERRY MILLER, 7501 E LOWRY BLVD, DENVER, CO, 80230-7006 (Insurer)
BACHAS & SCHANKER LLC, 1899 WYNKOOP ST # 700, DENVER, CO, 80202 (For Claimant)
RITSEMA & LYON PC, C/O: THOMAS KANAN ESQ, 999 18TH ST STE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-886-133-01

IN THE MATTER OF THE CLAIM OF

THEODORE CATLOW,

Claimant,

v.

FINAL ORDER

DAIRY FARMERS OF AMERICA,

Employer,

and

AMERICAN ZURICH INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated September 4, 2013, that denied and dismissed the claimant's request for workers' compensation benefits as a result of a motor vehicle accident on July 10, 2012. We affirm the ALJ's order.

This matter was previously before us. The claimant originally appealed the ALJ's September 4, 2013, order beyond the 20 days allowed. However, due to an incorrect email address, the claimant's attorney did not receive the order until after the time for appeal had expired. On February 26, 2014, we issued an order setting aside the dismissal of the appeal and remanding the case for the ALJ to issue a briefing schedule. On April 2, 2014, the ALJ issued the briefing schedule and the matter was subsequently transmitted to the panel.

This matter went to hearing on the issue of compensability of the claimant's July 10, 2012, motor vehicle accident and the claimant's request for benefits. After hearing, the ALJ entered factual findings that for purposes of appeal can be summarized as follows. In April of 2012, the claimant sustained an admitted injury to his low back while working for the employer as a semi-truck driver. One of the initial and continuing symptoms the claimant experienced was severe spasms in his low back. The claimant was diagnosed with an acute severe lumbar strain and was immediately referred for

physical therapy. The claimant received physical therapy from Falcon Physical Therapy beginning May 1, 2012.

Dr. Mary Dickson became the authorized treating provider in May of 2012. The first visit with Dr. Dickson was scheduled for May 9, 2012. The claimant, however, called and requested that his appointment be moved up to May 8, 2012, due to severe spasms he was experiencing. Dr. Dickson's office complied and medical records noted that the claimant was experiencing severe spasms and that the symptoms appeared to go up and down without steady improvement. Dr. Dickson recommended that the claimant continue with physical therapy and also gave him a Medrol dose pack.

The claimant treated with Falcon Physical Therapy four times over the next week. During one of the initial visits, physical therapist David Schultz, also partial owner of Falcon Physical Therapy, instructed the claimant to come in when he was suffering from a severe spasm even if the claimant did not have a scheduled appointment. Mr. Schultz testified at hearing that he instructed the claimant to do this so the therapist could determine the physical process that was going on at the time of the spasm and to help relieve the claimant's severe pain. The claimant followed Mr. Schultz' directions and came to Falcon Physical Therapy several times without a specific appointment. Sometimes the claimant would call ahead and sometimes he would just show up. Falcon Physical Therapy never turned the claimant away or denied any treatment bills for these services.

The claimant had a visit with Dr. Dickson on July 9, 2012. The claimant and Dr. Dickson testified that on that date they had a conversation regarding the claimant's physical therapy. Their testimony was similar in nature. Both Dr. Dickson and the claimant stated that the claimant should undergo a trial of chiropractic treatment because he continued to have spasms and did not make permanent gains with physical therapy. Dr. Dickson called Falcon Physical Therapy while the claimant was in her office and indicated her opinion that the claimant should wait to utilize any additional physical therapy visits until he tried chiropractic care.

On the morning of July 10, 2012, the claimant went to work as usual. However, he subsequently began to suffer from a back spasm. He left work and was headed home. On his way home the claimant's spasms became so bad that he drove towards Falcon Physical Therapy. The claimant was then involved in a motor vehicle accident where he injured his head, cervical, shoulder and sustained additional back injuries.

The ALJ found that although the claimant was credible in most regards, he was not authorized to seek treatment with Falcon Physical Therapy on July 10, 2012, as Dr. Dickson explicitly removed the physical therapy regimen from the claimant's course of treatment. The claimant was fully aware of this change in treatment and even agreed with Dr. Dickson. The ALJ specifically found the claimant not credible in failing to call Dr. Dickson on that date and that if the claimant was in a true emergent situation, the claimant would have sought care at the emergency department. The ALJ concluded that the claimant failed to establish that it is more likely than not that the motor vehicle accident occurring on July 10, 2012, is compensable as an injury sustained in the quasi-course and scope of employment or as emergent treatment.

On appeal, the claimant contends that the ALJ misapplied the law in reaching his conclusion that the treatment with Falcon Physical Therapy was not "authorized." The claimant also argues that the evidence does not support the ALJ's conclusion that the claimant sought treatment at Falcon Physical Therapy because it was an emergency. We perceive no reversible error and therefore affirm the order on review.

I.

It is well settled in Colorado that the quasi-course of employment doctrine extends workers' compensation benefits to injuries sustained while traveling to and from treatment by an authorized provider. *See Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009). Because an employer is required to provide medical treatment, and an injured employee is required to submit to it, a trip for authorized treatment becomes an implied part of the employment contract. *Price Mine Serv., Inc. v. Indus. Claim Appeals Office*, 64 P.3d 936, 937 (Colo. App. 2003); The quasi-employment doctrine, however, does not apply to subsequent injuries sustained when traveling to and from unauthorized treatment. *See Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993) (injuries from seeking unauthorized treatment not compensable).

The issue in this case is whether the claimant's travel to the physical therapy appointment on July 10, 2012 was "authorized" medical treatment bringing the claimant's travel into the quasi course and scope of employment. We agree with the ALJ that under the circumstances presented here, the physical therapy was not authorized.

"Authorization" refers to a medical care provider's legal authority to treat the claimant. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). An authorized provider includes any physician to whom the claimant is referred in "the

normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). The existence of such a referral is generally a question of fact. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

The panel has previously held that an authorized treating physician may limit the scope of a referral so as to retain the ultimate authority over the administration of the claimant's medical care. *E.g. Gamboa v. ARA Group, Inc.*, W.C. No. 4-106-924 (November 20, 1996). Whether such a referral has been made, and if so, the scope of the referral are questions of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. The substantial evidence standard of review requires us to consider the record in a light most favorable to the prevailing party, defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and the plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The claimant's arguments notwithstanding, the record supports the ALJ's determination that the scope of the referral for physical therapy was limited. Mr. Schultz testified that Falcon Physical Therapy began treating the claimant pursuant to a prescription from a doctor and that if the case wasn't progressing or they "ran out of authorization" they would write a progress note or a letter to the doctor to get additional authorization. Tr. at 30-31. Dr. Dickson testified that on July 9, 2012, she made the decision to place the claimant's physical therapy on hold because he was not making any functional gain after 18 sessions of physical therapy. Tr. at 83. Dr. Dickson placed a call to Falcon Physical Therapy advising them of the limitation in front of the claimant. Tr. at 85. The claimant also testified that he was aware of the limitation placed on physical therapy until he underwent the chiropractic treatment. Tr. at 45. Both the claimant and Dr. Dickson testified as to the conversation that occurred on July 9, 2012, where it was agreed that the claimant would not go to physical therapy until he had undergone chiropractic care. Tr. at 45 and 58. *Granger v. Penrose Hospital*, W.C. No. 4-351-885 (July 20, 1999); *Chapman v. The Spectranetics Corp.*, W.C. No. 4-162-568 (May 30, 1997). ("deauthorization" may occur if evidenced by an express agreement under which the claimant waives treatment by the previously authorized physician).

Under these circumstances, there is substantial evidence to support the ALJ's conclusion that the claimant was not en route to an authorized medical appointment when he was involved in a motor vehicle accident. The ALJ also correctly applied the relevant law. Consequently, we have no basis to disturb the ALJ's order here.

II.

The ALJ also explicitly rejected the claimant's argument that the claimant was on his way to physical therapy as an emergency situation and that the physical therapy was therefore authorized under the emergency doctrine. In *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990), the court held that in cases of medical emergency the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. Therefore, we must uphold the ALJ's determination if supported by substantial evidence. Section 8-43-301(8), C.R.S.

Generally speaking, the "emergency doctrine" requires the existence of a bona fide emergency requiring treatment. *Marks v. Continental Airlines, Inc.*, W. C. No. 4-298-455 (February 27, 1998); *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995). There is substantial evidence to support the ALJ's finding that situation on July 10, 2012, was not emergent. The record documents that the claimant had ample time to contact Dr. Dickson, as he had done so in the past to move his initial appointment to an earlier date because of the spasms he was experiencing. Tr. at 95. The ALJ also determined that had the situation been truly emergent, the claimant would have sought treatment at the emergency room. In our view, the ALJ's finding that the physical therapy was not "emergency" treatment is a plausible inference from this evidence, and therefore, the finding must be upheld. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 4, 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

8/04/2014 by KG .

THEODORE CATLOW, 31550 ANTIOCH ROAD, YODER, CO, 80864 (Claimant)
DAIRY FARMERS OF AMERICA, Attn: KELLY STOKER, P O BOX 909700, KANSAS CITY, MO, 64190 (Employer)
AMERICAN ZURICH INSURANCE, Attn: VALERIE BURKE, P O BOX 968020, SCHAUMBURG, IL, 60196-8020 (Insurer)
STEVEN U. MULLENS, P.C., Attn: AMY L. BREWER, ESQ., P O BOX 2940, COLORADO SPRINGS, CO, 80901-2940 (For Claimant)
THE KITCH LAW FIRM, P.C., Attn: MICHELLE PRINCE, ESQ., 3064 WHITMAN DRIVE, SUITE 200, EVERGREEN, CO, 80439 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-727-298-03

IN THE MATTER OF THE CLAIM OF

KIM R. DAVIES,

Claimant,

v.

FINAL ORDER

KINDRED HEALTHCARE,

Employer,

and

AMERICAN INSURANCE GROUP PLAN,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated January 10, 2014, that determined the claimant's claim was closed by operation of law because she had actual notice of final admissions of liability (FAL) but failed to file an objection or request a Division Independent Medical Examination (DIME) within 30 days of the actual notice. We affirm the ALJ's order

This matter was previously before us. The claimant had asserted the award of permanent disability was not correctly calculated. In an order dated December 10, 2012, the ALJ found that the claimant' claim was closed because of the claimant's failure to timely object to the FALs. The ALJ implicitly determined that the claimant waived her right to actual notice of the FAL because the claimant failed to notify the Division of her change of address. On June 3, 2013, we issued an order reversing the ALJ's determination based on the evidence in the record that the claimant did, in fact, provide the respondents with her change of address and under the circumstances of this case the claimant did not waive her right to actual notice of the FALs. We, therefore, remanded the matter for further proceedings.

On remand the ALJ held an additional hearing. The respondents presented evidence that the claimant subsequently had actual notice of the FALs and failed to

timely object or request a DIME. The respondents, therefore, argued that the claim was closed. On remand the ALJ found that the claimant sustained an admitted injury on January 2, 2007. The respondents filed an FAL on February 24, 2010. The FAL was sent to the claimant's address, 9831 S. Clariton Place, Littleton, CO 80216. On February 26, 2010, the respondents filed an amended FAL which was also mailed to the Clariton address. On March 5, 2010, the Division issued a letter to the respondents stating that it had received the February 26, 2010, amended FAL, and there was an overpayment of permanent partial disability benefits. The Division informed the respondents that they could amend the admission pursuant to WCRP 5-9. The ALJ found that on March 16, 2010, the respondents filed an amended FAL pursuant to the Division's letter. The amended FAL was again addressed to the Clariton address.

On May 19, 2011, the claimant filed a petition to reopen her claim asserting that her case should be reopened based on mistake or fraud because she did not receive the February 26, 2010, or the March 16, 2010, amended FALs. The claimant subsequently filed an application for hearing alleging that the claim was not closed because she had not received the amended FALs and alternatively, on the issue of petition to reopen. The claimant's address was officially changed with the Division on March 8, 2012, after a prehearing conference.

In his remand order, the ALJ found that the claimant did not receive the FALs that were filed on February 24, 2010, February 26, 2010, and March 16, 2010, through the mail because of her address change. The ALJ further found however, that the claimant acknowledged at the October 18, 2012, hearing that she had received copies of the FAL on November 15, 2010. The ALJ found that it was also apparent from the claimant's filing of the petition to reopen on May 19, 2011, that the claimant had possessed actual knowledge of the FALs and that she did not object to the FALs or file a notice and proposal for a DIME within 30 days of May 19, 2011. The ALJ also noted that the respondents mailed supplemental responses to the claimant's interrogatories to her correct address and that the responses included copies of the FALs. Although the claimant actually received the FALs, she did not object or file a notice and proposal for a DIME within 30 days of June 12, 2012. The ALJ also found that the FALs were mailed to the claimant on August 1, 2013, with the respondents' motion for a hearing on remand and that the motion included copies of the FALs. The claimant, however, never objected to the FALs within 30 days of August 1, 2013.

The ALJ concluded that the claimant's claim was closed by operation of law because she failed to properly file an objection or to request for a DIME within 30 days after she had actual notice of the FALs.

On appeal the claimant essentially argues that the ALJ's order is not supported by the evidence and applicable law. We disagree and, therefore, affirm the ALJ's order.

The respondents initially request that we strike four exhibits attached to the claimant's brief in support of petition to review. As we noted in our prior order, our review is restricted to the record before the ALJ and, as such, we cannot consider the exhibits which were not part of the record before the ALJ. *See City of Boulder* v. *Dinsmore*, 902 P.2d 925 (Colo. App. 1995)(appellate review limited to the record before the ALJ); *Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988)(appellate review limited to the record before the ALJ). We note however, that the claimant has not requested a transcript and we are unable to determine what exhibits were actually admitted by the ALJ. The documents attached to the claimant's brief in support appear to have been created after the ALJ issued his order on remand because they address the claimant's indigent status for the purpose of preparing a transcript. We presume that these exhibits were not before the ALJ and do not consider them on review.

Section 8-43-203(2)(b)(II), C.R.S., provides that a claimant's failure to object to a final admission of liability and request a hearing on any disputed issues that are ripe for hearing or request a DIME within 30 days will result in automatic closure of the claim concerning all admitted liability. The automatic closure of issues raised in an uncontested FAL is "part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

The claimant is entitled to actual notice of the FAL before the failure to object triggers a closure. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). Although there is nothing in the statutes or the rules that expressly provides that an FAL must be served by mail to the claimant's home address, the courts have held that such a requirement is implicit because it effectuates the legislative purpose of insuring the quick and efficient delivery of benefits and is reasonably designed to provide the claimant notice of the FAL and provide an opportunity to object. *Id.*

The panel has previously held that even if the FAL is mailed to an incorrect address, the claimant's receipt of actual notice was sufficient to trigger her obligation to object to the FAL and request a DIME if she so desired. *Duran v. Russell Stover Candies*, W.C. No. 4-524-77 (April 13, 2004). An error in addressing the FAL does not necessarily vitiate its effectiveness if the claimant actually receives the FAL in sufficient time to file a timely objection. Generally, the time period for the claimant to object to such an admission begins to run when the claimant received the actual notice of the FAL. *Meskimen v. FFE Transportation*, W.C. No. 3-966-629 (March 31, 2003). For example, in *Henriquez v. K.R. Swerdfeger Constuction*, W.C. No. 4-439-726 (May 5, 2003), the panel held that receipt of an FAL by obtaining a copy of the Division's file ten months subsequent to the filing of the FAL initiated the 30 day period to contest the FAL as of the date the file was received.

Thus, where a party receives actual notice of a proceeding and is afforded a reasonable opportunity to participate, non-jurisdictional errors in the statutory notice process do not nullify the administrative determination. *Wunder v. Department of Revenue*, 867 P.2d 178 (Colo. App. 1993) (despite Department of Revenue's violation of statute requiring 10 days written notice of change in license revocation hearing site, no error occurred where claimant received oral notice of change on day of hearing and there was no evidence change prejudiced his ability to participate in hearing); *Shumate v. Department of Revenue*, 781 P.2d 181 (Colo. App. 1989)*(*even if notice of license revocation not properly served, the claimant's right to notice was not affected because he appeared at revocation hearing and participated).

It follows that the ALJ here correctly held the claimant's receipt of actual notice of the FALs was sufficient to trigger her obligation to object to the FAL and to file an application for hearing and request a DIME if she so desired. The ALJ found that the claimant testified that she received copies of the FAL on November 15, 2010, and did not file an application for hearing or FAL within 30 days. Nor did the claimant file an application for hearing or request a DIME within 30 days of any other dates on which the ALJ found the claimant received the copies of the FAL. Because there was actual notice which afforded the claimant a meaningful opportunity to lodge an objection to the FALs and to file an application or to request a DIME within the statutory time limits, we agree with the ALJ's determination that the claim is now closed by operation of law.

Although the claimant contends on appeal that she did not testify that she received the March 16, 2010, FAL as of November 15, 2010, and the May 19, 2011 petition to reopen did not concede that she had received the FALs, the claimant does not dispute that

she later received all three of the FALs that that the respondents sent on June 12, 2012 and August 1, 2013. Additionally, we note that the record does not contain a transcript of the hearing before the ALJ on remand. Where, as here, the appealing party fails to procure transcripts of the relevant hearing, we must presume the pertinent findings of fact are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Further, as previously noted the transcripts from the prior hearing were listed in the claimant's exhibits, the order, however, does not expressly indicate what exhibits were received into evidence. We note that the ALJ references the transcript of the October 18, 2012, hearing in ¶ 13 of his findings of fact as an indication that transcript was received as an exhibit in the December 2, 2013, hearing. In that prior hearing the claimant does testify she received a copy of the February 24, 2010, FAL in November, 2010.

The claimant also appears to argue that the ALJ exceeded the scope of the remand in addressing whether the claim was closed based on the claimant's subsequent actual receipt of the FALs. We perceive no error. Generally the tribunal which enters an order remanding a case is in the best position to determine the scope of the remand. *See Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). The order of an appellate tribunal which remands for further proceedings consistent with its ruling is a general remand and the lower tribunal may make new findings and conclusions as long as there is no conflict with the appellate ruling. *Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686 (Colo. App. 1988).

Here, our order of remand remanded the matter for further proceedings "concerning the claimant's entitlement to workers' compensation benefits." The remand was general in nature and authorized the ALJ to determine whether an additional hearing was necessary and to reexamine the record and to make new findings and conclusions to resolve the pertinent conflicts in the evidence on the issue of the claimant's entitlement to workers' compensation benefits. *Id.* (case remanded for further proceedings consistent with appellate court's opinion constitutes a general remand authorizing trial court to make new findings and conclusions.) We do not see anything to suggest that the ALJ acted inconsistently with our order of remand here. The fact that the ALJ erred in determining the claim was closed at an earlier point in time, does not preclude the ALJ from finding that the claim subsequently closed once the claimant had actual notice of the FALs.

IT IS THEREFORE ORDERED that the ALJ's order dated January 10, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David Kroll

CERTIFICATE OF MAILING

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

7/30/2014 by KG .

KIM R. DAVIES, 7569 W FROST DRIVE, LITTLETON, CO, 80128 (Claimant)
KINDRED HEALTHCARE, 10201 EAST THIRD AVE, AURORA, CO, 80010 (Employer)
AMERICAN INSURANCE GROUP PLAN, Attn: MELISSA CARTER, C/O: SEDGWICK CMS, P O BOX 14493, LEXINGTON, KY, 40512 (Insurer)
THOMAS POLLART & MILLER, LLC, Attn: ILENE H. FELDMEIER, ESQ., 5600 S QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-764-331-01

IN THE MATTER OF THE CLAIM OF

LISA GAILEY,

Claimant,

v.

FINAL ORDER

SILVER MINE SUBS,

Employer,

and

MID-CENTURY INSURANCE COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Jones (ALJ) dated January 27, 2014, that denied her petition to reopen her request for temporary total disability (TTD) benefits from June 8, 2008, to October 29, 2008, and her request for increased permanent partial disability (PPD) benefits. We affirm.

This matter went to hearing on the issues of reopening for a changed condition, TTD benefits, and additional PPD benefits. After hearing, the ALJ found that the claimant was in an automobile accident on July 19, 2007, and sustained admitted injuries to her lower back and neck. In January 2008, Dr. Wunder diagnosed the claimant with C5-6 radiculopathy and L5-S1 radiculopathy with degenerative disc disease of the spine.

Dr. Carbaugh opined that the claimant was not a surgical candidate due, in part, to her unwillingness to participate in psychiatric therapy. Dr. Carbaugh noted pain behaviors and possible somatoform disorder.

On October 29, 2008, Dr. Wunder placed the claimant at maximum medical improvement (MMI) with a 31% whole person impairment rating. The claimant was assigned a 25 pound lifting restriction. The claimant also was assigned one year of maintenance care, which included additional epidural steroid injections. Dr. Wunder's range of motion measurements were 13% for the cervical spine and 9% for the lumbar spine.

Dr. Curiel performed a Division independent medical evaluation (DIME). Dr. Curiel agreed with the finding of MMI and assigned a 28% whole person impairment

rating. Dr. Curiel also agreed with Dr. Wunder that the claimant was not a surgical candidate due to her somatoform disorder. His range of motion measurements were 12% for the cervical spine and 9% for the lumbar spine.

The respondent insurer filed a final admission of liability (FAL) on May 26, 2009. The claimant objected and filed an application for hearing. The claimant endorsed the issues of PPD, Grover medical benefits, and overcoming the opinion of the DIME. For "other issues" the claimant listed medical treatment if not at MMI.

The claimant continued to receive medications from her authorized treating physicians as well as medical massages. The claimant informed her massage therapist in November 2009 that she was doing better. Over the next two months, the claimant reported less pain and ability to increase her activities of daily living.

Due to her maintenance care being completed, Dr. Pineiro discharged the claimant as a patient. Dr. Pineiro informed the claimant that if she could not enter into a pain management program via her personal physician to return to Dr. Pineiro for care.

Without requesting a change of physician, the claimant ultimately went to her personal physician, Dr. Seeton. The claimant reported a pain level of 8 out of 10, which she previously had reported prior to being placed at MMI. Dr. Seeton did not refer the claimant to a pain management program, but instead referred the claimant to Dr. Pettine, a surgeon.

Prior to beginning treatment with Dr. Pettine, the claimant filed a petition to reopen alleging a change of condition as of February 9, 2010.

The claimant eventually saw Dr. Pettine and filled out a pain questionnaire. The claimant circled "[s]taying the same" in reference to her back condition. The claimant indicated that this was the same situation with her neck. Dr. Pettine ultimately recommended the claimant undergo a lumbar discectomy and an artificial disc replacement surgery. Dr. Pettine performed these surgeries without obtaining prior authorization from the respondent insurer. After the surgeries, Dr. Pettine assigned a 25 pound lifting restriction, no sitting or standing for extended periods, and occasional bending, twisting, and overhead use of arm. These are the same restrictions as assigned at MMI.

At the respondents' request, the claimant underwent an independent medical evaluation (IME) with Dr. Striplin. He assessed radiculopathy at C5-6 and at L5-S2 with severe degenerative disc disease. Dr. Striplin agreed that the surgery may have been necessary in that she had received good results and was doing well. Dr. Striplin opined

that the claimant should have been seen for a surgical consult prior to MMI. Dr. Striplin did not opine that the claimant had worsened since MMI, and after reviewing the medical records, noted that the claimant's condition was consistent and showed no indication of a change in condition since MMI.

A hearing ultimately was held on March 29, 2011, before ALJ Cannici on the claimant's petition to reopen. ALJ Cannici subsequently denied the claimant's petition to reopen. He found that the claimant's condition had not worsened since MMI, that the reasons for surgery were the same diagnosis that the claimant had at MMI, and that the treatment by Dr. Pettine was not authorized. ALJ Cannici also denied the claimant's request for TTD from February 11, 2010, and ongoing. He found that since the claimant reached MMI on October 29, 2008, she was not entitled to TTD after the date of MMI. The claimant appealed ALJ Cannici's order arguing, in part, that she suffered a causally related change in condition due to the surgeries performed by Dr. Pettine. The Panel affirmed in *Gailey v. Silver Mine Subs*, W.C. No. 4-764-331 (Jan. 24, 2012). The claimant then appealed the Panel's decision to the Colorado Court of Appeals, arguing that the surgeries entitled the claimant to TTD.

While the claimant appealed the Panel's decision to the Court of Appeals, the claimant saw Dr. Wunder on August 23, 2011. In his report, Dr. Wunder assigned a permanent impairment rating of 32% whole person. The reason for the higher rating was that Dr. Wunder used the Table 53 Specific Disorder rating for the unauthorized surgeries.

The Court of Appeals ultimately affirmed the Panel's decision in *Gailey v. Industrial Claim Appeals Office*, Colo. App. No. 12CA0256 (Jan. 24, 2013)(NSOP). The Court rejected the claimant's argument that the claimant's June 2010 surgeries entitled the claimant to TTD.

Thereafter, on June 28, 2013, the claimant filed another petition to reopen, attaching the August 23, 2011, report of Dr. Wunder. The claimant alleged she sustained a worsening of condition based on Dr. Wunder's report assigning a 32% impairment rating. The claimant requested TTD and additional PPD.

The claimant then underwent an IME on August 30, 2013, with Dr. Thurston. He agreed with the restrictions that had been assigned as of the date of MMI. He opined that the claimant was not in need of further care. He also opined the claimant had not worsened since being placed at MMI.

ALJ Jones ultimately denied the claimant's petition to reopen for a change of condition and denied her request for additional PPD. ALJ Jones found that since Dr.

Curiel previously had provided a DIME report and impairment rating, then any subsequent rating by an ATP, such as that of Dr. Wunder, was conditional upon return to a follow-up DIME. ALJ Jones also found that in his report, Dr. Wunder used the Table 53 Specific Disorder rating for the June 14, 2010, unauthorized surgeries. ALJ Jones found that Dr. Wunder's inclusion of the unauthorized surgeries for a Table 53 II E impairment rating invalidated his report and it was not credible or persuasive evidence of a worsened condition. ALJ Jones also found that Dr. Wunder documented the claimant's range of motion measurements as improving since MMI and the DIME. ALJ Jones ultimately concluded that Dr. Wunder's report was not credible or persuasive evidence of a worsened condition. ALJ Jones further found that Dr. Pettine's medical records did not report the claimant's condition had changed, that the claimant did not testify her condition had changed since MMI, that the claimant's work restrictions had not changed since MMI, and that her range of motion had improved since MMI. Further, ALJ Jones found Dr. Thurston's opinions and testimony credible and persuasive that the claimant's condition had not worsened, and that her range of motion had improved. ALJ Jones also concluded that the claimant was barred from re-litigating the issue of TTD as a result of the June 14, 2010, surgeries in that ALJ Cannici, the Panel, and the Court of Appeals previously decided this issue against the claimant.

On appeal, the claimant argues that ALJ Jones erred in denying her petition to reopen and in denying her request for an award of additional PPD benefits. According to the claimant, the fact that her surgeries were not authorized does not alter the fact that these surgeries increased her permanent impairment. The claimant further contends that the respondents' IME, Dr. Striplin, determined her cervical and lumbar surgeries were reasonable, necessary, and related to her industrial injuries. The claimant therefore asserts that her condition has changed as a result. We agree with the claimant that merely because her surgeries were not authorized, that this does not necessarily dictate the conclusion that her permanent impairment has not increased. We conclude, however, that this ruling by ALJ Jones amounts to harmless error because this was only one of several bases ALJ Jones relied upon to conclude the claimant's condition had not worsened.

Section 8-43-303(1), C.R.S., provides that an ALJ may reopen any award within six years on the grounds of error, mistake, or a change in condition. As pertinent here, a change in condition refers either "to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328, 1330 (Colo. App. 1985); *see also Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008).

The reopening authority under the provisions of §8-43-303, C.R.S. is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). Absent fraud or a clear abuse of that discretion, we may not disturb the ALJ's order. *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). The findings of fact upon which the ALJ bases her determination must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we must defer to the ALJ's resolution of conflicts in the evidence, her credibility determinations, and the plausible inferences that she drew from the evidence. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. 2003). To the extent medical evidence is presented, it is solely the ALJ's responsibility to assess the weight of that evidence and resolve any conflicts or inconsistencies. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Initially, we reject the claimant's argument that ALJ Jones erred in ruling she was precluded from filing a second petition to reopen based on a change of condition. ALJ Jones did not conclude that the doctrine of *res judicata* prevented the claimant from filing a second petition to reopen. Rather, ALJ Jones ruled that *res judicata* barred the claimant from re-litigating the issue of TTD as a result of the June 14, 2010, surgeries since this issue previously had been decided against the claimant by ALJ Cannici, the Panel, and the Court of Appeals. Order at 9-10. In her appeal, the claimant only disputes ALJ Jones' order in regard to reopening and PPD benefits. She does not contend there was error pertinent to TTD benefits. This issue then, is not before us.

Next, the claimant's argument notwithstanding, evidence that Dr. Wunder assessed a 32% permanent impairment rating for the unauthorized surgeries does not compel the conclusion, as a matter of law, the claimant's condition worsened. *See Heinicke v. Industrial Claim Appeals Office, supra* (ALJ is not required to reopen claim based upon worsened condition whenever ATP finds increased impairment following MMI). Further, as found by ALJ Jones, even in the context of a reopening premised upon a change of condition due to an increase in an ATP's assigned permanent impairment rating, the claimant is still constrained by the provisions of §8-42-107(8)(c), C.R.S. That section prohibits an ALJ from considering the issue of permanent disability until a DIME report on the matter has been filed with the Division. Accordingly, in this case, ALJ Jones could not have awarded additional PPD benefits due to the absence of a second DIME review of the increased impairment rating. *Id.* We further note that ALJ Jones ultimately found Dr. Wunder's opinion to be not credible, which is solely within her fact finding authority. *See also Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *see also Rockwell International v. Turnbull, supra* (weight to be accorded expert testimony is a matter exclusively within ALJ's discretion).

ALJ Jones' additional bases for denying the claimant's petition to reopen are supported by substantial evidence. ALJ Jones found, with record support, that the claimant's underlying condition had not worsened but, rather, had improved. During the hearing, the claimant did not testify her condition had worsened or changed. Rather, the claimant testified that her pain had decreased. Tr. at 24. Similarly, Dr. Thurston testified that the claimant's condition had not changed or worsened. Instead, Dr. Thurston explained that the claimant had greater range of motion, and that she reported she felt better and her physical findings were somewhat improved. Tr. at 34-35. Additionally, ALJ Jones found, with record support, that Dr. Pettine had not changed the claimant's work restrictions since being placed at MMI and, therefore, there had been no negative impact on her earning capacity since MMI. Ex. N at 19; Ex. C at 10. Section 8-43-301(8), C.R.S.; *cf. City of Colorado Springs v. Industrial Clalim Appeals Office*, 954 P.2d 637 (Colo. App. 1997)(TTD may only be awarded through a reopening when claimant's changed condition establishes "greater impact" upon claimant's capacity for work than he already had sustained at the point of MMI).

The claimant points to certain evidence in support of her argument that she sustained a worsening of her condition. The weight to be assigned such evidence, however, was a matter for the ALJ. Since there is substantial evidence supporting the denial of the petition to reopen, we may not substitute our judgment for that of the ALJ on that issue. Section 8-43-301(8), C.R.S. Under these circumstances, the claimant's petition to reopen was properly denied.

Since we conclude ALJ Jones did not err in denying the claimant's petition to reopen, we need not address her argument regarding her entitlement to additional PPD benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated January 27, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

7/24/2014 by KG .

LISA GAILEY, 927 PALOVERDE DR, LOVELAND, CO, 80538 (Claimant)
SILVER MINE SUBS, Attn: JOHN LANGRECK, 925 E. HARMONY ROAD, UNIT 500, FT. COLLINS, CO, 80525 (Employer)
MID-CENTURY INSURANCE COMPANY, Attn: BETH NEU, C/O: WORKERS' COMPENSATION BCO - DENVER, P O BOX 108843, OKLAHOMA CITY, OK, 73101-8843 (Insurer)
THE LAW OFFICE OF JESS M PEREZ PC, Attn: JESS M. PEREZ, ESQ., 1717 MADISON AVE STE 2, LOVELAND, CO, 80538 (For Claimant)
HUNTER & ASSOCIATES, Attn: JOSEPH M. ESPINOSA, ESQ., 1801 BROADWAY, SUITE 1300, DENVER, CO, 80202-3878 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-907-314-02

IN THE MATTER OF THE CLAIM OF

NOREEN HUBBARD,

Claimant,

v.

FINAL ORDER

UNIVERSITY PARK CARE CENTER,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated March 12, 2014, that ordered the claim compensable, awarded temporary partial disability benefits and medical benefits. We affirm the order pertinent to compensability and temporary benefits. We reverse the order relative to medical benefits.

The respondents bring this appeal contending the claimant's injury is a preexisting condition and that the ALJ does not presently have authority to order medical benefits after MMI.

The claimant asserts she sustained an injury to her low back on December 11, 2012. She testified at the January 9, 2014, hearing that she slipped on ice in the employer's parking lot when she arrived at work that morning. The claimant stated she began to fall while holding onto the door to her car. This caused her to hit the car parked next to hers. She felt pain in her head, shoulder, knee and low back. The claimant stated she did not initially report her injury to the employer. However, after her back pain did not resolve, she reported the injury on December 13. The employer referred her to Dr. Douglas Bradley at Emergicare. The claimant had previously treated with Dr. Bradley for unrelated conditions.

Dr. Bradley obtained an X-ray of her back, prescribed pain medication and physical therapy. The doctor recommended work restrictions of 20 pounds lifting and no kneeling, crawling, squatting or climbing. On December 21, Dr. Bradley tightened the

restrictions to no lifting over 5 pounds. The claimant was further restricted on December 26 and 28 to working no more than six hours per day. The claimant normally worked three 12 hour shifts each week. She continued to work for the respondent employer but for only half her pre-injury number of hours.

Dr. Bradley obtained an MRI of the claimant's lumbar spine and referred the claimant to Dr. Joseph Illig, a neurosurgeon, for recommendations. Dr. Illig read the MRI on January 31, 2013. He observed the MRI revealed disc bulges at L4, L5 and S1and foraminal narrowing at L4-L5. These conditions were all noted to predate the claimant's December 11 fall at work. Dr. Illig recommended epidural steroid injections and additional physical therapy. The respondent insurance carrier denied authorization for the injections. Dr. Bradley also recommended chiropractic treatment and a psychological evaluation. Both were denied authorization by the respondents.

The claimant had been involved in a motor vehicle accident in 1999. This led to an injury to her shoulder, neck and arms. She last treated for this accident in 2003. The claimant had also suffered a work injury to her right shoulder on January 31, 2006. Dr. Bradley treated her for this accident and released her to MMI within 6 months.

After finishing physical therapy, Dr. Bradley determined the claimant was at maximum medical improvement (MMI) on April 28, 2013 for her December 11, 2012, low back injury. He assigned the claimant a permanent impairment rating of 24% whole person. The doctor recommended permanent work restrictions of 10 pounds lifting and working no more than 6 hours per day. Future medical treatment in the form of Ibuprofen and TheraGesic cream, epidural injections, chiropractic treatment and psychological counseling were suggested. The parties agreed the respondents had requested a review by a Division Independent Medical Exam (DIME), which was still pending as of the date of the hearing.

The ALJ evaluated the lay testimony of several witnesses offering various accounts of how quickly the claimant had complained of her injury to co-workers. The ALJ also compared the medical testimony of Dr. Jorge Klajnbart with the opinion of Dr. Jack Rook. The former testified the claimant's medical condition was primarily of a preexisting degenerative nature. The latter asserted the claimant's disability was substantially aggravated by the December 11 near fall in the parking lot. The ALJ found the testimony of the claimant the more persuasive in regard to the question of the likelihood of the slip on ice in the parking lot and its cause of her symptoms. The ALJ also credited the testimony of Dr. Rook over that of Dr. Klajnbart.

The ALJ ruled the claim was compensable. Temporary partial benefits were ordered beginning December 27, 2012, and concluding on April 28, 2013, the date Dr.

Bradley placed the claimant at MMI. The ALJ observed that all medical treatment obtained through Dr. Bradley and his referrals was reasonable, necessary and related and that the respondents were liable for its cost. The ALJ also surmised the six to nine months of future treatment for the claimant's injuries recommended by Dr. Klajnbart was reasonable and necessary.

I. COMPENSABILITY

On appeal the respondents contend there is not substantial evidence to support the findings of the ALJ as they pertain to compensability. The respondents argue claimant's condition of disability is a preexisting condition that was not significantly aggravated by the December 11, 2012, work incident. Pursuant to §8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury . . . arising out of and in the course of the employee's employment." *See also* §8-41-301(1)(b), C.R.S. As pertinent here, the question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)). Accordingly, we must uphold the ALJ's determination of this issue if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *see Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). This standard of review requires us to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The claimant testified to the details of her slip and near fall on December 11. She related that her back hit the parked car next to hers when she lost her footing on the ice. She also described how her back pain became increasingly worse afterwards. This testimony showed a consistent link between the near fall on the ice and the claimant's subsequent physical disability. The employer's recreation director, Susie Rinn, testified that when she asked the claimant if she had been injured, the claimant informed her she had fallen in the parking lot. Ms. Rinn was equivocal regarding the date of the conversation but she did say it was entirely possible the conversation could have occurred on December 11 or 12. Ms. Chris Esquibel verified the claimant did report her injury as a work related slip in the parking lot on December 13, just two days after its occurrence. This lay testimony is substantial evidence the ALJ had available to support his deduction that the claimant had injured her back in the parking lot at work.

The ALJ also was not unreasonable in basing his conclusion on the report of Dr. Rook. Dr. Rook observed the claimant was asymptomatic pertinent to her low back prior to December 11, 2012. He noted the claimant had not received treatment for her previous motor vehicle and work injuries for many years prior to December 11. Dr. Rook found the claimant's description of the mechanism of her near fall in the parking lot to be consistent with the symptoms she developed immediately following. The doctor acknowledged the claimant likely had some preexisting weaknesses in her back, but these conditions did not present any disability to the claimant until aggravated by her slip on the ice on December 11. This report of Dr. Rook is substantial evidence that supports the compensability finding of the ALJ. The finding of compensability is a plausible inference for the ALJ to make given the medical evidence in the record.

We are not compelled to find error in the conclusions of the ALJ that it is probable the claimant sustained a low back injury when she slipped on the ice coming to work on December 11.

II. MEDICAL TREATMENT AFTER MMI

The ALJ made findings of fact that the medical treatment provided the claimant after the December 11, 2012, date of her injury was reasonable and necessary and related to a compensable work injury. As such, the respondents were ordered liable for the payment of those medical costs. The ALJ observed in his conclusions of law that the claimant has been put at MMI by a treating physician. The parties informed the ALJ at the outset of the January 9, 2014, hearing that, although requested by the respondents, no Division Independent Medical Exam (DIME) had been completed.

The ALJ made findings that the treatment obtained by the claimant from Dr. Bradley was reasonable and necessary and related. The ALJ observed Dr. Klajnbart made recommendations of six to nine months for the future treatment of the claimant's symptoms. These suggestions included physical therapy, chiropractic treatment, and facet joint injections versus epidural steroid injections. It was found the claimant "is in need of medical care to cure or relieve her from the effects of her industrial injury." The ALJ ordered the respondents liable for this treatment.

The respondents argue the ALJ is without jurisdiction to award medical benefits after the MMI date of April 28, 2013, provided by Dr. Bradley. The respondents assert that until MMI is ripe to be adjudicated, medical treatment that is intended to improve the condition of the claimant may not be ordered. The issue of MMI may not be the subject of a hearing until a DIME report is completed and filed with the Division. § 8-42-107(8)(b)(III) C.R.S.

Here "an authorized treating physician" (ATP) placed the claimant at MMI. Pursuant to § 8-42-107(8)(b)(I), C.R.S., an ATP shall make the initial determination concerning the date of MMI. Once an ATP makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of the ATP's determination until a DIME is conducted. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

If either party disputes a determination by the authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, the DIME process may be initiated. Section 8-42-107(8)(b)(II), C.R.S.

The finding of MMI by the ATP ended the claimant's entitlement to further treatment to cure and relieve the effects of his injury. *See Whiteside v. Smith*, 67 P.3d 1240, 1245 (Colo.2003)("medical treatment automatically terminate[s] if the treating physician determines that the claimant has reached MMI"). Therefore, the ALJ lacked jurisdiction to hear claimant's request for medical treatment because a DIME has not yet filed a report regarding MMI with the Division. *Chapman v. American Medical Response*, W.C. No. 4-600-029 (September 15, 2006). A hearing on MMI shall not take place until the finding of the DIME physician has been filed. Section 8-42-107(8)(b)(III), C.R.S. *Story v. Industrial Claim Appeals Office, supra*; *Haakinson v. Loomis Fargo & Co*. W. C. No. 4-544-827 (April 13, 2005); *Rakestraw v. American Medical Response* W. C. No. 4-384-349 (October 3, 2005).

In *Grover v. Industrial Commission*, 759 P.2d 705, 711 (Colo. 1988), the Court held that an order for liability for the costs of future medical care post MMI is to be considered "at the hearing on the final award of permanent disability." *See also, Milco Construction v. Cowan*, 860 P.2d 539, 541 (Colo. App. 1993). Because the issue of permanent disability cannot be considered until the issue of MMI has been resolved, medical benefits after MMI could not be considered by the ALJ in the January 9, 2014, hearing in this matter.

Accordingly, the ALJ's order that the respondents pay for the claimant's medical treatment after the April 28, 2013, date of MMI assigned by a treating physician is set aside as premature.

IT IS THEREFORE ORDERED that the ALJ's order issued March 12, 2014, is affirmed to the extent it finds the injury of December 11, 2012, compensable and finds the respondents liable for medical benefits provided to the date of April 28, 2013, the date stated by an ATP that the claimant is at MMI. The order is also affirmed insofar as temporary partial disability benefits are awarded the claimant December 27, 2012,

through April 27, 2013. The order of the ALJ that awards medical benefits after April 28, 2013, is reversed.

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

7/17/2014 by KG .

NOREEN HUBBARD, PO BOX 7291, PUEBLO WEST, CO, 81007 (Claimant)
UNIVERSITY PARK CARE CENTER, C/O: BONNIE BATES, 14499 EAST HAMPDEN AVE, AURORA, CO, 80014 (Employer)
OLD REPUBLIC INSURANCE COMPANY, Attn: ALIXE LANDRY, C/O: GALLAGER BASSETT, PO BOX 4068, ENGLEWOOD, CO, 80155 (Insurer)
MCDIVITT LAW FIRM, C/O: MICHAEL W MCDIVITT AARON S KENNEDY ESQ, 19 EAST CIMARRON ST, COLORADO SPRINGS, CO, 80903 (For Claimant)
THOMAS POLLART & MILLER LLC, C/O: ERIC J POLLART ESQ, 5600 S QUEBEC ST STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-896-504-04

IN THE MATTER OF THE CLAIM OF

REYNA MARQUEZ,

Claimant,

v.

FINAL ORDER

AMERICOLD LOGISTICS,

Employer,

and

HARTFORD INSURANCE COMPANY OF THE MIDWEST,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cain (ALJ) dated April 14, 2014, that determined the claimant had not overcome the zero impairment rating of the Division-sponsored Independent Medical Examination (DIME), and that determined the claimant received an overpayment. We affirm.

This matter went to hearing on overcoming the DIME physician's 0% permanent impairment rating and overpayment of permanent partial disability (PPD) benefits. After the hearing, the ALJ found that the claimant sustained an admitted industrial injury on August 23, 2012. Dr. Fall diagnosed the claimant as suffering from a cervicothoracic strain with disc extrusion at C5-6 and protrusion at C6-7 with central stenosis. Dr. Fall also diagnosed a lumbosacral strain "stable and at baseline." Dr. Fall placed the claimant at maximum medical improvement (MMI) on March 5, 2013. Applying the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (revised), Dr. Fall assessed a 12% whole person impairment rating for the claimant's cervical spine. Dr. Fall assessed 7% impairment for specific disorders of the cervical spine and 5% impairment for lost range of motion. Dr. Fall did not give any rating for the claimant's lumbar spine. The respondent insurer filed a Final Admission of Liability (FAL) on April 29, 2013, and ultimately paid the claimant PPD benefits totaling $19,213.82.

The claimant requested a DIME. Dr. Mitchell performed the DIME on July 26, 2013. In her DIME report, Dr. Mitchell diagnosed the claimant with cervical

spondylosis, lumbar spondylosis, and rheumatoid arthritis. Dr. Mitchell applied the AMA Guides and found the claimant sustained "no permanent impairment of either the cervical or lumbar spine" relative to the August 23, 2012, industrial injury. The claimant gave a history that she previously had one other low back injury, and also injured her back pulling cases, and admitted she previously had a neck injury in a motor vehicle accident. Dr. Mitchell also noted the claimant had a history of rheumatoid arthritis. Dr. Mitchell opined that the claimant's industrial injury was a sprain/strain-type injury to the neck and low back" that did not have any permanent effect of the claimant's pre-existing condition. Dr. Mitchell specifically opined that based on the AMA Guides, the claimant has an overall impairment rating of 26% of the whole person, but in her opinion, none of the claimant's impairment was causally related to the industrial incident of August 23, 2012. Dr. Mitchell opined in pertinent part as follows:

> She was seen as recently as 06/20/12 for complaints of neck pain. At present her cervical complaints are consistent with her longstanding cervical spondylosis. In my opinion, her radiographic studies have not changed substantially and are consistent with the natural history of cervical spondylosis. The increased protrusion at C6-C7 is not attributable to the injury of 08/23/12 to a reasonable degree of medical probability, but is more likely a natural progression of her degenerative condition.

On her summary sheet, Dr. Mitchell checked a space indicating that "apportionment is not applicable."

The respondent insurer filed an Amended FAL. Based on Dr. Mitchell's DIME report, the amended FAL stated that the claimant had 0% impairment and, therefore, did not admit for any PPD benefits. The Amended FAL also claimed an overpayment.

During the hearing, Dr. Swarsen opined that Dr. Mitchell incorrectly determined the claimant's impairment rating because she failed to apply the "apportionment algorithm." Dr. Swarsen testified that the "rules" require that if there is a pre-existing condition involving that body part, then the rating physician must "negate her own impairment rating by providing an apportionment according to the algorithm." Conversely, Dr. D'Angelo testified that it was appropriate for Dr. Mitchell to determine there was no impairment causally related to the industrial incident of August 23, 2012. Dr. D'Angelo testified that an apportionment analysis is not necessary in cases where the rating physician determines there is no causal relationship between the injury and the findings on evaluation. Dr. D'Angelo stated that the Level II accreditation program and

the rating tips issued by the Division of Workers' Compensation teach that if there is no Table 53 diagnosis that is related to the injury, then it is inappropriate to issue any rating.

The ALJ ultimately found the claimant failed to prove by clear and convincing evidence that Dr. Mitchell incorrectly assessed 0% impairment. The ALJ found that Dr. Mitchell credibly and persuasively opined that none of the claimant's cervical or lumbar impairment is causally related to the industrial incident on August 23, 2012. Rather, the ALJ found that Dr. Mitchell credibly explained that the claimant's low back and neck conditions pre-existed the industrial injury. The ALJ further found that Dr. Mitchell's opinion was corroborated by the credible opinions of Dr. D'Angelo. The ALJ also rejected the claimant's argument that Dr. Mitchell erred in her impairment rating because she failed to apply the apportionment algorithm. The ALJ found, as persuasive, Dr. D'Angelo's opinion that an apportionment analysis is not necessary where the rating physician determines there is no causal relationship between the injury and the impairment. The ALJ found that the opinions of Dr. Swarsen were neither credible nor persuasive in this regard. The ALJ further concluded that the clear language of §8-42-104(5)(a) and (b), C.R.S. establishes that the apportionment statutes are to be applied only after a rating physician, including the DIME physician, initially determines that the industrial injury caused ratable impairment under the AMA Guides. Thus, the ALJ concluded where a rating physician, including a DIME physician, has applied the AMA Guides and found the subsequent industrial injury did not cause any impairment, as was the circumstance here, then there is no medical impairment rating from which a pre-existing impairment could be deducted.

The ALJ also concluded that there had been an overpayment of benefits to the claimant in the total amount of $19,213.82. The ALJ noted that the respondents were not seeking at the time of the hearing to collect the overpayment but, rather, wished to reserve issues of collection to a future date. The ALJ, therefore, ordered that questions related to recovery of this overpayment were reserved for future determination.

The claimant has petitioned to review the ALJ's order. The claimant argues that the DIME physician's impairment rating has been overcome by clear and convincing evidence. The claimant contends that the DIME never employed the algorithm required by WCRP 12-3 (B). According to the claimant, Dr. Mitchell's failure to do so violated §8-42-104(5)(a) and (b), C.R.S. by depriving the claimant of an impairment rating. The claimant further reasons that there is no evidence the claimant had received a prior Workers' Compensation impairment rating or was not independently disabled at the time of her admitted injury. Additionally, the claimant argues that the ALJ erred in ruling

there was an overpayment of PPD benefits. The claimant argues she was entitled to recover the PPD payment when it was made and, therefore, there is no overpayment.

I.

Under §8-42-107(8), C.R.S., a DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. *See Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482-83 (Colo. App. 2005). Whether the claimant carried her burden to overcome the DIME physician's opinion involves a determination of the extent of the impairment that is causally related to the industrial injury. Thus, the DIME physician's findings that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Clear and convincing evidence means evidence which is stronger than a mere preponderance; it is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is highly probable that the DIME impairment rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the ALJ's determination. *Metro Moving & Storage v. Gussert, supra*. We must uphold the factual determinations of the ALJ if the decision is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

A.

Initially, we are not persuaded the ALJ erred in determining that the apportionment provisions enunciated in §8-42-104(5)(a), C.R.S. and WCRP 12-3 (B) are inapplicable here.

Section 8-42-104(5)(a) and (b), C.R.S. provide as follows regarding the effect of a previous injury or compensation:

> (5) In cases of permanent medical impairment, the employee's award or settlement shall be reduced:
>
> (a) When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "Workers' Compensation Act of Colorado" or a

> similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.
>
> (b) When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the subsequent compensable injury.

Moreover, WCRP 12-3 (B) provides as follows regarding apportionment of permanent impairment ratings:

> (B) For claims with a date of injury on or after July 1, 2008, the Physician may provide an opinion on apportionment for any preexisting work related or nonwork- related permanent impairment to the same body part using the AMA Guides, 3rd Edition, Revised, where medical records or other objective evidence substantiate a preexisting impairment. Any such apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease. The Physician shall explain in their written report the basis of any apportionment. If there is insufficient information to measure the change accurately, the Physician shall not apportion. If the Physician apportions based on a prior non work-related impairment, the Physician must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated. Identified and treated in this context requires facts reflecting that a medical provider previously noted and provided some level of treatment for the nonwork-related impairment.

The Panel's previous order in *Trusty v. Big Lots Stores, Inc*., W.C. 4-770-446 (March 25, 2011) persuades us that apportionment is inapplicable here. In *Trusty*, the ALJ denied an award for PPD benefits. The ALJ concluded the respondents proved by clear and convincing evidence that the DIME physician incorrectly found the claimant's industrial injury was the cause of his low back impairment. The claimant appealed,

arguing that the ALJ should have applied apportionment pursuant to §8-42-104(5), C.R.S. because the industrial injury was to the same part of the body as the pre-existing impairment, and that the pre-existing impairment was not independently disabling at the time of the industrial injury. The Panel held that the ALJ did not view the claimant's ongoing back condition as the result of industrial and nonindustrial concurrent causes. Consequently, the Panel concluded that resolution of the case did not involve apportionment. The Panel instead held that the relevant inquiry was the causal relatedness of the claimant's impairment to the industrial injury, and noted that on this issue, the opinion of the DIME physician must be given presumptive effect. Section 8-42-107(8)(c), C.R.S.; *see also Valdez v. Alstom, Inc.*, W.C. 4-784-196 (Oct. 18, 2012).

Here, the clear and plain meaning of §8-42-104(5)(a) and (b), C.R.S. and WCRP 12-3 (B) provide that apportionment is required only after the DIME physician initially determines that the industrial injury has caused ratable impairment under the AMA Guides. Section 8-42-104(5)(a) and (b), C.R.S. explicitly provide that a permanent medical impairment rating applicable to a body part shall be deducted from the permanent medical impairment rating for a subsequent injury to the same body part. Similarly, WCRP 12-3(B) specifically provides that "apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease." Consequently, both the statute and the Rule presume that apportionment applies as long as there is a subsequent permanent impairment that is causally related to the industrial injury. The ALJ found, however, that Dr. Mitchell credibly and persuasively opined that none of the claimant's cervical or lumbar impairment was causally related to the industrial incident on August 23, 2012. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009) (relevant inquiry is causal relatedness of the claimant's impairment to industrial injury, and on this issue DIME opinion must be given presumptive effect). Rather, Dr. Mitchell explained that the claimant's low back and neck conditions pre-existed the industrial injury. Depo. of Dr. Mitchell at 22-25, 26-30, 32-34, 35. Thus, since the DIME physician applied the AMA Guides and found that the claimant's subsequent industrial injury did not cause any permanent impairment, then there was no medical impairment rating from which a pre-existing impairment could be deducted.

The claimant's argument notwithstanding, the fact that the claimant had not received a prior Workers' Compensation impairment rating or was not independently disabled at the time of her admitted injury does not impact the DIME's determination because the apportionment provisions in §8-42-104(5)(a) and (b), C.R.S. and WCRP 12-3(B) are inapplicable here. Rather, after determining that none of the claimant's cervical or lumbar impairment was causally related to the industrial incident on August 23, 2012,

it was unnecessary for Dr. Mitchell to consider apportionment under the provisions of §8-42-104(5)(a) and (b), C.R.S. or WCRP 12-3(B).

B.

We also are not persuaded by the claimant's argument that there is no overpayment on the basis that the PPD payment was both due and owing pursuant to the FAL dated April 29, 2013.

"Overpayment" is defined in §8-40-201(15.5), C.R.S. as follows:

> "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 respondents bear the burden of proof to establish that the claimant received an overpayment of benefits. *See City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

Initially, it does not appear that the claimant contests the particular amount of the overpayment. Rather, the claimant appears only to contest that there is an overpayment. We conclude, however, that the Panel's holding in *Mattorano v. United Airlines*, WC 4-861-379-01 (July 25, 2013) is persuasive here. In *Mattorano*, the respondents filed an FAL admitting for a 16% scheduled impairment rating based on the opinion of the authorized treating physician. The respondents paid the award in full. The claimant sought a DIME, and the DIME physician issued a 12% upper extremity rating. As a consequence of the reduction in the impairment rating, the claimant had received an overpayment of $2,122.60. The Panel upheld the ALJ's order finding the claimant had received an overpayment and requiring her to repay it. The Panel held that pursuant to §8-43-203(2)(b)(II)(A), C.R.S., and §8-42-107.2, C.R.S., the respondent insurer's receipt of the DIME report required it to admit liability consistent with the DIME report or request a hearing. The Panel determined that the claimant had received moneys she was not entitled to receive, and that under the statute it did not matter that the moneys did not constitute an overpayment at the time they were paid. Here, similar to *Mattorano*, we perceive no error in the ALJ's determination that the claimant received an overpayment. The claimant requested a DIME which essentially vitiated the respondents' original FAL dated April 29, 2013. Section 8-43-203(2)(b)(II)(A), C.R.S. The ultimate effect of the

DIME process resulted in a lower impairment rating and entitlement to PPD benefits than what the respondents previously admitted in their original FAL. As found by the ALJ, the mere fact that the respondents filed a FAL did not result in a vested right to receive any specific amount of PPD benefits once the claimant initiated the DIME process.

Additionally, the claimant's reliance on the holdings in *Cooper v. Industrial Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005), *Rocky Mountain Cardiology v. Industrial Claim Appeals* Office, 94 P.3d 1182 (Colo. App. 2004), and *United Airlines v. Industrial Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013) do not mandate a different outcome here. In *Cooper*, the decedent sustained an admitted industrial injury, and the respondent filed an uncontested FAL, accepting liability for PPD benefits. The respondent made a periodic PPD payment and then made a lump sum payment. Thereafter, the decedent died of causes unrelated to her industrial injury. The decedent's Estate then requested an order requiring payment of the balance of the PPD award. The Court of Appeals held that the Estate was not entitled to recover the balance of the decedent's impairment benefits. Citing to §8-42-107(8)(d), C.R.S., the Court also held that the respondent was not entitled to recover an overpayment because the lump sum payment not only was authorized, but it was required by statute. The Court explained that the lump sum payment was a vested right and not subject to recoupment by an employer or its insurer upon the subsequent death of the employee. Conversely, here, the respondents' FAL did not result in a vested right to the PPD benefits once the claimant contested the FAL by initiating the DIME process. *Compare Rocky Mountain Cardiology v. Industrial Claim Appeals Office*, *supra* (because temporary disability benefits were owing as a matter of law until ALJ's order granted prospective relief to respondent, disputed payments did not constitute overpayment); *United Airlines v. Industrial Claim Appeals Office, supra* (temporary benefits received in excess of the $75,000 cap for combined temporary and permanent partial benefits referenced in §8-42-107.5, not an overpayment subject to recovery by the respondents).

We also are not persuaded by the claimant's argument that imposing an overpayment violates the Act's beneficent purpose and chills the claimant's DIME right. There are no certainties when either party initiates the DIME process. The harsh reality is that when a claimant requests a DIME, this can result in a lower impairment rating and entitlement to PPD benefits, the exact circumstances present here. Consequently, we perceive no error in the ALJ's order determining that the claimant received an overpayment in the amount of $19,213.82.

IT IS THEREFORE ORDERED that the ALJ's order dated April 14, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

8/7/2014 by KG .

REYNA MARQUEZ, 8327 MITZE DR, DENVER, CO, 80221 (Claimant)
AMERICOLD LOGISTICS, 10251 EAST 51ST AVE, DENVER, CO, 80239 (Employer)
HARTFORD INSURANCE COMPANY OF THE MIDWEST, C/O: TAMMY WASHINGTON-SEDGWICK, PO BOX 14493, LEXINGTON, KY, 40512-4493 (Insurer)
O'TOOLE & SBARBARO PC, C/O: NEIL D O'TOOLE ESQ, 226 W 12TH AVE, DENVER, CO, 80204-3625 (For Claimant)
THOMAS POLLART & MILLER LLC, C/O: ERIC J POLLART ESQ, 5600 SOUTH QUEBEC ST STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-885-416-02

IN THE MATTER OF THE CLAIM OF

SANDRA MEACHAM,

Claimant,

v.

FINAL ORDER

AMERICAN BLUE RIBBON HOLDINGS d/b/a VILLAGE INN,

Employer,

and

ARCH INSURANCE COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Stuber (ALJ) dated March 11, 2014, that denied and dismissed her request for attorney fees and costs under §8-43-211(2)(d), C.R.S. We affirm.

The claimant suffered an admitted work injury on April 22, 2012. The treating physician ultimately determined the claimant was at maximum medical improvement (MMI). A Division Independent Medical Examination (DIME) determined, however, that the claimant was not at MMI.

On November 5, 2013, the respondents filed an application for hearing on the issues of medical benefits, permanent partial disability benefits, and the following other issues: "Contesting Division IME impairment rating; overcome Division IME; claimant is at MMI; offsets/overpayment; causation; CRS 8-42-107.5. Respondents reserve the right to add or delete issues and defenses as discovery progresses." A hearing was set to commence on February 26, 2014.

On November 11, 2013, the claimant sent the respondents discovery requests, inquiring about the basis for offsets, overpayments, and application of the statutory cap on benefits.

Thereafter, on December 16, 2013, the claimant filed her motion to strike issues, arguing that there were no facts which would support an allegation of overpayment, offset, or the cap on benefits. A prehearing conference was set for January 8, 2014.

At 11:05 p.m. on January 7, 2014, the respondents' counsel e-mailed the claimant's attorney, stating that the respondents were authorizing additional surgery and agreed that the claimant was not at MMI. The respondents stated that they were willing to withdraw all issues in the application for hearing. The respondents' counsel also e-mailed the claimant's attorney at 11:42 p.m. the answers to the claimant's discovery requests. As pertinent here, the respondents stated that it was unknown if the insurer had made any overpayment of indemnity benefits and if there would be any offset against PPD benefits. The respondents also stated that it was unknown if or when the statutory cap on benefits would be met.

A prehearing conference was held on January 8, 2014, and the prehearing ALJ (PALJ) granted the claimant's motion to strike the issues of offset/overpayment and the §8-42-107.5, C.R.S. cap on benefits. In his order, the PALJ specifically held in pertinent part that "[t]here was no evidence from the date of Application for Hearing on November 5, 2013 to date of this Prehearing Conference on January 8, 2014, that those issues were ripe for hearing."

Thereafter, on January 31, 2014, the insurer filed a general admission of liability for resumed temporary total disability benefits commencing January 15, 2014. Given the insurer's general admission of liability, the PALJ issued another order determining that no issues remained for determination at the February 26, 2014, hearing other than the claimant's request for attorney fees and costs as a result of the claimant's motion to strike issues that were not ripe for hearing.

A hearing subsequently was held on February 26, 2014, on the issue of attorney fees and costs under §8-43-211(2)(d), C.R.S. The ALJ ultimately denied and dismissed the claimant's request for fees and costs, finding that the record evidence did not demonstrate that the issues of overpayment, offset, or statutory cap on benefits under §8-42-107.5, C.R.S. were unripe for determination at the time of the application for hearing. The ALJ concluded that if the respondents had prevailed on the threshold issue of the claimant achieving MMI, then any overpayments, offsets, or caps had to be determined in conjunction with the PPD benefits. As such, the ALJ concluded that no legal impediment existed at the time of the application for hearing to determining these issues. While the ALJ found the issues raised by the respondents in their application for hearing were ripe, he also noted that they perhaps were frivolous. Nevertheless, the ALJ concluded that §8-43-211(2)(d), C.R.S. afforded no basis for imposing attorney fees and costs due simply to raising a frivolous issue.

The claimant has appealed the ALJ's order, arguing that the ALJ erred in denying her request for attorney fees and costs under §8-43-311(2)(d), C.R.S. She contends that the ALJ's analysis begins with a speculative premise- the respondents prevailing on the

threshold issue of the claimant's achieving MMI. The claimant contends that because the ALJ's initial premise is speculative, then all subsequent conclusions stemming from that premise are equally speculative. As yet further support for her argument that the issues of overpayment, offsets, and statutory cap were not ripe, the claimant argues the respondents presented no factual basis to support their endorsed issues at the time of the application for hearing. The claimant therefore asserts that the respondents' endorsement of the issues of overpayment, offset, and statutory cap under §8-42-107.5, C.R.S. were uncertain, speculative, and not ripe at the time they endorsed the issues for hearing. We are not persuaded the ALJ erred.

Section 8-43-211(2)(d), C.R.S. provides as follows:

> If an attorney requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time the request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing or setting. The requesting party must prove its attempt to have an unripe issue stricken by a prehearing administrative law judge to request fees or costs. Requested fees or costs incurred after a prehearing conference may only be awarded if they are directly caused by the listing of the unripe issue.

"An issue is ripe for hearing when it 'is real, immediate, and fit for adjudication.'" *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 969 (Colo. App. 2012)(quoting *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006)). As recognized by the ALJ, the term "fit for adjudication" refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. *See Maestas v. Wal Mart Stores, Inc.*, W.C. 4-717-132 (Jan. 22, 2009)(quoting *Olivas-Soto v. Genesis Consolidated Services*, W. C. No. 4-518-876 (November 02, 2005), *aff'd Olivas-Soto v. Industrial Claim Appeals Office, supra*)).

Here, we conclude the ALJ did not err in ruling that the issues raised by the respondents in their application for hearing were ripe at the time of the filing. The record is devoid of any evidence demonstrating that there was any legal impediment to the immediate adjudication of the issues of overpayment, offsets, and statutory cap under §8-42-107.5, C.R.S. As noted by the ALJ, if the respondents had overcome the DIME opinion on MMI, then these issues would have to be decided by the ALJ. Conversely, had the respondents not overcome the DIME opinion on MMI, then the issues of overpayment, offsets, and statutory cap would not need to be decided by the ALJ. The claimant's argument notwithstanding, this does not demonstrate that the issues of overpayment, offsets, and statutory cap were speculative, that the ALJ's analysis was based on speculation, or that these issues were not ripe. Rather, the litigation of claims

routinely involves rulings by an ALJ which necessarily cause various other issues to also have to be ruled on, or which dispose of the need to rule on such issues. This case is no different. Consequently, we agree with the ALJ that at the time of the application for hearing, the issues of overpayment, offsets, and statutory cap under §8-42-107.5, C.R.S. were fit for adjudication and, therefore, were ripe. *Compare Silveira v. Industrial Claim Appeals Office,* Colo. App. Nos. 11CA2396 and 11CA2397 (Nov. 8, 2012)(NSOP)(attorney fees and costs properly awarded to claimant because insurer on the risk issue raised by insurer could not yet have been determined).

Additionally, even though the respondents' listing of the issues of offsets, overpayment, and statutory cap ultimately may have lacked merit, this does not necessarily demonstrate a lack of ripeness. *See Younger v. Merritt Equipment Co.*, W.C. No. 4-326-355 (December 30, 2009). Similar to *Younger*, the claimant's argument regarding the lack of a factual basis appears to address whether the issues listed in the respondents' application for hearing were meritorious and not whether the issues were ripe for adjudication. While the respondents' challenges regarding offsets, overpayments, and statutory cap ultimately may have been unsuccessful, at the time the respondents filed their application for hearing, the endorsement of these issues was ripe for determination because they could have been adjudicated at the hearing. Thus, we conclude that the ALJ did not err in denying the claimant's request for attorney fees and costs under §8-43-211(2)(d), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated March 11, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

7/18/2014 by KG .

SANDRA MEACHAM, 4723 TIMBERWOLF TRAIL, COLORADO SPRINGS, CO, 80920 (Claimant)
AMERICAN BLUE RIBBON HOLDINGS d/b/a VILLAGE INN, C/O: CANDACE BELLIN, 3038 SIDEO DR, NASHVILLE, TN, 37204 (Employer)
ARCH INSURANCE COMPANY, C/O: SEDGWICK CMS, PO BOX 14493, LEXINGTON, KY, 40512 (Insurer)
STEVEN U MULLENS PC, C/O: STEVEN U MULLENS ESQ, 105 E MORENO AVE STE 101 PO BOX 240, COLORADO SPRINGS, CO, 80901-2940 (For Claimant)
THOMAS POLLART & MILLER PC, C/O: BRAD J MILLER ESQ, 5600 S QUEBEC ST STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-921-644-01

IN THE MATTER OF THE CLAIM OF

KEEGAN RIEKS,

Claimant,

v.

FINAL ORDER

ON ASSIGNMENT INC,

Employer,

and

SENTRY INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 31, 2014, that found his claim not compensable and dismissed his request for temporary indemnity benefits and medical benefits. We reverse the order of the ALJ.

The claimant was injured in an automobile accident while traveling to work on the morning of January 17, 2013. The respondents denied liability for the claimant's resulting injuries on the basis that he was traveling to work from home such that the accident did not arise out of work. The claimant contends that the claimant's travel to work in his automobile was contemplated by the employment contract and, as a consequence, the auto accident did arise out of work.

The claimant worked for the respondent employer as an account manager. The employer is an information technology (IT) staffing company. The claimant's job was to market the employer's IT services to various customer businesses. To do so, he would set up appointments and meetings with prospective, and existing, business customers. He would travel to the customer's location for the meeting, or to a mutually agreed upon site such as a restaurant or a Starbucks. The claimant's supervisor, Matt Griffin, testified it was required of account managers that they arrive at work, on time, dressed well and "with their own vehicle." (Tr. pg. 47). The account managers would typically drive in their automobiles to their appointments during the day. The employer did, in fact,

reimburse the account managers for the mileage costs they incurred while driving their cars on the employer's business.

On January 17, the claimant was scheduled to arrive at work by 7:30 a.m. to attend a daily office meeting. He was then to drive with another employee in the claimant's car to an 8:45 a.m. meeting with a potential customer. On his way to work the claimant stopped and purchased some bagels to bring with him to the meeting with the customer. The claimant then resumed his journey to work when he was hit by another motorist. This accident heavily damaged his car and hurt the claimant's low back, neck, right wrist and caused psychological injury. The parties stipulated to the claimant's injured body parts, his average weekly wage, the authorized treating physician and his eligibility for temporary benefits in the event the ALJ found the accident compensable.

The ALJ concluded the accident and the claimant's injuries were not compensable because they did not arise out of his employment. The ALJ observed the claimant was not paid for the time he spent traveling to work and his commute to work did not provide any benefit to the employer beyond the claimant's arrival at the employer's business. The claimant had not been instructed to purchase bagels that morning and his decision to do so was at his own discretion. Travel to the employer's address, located as it was in the Denver Tech Center, was found not to create a special zone of danger to the claimant's travel. Relying upon the holding in *Madden v. Mountain West Fabricators*, 977 P.2d 861(Colo. 1999), the ALJ reasoned none of the exceptions applied which would allow compensation for injuries incurred while traveling to and from work. The claim was therefore dismissed.

In *Madden* the court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable because they are not seen as arising out of employment. The *Madden* opinion however, acknowledged the facts of any particular case may justify an exception to this general rule. The decision set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. The claimant does not argue the evidence makes categories (1), (2) or (4) applicable in this case. The claimant contends that category (3) is pertinent to this claim and renders the claimant's automobile accident compensable. The claimant argues that his job turned on his ability to use his personal automobile to attend appointments with customers. The employment contract then, contemplated his travel to work by way

of his car. His trip to work, he asserts, provides a benefit to the employer beyond simply the claimant's arrival at work. His trip to work by auto also ensures the arrival of his car which enables him to perform his job for the employer. The respondents counter that this standard advocated by the claimant ignores precedential case law and would draw a "burdensome number of commuters into the workers' compensation system."

We agree with the claimant and disagree with the respondents' position that case law shows the employment contract could not contemplate the claimant's travel in this case. As we recently noted in *Norman v. Law Offices of Frank Moya*, W.C. No. 4-919-557 (April 23, 2014), both the Court of Appeals and in previous decisions of the panel, it has been held that where the contract of employment required the claimant to transport his personal vehicle to the employer's premises, an injury occurring to the claimant in the act of transporting that vehicle arises out of the employment and is compensable.

The *Madden* opinion discussed the third exception which asked if "the travel was contemplated by the employment contract." The court listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer; (b) the travel was at the express or implied request of the employer and conferred a benefit beyond the employee's arrival at work; and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer. Finally, if the claimant establishes only one of the four "variables," (exclusions from the coming and going rule) recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from the work arises out of and in the course of employment. *See Madden v. Mountain West Fabricators,* 977 P.2d at 865.

The Court of Appeals in *Whale Communications v. Osborn*, 759 P.2d 848 (Colo. App. 1988), awarded death benefits in a case where the decedent was killed when driving her personal vehicle from her office to her home. The court held the death was compensable because the employer required the claimant to use the vehicle to meet clients during the workday. The court reasoned "the requirement that employee bring her automobile to work for use in pursuing employer's business conferred an added benefit on employer beyond the mere fact" of arrival at work, and established "special circumstances" demonstrating a causal connection between the decedent's work and her death. The decision explained:

> The rationale for this exception is that

> the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Such a requirement causes the job duties to extend beyond the work place and makes the vehicle a mandatory part of the work environment. … *See* 1 A. Larson, *Workmen's compensation Law*, § 17.50 (1985).

Id. at 848.

Following the Supreme Court's decision in *Madden*, we applied the *Whale Communications* analysis in *McDade v. Mile High Child Care*, W.C. 4-417-948 (February 23, 2001). In *McDade*, the claimant worked at two schools for the employer and once per week was required to travel to a third location for staff meetings. The claimant was required to provide a vehicle to accomplish travel between the schools and to the staff meeting. The claimant was injured in an auto accident when driving from her home to the staff meeting at the beginning of the work day. The ALJ's denial of benefits was reversed for the reason that travel by car was part of the claimant's work for the employer.

> Thus, regardless of whether the employer compensated the travel to and from work as an inducement to employment, the contract of employment required the claimant to transport her personal vehicle to the employer's premises. Further, the employer received a benefit beyond the claimant's mere arrival at work because the employer was not required to maintain its own fleet of vehicles. Finally, the fact that the claimant's workday did not officially begin until she arrived at the worksite does not negate the fact that the employment contract made the claimant's vehicle a mandatory part of the work environment.

Id. at 3.

A similar holding was applied in *Lopez v. Labor Ready*, W.C. 4-538-791 (September 26, 2003). The claimant's job required her to spend large parts of her day making sales calls on potential clients. The claimant used her personal automobile to complete the calls. While traveling to her home to eat lunch the claimant was involved in an automobile accident. We set aside the ALJ's decision denying benefits. We reasoned a requirement that the claimant use her personal vehicle to further the employer's business would be a circumstance which could bring the travel between home and the worksite within the scope of the employment because it would "confer a benefit on the employer beyond the claimant's mere arrival at work."

In *Norman v. Law Offices of Frank Moya*, *supra*, the claimant was employed as an attorney performing public defender duties for the employer pursuant to its contract with the City and County of Denver. The claimant was required to use her automobile at work to travel from her office to the court house, to the jails and to other miscellaneous locations. When the claimant was injured in a traffic accident while she was driving to her first appointment of the day at the court house, we upheld the ALJ's determination the claimant's travel was contemplated by the contract of hire and the claimant's injuries were compensable. The claimant's travel by automobile to the court house was deemed to confer a benefit upon the employer beyond the sole fact of the claimant's arrival at work. Therefore, "…the circumstances of the auto accident on that date fell within the exception to the going and coming rule specified in the *Madden* decision."

This case presents no material distinction to the situations in *Whale Communications*, *McDade*, *Lopez* or *Norman*. The claimant was required by the employer to come to work in an automobile he would then use to attend his appointments and meetings with customers. Travel to those events was a necessary part of his job. Because the claimant's transport of his car to work was a benefit to the employer contemplated by the contract of hire, it was of no consequence that the claimant was traveling to work from his home to begin his work day. Therefore, the automobile accident he encountered on his way was in the course of, and arose out of, the claimant's employment. The ruling of the ALJ that the claimant's motor vehicle accident was not contemplated by the contract of employment, and so did not arise out of work, is set aside and reversed.

IT IS THEREFORE ORDERED that the ALJ's order issued March 31, 2014, is reversed, and the claimant is awarded benefits pursuant to the conditions of the parties' prehearing stipulation.

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

8/12/2014 by KG .

KEEGAN RIEKS, 11990 W ALAMEDA PKWY, LAKEWOOD, CO, 80228 (Claimant)
ON ASSIGNMENT INC, C/O: ELEN KLADIS, 26745 MALIBU HILLS RD, CALABASAS, CA, 91301 (Employer)
SENTRY INSURANCE, C/O: LESLIE JOHNSON, PO BOX 29466, PHOENIX, AZ, 85038 (Insurer)
IRWIN & BOESEN PC, C/O: J J FRAISER III ESQ, 4100 E MISSISSIPPI AVE 19TH FLR, DENVER, CO, 80246 (For Claimant)
RITSEMA & LYON PC, C/O: JOHN P MOON ESQ, 2629 REDWING RD STE 330, FT COLLINS, CO, 80526 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-917-273-01

IN THE MATTER OF THE CLAIM OF

JUAN RIVERA,

Claimant,

v.

FINAL ORDER

CONWAY FREIGHT INC,

Employer,

and

INDEMNITY INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 19, 2014, that denied and dismissed his request for a change of physician. We affirm.

The matter went to hearing on whether the respondents timely objected to the claimant's request for a change of physician pursuant to §8-43-404(5), C.R.S. After the hearing, the ALJ found that the claimant sustained a compensable industrial injury on April 22, 2013. The respondents directed the claimant to Concentra Medical Centers for treatment.

Ms. Krege was the adjuster handling the claim for the third-party administrator, and she wrote the claimant correspondence informing him she would be responsible for managing his claim.

During September and October 2013, the claimant communicated with Ms. Krege regarding his claim, and he also spoke to Nurse James throughout this period of time. The claimant had been pursuing his workers' compensation claim without the assistance of counsel. On September 18, 2013, however, his counsel filed an entry of appearance on behalf of the claimant.

Despite retaining counsel, the claimant continued to communicate directly with Ms. Krege and Nurse James regarding his concerns about returning to work and regarding physicians. The claimant did not advise Ms. Krege or Nurse James that he was represented by counsel.

Thereafter, on October 21, 2013, Ms. Krege received correspondence from the claimant's counsel, dated September 18, 2013, that included his entry of appearance and a power of attorney to receive and negotiate workers' compensation payments. Ms. Krege's claim note dated October 21, 2013, stated that she had received the entry of appearance, added the attorney information to the file, and provided that all further correspondence should be directed to counsel's office. In his correspondence dated September 18, 2013, the claimant's counsel also requested a change of physician to Dr. Orgel. The claim notes reflect that Nurse James began to research and schedule an appointment with Dr. Orgel. Ms. Krege, however, advised Nurse James that the respondents would not agree to a change of physician to Dr. Orgel.

On October 22, 2013, the claimant's counsel sent correspondence to the respondents stating that an appointment had been scheduled with Dr. Orgel for November 1, 2013. Counsel stated that he had requested a change of physician dated September 18, 2013, and that pursuant to §8-43-404(5)(a), C.R.S., the claimant would be vising Dr. Orgel.

Ms. Krege sent correspondence to the claimant's counsel on October 30, 2013, advising him that she had not received his September 18, 2013, letter until October 21, 2013. She also informed the claimant's counsel that the requested change of physician to Dr. Orgel was denied.

The ALJ ultimately entered his order denying the claimant's request to change physicians to Dr. Orgel. The ALJ found that the respondents timely objected to the claimant's request for a change of physician pursuant to §8-43-404(5), C.R.S. The ALJ found that Ms. Krege explained that mail is scanned into the computer on the date it is received. The ALJ found that the claim notes submitted by the claimant and Ms. Krege's testimony both reflect that counsel's entry of appearance and change of physician request letter were not received by Ms. Krege until October 21, 2013. The ALJ found that Ms. Krege advised the claimant's counsel, via correspondence dated October 30, 2013, which was within the 20 day statutory time period enunciated in §8-43-404(5), C.R.S., that the respondents would not agree to a change of physician to Dr. Orgel.

The claimant has appealed the ALJ's order denying his request for a change of physician to Dr. Orgel. The claimant argues that the ALJ erred in failing to address his second argument that the respondents had agreed to the change of physician, and that they should not be allowed to "unilaterally revoke their agreement." We are not persuaded the ALJ erred.

Section 8-43-404(5), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change physicians without permission from the insurer or upon the proper showing to the division. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Further, §8-43-404(5)(a)(VI), C.R.S. allows a claimant to obtain a change of physician by making a written request to the insurer. If the insurer fails to respond to the written request within twenty days, the insurer is deemed to have waived the right to object to the change and the physician selected by the claimant is authorized to treat the injury. *Gianetto Oil Co. v. Industrial Claim Appeals Office, supra*.

Moreover, an injured employee may engage medical services "if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion, or, with full knowledge over a sustained period of time, has failed to object to claimant's change of physician." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985).

Here, while the claimant contends the ALJ erred in failing to address his argument that the respondents had agreed to the change of physician, it is implicit in the ALJ's order that he rejected this argument. The ALJ was not obligated to specifically discuss and reject every contention that the claimant raised. *See Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000)(ALJ under no obligation to address every issue raised and we may consider findings which are necessarily implied by the ALJ's order); *see also Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)(ALJ not required explicitly to reject unpersuasive arguments). Nevertheless, we conclude that the basis of the ALJ's order is apparent from his findings of fact. *Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992). In his order, the ALJ specifically ruled that the claim notes reflect that Nurse James began to research and schedule an appointment with Dr. Orgel. The ALJ found, however, that Ms. Krege advised Nurse James that the respondents would not agree to a change of physician to Dr. Orgel. Section 8-43-301(8), C.R.S.

In his brief in support, the claimant cites to claim notes from Nurse James in support of his argument that the parties had entered into an agreement for a change of physician. Again, the ALJ's findings demonstrate that he was not persuaded by this contention. The ALJ found, with record support, that the claimant's counsel sent correspondence to the respondents on October 22, 2013, which states that since the respondents had not sent a letter objecting to the claimant's request for a change of physician, that the claimant would be seeing Dr. Orgel pursuant to §8-43-404(5)(a), C.R.S. Ex. B at 2-3. Further, the ALJ found, with record support, that Ms. Krege sent correspondence to the claimant's counsel on October 30, 2013, advising him that she had not received his September 18, 2013, letter until October 21, 2013, and she informed him that the respondents were not authorizing treatment with Dr. Orgel. Ex. 1 at 1; Ex. 2 at 16; Findings of Fact at 6 ¶5. Section 8-43-404(5)(a)(VI), C.R.S. The claimant's argument notwithstanding, the record does not compel the conclusion that the respondents expressly or impliedly conveyed to the claimant the impression that he had authorization to change physicians. Section 8-43-301(8), C.R.S. Thus, we will not disturb the ALJ's order denying the claimant's request for a change of physician.

IT IS THEREFORE ORDERED that the ALJ's order dated March 19, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

8/12/2014 by KG .

JUAN RIVERA, 13036 E 106TH AVE, COMMERCE CITY, CO, 80022 (Claimant)
CONWAY FREIGHT INC, C/O: ANGELA RILEY, 9801 DALLAS ST, HENDERSON, CO, 80640-8464 (Employer)
INDEMNITY INSURANCE, C/O: TRAVELERS-CARRIER No. 127-CB-EWU38589-M, PO BOX 173762, DENVER, CO, 80217 (Insurer)
KAPLAN MORRELL PC, C/O: BRITTON MORRELL ESQ, PO BOX 1568, GREELEY, CO, 80632 (For Claimant)
RITSEMA & LYON PC, C/O: TAMA L LEVINE ESQ, 999 18TH ST STE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-929-714-01

IN THE MATTER OF THE CLAIM OF

CORY SAVAGE,

Claimant,

v.

FINAL ORDER

FIRST FLEET INC,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated March 26, 2014, that found the claim compensable and ordered the respondents liable for the medical treatment of the claimant's carbon monoxide poisoning. We set aside the order of the ALJ.

The claimant worked for the respondent employer as an over the road truck driver. The claimant had been driving regularly throughout the week prior to Friday, September 20, 2013. He reported his wife and son had been suffering from stomach flu that week. While driving he developed headaches and came to feel increasingly ill. On September 20, at approximately 7:00 p.m. he parked his truck at a truck stop near Colby, Kansas, adjacent to Interstate 70. He then went to bed in the cab with the truck motor left on as he often did. When he failed to contact his wife that evening by phone, she alerted the employer's dispatcher and informed them that in his last message the claimant stated he was feeling ill. On September 21, the employer located the claimant's truck and requested the highway patrol contact the claimant. The claimant was found by the patrol officer to be incoherent and largely unresponsive with emesis on his clothes. The claimant was transported by ambulance to the emergency room at Citizens Medical Center in Colby. Shortly thereafter, he was flown in a medical flight to Memorial Hospital in Colorado Springs. He was intubated with oxygen during the flight and then again at Memorial Hospital. The claimant was largely unconscious until he was revived at Memorial Hospital. On September 24 he had recovered sufficiently and was released.

The medical records from Citizens Medical Center, Memorial Hospital, and CCOM were evaluated by Dr. Tashof Bernton at the request of the respondents. In his report of December 20, 2013, Dr. Bernton noted the measurements of elevated carbon monoxide in the claimant's system when measured at Memorial Hospital. Observing the several hours of intubation with oxygen that had been administered prior to that point, Dr. Bernton concluded the claimant had sustained a high level of exposure to carbon monoxide at the point he was removed from his truck cab. The doctor resolved the medical reports supported a diagnosis of carbon monoxide toxicity: "The information reviewed is consistent with carbon monoxide poisoning, and it would be my assessment, … that the medically probable cause for the patient's episode is carbon monoxide toxicity, In this situation, that would represent a work related disease." He recommended an examination and testing of the claimant's truck to determine if it featured any leaks of exhaust fumes which would explain the claimant's exposure to high levels of carbon monoxide.

The truck was examined by Garrick Mitchell, a mechanical engineer, and by Brett Engel, and also by an expert retained by the claimant. Mr. Mitchell was hired by the insurance carrier and Mr. Engel was a representative of Volvo, the maker of the truck cab. The truck had been driven from Colby to Fountain, Colorado by another of the employer's drivers, and then segregated at the employer's terminal. It was not used or repaired any further prior to the investigation. Mitchell and Engel tested the truck for several hours on September 30. The truck was left parked and idling for three hours. The air inside the cab was measured during this time with both the air conditioning controls on and off. The truck was moved to face into the wind and then turned around to face the opposite direction. The truck was then driven up and down interstate 25. The exhaust system was manually inspected for cracks and soot marks which might indicate cracks. The exhaust system was partially disassembled to allow examination of the exhaust particulate filter. Mitchell observed the truck was tested while the wind in Foundation was blowing at a 5-10 mph rate. He was aware the wind in Colby was usually even more brisk. The claimant had been pulling a trailer without any motors or air conditioning equipment on September 20 which could have been a source of additional carbon monoxide so the tractor was tested without a trailer. Two different monitors were used to collect air quality information. Mitchell was qualified as an expert in mechanical engineering. He testified the air inside the cab never revealed high levels of carbon monoxide. The highest reading registered was only 20% of the level characterized as dangerous by OSHA, and that level was only of momentary duration. No cracks or leaks were discovered. Once the engine was warmed up it did not show any increase over time in CO levels or accumulation of carbon monoxide in the cab. The truck was relatively new, showing only 64,000 miles of wear. The inspection revealed no source of carbon

monoxide exposure for someone inside the cab for either a brief or an extended period. The claimant submitted no report or testimony from its inspection. Randall Sams, the employer's service manager, testified that after the inspection the tractor was placed back in operation, without any repairs. No drivers reported any subsequent problems with the air inside the truck's tractor.

Dr. Bernton was provided the results of the truck inspection after he authored his December 20 report. Following review of the inspection results, Dr. Bernton prepared a January 8, 2014, addendum to his report. He stated his review of the medical records was consistent with an exposure to excessive levels of carbon monoxide. However, he noted that if the engineering tests revealed no source for such an exposure, then such a diagnosis became questionable. Dr. Bernton concluded by writing:

> The best that I can tell you is that if the patient had a reasonable probability of carbon monoxide exposure, his clinical data is consistent with that as the cause for his hospitalization and clinical episode. … Therefore, the best assessment I can make is that if it does appear probable that exposure occurred, then information does fit with carbon monoxide exposure. If it is not probable that there was exposure, then clearly that cannot be the cause of his condition. … It would really rely on engineering expertise as to whether or not, given the other data you have, it is probable that the patient had carbon monoxide exposure or whether that is simply something that is not reasonable given the condition of the truck.

At the conclusion of the February 11, 2014, hearing, the ALJ submitted findings and an order. The ALJ surmised "The respondents inability to recreate conditions that may have caused an exhaust leak do not overcome the claimant's testimony, Erin Hassel's testimony [the claimant's wife] and medical records indicating carbon monoxide toxicity as the cause of the claimant's injury." The ALJ then determined "The ALJ finds that based upon the totality of the evidence the claimant has established that carbon monoxide toxicity is more likely than not the cause of his injury. The claimant was in the course of his employment at the time of the injury and the injury arose out of his employment as a truck driver." The ALJ ordered the claim compensable and that the

respondents were liable for the costs of the claimant's treatment including that from Citizens Medical Center, Memorial Hospital, CCOM and for his air transport from Colby to Colorado Springs.

On appeal, the respondents do not dispute the claimant was injured in the course of his work, but they contend that the evidence does not persuasively show his injury arose out of the conditions of his employment. They do not argue the medical records are in error when they show a diagnosis of carbon monoxide poisoning. Their objection is that the claimant has not proven exposure to toxic levels of carbon monoxide can be linked to his truck. Because this is essential to the claimant's prima facie case, this failure to establish the injury or symptoms disabling the claimant arose out of the employee's employment is fatal to the claim. We agree with the respondents' position.

Pursuant to §8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury . . . arising out of and in the course of the employee's employment." *See also* §8-41-301(1)(b), C.R.S. As pertinent here, the question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)). Accordingly, we must uphold the ALJ's determination of this issue if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *see Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). This standard of review requires us to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Here, the ALJ points primarily to the reports of Dr. Bernton. The ALJ finds persuasive the medical opinion of Dr. Bernton. He found "Dr. Bernton to be credible and his medical opinion is the most credible medical evidence as to the cause of the claimant's malady." The January 8 addendum from Dr. Bernton is criticized only because it deals with the information from Mitchell's and Engel's tests of the truck. The result of those tests is described by the ALJ as a "… hypothesis not supported by the evidence." The finding by the ALJ that the claimant suffered from carbon monoxide toxicity is supported by substantial evidence in the record, primarily that of Dr. Bernton's review.

However, the ALJ's findings pertinent to the Mitchell and Engel tests does not appear grounded in contrary evidence. The ALJ observed the testers did not recreate the weather conditions extant on September 20, that a trailer was not attached to the tractor, that the test did not require that the truck to be idled for eight hours and that it was tested by individuals that were qualified as experts in mechanical engineering but not on the effects of carbon monoxide exposure. Unfortunately, the ALJ made no findings as to why these circumstances were of any significance. Mitchell explained that he did monitor the weather and wind speed during the test to ensure a viable comparison of weather conditions, but there was no account available of any special weather circumstances. He explained that because the trailer had no motors itself, such as a refrigeration unit, its absence was of no consequence. Mitchell testified that once the engine was warmed up, the measurement showing no increasing accumulation in the tractor of carbon monoxide as the engine ran for three hours established there would be no reason to believe it would accumulate over eight hours either. The ALJ had also found the claimant began suffering symptoms of headaches, nausea and fatigue during the week prior to September 20 when no idling of the truck was involved. The evidence Mitchell was presenting was directed at the issue of whether the tractor leaked carbon monoxide into the cab. There is no explanation as to why the ALJ felt the report was weakened due to Mitchell's lack of medical credentials.

The evidence credited by the ALJ was the testimony of the claimant and his wife, and the medical records. The ALJ found the claimant was unconscious for 14 hours beginning at 7:00 p.m. on September 20 and recalled nothing of the conditions surrounding his illness after that point. The ALJ only noted that the claimant's wife received a phone call from the claimant before he stopped, stating "something was not right." As found, Dr. Bernton summarized the medical records as consistent with carbon monoxide poisoning, but they did not shed light on the source of the carbon monoxide exposure. The ALJ's finding that that Mitchell and Engel made a "… hypothesis not supported by the evidence" is itself supported by scant evidence. In any event, the ALJ cites to no other evidence that does support an inference the truck was the source of a carbon monoxide exposure.

The confounding difficulty with the record in this claim occurs because there is significant evidence to support a finding the claimant suffered from symptoms of CO toxicity, but there is a mystery as to how that exposure came about. There is considerable evidence represented by the September 20 investigation of Mitchell and Engel showing the truck driven by the claimant featured no leak of carbon monoxide. There is a paucity of evidence to the contrary. The claimant's theory appears to be that carbon monoxide

symptoms are ipso facto evidence of exposure from his truck. However, the mere fact that a claimant develops an injury during the course of his employment does not relieve him of the duty to establish the injury arose out of that employment.

The Supreme Court addressed this issue most recently in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). In *City of Brighton*, the court identified three categories of injuries. These are (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. The first category was observed to be compensable, while the second category was not. The third category of neutral risks would be compensable if the application of a *but for* test revealed that the simple fact of being at work would have caused any employee to been injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. Therefore, *but for* the requirements of the job, no one would have been struck by the lightning. The Court also further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are said to be "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions.

The question posed by the record in this case involves whether the claimant's injuries have moved from the category of personal risk, and not compensable, to either a risk tied directly to work or one that is a neutral risk, and thereby compensable. Without evidence of a malfunction in the employer's truck, there is absent a link to the work itself. Additionally, the record contains not only the result of the inspection by Mitchell and Engels, but also the unrebutted testimony of Randall Sams that neither the driver returning the truck from Colby to Fountain after the claimant's illness, nor any driver operating the truck subsequent to its return to duty has suffered symptoms similar to those experienced by the claimant. The *but for* test applied here is not established by this record to show another employee in the same circumstances encountered by the claimant did sustain a similar injury. There is then, also absent evidence of a neutral risk.

The claimant has presented evidence of an injury he contends is not personal to him. He testified he did not ever experience his symptoms of headache, fatigue and eventually unconsciousness in the past. The claimant then points to his recovery after his removal from the truck and the subsequent absence of similar symptoms since September 21. He submits Dr. Bernton's report which concludes that this episode was most likely caused by carbon monoxide exposure. However, Dr. Bernton points out that his review is limited to a review of the medical records and he is not qualified to locate the

mechanical source of the exposure, nor could he determine from the medical records alone the identify of that source.

This record is similar to that described in *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). *Finn* involved an employee with a head injury found lying unconscious on the floor at work. The evidence was incapable of establishing the reason for the lack of consciousness or the head injury other than by reference to "some mysterious innerbody malfunction." The court in *Finn* rejected the argument that the doctrine of res ipsa loquitur applied. The court ruled the claimant's burden of proof required him to show a "causal relationship between his employment and his injury." In *City of Brighton*, the court affirmed and explained the analysis of the *Finn* opinion.

> Thus. While *Finn's* rationale is not a model of clarity, its central holding - that an injury due to a "mysterious innerbody malfunction" does not "arise out of" employment merely because that injury occurs at work - is entirely consistent with this court's precedent regarding the non-compensability of idiopathic injuries. (318 P.3d at 506-07).

Due to the absence of evidence to show a direct tie to the work itself, or evidence to show that *but for* the requirement of work an employee in similar conditions would also suffer these symptoms, the claimant's injury falls into the category of a personal risk due to its idiopathic nature. That category of injury is not compensable. The claimant's failure to present substantial evidence to directly tie his symptoms of carbon monoxide exposure to the work itself must result in a denial of his claim.

Accordingly, we conclude the ALJ's order of compensability must be set aside and the claim dismissed.

IT IS THEREFORE ORDERED that the ALJ's order issued March 26, 2014, is reversed and set aside.

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

8/5/2014 by KG .

CORY SAVAGE, 2625 FRAZIER LANE, COLORADO SPRINGS, CO, 80922 (Claimant)
FIRST FLEET INC, C/O: SHERITTA GOODRICH, 202 HERITAGE PARK DR, MURFREESBORO, TN, 37128 (Employer)
TRAVELERS INDEMNITY COMPANY, C/O: KRISTINE CLYNES, PO BOX 173762, DENVER, CO, 80217 (Insurer)
THE LAW OFFICE OF KIRK ANDERSON LLC & WINSTON LAW FIRM PC, C/O: KIRK ANDERSON ESQ & JOSEPH R WINSTON ESQ, 1009 SOUTH TEJON ST, COLORADO SPRINGS, CO, 80903 (For Claimant)
RAY LEGO & ASSOCIATES, C/O: GREGORY W PLANK ESQ, 6060 S WILLOW DR STE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-932-395-01

IN THE MATTER OF THE CLAIM OF

ANTHONY TRUJILLO,

Claimant,

v.

FINAL ORDER

LOWE'S,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated April 9, 2014, that dismissed the claimant's claim for benefits. We affirm the order of the ALJ.

The ALJ determined the claimant was engaged in a deviation from his employment when he fractured his left arm at work on October 17, 2013. The claimant asserts the activity involved, a 'chest bump' with a fellow employee, was integral with the activities of the job, was therefore within the course and scope of his employment and should be found compensable.

The claimant testified at the March 5, 2014, hearing that he was working at his job in the employer's warehouse and store on October 17. He was working with co-employee Matthew Walz. The two were nearing the end of their shift and had just successfully completed the preparation of a large order with the final application of shrink wrap. In order to note their achievement, Mr. Walz inquired of the claimant, "High five?" The claimant responded "no, chest bump." The claimant testified that Mr. Walz had taken a step closer to the claimant while the claimant was turned around placing an item on the floor. The claimant then described how he simply turned around and walked into Mr. Walz, causing the claimant to fall backwards onto his left arm. This caused a fracture of the left humerus. Mr. Walz also testified that the claimant walked

into him leading him to fall backwards. The claimant discussed how a chest bump, in contrast, required "running and jumping into somebody."

The ALJ found more credible the history taken in the emergency room which described the claimant as "celebrating with a fellow employee, and 'chest bumped' that individual falling backwards and landing on his left elbow." This was also the account provided to the employer's human resource manager when she completed the First Report of Injury form. Accordingly, the ALJ determined the claimant was indeed injured in the course of a 'chest bump' with Mr. Walz.

The ALJ concluded that the chest bumping activity constituted a deviation from employment that was so substantial it could not be considered part of the employment relationship. The ALJ noted that the claimant and Mr. Walz still had further steps to take to complete the order on which they were working and the chest bump activity was not consistent with the balance of the work required. Instead, the ALJ characterized the chest bump as a celebratory action in the nature of horseplay. It was seen by the ALJ as an activity that did not arise out of the employment relationship and, as such, did not result in a compensable injury. The ALJ dismissed the claim and the request for medical and temporary disability benefits.

On appeal, the claimant contends the ALJ did not make factual findings that would remove the chest bumping activity from the circumstances of work. The claimant points to the more recent construction of the opinion given in *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995) by the decision in *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). In the *Lori's Family Dining* opinion the court set forth four criteria by which to gauge the horseplay activity pertinent to a finding the activity arose out of employment. In *Panera Bread* the court pointed out that only the first two of the criteria are critical. Those two suggest consideration of: (1) the extent and seriousness of the deviation; and (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of duty. The claimant argues he was engaged in a brief celebration with his co-employee due to the completion of the largest part of a difficult task required before the end of their shift. Because the celebration had to do with the work activity and it was a brief and insubstantial deviation, it was said to be similar to the claimant's playful kick found compensable in *Panera Bread*.

To obtain compensation for an injury, an injured employee must, at the time of injury, have been performing service arising out of and in the course of the employee's employment. § 8-41-301(1)(b) C.R.S. An injury or occupational disease arises out of

employment when it has its origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer in connection with the contract of employment. The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. It is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985).*

Under this approach, horseplay is analyzed under general principles that govern whether a claimant has deviated from employment so substantially as to remove him from the course of employment. When, as here, a particular act of horseplay, as opposed to the employment environment in general, is at issue, the act is to be judged according to the same standards of extent and duration of deviation that are accepted in other fields, such as resting, seeking personal comfort, or indulging in incidental personal errands. It does not matter whether the horseplay doctrine fits best under the arising out of causation category or the course of employment time and place category. Whichever theoretical framework is applied, the issue remains whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra*.

Because the issues are factual in nature, they must be reviewed under the substantial evidence standard. Section 8-43-308, C.R.S.. The evidence must be considered in the light most favorable to the prevailing party, and we must defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *See Wilson v. Indus. Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

Here, the ALJ found the chest bump activity occurred while the claimant still had further work to do to get the designated order complete. The ALJ relied on this finding to establish the activity was a deviation from work. The ALJ did not specify a list of additional factors which led him to conclude the deviation was a serious abandonment of duty. However, the ALJ did take note that Mr. Walz is 6' 8" tall and weighs 280 pounds. The claimant, on the other hand was observed to be "diminutive in stature." The ALJ also discussed the fact that at the hearing both the claimant and Mr. Walz carefully testified that the claimant did not actually initiate a chest bump as he suggested. They

stated he just walked into Mr. Walz. The ALJ noted the testimony was a significant departure from the claimant's statements to the emergency room attendant and to the human resources manager. The claimant had also testified that if the activity was a chest bump, he would have been "running and jumping" into Mr. Walz. The ALJ found the claimant and Mr. Walz changed their description of the activity involved from the original accounts they had provided. This change would reasonably support the inference that the claimant and Mr. Walz perceived a chest bump could indeed be seen as a substantial deviation from work duties. The claimant also testified that neither he nor Mr. Walz had ever previously tried a chest pump, deferring instead to execute a high five or a hand shake. This would logically follow from the ill-advised nature of an activity wherein a smaller person runs and jumps at a 6' 8" 280 pound co-worker. We find these circumstances to be substantial evidence in the record to support the findings of the ALJ that the chest bump by the claimant which led to his injury was such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit. This finding is consistent with the requirements of *Panera Bread*.

Accordingly, we do not deem there to be a sufficiently compelling reason to find error in the determinations of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's order issued April 9, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

7/29/2014 by KG .

ANTHONY TRUJILLO, 4886 RAVEN RUN, BROOMFIELD, CO, 80023 (Claimant)
LOWE'S, C/O: CHRISTINE HARRIS -MARK WALZ, 5600 W 88TH AVE, WESTMINISTER, CO, 80031 (Employer)
SEDGWICK CMS, C/O: SHIRIN CHOWDHURY, PO BOX 14493, LEXINGTON, KY, 40512 (Insurer)
KEATING WAGNER POLIDORI FREE PC, C/O: BRADLEY UNKELESS ESQ, 1290 BROADWAY STE 600, DENVER, CO, 80203 (For Claimant)
WHITE AND STEELE PC, C/O: MATTHEW W TILLS ESQ, 600 SEVENTEENTH ST STE 600N, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-621-01

IN THE MATTER OF THE CLAIM OF

MORGAN WILLIAMS,

Claimant,

v.

FINAL ORDER

COLORADO CAB d/b/a
DENVER YELLOW CAB,

Employer,

and

OLD REPUBLIC C/O SEDGWICK CMS,

Insurer,
Respondents.

The pro se claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated March 5, 2014, that ordered his claim for compensation dismissed. We affirm the order of the ALJ.

A hearing was held on the issue of compensability, eligibility for temporary total disability benefits and medical benefits. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant is a cab driver for the employer. The claimant testified he had a regular customer in the person of Merl Mitchell. On May 22, 2013, the claimant and Mr. Mitchell drove around the Denver metro area for several hours with the meter off. The two then stopped off at Tequila's Restaurant for tacos and tequila. Mr. Mitchell expressed an interest in traveling to Paonia, Colorado, to view some land he owned and to rest for several days. The two picked up another, unnamed, passenger and the claimant's dog and set off for Paonia. The cab's meter was still off. After the group passed through the Eisenhower tunnel on Interstate 70, the claimant swerved the cab to avoid a rock. The cab went out of control and rolled several times before it came to rest. The claimant and Mr. Mitchell exited through a car window. The second passenger fled the scene. The claimant was transported to the St. Anthony Summit Medical Center. At the hospital, the claimant was determined to be intoxicated and was treated for several minor injuries. The claimant was then treated at the Concentra Medical Center in Denver. He complained of a left knee injury on May 24. However, X rays were said to be normal and the claimant was released to regular duty. The claimant continued to claim his knee was injured. A subsequent MRI revealed meniscal tears and surgery was recommended. The

respondents denied the compensability of the claim as well as temporary benefits and further medical care.

The respondent employer is a taxi company that provides transportation for fees derived from a meter running in the cab. The employer's witness, Randy Jensen, explained that a meter is used to calculate all fares with the exception of trips to Denver International Airport, the Denver Tech Center and Boulder. Cabs are not allowed to be driven more than 16 miles outside the Denver metro area for the reason that they are fitted with radio transmitting GPS devices which cannot be detected by the employer if driven any further away. The claimant was aware of this policy as it was covered in the orientation training the claimant had completed two months previously. The claimant did not communicate with the employer prior to setting off for Paonia, which is located in Colorado's western slope region. The claimant asserted in his position statement that while he was driving to Paonia off the meter, Mr. Mitchell had agreed to pay him $500 plus the cost of gasoline for the trip to Paonia.

The ALJ credited the testimony of Mr. Jensen and found the testimony of the claimant unpersuasive. It was determined the claimant and his friend, Mr. Mitchell, were driving to Paonia for a vacation and the claimant was not acting in the course of his occupation as a taxi driver during the trip. Accordingly, the ALJ found the claimant's injuries not compensable. The claimant's request for benefits was denied and dismissed.

On appeal the claimant essentially disputes the evidence and testimony submitted by the respondent and reiterates his version of events. The claimant did not file a brief in support of his petition to review but did make arguments in the petition to review concerning the ALJ's factual findings and credibility determinations. We are not persuaded that the ALJ committed reversible error.

The claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. Section 8-43-301(8), C.R.S. Where, as here, the appealing party fails to procure a transcript of the relevant hearing, we must presume the pertinent findings of fact are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). The ALJ's order here is based in large part on credibility determinations and the ALJ found that the claimant's testimony about the alleged work injury was not credible. Under the substantial evidence standard of review it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the

probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *See People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Consequently, the ALJ's credibility determinations are binding except in extreme circumstances. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000). We perceive no extreme circumstances here.

Although the evidence may have been subject to conflicting inferences, without transcripts, it is presumed that there is substantial evidence in the testimony of the employer's witness to support the ALJ's factual findings and conclusions. Where, as here, the record was subject to conflicting inferences it is left to the ALJ's discretion to resolve those conflicts and to determine the inference to be drawn and we may not substitute our judgment for the ALJ in this regard. *Gelco Courier v. Industrial Commission*, 702 P.2d 295 (Colo. App. 1985).

IT IS THEREFORE ORDERED that the ALJ's order dated March 5, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

6/25/2014 by KG .

MORGAN WILLIAMS, 7985 W 51ST AVE, UNIT 1, ARVADA, CO, 80002 (Claimant)
COLORADO CAB d/b/a DENVER YELLOW CAB, 7500 E 41ST AVE, DENVER, CO, 80216-4706 (Employer)
OLD REPUBLIC C/O SEDGWICK CMS, C/O: SHANNON BROWNE, PO BOX 14493, LEXINGTON, KY, 40512-4493 (Insurer)
MOSELEY BUSSER & APPLETON PC, C/O: SCOTT M BUSSER ESQ, 300 SOUTH JACKSON ST STE 240, DENVER, CO, 80209 (For Respondents)

FILED
United States Court of Appeals
Tenth Circuit

May 6, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VON J. PHATHONG; JENNIFER D. PHATHONG,

Plaintiffs - Appellees,

v.

TESCO CORPORATION (US),

Defendant - Appellant.

No. 12-1455
(D.C. No. 1:10-CV-00780-WJM-MJW)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **LUCERO**, **MURPHY**, and **BACHARACH**, Circuit Judges.

I. INTRODUCTION

Von J. Phathong was seriously injured while working on a drilling rig in Garfield County, Colorado. Phathong sued Tesco Corporation ("Tesco"), the operator of the drilling rig, alleging a Colorado state-law claim for negligence.[1]

[*]This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1]Phathong's wife, Jennifer Phathong, brought a claim for loss of consortium in the same complaint. In Colorado, "[l]oss of consortium is a derivative claim. Derivative claims are unique in that they depend entirely upon the right of the (continued...)

Prior to trial, Tesco sought summary judgment on the ground it was immune from common-law negligence liability because, inter alia, it was Phathong's statutory employer under the provisions of Colorado's Workers' Compensation Act. *See* Colo. Rev. Stat. § 8-41-401. The district court denied Tesco's motion, concluding the existence of disputed issues of material fact precluded summary judgment. The matter proceeded to trial. After the parties rested their cases, but before the matter was submitted to the jury, the district court, on its own motion, granted judgment as a matter or law to Phathong on the question of immunity. In so doing, it concluded "the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer" under § 8-41-401. The district court thereafter submitted Phathong's negligence claim to the jury; the jury found in Phathong's favor and granted him a substantial award of damages.[2] Tesco appeals, raising multiple challenges to both the district court's legal rulings and the jury's award of damages. This court concludes the record conclusively demonstrates Tesco was Phathong's statutory employer and, therefore, immune

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[1](...continued)
injured person to recover." *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1164 (Colo. 2000) (citation omitted). "The effect of being a derivative claim is that loss of consortium claims are subject to the same defenses available to the underlying personal injury claim." *Id.* at 1164 n.6. Accordingly, the analysis set out in this opinion as to Phathong's negligence claim applies equally to Jennifer Phathong's claim for loss of consortium.

[2]The jury likewise found in favor of Jennifer Phathong on her loss-of-consortium claim and awarded her $75,000 in damages.

from Phathong's negligence claims. This ruling obviates the need to address any of the other issues raised by Tesco on appeal. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **remands** this case to the district court to vacate its judgment in favor of the Phathongs and, instead, enter judgment in favor of Tesco.

II. BACKGROUND

A. Factual Background

Phathong began working for Tesco as a "floor hand" on a particular drilling rig, the DTC2 rig, in October of 2005. At 3:30 a.m. on the morning of December 13, 2005,[3] Phathong was seriously injured while working on DTC2. For purposes of resolving this appeal, it is unnecessary to set out the facts surrounding Phathong's injury. Instead, it is sufficient to note the jury found Tesco's negligence in the operation of DTC2 was ninety-percent responsible for Phathong's injuries and awarded him a substantial amount of damages.

Tesco develops, manufactures, and services oil and gas rigs. As part of its normal business practices, Tesco would, at the time of the events at issue in this case, sign drilling contracts with owners of natural gas wells to provide drilling services, including the provision of drilling rigs and the personnel necessary to operate those rigs (the "casing drilling services business"). In April 2003, Tesco

[3]As will quickly become apparent, the date and time of this accident plays a critical part in this appeal.

entered into a Master Service Agreement with EnCana Oil & Gas (USA), Inc. ("EnCana"). This Master Service Agreement governed all subsequent contracts between Tesco and EnCana. Thereafter, in June 2005, Tesco and EnCana entered into a drilling contract (the "EnCana Drilling Contract") covering Tesco's natural gas casing drilling services operations on behalf of EnCana in Garfield County, Colorado. The EnCana Drilling Contract obligated Tesco, as the driller, to furnish all equipment, labor, and services necessary to dig wells to the depth of no less than 9500 feet, and no more than 10,000 feet. In particular, it mandated that Tesco use DTC2, a drilling rig leased by Tesco from Drillers Technology Corporation, for all work covered by the contract. The EnCana Drilling Contract also made Tesco responsible for making sure work on the rig was performed safely and obligated Tesco to carry adequate workers' compensation insurance.

During the summer of 2005 (i.e., before Phathong was hired by Tesco and before the accident giving rise to Phathong's injuries), Tesco entered into negotiations to sell the casing drilling services portion of its business to Turnkey E&P Corporation ("Turnkey"). At approximately 7:30 a.m. on the morning of December 13, 2005, Tesco and Turnkey closed on their Revised and Restated Acquisition Agreement (the "Acquisition Agreement") and related Rig Personnel Supply Agreement (the "Rig Personnel Agreement"). Pursuant to the terms of the Acquisition Agreement, the deal became effective at 12:01 a.m. on the closing date (i.e., 12:01 a.m. on December 13, 2005, which is approximately three and

one-half hours before the accident giving rise to Phathong's injuries).[4] Turnkey acquired only the casing drilling services division of Tesco and, after the sale, Tesco remained in business. Specifically, Turnkey acquired four Tesco-owned drilling rigs and the drilling contracts associated with those rigs. Turnkey also acquired all employees who worked in Tesco's casing drilling services division, including Phathong and the other DTC2 crew members.[5] Importantly, however, Turnkey did not acquire the Master Service Agreement or EnCana Drilling Contract. Nor did Turnkey acquire Tesco's lease of DTC2 or of the other two rigs Tesco leased from Drillers Technology Corporation. Thus, as of 12:01 a.m. on December 13, 2005, Tesco remained obligated to perform under its remaining

[4]This provision of the Acquisition Agreement underpins Phathong's arguments regarding the unavailability of immunity to Tesco under Colorado's Workers' Compensation Act. That is, if the agreement had become effective upon closing, rather than at 12:01 a.m. on the day of closing, there would be no doubt but that Tesco was Phathong's actual employer at the time of the accident and, thus, entitled to immunity under the provisions of Colorado's Workers' Compensation Act. Because Tesco does not raise the argument on appeal, and because the record makes clear Tesco was Phathong's statutory employer, this court need not address whether the arbitrary time frame for assigning corporate liabilities in the contract between Tesco and Turnkey served to strip Tesco of its status as an actual employer under Colorado law. *See infra* n.5.

[5]The Acquisition Agreement provided that Tesco would be responsible for all "liability, costs[,] and expenses" for employment claims, including workers' compensation claims, "any employment-related tort claim," or "other claims or charges of or by" a former Tesco employee that accrued prior to the effective time of the agreement. Likewise, the agreement provided Turnkey would be responsible for the same accruing after the effective time.

contracts with, inter alia, EnCana and its drilling rig leases with Drillers Technology Corporation.

To fulfil its contractual obligations to EnCana and others, Tesco entered into the Rig Personnel Agreement with Turnkey. The Rig Personnel Agreement first recited that Tesco (1) remained contractually obligated to perform under its agreements with EnCana and others, (2) continued to hold leases on drilling rigs owned by Drillers Technology Corporation, but (3) lacked the manpower to manage the rigs because of the sale of its casing drilling services business to Turnkey. In light of these facts, the parties agreed that "while [Tesco] provides services to its third party customers, [Turnkey] shall provide personnel services with respect to the" leased rigs. Tesco paid Turnkey every two weeks pursuant to the following formula: "[Turnkey] will be compensated for the Services at the rate of one hundred and fifteen percent (115%) of the total of the actual and reasonably documented costs to [Turnkey] of salary and employment benefits and related [workers'] compensation paid to (or on behalf of) those individual employees of [Turnkey] who provide Services to [Tesco] under this Agreement . . . ."[6] The Rig Personnel Agreement imposed upon Tesco the

[6]This billing arrangement stands in stark contrast to the billing arrangement Turnkey and Tesco reached as to drilling contracts assigned to Turnkey under the Acquisition Agreement. As to the assigned contracts, the Acquisition Agreement obligated Tesco to use its best efforts to secure consent from all its customers to the assignments. Until such consent was secured, Tesco was obligated to

(continued...)

responsibility for designating to Turnkey the drilling locations for the rigs, the drilling schedule, and providing a safe workplace environment for the performance of the services under the agreement. Turnkey was responsible for ensuring its personnel acted in a "commercially reasonable, industry standard manner and endeavor in good faith to perform its responsibilities . . . with operational expertise" in accordance with Tesco's direction, unless Turnkey "reasonably believes that such directions will cause the well to be drilled in an imprudent or unsafe manner, in which case [Turnkey] shall have the right to refuse to conduct the requested operation." Finally, the Rig Personnel Agreement defined the relationship of the parties as "independent contractor[s]," with neither party "deemed for any purpose to be, the agent, servant[,] or representative" of the other party.

B. Procedural Background

The Phathongs filed suit against Tesco in the United States District Court for the District of Colorado claiming, inter alia, that Tesco's negligence in operating the DTC2 drilling rig led to their injuries. Tesco eventually filed a motion for summary judgment, asserting the Phathongs' common-law damages claims were barred by, inter alia, the immunity afforded to statutory employers by

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[6](...continued)
continue invoicing customers for all services performed by Turnkey and to remit any payments it received to Turnkey. Ultimately, however, Tesco was not liable to Turnkey for any amounts a customer refused to pay on an invoice.

the Colorado Workers' Compensation Act. *See* Colo. Rev. Stat. § 8-41-401. The district court denied Tesco's motion and the case proceeded to trial. Prior to submission of the case to the jury, the district court sua sponte granted judgment as a matter or law to Phathong on the question of Tesco's entitlement to immunity as a statutory employer. In so doing, it concluded "the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer" under § 8-41-401. In that regard, the district court reasoned as follows:

> The relationship [between Tesco] and Turnkey pursuant to that sale was not one of a general contractor and subcontractor . . . as envisioned by the Colorado Supreme Court in [*Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988)]. This was a sale of drilling operations, such that EnCana remained a general contractor, and Turnkey took over the subcontractor duties of running the drilling operations.
>
> In these circumstances, [Tesco] is not the "statutory employer" entitled to immunity under the Colorado Workers' Compensation Act.

III. ANALYSIS

A. Legal Background

"The primary purpose of [Colorado's] workers' compensation act is to provide a remedy for job-related injuries, without regard to fault. The statutory scheme grants an injured employee compensation from the employer without regard to negligence and, in return, the responsible employer is granted immunity from common-law negligence liability." *Finlay*, 764 P.2d at 63 (citations

omitted). "Although a given company might not be [an injured party's] employer as understood in the ordinary nomenclature of the common law, it nevertheless might be a statutory employer for workers' compensation coverage and immunity purposes." *Id.* at 64. The term "statutory employer" is defined in Colorado's Workers' Compensation Act as follows:

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents . . . .

Colo. Rev. Stat. § 8-41-401(1)(a)(I). Section 8-41-401(1)'s "purpose is to prevent employers from avoiding responsibility under the workers' compensation act by contracting out their regular work to uninsured independent contractors." *Finlay*, 764 P.2d at 64.[7] Thus, § 8-41-401(1) "makes general contractors ultimately responsible for injuries to employees of subcontractors." *Id.* Along with this burden comes a corresponding benefit. Under the Colorado scheme, "[s]tatutory immunity goes hand in hand with statutory liability." *Buzard v. Super Walls,*

[7]In *Finlay*, the Colorado Supreme Court was considering a predecessor version of the "statutory employer" provisions of the Workers' Compensation Act, specifically Colo. Rev. Stat. § 8-48-101(1) (1986). *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 64 (Colo. 1988). For all purposes relevant to this appeal, the current version of the Workers' Compensation Act is identical to the version at issue in *Finlay*.

Inc., 681 P.2d 520, 523 (Colo. 1984). To qualify for the immunity afforded a statutory employer, § 8-41-401(1) imposes an obligation on general contractors to carry workers' compensation insurance. *Id.* at 522.

Section 8-41-401(1) does not permit injured employees to obtain a double recovery. *Finlay*, 764 P.2d at 64. Instead, under Colorado's Workers' Compensation Act, "if a subcontractor has obtained insurance[,] its employee cannot reach upstream to the general contractor to establish tort liability; the general contractor is immune from suit as any insured employer would be." *Id.* (quotations and alterations omitted). This aspect of Colorado law "encourages those contracting out work to require that contractors and subcontractors obtain workers' compensation insurance."[8] *Buzard*, 681 P.2d at 523.

[8]It is undisputed Tesco and Turnkey both carried workers compensation policies at the time of Phathong's injuries. Phathong nevertheless argues Tesco is not entitled to the immunity ordinarily afforded a statutory employer under Colorado law because it "divested itself of any liability for workers' compensation claims" in the Acquisition Agreement. This assertion is not persuasive. As the cases cited above make clear, Tesco had a statutory obligation to provide workers' compensation insurance under Colorado's Workers' Compensation Act. Tesco was unable, as a matter of law, to contract away its workers' compensation liability. *See Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998) (en banc) (holding that parties may not privately contract to abrogate statutory requirements or contravene public policy of Colorado). Contrary to Phathong's suggestion, Tesco's obligation to provide workers' compensation insurance was not "divested by contract" simply because Tesco elected to allocate ultimate payment responsibility between itself and Turnkey for any future claims for workers' compensation benefits.

Whether a corporation like Tesco is a statutory employer under the terms of § 8-41-401 is dependent upon the nature of the "work contracted out." *Finlay*, 764 P.2d at 64. Colorado employs the "regular business test" to determine whether the party contracting out work is a statutory employee; the test is satisfied "where the disputed services are such a regular part of the statutory employer's business that absent the contractor's services, they would of necessity be provided by the employer's own employees." *Id.* at 66. The Colorado Supreme Court has described its "regular business test" as intentionally broad and has justified an inclusive test as necessary "to accommodate more fully the purposes of the workers' compensation act." *Id.*[9] In applying the regular

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[9]In this regard, the *Finlay* court noted as follows:

> From [more recent Colorado] cases there emerges a broader standard that takes into account the constructive employer's total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. This broader standard ensures that an important purpose of section [8–41–101(1)]—that of making general contractors ultimately responsible for injuries to employees of subcontractors—will be fulfilled. That purpose, as well as the more general purpose of the workers' compensation act to compensate injured employees for job-related injuries regardless of fault, would be frustrated were we to revert to the narrow standard applied in [an earlier Colorado case], and focus exclusively on whether the subcontracted activity *directly* relates to the alleged employer's primary business. Such a narrow interpretation of the "regular business" test could potentially bar the recovery of an injured worker who is unable to show negligence and whose primary employer is uninsured and financially irresponsible. This result would clearly

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business test, courts should consider "the constructive employer's total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Id.* The importance of the contracted service to the employer's total business operation is demonstrated where, absent the contractor's services, the employer would have to provide its own employees rather than forgo having the work performed. *Id.* at 67. In other words, where the work is so essential to the day-to-day business operations of the employer that it cannot continue to function without the task being performed, its importance to the total business operation is demonstrated.

B. Standard of Review

This court reviews de novo the district court's sua sponte grant of judgment as a matter of law in favor of Phathong on the question of Tesco's status as a statutory employer. *Myklatun v. Flotek Indus., Inc.*, 734 F.3d 1230, 1233-34 (10th Cir. 2013); *cf. Humphrey v. Whole Foods Mkt. Rocky Mountain/S.W., L.P.*, 250 P.3d 706, 708 (Colo. App. 2010) (holding that when the facts supporting an entity's status as a statutory employer are undisputed, the trial court's determination of that status from the undisputed facts is a question of law).

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[9](...continued)
contravene the long-recognized rule that the workers' compensation act is to be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families.

Finlay, 764 P.2d at 66-67 (quotations and alteration omitted).

Under this standard, the question is whether "a reasonable jury would . . . have a legally sufficient evidentiary basis to find for" Tesco on the question of its status as a statutory employer. Fed. R. Civ. P. 50 (a)(1). The resolution of this case turns heavily on questions of contract interpretation, which are also questions of law subject to de novo review. *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008).

C. Analysis

The district court concluded that after the closing of the Acquisition Agreement, the relationship between Tesco and Turnkey was not one of a general contractor and subcontractor as envisioned in *Finlay*. Instead, according to the district court, Tesco completely exited the casing drilling services business, EnCana remained the general contractor, and Turnkey took over the subcontractor duties of running the drilling operations. The uncontested facts in the record do not bear out the district court's conclusions. Tesco remained an active participant in the casing drilling services business after the closing of the Acquisition Agreement and, absent the labor provided by Turnkey, would have had to train or hire its own workers to conduct that business. *See Finlay*, 764 P.2d at 67. Thus, because the work performed by Turnkey for Tesco satisfies Colorado's regular business test, the district court erred in ruling Tesco was not Phathong's statutory employer.

At the moment of the closing of the Acquisition Agreement, Tesco continued to be engaged in the casing drilling services business. Taken together, the Acquisition Agreement and the Rig Personnel Agreement demonstrate Tesco remained obligated to perform its duties to EnCana under the terms of the Master Service Agreement and the EnCana Drilling Contract. There is no evidence in the record indicating Turnkey succeeded in any way to Tesco's relationship with EnCana.[10] Likewise, the Acquisition Agreement and the Rig Personnel

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[10]In contrast, the Acquisition Agreement makes quite clear that Turnkey did succeed to Tesco's contractual relationships with those entities holding drilling contracts associated with the drilling rigs transferred by Tesco to Turnkey. *See supra* n.6 (noting Acquisition Agreement obligated Tesco to operate like a pass-through entity for the benefit of Turnkey for those drilling contracts associated with the rigs Turnkey acquired). All this demonstrates, however, is that after the parties closed on the Acquisition Agreement, Tesco's footprint in the casing drilling services business was smaller than it was before the closing. To the extent Phathong argues the lack of an intent on the part of Tesco to continue operations in this sector of its business indefinitely prevents it from being a statutory employer, we note the argument is wrong as both a matter of law and fact. Phathong has not cited, and this court has not found, any indication in Colorado law that the definition of statutory employer set out in the Colorado Code is limited to employers that continue to operate indefinitely under their current business models. Furthermore, such a counterintuitive assertion is at odds with *Finlay*'s statement that the regular business test should focus broadly on a potential statutory employer's regular business operations, not on some narrow notion of its core or primary business. Even if the law were as Phathong imagines it, the record does not demonstrate Tesco intended to exit the casing drilling services business at the scheduled expiration of those drilling contracts associated with the Drillers Technology Corporation rigs. The Rig Personnel Agreement specifically provides as follows:

> The term of this Agreement shall be coterminous with the longest term of the Equipment Leases with [Drillers Technology

(continued...)

Agreement make clear it was Tesco, not Turnkey, that was obligated to continue making lease payments to Drillers Technology Corporation on the three drilling rigs not transferred to Turnkey under the agreements. Tesco maintained the same role with regard to its business operations on DTC2 as it had prior to the effective date of the Acquisition Agreement: it was still responsible for safety on the rig, providing the labor and equipment necessary to operate the rig, and designating the drilling locations and schedule. The only salient difference flowing from the closing of the Acquisition Agreement was that Tesco no longer had sufficient staff to manage the operation of DTC2 and contracted with Turnkey, who became the crew's direct employer and Tesco's subcontractor, to provide those services. *See Finlay*, 764 P.2d at 67-68 (holding a janitor for a cleaning service was a statutory employee of a computer company because absent the provision of cleaning services by the janitorial company, the computer company would have had to hire new employees or trained its existing employees to do the job).

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[10](...continued)
Corporation]. If [Tesco] wishes to renew or extend the terms of one or more such Equipment Leases, it shall provide [Turnkey] with not less than 45 days prior written notice thereof and [Turnkey] shall advise [Tesco] in writing within 15 days of its receipt of such notice, whether it has elected to (i) terminate this Agreement at the end of the last initial term of the Lease Agreements, or (ii) extend the term of this Agreement, subject to the same terms and conditions, to coincide with the extended term or terms of the Lease Agreements. Such determination shall be made by [Turnkey] in its sole discretion and, if it elects not to extend the term of this Agreement, it shall have no further obligations to Tesco hereunder at the end of such term.

The nature of the billing process between Tesco and Turnkey also belies the district court's suggestion Turnkey simply took Tesco's place in the employment chain between EnCana and Phathong. Tesco paid Turnkey pursuant to a contractual rate that was not tied in any regard to the rate EnCana paid Tesco under the EnCana Drilling Contract. Likewise, under the Rig Personnel Agreement, Tesco retained the responsibility for designating to Turnkey the drilling locations for the rigs, setting the drilling schedule, and providing a safe workplace environment for the performance of the services under the agreement. *See id.* at 67 n.4 (recognizing this type of control by a statutory employer over the work to be performed is indicative of, but not a necessary predicate to a statutory employment relationship). Finally, the Rig Personnel Agreement defined the relationship of the parties as "independent contractor[s]," with neither party "deemed for any purpose to be, the agent, servant[,] or representative" of the other party. There is absolutely no indication in the record that Tesco and Turnkey acted in derogation of this contractual provision.

IV. CONCLUSION

The record in this case conclusively demonstrates the work contracted out by Tesco to Turnkey was an important, routine, and regular part of Tesco's casing drilling services business. That being the case, the district court erred in sua sponte granting judgment in Phathong's favor on the immunity question and in denying Tesco's post-trial motion pursuant to Fed. R. Civ. P. 50. Thus, we

remand to the district court to **vacate** the jury's verdict in favor of the Phathongs and to, instead, **enter** judgment in favor of Tesco.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge