BROWN BAG SEMINAR

Thursday, December 18, 2014

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

633 17th Street

12th Floor Conference Room

(note different location)

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

November 14, 2014 through December 12, 2014

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-945-671-02

IN THE MATTER OF THE CLAIM OF JAMES ALLEN, Claimant, v. US ENGINEERING COMPANY, Employer, and LIBERTY MUTUAL FIRE INSURANCE, Insurer, Respondents.	ORDER OF REMAND

The respondents seek review of an order of Administrative Law Judge Harr (ALJ) dated June 5, 2014, that found the claim compensable and ordered the respondents to pay certain medical benefits. We set aside the order and remand for further proceedings.

A hearing was held on June 5, 2014. Neither the insurer nor the employer appeared for the hearing. The ALJ entered an order on the merits the same day determining that the claim was compensable and ordering the respondents to pay for medical benefits. The respondents filed a petition to review contending that a notice of hearing as provided for under §8-43-211, C.R.S., was never provided to the employer by the Office of Administrative Courts. The claimant has not filed a brief in opposition and, thus, it appears that the claimant does not dispute that the employer did not receive notice of the hearing. Based on the undisputed evidence, we agree with the respondents that the order must be set aside and the matter remanded for further proceedings.

Due process requires that parties be notified of pending proceedings affecting their rights. *Hall v. Home Furniture Co.,* (Colo. App. 1996). "The fundamental requisites of

due process are notice and the opportunity to be heard." *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990). In an administrative hearing turning on questions of fact, "due process requires that the parties be apprised of all the evidence to be submitted and considered, and that they be afforded a reasonable opportunity to confront adverse witnesses and to present evidence and argument in support of their position." *Id.*

Section 8-43-211(1) C.R.S., provides that at least thirty days prior to any hearing, the Office of Administrative Courts in the Department of Personnel shall send written notice to all parties by regular or electronic mail or by facsimile and that the notice shall give the time, date, and place of the hearing. Moreover, the Office of Administrative Courts has promulgated a procedural rule regarding notice of hearings. See Office of Administrative Courts' Rule of Procedure (OACRP) 11. Additionally, §8-43-211(2)(b), C.R.S., requires that a request for hearing, "shall be mailed to all parties at the time they are filed with the office of administrative courts." The panel has previously held that the statue and rule contemplate that the employer is a party in interest and entitled to separate notice of hearing. *See Nwanorim v. Prime Hospitality*, W.C. No. 4-819-936 (November 8, 2010); *Lopez v. UB Code* W.C. No. 4-813-382 (October 22, 2010); *Ford v. Katzon Brothers*, W.C. No. 4-790-320 (November 12, 2009). Absent an express waiver or some other clear indication, we presume that the employer was necessarily interested in the outcome of the claim. It follows that an application for hearing and notice of the hearing was an indispensable requisite to the entry of any award against employer. *See Loeffler v. Thomas Reeder d/b/a International Wrestling Alliance*, W.C. 3-940-761 (September 14, 1992)(respondent entitled to personal notice of hearing).

Here, the undisputed evidence record shows that the certificate of mailing on the claimant's application for hearing was only addressed to the insurer. Similarly, the Notice of Hearing was only addressed to the insurer and the claimant, and not to the employer. Both documents show on their face that the employer did not have notice of the hearing. Therefore, consistent with the panel's prior holdings, such notice must affirmatively appear of record, unless waived, or the proceedings are void. *See Nwanorim v. Prime Hospitality, supra; Lopez v. UB Code, supra; Ford v. Katzon Brothers, supra.*

IT IS THEREFORE ORDERED that the ALJ's order dated June 5, 2014, is set aside and the matter is remanded for further proceedings.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

12/8/2014 by RP .

LAW OFFICE OF DAVID LEVY, Attn: DAVID LEVY, ESQ., 595 CANYON BLVD., BOULDER, CO, 80302 (For Claimant)
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ALJ HARR, % OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA MCGOVERN, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-834-243-02

IN THE MATTER OF THE CLAIM OF LINDA ARTMANN, Claimant, v. REILLY, POZNER & CONNELLY, LLP, Employer, and SENTINEL INSURANCE COMPANY, LTD., Insurer, Respondents.	FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated July 8, 2014, that confirmed the finding of the Division Independent Medical Exam (DIME) physician that the claimant was not at MMI, ordered continuing temporary disability benefits and additional medical benefits. We affirm the decision of the ALJ.

The claimant was injured on August 25, 2010, when she hurt her low back at work. The claimant was treated by Dr. Ritzer at a HealthOne clinic. Dr. Ritzer determined the claimant had reached maximum medical improvement (MMI) on December 21, 2010. The claimant requested a DIME review. Dr. Ronald Swarsen was selected to perform the DIME and submitted a report dated April 25 and May 13, 2011. Dr. Swarsen surmised the claimant was not at MMI and recommended additional osteopathic manipulation and physical therapy. He estimated this treatment should continue for an additional four to six months. The claimant obtained treatment from Dr. Christopher LaFontano, D.O. A CT scan the following month revealed joint arthritis and a disc protrusion at L2-3, and spondylolisthesis at L4-5. The claimant underwent a lumbar fusion surgery by Dr. Sean Markey in August, 2012. This surgery provided some relief to the claimant. However, Dr. Markey noted in February, 2013, that the fusion had begun causing difficulties in the claimant's spine below the level of the fusion at the SI joint.

The respondents arranged for a second opinion examination and report by Dr. Michael Striplin. Dr. Striplin observed that injections had been administered to the claimant's SI joint on March 13, 2013, which had provided only partial relief. The doctor concluded the claimant had reached MMI as of that date and he provided a 24% whole person impairment rating. Dr. LaFontano and Dr. Markey disagreed with this determination of MMI.

A second DIME review was scheduled with Dr. Swarsen pursuant to § 8-42-107(8)(b)(II)(when the claimant has not been placed at MMI 24 months post injury). Dr. Swarsen authored a report dated September 3 and September 11, 2013. He again determined the claimant was not at MMI. Dr. Swarsen felt the claimant suffered from an ITB syndrome. He recommended further injections, physical therapy and massage therapy. Dr. Swarsen estimated the claimant would not be at MMI until two years after her last August, 2012, surgery.

The respondents filed an application for a hearing to challenge this finding of Dr. Swarsen pertinent to MMI. The respondents arranged for an IME to be conducted by Dr. Tashof Bernton. Dr. Bernton submitted a report and participated in a prehearing deposition. The doctor was of the impression the claimant's original injury consisted of a lumbar and sacroiliac joint strain. He concluded the claimant did not have an ITB syndrome. Dr. Bernton noted the claimant had received extensive treatment for the past three years and yet had demonstrated no significant improvement in her condition. He observed that the Director's Medical Treatment Guidelines did not justify any further care that could be expected to improve the claimant's condition. Dr. Bernton was of the opinion the claimant presented a psychological disability profile which would preclude her from achieving a successful result regardless of the nature and amount of medical treatment she received.

The ALJ convened a hearing in regard to the respondents' application on June 17, 2014. The ALJ stated he had read the previously submitted deposition of Dr. Bernton. The ALJ received the documentary submissions of the parties. These included 361 pages of medical documents from the respondents and another 112 pages, primarily medical, from the claimant. There was some duplication of documents. The ALJ announced he would take a 15 minute recess to review the documents and the hearing would then recommence. The ALJ did so and then took the live testimony of the claimant. At the conclusion of the testimony and closing argument, the ALJ submitted an oral decision indicating he disagreed with the opinion of Dr. Bernton regarding MMI. He acknowledged Dr. Bernton was correct insofar as Dr. Swarsen had relied on an ITB syndrome as a diagnosis. However, the ALJ criticized Dr. Bernton's analysis that further

treatment would prove unsuccessful and that the claimant suffered from a personality that would not allow further medical treatment to help her. The ALJ found Dr. Swarsen's conclusion that MMI would not be achieved until two years after her surgery to be persuasive. The ALJ adopted the MMI opinion of Dr. Swarsen and ordered the respondents liable for additional medical treatment and continuing temporary benefits pursuant to their last amended general admission of liability.

On appeal, the respondents argue the ALJ was mistaken in upholding the DIME determination of Dr. Swarsen that the claimant was not at MMI. The respondents also contend the ALJ committed error to the extent he did not properly apply judicial discretion when arriving at his MMI decision.

I.

In his written order of July 8, 2014, the ALJ credits the lay testimony of the claimant and the medical opinions of the claimant's treating doctors, Dr. LaFontano and Dr. Markey. He notes that these doctors have recommended further diagnostic studies to determine the sources of the claimant's continuing pain complaints. These include bilateral branch blocks and radio frequency ablation applications. The ALJ also referenced EMG exams from June of 2013, which revealed continued chronic radiculopathy at the L4-5 level. The ALJ reviewed psychological evaluations by Glenn Kaplan, Ph.D., and Dr. Gary Gutterman, M.D. in 2012, which found the claimant's personality was not such that further medical treatment would be wasted on her. The ALJ articulated several reasons for rejecting the contrary opinion of Dr. Bernton. He noted Dr. Bernton did not specialize in psychological analysis or treatment. The ALJ pointed to the recent EMG tests which were inconsistent with Dr. Bernton's statement that there was no evidence of radiculopathy. The ALJ reasoned the opposing opinions of the claimant's treating physicians were of more value than the independent, more theoretical, discernment of Dr. Bernton. The ALJ concluded that despite the incorrect suspicion of ITB syndrome, Dr. Swarsen's analysis that the claimant required additional diagnosis and treatment before she attained MMI was correct.

Section 8-42-107(8)(b)(III) and (c), C.R.S. provide that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the

trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* The ALJ's decision that the respondents had failed to carry their burden of proof was supported by substantial evidence in the record. This included reports from Dr. LaFontano and Dr. Markey, as well as others. We may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990). Given the nature of the record and the medical dispute involved, we cannot say the ALJ committed error in adopting the DIME MMI determinations of Dr. Swarsen.

II.

The respondents contend the ALJ did not properly exercise judicial discretion when reviewing the medical evidence pertinent to the issue of MMI. The respondents argue the ALJ reflexively rejected the medical opinions of Dr. Bernton prior to reading the medical evidence submitted by the parties. It is asserted the 15 minute recess the ALJ allotted during the hearing to read the medical documents prior to his ruling from the bench was inadequate. The respondents point to the ALJ's reference to the American Psychiatric Association's Diagnostic and Statistical Manual of Disorders, vol. V, as evidence the ALJ was guilty of interjecting his own opinion into the issue instead of weighing the opinions of the submitted medical professionals.

The ALJs are experienced in the assessment of medical evidence and testimony, and are presumed to have special expertise in evaluating this type of evidence, *Wierman v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941); *Seagrave v. Sanders* W.C. No. 3-107-326 (June 5, 1995). Under section 8-43-207(1), C.R.S., "the ALJ is vested with wide discretion in the conduct of evidentiary proceedings." *Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009); *see also Eller v. Industrial Claim Appeals Office*, 224 P.3d 397, (Colo. App. 2009) (applying an abuse of discretion standard to evidentiary rulings); *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ("An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law.") The ALJ was fully capable of weighing the doctors' testimony and reports and, in doing so, of considering the bases for their opinions. Insofar as expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

To the extent the ALJ was critical of Dr. Bernton's testimony, that is within the purview of his authority. An ALJ is not obligated to specify why he is not persuaded by a medical opinion, but, should he undertake to do so, his ruling becomes more transparent and easier for the parties and other readers to understand. We cannot say the ALJ's criticism constitutes an abuse of discretion as opposed to a legitimate exercise of the duty to resolve conflicting evidence.

It is clear the ALJ could not have read every page of the medical record submitted within the 15 minute recess. However, some of the medical exhibits were duplicative. Many were of peripheral relevance to the issue at hand. The ALJ might have discerned which reports were the most pertinent and chose to devote his attention to those items. In *Cordova v. General Cable Co.*, W.C. No. 4-133-863 (May 2, 2000), we reviewed a similar claim wherein the ALJ that had presided at a hearing had retired prior to an appeal. A second ALJ submitted the matter to the Industrial Claim Appeals Office pursuant to § 8-43-301(4) and (5) C.R.S. after stating he had reviewed only the briefs submitted pertaining to the petition to review. Noting that these statutory sections required an ALJ to determine the propriety of amending the original order or of ordering a new hearing, it was held that the second ALJ was obligated to review "a transcript and all evidence submitted." Without such a complete review, an ALJ would be unable to appropriately exercise his judicial discretion in regard to authoring or waiving a supplemental order as required by the statute. The standard applied in *Cordova* for purposes of § 8-43-301(4) and (5) applies equally to orders pursuant to §§ 8-43-207(1)(k) and 8-40-201(15). However, while the statutory scheme does not prohibit rulings from the bench immediately upon the conclusion of an evidentiary hearing, it does not provide any official sanction to such a decision. Section 8-43-215, C.R.S. specifies that an ALJ, regardless of a prior oral ruling, must submit a written order within 15 working days of a hearing. It is this written order that controls the outcome of the hearing. One obvious function of this delay between the hearing and the order is to allow the ALJ to complete a review of a sometimes voluminous written record. Without evidence that the ALJ did not take advantage of this period to complete an examination of the documents submitted, we are unable to conclude he was remiss in this regard. See *Crandall v. Watson-Wilson Transportation System, Inc.*, 171 Colo. 329, 467 P.2d 48 (1970)(ALJ is presumed to have considered entire record). This is particularly true in light of the fact that the ALJ did allow himself additional time after his oral ruling to issue a written order. The ALJ's written order was not submitted until three weeks after the conclusion of the hearing. During this period, the ALJ did have the extra time to further peruse the medical documents and to reconsider his initial opinion. Finally, the ALJ had the ability to author a supplemental order, had he chosen to do so, within 30 days following the petition to review to consider arguments raised by the parties through that petition. Section 8-43-

301(4) & (5) C.R.S. A reliance solely on the notation in the record of a too brief recess for review of the medical records does not necessarily establish a due process irregularity. Without more, the respondents have not made a sufficient showing that their rights to procedural due process were abridged in this hearing.

In summary, the record in this matter does not reveal an abuse of discretion on the part of the ALJ in respect to his disposition of the competing medical evidence pertinent to issue of MMI. We decline to disturb the ALJ's order in this claim.

IT IS THEREFORE ORDERED that the ALJ's order issued July 8, 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

12/3/2014 by RP .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-872-923-01

IN THE MATTER OF THE CLAIM OF PEDRO GUTIERREZ LOPEZ, Claimant, v. SCOTT CONTRACTORS, Employer, and ZURICH AMERICAN INSURANCE CO, Insurer, Respondents.	FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated June 4, 2014, that authorized treatment from a physician selected by the claimant. We affirm the order of the ALJ.

The claimant sustained injuries to both his legs while working to extricate one of the employers' trucks from snow on December 6, 2011. In regard to the left leg, the claimant was diagnosed with a fracture of the tibia. On January 5, 2012, the claimant underwent a surgery involving the insertion of two metal plates through the use of six screws placed into the tibia. This surgery was revisited with additional surgery on June 7, 2012, performed by Dr. Hammerberg. The parties agreed to designate Dr. Primack as the claimant's primary treating physician. The claimant underwent further conservative therapy. However, he continued to complain of pain in his left leg. Surgical opinions were obtained from Dr. Murken and from Dr. Hammerberg in 2013. These physicians recommended the claimant's hardware be removed from his left leg. Dr. Primack recommended against such a procedure. The respondents declined to authorize the surgery. After hearing on March 11 and May 2, 2014, the ALJ found the recommendation for the procedure to be reasonable and necessary and ordered it authorized.

The claimant also requested at the hearing that the ALJ authorize his selection of Dr. Gellrick to provide treatment due to his stated lack of confidence in Dr. Primack.

The claimant testified he felt Dr. Primack would not allow him to discuss his treatment issues. The claimant was particularly alienated by a statement he attributed to the doctor when reviewing the possibility of the hardware removal surgery. The claimant reported that Dr. Primack stated to him: "there is no God, God is not going to fix you, all you need to do is get back to work." The claimant perceived this statement as an assault on his religious faith. Dr. Primack asserted the claimant had misconstrued his statement and he had apologized for any misunderstanding. Nonetheless, the ALJ concluded the claimant had made an appropriate showing that he had lost confidence in Dr. Primack. The ALJ determined a change in primary care physician to Dr. Gellrick would facilitate the claimant's recovery. Dr. Gellrick was therefore authorized to treat the claimant.

On appeal, the respondents do not dispute the finding that the claimant made a "proper showing" to secure the ALJ's permission to have a change of physician pursuant to §8-43-404(5)(a)(VI). However, the respondents argue, first, that once the ALJ determined a change of physician was in order he was obligated to either direct Dr. Primack to make a referral to a new doctor or to allow the respondents to provide a substitute physician to provide treatment. Secondly, the respondents contend the ALJ committed error in authorizing Dr. Gellrick because the claimant had previously used Dr. Gellrick to provide an independent medical examination (IME) opinion pertinent to the decision to undergo the hardware removal surgery. It is asserted Dr. Gellrick's authorization under those circumstances is not consistent with the statute's requirement that the change be limited to the claimant's "personal physician" and that it represents an ethical conflict of interest for Dr. Gellrick.

As the claimant points out, the respondents have inverted the reading of § 8-43-404(5)(a)(VI) C.R.S. The findings of the ALJ reveal that the claimant did initially request in writing from the respondents a change of physician to Dr. Gellrick. The respondents presented a timely objection to the request. Consequently, the claimant added the issue to a pending request for a hearing pertaining to his request for leg surgery. The statutory section opens with a statement that "upon written request to the insurance carrier … an injured employee may procure written permission to have a personal physician or chiropractor treat the employee." The carrier may then object within twenty days as occurred here. In that event, the section provides: "upon the proper showing to the division, the employee may procure the division's permission at any time to have a physician of the employee's selection treat the employee, …".

The respondents reason that because they did seasonably object to the request to change physicians, they cannot be held to have waived their right to control the selection of the treating physician. Such a 'waiver' is said to occur only when the carrier does not

make an objection within the twenty days. Due to the carrier's objection, it is argued the ALJ must allow the carrier to make the referral to a new physician upon the claimant's showing of a need for a change. However, the difficulty with the respondents' argument lies in the fact that the sentence allowing the claimant to make a 'proper showing' for a physician change is not dependent on the result of a prior request made to the carrier. A claimant could forego any written request to the carrier and still petition the ALJ for a change of physician. The sentence contains no indication the respondents are allowed to select the replacement. The language explicitly refers to a request to have a physician of the "employee's selection" treat the claimant. Because the ALJ here was acting in regard to the clause pertaining to a 'proper showing,' and not to the opening sentence discussing a 'written request to the insurance carrier,' the contention of the respondents is misplaced. The ALJ is under no obligation in that case to seek or acquiesce to a further physician referral from the carrier.

Similarly, the respondents' claim that only a "personal physician" of the claimant may be nominated for authorization is relying on a phrase appearing in the sentence referencing the request to the carrier, but not in the sentence discussing a proper showing to the ALJ.[1] The ALJ may simply authorize "a physician of the employee's selection." There is no requirement limiting the ALJ's authorization to a 'personal' or prior treating physician.

The assertion that there is a conflict of interest when an IME provides treatment would apply if the sequence of roles was reversed. A treating physician would not qualify as an 'independent' examiner. However, once the independent opinion is rendered, there would not appear to be a reason to preclude the former IME from undertaking direct care of the claimant. This is especially true when the selection of both the IME and the candidate for a treating physician is at the discretion of the claimant. This would not be the case should the IME be a Division Independent Medical Examiner (DIME) selected pursuant to § 8-42-107.2. However, a DIME is not involved here. The conflict of interest is illusory and is not a constraint on the authority of the ALJ to approve the claimant's request for a new physician.

Because the statute does not contain a specific definition of a "proper showing," we have previously held the ALJ possesses broad discretionary authority to grant a change of physician depending on the circumstances prevailing in the particular case. *See Szocinski v. Powderhorn Coal Co.,* W.C. No. 3-109-400 (December 14, 1998); *Merrill v. Mulberry Inn, Inc.,* W.C. No. 3-949-781 (November 16, 1995). Of course, the

[1] In addition, because "personal physician" is not otherwise qualified, there is no reason a claimant could not characterize any physician of his choosing as now being his "personal" physician.

ALJ's discretion is not unlimited. Obviously, the ALJ's decision should be made with a view towards insuring the claimant is being provided reasonable and necessary medical treatment as required by § 8-42-101(1) (a), while protecting the respondents' legitimate interest in being apprised of the course of treatment for which it may ultimately be held liable. *Landeros v. CF & I Steel*, W.C. No. 4-395-314 (October 26, 2000); *Villalobos v. Spring Air Mattress*, W.C. No. 4-662-825 (June 22, 2007).

Because of the discretionary nature of the issue, we may not interfere with the ALJ's order unless an abuse of discretion is shown. An abuse exists if the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1995). Here, the ALJ noted the claimant's frustration with his inability to discuss his care with Dr. Primack and his objection to the statement by Dr. Primack indicating the claimant may be hoping for too much from the proposed hardware removal surgery. The ALJ reasonably inferred the claimant did not have a good relationship with Dr. Primack and this lack of confidence would retard the claimant's recovery from his injuries. We have previously upheld orders authorizing a change of physician based on the breakdown of the relationship between the claimant and the treating physician. *Merrill v. Mulberry Inn, Inc., supra*. We find no reason to disturb the ALJ's order to authorize Dr. Gellrick in this matter.

IT IS THEREFORE ORDERED that the ALJ's order issued June 4, 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

11/19/2014 by RP .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-384-910

IN THE MATTER OF THE CLAIM OF JANE MCMEEKIN, Claimant, v. MEMORIAL GARDENS, Employer, and RELIANCE NATIONAL INDEMNITY, Insurer, Respondents.	FINAL ORDER

The claimant and respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated May 14, 2014, that awarded the claimant $1,323.10 for attorney fees and costs for filing an application for hearing on an unripe issue. We set aside the ALJ's order.

This matter previously was before us. In an October 19, 2011, order the ALJ made factual findings pertinent to the September 6, 2011, hearing in this matter. The claimant sustained an admitted injury on March 3, 1997. The respondents filed a final admission of liability on March 5, 2003, admitting for a 36 percent whole person impairment and admitting for "*Grover* type medical care 'per attached division IME report by Dr. Beatty dated August 27, 2002.'" The respondents later stipulated to reimburse the claimant for prescriptions and agreed to directly pay for the prescriptions in the future. In addition, the ALJ determined that the respondents formally stipulated to the claimant's need for such medical care.

On April 27, 2011, the respondents filed an application for hearing seeking to terminate maintenance medical benefits, specifically stating that the claimant's condition "as is right now" does not require narcotic medications as "it's laid out in Beatty's report." Tr. at 17. The respondents' requested that "everything be cut off based on the causation defense and based on the fact that it's not reasonable and necessary." Tr. at 21.

The respondents also endorsed the issue of apportionment and authorized treating physician.

The ALJ considered the respondents to be challenging the reasonableness and necessity of the claimant's current medical care. The ALJ credited the opinion of the claimant's authorized treating physician, Dr. Meyer, indicating that the claimant's current medical treatment resulted from her work-related injury. The ALJ concluded that the claimant had established her entitlement to her current treatment as prescribed by Dr. Meyer. Consequently, the ALJ denied the respondents' request to terminate the claimant's current medical treatment regimen.

The ALJ went on to determine that the issues of apportionment and authorized treating provider endorsed by the respondents were not ripe under §8-43-211(2)(d), C.R.S. The ALJ granted the claimant's request for attorney fees and costs and directed the claimant to submit an affidavit of fees and costs. The ALJ stated that he would "issue a separate order concerning the attorney fees and costs that will approve, deny or approve in part the submitted attorney fees and costs."

The claimant's attorney submitted an affidavit for attorney fees and costs in the amount of $26,462.00 which was the attorney fees and costs for the entire proceeding. In an order dated February 3, 2012, the ALJ concluded that the claimant was entitled to only 10 percent of the amount of attorney fees and costs delineated in the claimant's affidavit and, therefore awarded $2,646.20. The ALJ rejected the claimant's argument that she was entitled to attorney fees and costs for the entire proceeding. Instead, the ALJ reasoned that the only unripe issues were apportionment and authorized treating provider and that assessing fees and costs against the opposing party for that portion of the hearing that is ripe was not legally or logically reasonable for purposes of §8-43-211(2)(d), C.R.S. Both parties appealed to the Industrial Claims Appeals Office. (Panel)

In an order dated November 15, 2012, the Panel reversed the findings of the ALJ that determined that the apportionment issue was not ripe for hearing, leaving only the issue of authorized treating provider as an unripe issue and subject to attorney fees and costs. The matter was remanded to the ALJ to determine attorney fees and costs appropriate for the single unripe issue of authorized treating provider. On remand the ALJ found that the claimant's counsel's October 2011 Affidavit of Attorney Fees and Costs was deficient in that it failed to delineate the attorney fees and costs that are attributable to only the unripe issue of authorized treating provider. The ALJ nonetheless found it reasonable to assess attorney fees and costs of five percent of the amount

delineated in the claimant's affidavit noting that the claimant's post-hearing statement devotes only a single paragraph of four sentences to the unripe issue of authorized treating provider, in a position statement that is otherwise ten pages in length. The ALJ, therefore, awarded the claimant $1,323.10 in attorney fees and costs pursuant to §8-43-211, (2)(d), C.R.S. Both the respondents and the claimant appealed the May 14, 2014, order.

On appeal the respondents argue that the ALJ erred in determining that the issue of authorized treating provider was unripe for purposes of §8-43-211(2)(d), C.R.S. and that the ALJ erred in determining that any attorney fees and costs were reasonable. The claimant argues on appeal that she is entitled to the entire amount of attorney fees and costs despite the fact that there was only one unripe issue listed on the application for hearing. We hereby revise our previous analysis of the applicability of §8-43-211(2)(d) and reverse the ALJ's order.

I.

Section 8-43-211(2)(d), C.R.S., as it existed at the time the respondents' application for hearing was filed, provides that if any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting. The statute was amended in 2014 by Senate Bill 13-285, ch. 301, p. 1594, § 5, and the amendments are not pertinent here.

"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 (Colo. App. 2006). 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*)). Whether an issue is ripe for review is a legal question that an appellate court reviews *de novo*. *Youngs v. Industrial Claim Appeals Office, supra*.

We note that although the Workers' Compensation Act formerly provided for the assessment of attorney fees in frivolous actions, that section was repealed effective March 1, 1996, and attorney fees are not generally available as a sanction for endorsing an issue without merit. Colo. Sess. Law 1991, ch. 219, § 8-43-216(1) at 1321. We also

specifically recognize that an issue that lacks merit does not necessarily lack ripeness. The two concepts are distinct and a frivolous or meritless claim may nonetheless be ripe for adjudication. *See Younger v. Merritt Equipment Company,* W.C. No. 4-326-355 (December 30, 2009).

II.

The claimant contends the respondents breached the requirements of § 8-43-211(d) when they submitted a request for a hearing which included the issue of "authorized provider." The claimant asserts the respondents did not possess evidence with which to support their claim in regard to this issue when they filed their request. As a result, the claimant argues that the respondents requested a hearing in regard to an issue that was not 'ripe for adjudication' and are liable to pay the claimant's corresponding attorney fees.

Conversely, the respondents argue the issue was ripe for the reason that there was no legal impediment to submitting the issue to a hearing. They argue that an issue which is without evidentiary support is distinct from the circumstance that the issue might be barred by a legal impediment. They point to our previous decision in *Younger*, which held that the likelihood of success on the merits of an issue is a consideration discrete from that of ripeness for adjudication. That latter requirement turns on the absence of a legal barrier pertinent to the issue requested for hearing. We agree with the respondents and therefore set aside the ALJ's award of attorney fees.

In his order of October 19, 2011, the ALJ concluded the issue of 'authorized provider' was not ripe for adjudication at the time the application for a hearing was filed. The ALJ's findings in this regard was that the respondents "have not put forth evidence of that issue nor have they argued the issue." The ALJ also cited to the decision in *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006), as support. The ALJ noted the court in *Olivas-Soto* described an issue ripe for adjudication as one which is "real, immediate, and fit for adjudication."

However, the fact that a party determines to abandon an issue at the point of a hearing is not germane to that issue's integrity at the point the request for a hearing was made several months previously. The ALJ has also misconstrued the holding in *Olivas-Soto*. The court in *Olivas-Soto* sought to interpret § 8-43-203(2)(b)(II). That section requires that a claimant seeking to challenge a final admission of liability made by an insurer must file within 30 days of the admission a request for a hearing on "any disputed issues that are ripe for a hearing." In *Olivas-Soto*, the claimant had filed an application for a hearing on several issues within 30 days of the admission. That application

however, did not include the issue of permanent total disability benefits. When the claimant later submitted an amended application which did list the issue, the respondents objected the issue was untimely and it was closed. The court agreed stating: "the issue of PTD was legally ripe for adjudication when claimant filed his first application for hearing. The FAL and the DIME placing claimant at MMI removed any legal impediment to a determination of his eligibility for PTD benefits …" *Id.* at 1180. Because it was legally ripe, the failure to include the issue on the application caused it to be closed. The claimant argued the court's analysis was illogical because the inclusion of an issue when the party may not currently possess sufficient evidence to justify the pursuit of that benefit would force both parties to incur significant costs even though the issue may not need to be decided at the time of a hearing. The court found that argument to be notwithstanding: "… despite the potential for additional cost, the result we reach promotes judicial economy because it requires early identification of the disputed issues …" *Id.* In *Olivis-Soto*, the court described the test of 'ripeness' generally as whether "an issue is real, immediate, and fit for adjudication." However, the holding of the decision was that the statute's reference to 'ripeness' meant "ripe for adjudication" because there was no longer a "legal impediment" to the issues' determination at a hearing.

The opinion in *Olivis-Soto* followed a similar analysis in *Peregoy v. Industrial Claims Appeals Office*, 87 P.3d 261 (Colo. App. 2004). The court in *Peregoy* also was required to construe § 8-43-203(2)(b)(II). The claimant in that case had filed an application for a hearing within 30 days of the respondents' final admission but had not listed any issues for hearing. The claimant argued she sought to reserve the litigation of permanent partial disability benefits to a later point when she could present evidence of a dispute to the PPD benefits awarded in the respondents' admission. The opinion noted the claimant "contends that an issue is not ripe for hearing until it is ready for adjudication, both legally and factually." The court observed "that claimant's argument strains the statutory language …" *Id.* at 264. The decision found the requirement that an issue be listed in the request for hearing within 30 days of the admission was a rational method to "provide time limitation on a claimant's right to contest closure." *Id.* at 265. The court explicitly made the distinction between a contest of an issue through filing an application for a hearing, and the concept of 'prevailing' at a hearing. "To contest an aspect of an FAL, a claimant must be able to state the benefits to which he or she is entitled." *Id.* at 264. However, "to prevail at the hearing, the claimant must overcome the DIME by clear and convincing evidence." *Id.* In both *Olivas-Soto* and in *Peregoy*, the court found that the provision requiring a claimant to file a request for hearing on an issue 'ripe for adjudication' had nothing to do with the amount, or lack, of evidence pertinent to the issue when a request for a hearing was filed. An issue was said to be

'ripe' when any legal impediment was absent. A clear distinction was present between the merits of the issue and its ripeness. The latter had nothing to do with the former.

Citing to *Olivis-Soto*, our decision in *Younger v. Merritt Equipment*, W.C. 4-326-355 (December 30, 2009), applied that concept of ripeness to § 8-43-211(2)(d). In *Younger*, the respondents sought an award of attorney fees when the claimant listed as an issue for hearing temporary disability benefits. The respondents contended a previous decision by an ALJ had resolved the temporary benefits issue against the claimant. The respondents argued res judicata was a legal barrier to a hearing on the issue. Our decision noted that res judicata was an affirmative defense required to be raised by the respondents. Accordingly, at the time the request for a hearing was made, there was no legal impediment to the issue. The argument of the respondents was characterized as being aimed at the likelihood of success for the issue, and not on whether it was ripe for adjudication when filed. The claim for attorney fees was denied. The decision noted: "And, an issue that lacks merit does not necessarily lack ripeness. The two concepts are distinct and a frivolous or meritless claim may nonetheless be ripe for adjudication."

We applied this analysis from *Younger* subsequently in *Ferry v. City Glass Co*., W.C. 4-741-385 (May 7, 2010)(failure to specifically plead the basis for a penalty is not cause for an attorney's fee award); *Martin v. El Paso School Dist*. W.C. 3-979-487 (June 6, 2012)(challenge to medical benefits in a partially settled case not legally precluded) and in *Meacham v. American Blue Ribbon Holdings*, W.C. 4-885-416 (July 18, 2014)(if a party was successful on one issue, the need for the resolution of additional issues would no longer be barred). To the extent that *Silvera v. Colorado Springs Health Partners*, W.C. 4-502-555 (November 8, 2011), and *McMeekin v. Memorial Gardens*, W.C. 4-384-910 (November 15, 2012), express a contrary view, we decline to follow those decisions.

In this matter, the claimant and the ALJ are also confusing the standard of 'merit' with that of 'ripe for adjudication' due to an absence of a legal impediment. The only pertinent findings by the ALJ state that at the hearing the respondents did not present evidence or argument relating to the authorized provider issue. This determination indicates that the respondents may have abandoned the issue by that point, but it does not reveal any insight as to whether the issue was ripe for adjudication several months earlier when the application for a hearing was submitted. Similarly, the claimant argues the respondents did not have any evidence at the hearing, or probably at the time of application, to support the issue. However, that is a dispute as to the merits of the issue. It does not implicate the legal ability to have the issue adjudicated at hearing. The ALJ's reference to the standard cited in *Olivas-Soto*, that ripe for adjudication means an issue

must be "real, immediate, and fit for adjudication" ignores the holding in that case that the issue of PTD benefits was "ripe for adjudication" when the finding of MMI by a DIME "removed any legal impediment to a determination of his eligibility for PTD benefits" regardless of whether PTD was an issue that "may not need to be decided." *Id.* at 1180. Neither the ALJ nor the claimant point to a legal barrier that would make impossible a hearing pertaining to 'authorized provider.'

Because there was no legal impediment to the presentation of the issue of authorized provider extant at the time the respondents included the issue on their application for hearing, the issue was 'ripe for adjudication' and there was no violation of §8-43-2011(2)(d). The status of the evidentiary merits of that issue is notwithstanding. The claimant, therefore, is not entitled to an award of attorney fees or costs.

The construction of § 8-43-211(2)(d) suggests it is not aimed generally at categories of frivolous litigation. It applies only to issues requested for hearing and limits its focus to the date the issue was requested. It does not apply to issues at any other juncture in the litigation process, including at hearing. Therefore, an issue presented to an ALJ supported by a paucity or absence of evidence is beyond the scope of the section. As noted, the statute previously allowed for attorney fees in the case of frivolous actions, but that section was repealed by the General Assembly as of March 1, 2006, Colo. Sess. Law 1991, ch 219, § 8-43-216. In 2013, § 8-43-211(2)(d) was amended to preclude an award of attorney fees against *pro se* litigants and to require a party requesting fees to first seek relief from a prehearing ALJ and specified the fees awarded must be limited to those directly caused by the unripe issue. S.B. 13-285, ch301, pg. 1594 (effective July 1, 2013). This history suggests the General Assembly has sought to minimize the attorney fees remedy for perceived frivolous litigation in workers' compensation claims.

The statutory and regulatory scheme governing workers' compensation claims often requires a very speedy request for a hearing in order to prevent an issue from being resolved by default. An insurer must request a hearing to challenge a DIME finding within 20 days of the finding, § 8-42-107.2(4)(c). A claimant will need to contest any final admission of liability within 30 days, § 8-43-203(2)(b)(II). A response to an application for hearing with any additional issues is due within 30 days of the application, OAC Rule 8 (G). An insurer is deemed to have agreed to a medical preauthorization request absent a contrary medical review unless a hearing is requested within seven days, WC Rule 16-10(E)(1). These and other situations require requests for hearing often before any significant evidence can be obtained by the requesting party. If it was required that the issue be suitable for presentation at a hearing on the date a hearing

request became due, the parties would be forced to choose between their right to a hearing or waiving that right to avoid an expensive assessment of fees should they guess wrong about the possible strength of their claim. The reason for the deadlines is to keep the process moving in an efficient manner. The deadlines are not to discourage parties from presenting their disputes to a judge.

The final difficulty presented by the determination of the ALJ in this matter pertinent to the award of attorney fees derives directly from the finding that the issue of "authorized provider" was without evidentiary support and was therefore, on that basis, not fit for adjudication. The ALJ made a finding that "there existed a 'justiciable issue,' that being: 'whether or not the current medical maintenance care is related and reasonably necessary". The issue designated as "authorized provider" is not very specific and allows for a variety of evidentiary issues to be included within its realm. The respondents' application for hearing also revealed that the respondents sought to argue: "whether claimant continues to require maintenance medical treatment for her work related injury; whether any need for medical treatment is related solely to claimant's non-occupational medical conditions' which medical treatment, if any, is reasonable, necessary, and related to claimant's work-related injury." While 'authorized provider' can refer to whether a medical care giver is authorized by the parties, it may also be seen to refer to the scope of a referral. In *Steele v. Berardi*, W.C. 4-441-620 (June 15, 2001), payment for surgery was denied when it was determined the referral to the surgeon by an authorized treater was limited to an evaluation for an impairment rating and did not include surgery. The scope of the referral is a question of fact for resolution by the ALJ. *City of Durango v.Dunagn*, 93 P.2d 496 (Colo. App. 197); *Suetrack USA v.Industrial Claim Appeals Office* , 902 P.2d 854 (Colo. App. 1995). To the extent the respondents in this case presented the issue of whether continued maintenance care was related, the issue does implicate the scope of the referral to the authorized provider. The respondents are arguing the authorized provider may be exceeding the scope of his authorization by treating symptoms not related to the work injury.

Because the application of § 8-43-211(2)(d) is subject to a de novo review, we are not constrained by the ALJ's findings of fact that the designation of 'authorized provider' was not submitted for adjudication at the September 6, 2011, hearing. Given the dispute over the work relatedness of continuing medical maintenance benefits, the more persuasive conclusion is that issue was part of the respondents' case presented at the hearing.

Accordingly**,** the ALJ's order awarding attorney fees to the claimant under §8-43-211(2)(d) is set aside. This follows from our analysis that the issue of authorized provider was ripe for adjudication due to an absence of any legal impediment at the point a hearing was requested. It is also for the reason that the issues submitted at hearing, and adjudicated, included 'authorized provider' and, as such, is evidence that issue was indeed present at the time the respondents filed their application for a hearing.

IT IS THEREFORE ORDERED that the ALJ's order dated May 14, 2014, is set aside and the claimant's request for an award of attorney's fees is denied.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

<u>Dissent:</u>

Examiner DeFalco-Galvin dissents.

Although I agree with the majority's order insofar as it generally sets forth the law, I disagree with its application in this case. In my view, the ALJ did not err in his determination that the issue of authorized treating physician was unripe under the circumstances of this case.

The respondents' endorsement of the authorized treating provider issue in this case did not present an actual controversy between the parties that was sufficiently real and immediate. Contrary to the respondents' arguments, this is not a case where the issue of

authorized treating provider may have simply lacked merit or was frivolous. Nor is this a case where the respondents are being assessed attorney fees and costs because they presented scant or no evidence on the issue. Rather, this is a case where there was no disputed issue concerning the authorized treating provider at the time the application for hearing was filed. The fact that the respondents did not present any evidence on this issue is merely indicative of the fact that at the time the application for hearing was filed there was no real and immediate controversy that was capable of litigation on the issue of the authorized treating provider.

It is true that the prior panel orders addressing the issue of ripeness have discussed the concept in terms of there being "no legal impediment." This, however, is not the only factor to be considered in a ripeness determination. As recognized by the Supreme Court, "ripeness is an amorphous legal concept subject to many 'subtle pressures including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.'" *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo.1982)(*citing Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961)). The central concern of a ripeness inquiry is "whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to warrant the attention of the Court. *Id; Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498, 506, 92 S. Ct. 1749, 1755, 32 L. Ed. 2d 257 (1972) (quoting *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941)); *National Park Hospitality Assn. v. Department of Interior*, (02-196) 538 U.S. 803 (2003)(issue unripe because no concrete dispute about a particular concession contract).

The case law from the Colorado Supreme Court and Court of Appeals also sets forth a more comprehensive analysis rather than just looking at whether there is a legal impediment. Ripeness tests where an issue is *real, immediate and fit for adjudication. Bd. of Directors, Metro Wastewater Reclamation District v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653 (Colo. 2005). Thus, ripeness also requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication. *Metal Management West, Inc. v. State* 251 P.3d 1164 (Colo. App. 2010); *Jesse v. Farmers Ins.* 147 P.3d 56 (Colo. App 2006); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). The doctrine of ripeness recognizes that courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur. *Dicocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314 (Colo. App. 2006); *See Stell v. Boulder County Department of Social Services*, 92 P.3d 910 (2004). In all of these cases, the court's analysis does not resolve the issue based on whether there was a legal impediment, but rather, the opinions discuss whether the facts of the case give rise to an actual dispute or controversy that is real and immediate.

Even in *Olivas-Soto,* cited in the majority order, the court referred to the opinion of the Colorado Supreme Court in *Nat'l Union Fire Ins. Co.,* 105 P.3d 653 (Colo. 2005). In *Nat'l Union*, the court noted that judicial review generally requires "*actual controversies based on real facts*" and that "[r]ipeness tests whether the issue is *real, immediate*," in addition to being "fit for adjudication" (emphasis added). The court reiterated that "[c]ourts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur." *Nat'l Union*, 105 P.3d at 656.

In order to determine whether an issue is ripe for adjudication at the time the application for hearing was filed, it is instructive to look at how the parties handled the issue in question during the course of the hearing proceedings. *See Franz v. Industrial Claims Appeals Office*, (Colo. App. 2010)(Court looked at the ALJ's characterization of the issue and responses to interrogatories to determine issue was ripe). In this case, based on the respondents' handling of the authorized treating provider issue during the course of the hearing, it was reasonable for the ALJ to conclude that there was no real and immediate controversy between the parties on the issue of authorized treating provider at the time the respondents filed the application for hearing. In October of 2007, the respondents stipulated to ongoing medical treatment provided by the authorized treating provider, Dr. Meyer. October 19, 2011, order at 3 ¶9; Claimant's Exhibit at 60-61. The respondents then filed an application for hearing in 2011, on the issue of authorized treating provider. When the ALJ confirmed that this was the issue for hearing, the respondents did not disagree. Tr. at 3. There were no medical bills at issue and no request for treatment at issue for the hearing. The respondents never stated who was authorized or whose authorization they were contesting. Moreover, the respondents' counsel acknowledged at hearing that the authorized treating physician, Dr. Meyer, was providing ongoing treatment and did not ever challenge his authorization throughout the hearing. Tr. at 14 and 15. The respondents' post hearing submission and proposed findings of facts make no mention of the authorized treating physician issue.

In the brief in support, the respondents state that the authorized treating provider issue was, "ultimately abandoned and was not presented at hearing." Respondents' Brief at 9. However, the respondents never notified the claimant or the ALJ that they were withdrawing the issue of authorized treating provider. *See Office of Administrative Courts Rule of Procedure* (OACRP) 15 (Application for hearing may not be withdrawn except on agreement of the parties or upon order of a judge). The record provides ample support in the record to make a plausible inference that there was not a real and immediate controversy or any type of dispute concerning the authorized treating provider at the time the respondents filed the application for hearing.

The respondents contend that the authorized treating provider issue is inextricably intertwined with medical benefits and apportionment of medical benefits and if those issues were ripe, the issue of authorized treating physician must be ripe as well. The majority order similarly discusses the authorized treating provider issue as essentially related to the provision of medical benefits. I disagree. It is well settled that a provider's authorization is a separate and distinct issue from determining the reasonableness, necessity and relatedness of medical benefits. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). This is especially true as evidenced in this case by the respondents who choose to contest the causation of the medical benefits but ultimately decided to abandon the issue of authorized treating provider. The issues are not dependent or necessarily related to each other. *Compare Meacham v. American Blue Ribbon Holdings*, W.C. No. 4-885-416 (July 18, 2014) (issues of overpayment, offsets and caps to be determined in conjunction with compensation benefits). There is nothing in the record to suggest that the respondents would have waived the issue of authorized treating provider had they not listed in conjunction with the issues on medical benefits.

Under these circumstances, the respondents sought a hearing on a matter that was not ready to be heard because at the time of applying for the hearing there was not an actual controversy that was real and immediate concerning the issue of authorized treating provider. The fact that the respondents can fashion a set of hypothetical facts on appeal and contend that "it was likely" or "probable" that the claimant was "receiving treatment from her personal care physician for injuries and accidents which the claimant suffered at home or outside of the work environment," does not mean that there was a justiciable issue here. See Respondents' Brief in Support at 7. The respondents' contention is purely speculative and therefore, unripe. *Sheridan Redevelopment Agency v. Knightsbridge Land Co. L.L.C.* 166 P.3d 259 (Colo. App. 2007) (issue of attorney fees was not ripe because outcome of case was unknown); *see also Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008)(First amendment challenge was not ripe because statute had not been applied).

The majority order in this case similarly sets forth a hypothetical scenario under which the respondents could have been contesting the "scope of the referral" by listing the issue of authorized treating provider. The respondents, however, do not make this contention and there is nothing in the record to suggest that this was the case. The idea that facts *could have* arisen during the course of a hearing on the causation of medical benefits is purely speculative and, therefore, could not have been real and immediate at the time the application for hearing was filed. This is especially true in light of the fact that there were no medical bills from Dr. Meyer at issue or any treatment from Dr. Meyer that had been specifically contested. If the respondents discovered facts during the hearing process that actually gave rise to a dispute on the authorized treating provider,

OACRP 12 provides a mechanism to add issues for hearing. Moreover, in order for the authorized treating provider issue to even arise, the respondents would have had to first been successful on their claim that the medical benefits the claimant was receiving were not related to the industrial injury. This arguably constitutes a legal impediment to trying the issue of authorized treating provider and, therefore, the issue was not fit for adjudication, in addition to not being real and immediate.

Thus, in my view, the ALJ did not commit reversible error in awarding attorney fees and costs for this issue. *See Silveira v. Colorado Springs Health Partners*, W.C. No. 4-502-555 (November 8, 2011)(award of attorney fees and costs appropriate where the party files an application without a real and immediate controversy) *aff'd Silveira v. Industrial Claim Appeals Office*, Colo. App. No. 11CA2396 & 11CA2397, November 8, 2012, *not selected for publication.*

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_____9/30/2014_____ by _____RP_____ .

JANE MCMEEKIN, 7139 PALMER PARK BLVD., COLORADO SPRINGS, CO, 80915 (Claimant)
MEMORIAL GARDENS, 3825 AIRPORT ROAD, COLORADO SPRINGS, CO, 80910 (Employer)
RELIANCE NATIONAL INDEMNITY, Attn: MELISSA RYAN - CLAIMS REPRESENTATIVE, C/O: GALLAGHER BASSETT SERVICES, INC., P O BOX 4068, ENGLEWOOD, CO, 80155 (Insurer)
STEVEN U. MULLENS, P.C., Attn: STEVEN U. MULLENS, ESQ., P O BOX 2940, COLORADO SPRINGS, CO, 80901 (For Claimant)
THOMAS, POLLART & MILLER, LLC, Attn: BRAD J. MILLER, ESQ., 5600 S. QUEBEC STREET, SUITE 220A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-898-245-02

IN THE MATTER OF THE CLAIM OF DENNIS MEENEN, Claimant, BOULDER COUNTY, Employer, and SELF INSURED, Insurer, Respondents.	ORDER OF REMAND

The respondent seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated March 4, 2014, that found the claimant sustained a compensable injury, awarded medical and temporary disability benefits and penalties in the amount of $4,600.00 against the respondent for failure to comply with §8-42-101(1)(a), C.R.S., §8-43-404(5)(a)(I)(A), C.R.S. and Workers' Compensation Rule of Procedure (WCRP) 8-2(a)(1). We dismiss, without prejudice, the respondent's appeal of temporary disability benefits for lack of a final order and remand the matter to the ALJ for further findings on the issue of penalties.

The claimant was employed as a seasonal forest technician with the employer's parks and recreation division. During the 2012 season the claimant worked at a community sort yard for the employer where the residents of the community would bring wood and slash as part of the fire mitigation efforts. The ALJ credited the claimant's description of the lifting motions and techniques he used at work to conclude that the claimant's job required heavy lifting, bending and twisting. As a result of these activities the ALJ determined that the claimant sustained an occupational disease to his lumbar spine.

The claimant completed a workers' compensation injury report dated September 11, 2012, which was marked as received on September 18, 2012, by Andrea Bell, the

claims administrator for the employer. The ALJ found that the employer failed to provide the claimant with the designated provider list. The claimant went ahead with back surgery performed by Dr. Smith on September 26, 2012. The ALJ concluded that the right to select a physician passed to the claimant when the employer did not provide the list of designated physicians in the first instance or as of September 11, 2012, when the claimant reported the injury. Dr. Hinman and Dr. Smith were determined to be the claimant's authorized treating physicians and the respondent was ordered to pay for their treatment. The ALJ also awarded temporary disability benefits from August 29, 2012 through December 21, 2012.

The ALJ denied the respondent's request for penalties against the claimant for failure to timely report the injury. The ALJ, however, awarded penalties against the respondent pursuant to §8-43-304(1), C.R.S., finding that the respondent violated §8-42-101(1)(a), C.R.S., §8-43-404(5)(a) and W.C.RP 8-2 (a)(1), C.R.S. The ALJ determined that the employer's claims administrator was aware on September 11, 2012, that the claimant was actively receiving medical care and had reported a workers' compensation injury but failed to provide the claimant with a designated provider list. The ALJ imposed a penalty of $50 per day from September 20, 2012, until December 21, 2012, the date that the claimant was released from care. This was a period of 92 days resulting in a total penalty of $4600.00.

On appeal the respondent does not contest the ALJ's determination of compensability or the award of medical benefits. The respondent appeals the ALJ's award of temporary disability benefits but asserts that the issue is not final for purposes of appeal. The respondent also contends that the ALJ's findings on the issue of penalties are insufficient to permit appellate review because the ALJ failed to specify the amount of the penalty apportioned to each violation. We agree with the respondent.

I.

Under §8-43-301(2), C.R.S., a party dissatisfied with an order "which requires any party to pay a penalty or benefits or denies a claimant a benefit or penalty," may file a petition to review. Orders which do not require the payment of benefits or penalties, or deny benefits or penalties are interlocutory and not subject to review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989). An order may be partially final and reviewable and partially interlocutory. *Bestway Concrete v. Industrial Claim Appeals* Office, 984 P.2d 680 (Colo. App. 1999). Without a determination of average weekly wage, an order awarding temporary total disability benefits is interlocutory and not

subject to review. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989); *Tooley v. Johnson and Sons Trucking*, W.C. No. 4-376-713 (January 28, 2000).

Here, the ALJ ordered temporary disability benefits to be paid to the claimant based on a percentage of the hours owed to the claimant using the claimant's regular wages and a percentage using the claimant's overtime wage. The ALJ made these findings due to her inference from the claimant's testimony that he was responsible for the loss of his job. *See*, § 8-42-105(4)(a). He testified he only would ever work a specified number of days in each calendar year so as not to affect his PERA pension benefits. The number of hours the claimant had already worked prior to his injury thereby allowed the ALJ to calculate the date by which wage loss would no longer be "attributable to the on the job injury." *Gutierrez-Delgado v. North Star Foods*, W.C. No. 4-857-384 (December 19, 2012).

However, both parties on appeal state that the issue of average weekly wage was not an issue for hearing and was specifically reserved for future determination. Tr. at 29 and 95. Because temporary disability benefits are based on the average weekly wage, temporary disability benefits cannot be ascertained without a determination of average weekly wage. Consequently, to the extent the ALJ ordered a specific amount of temporary disability benefits to be paid to the claimant, the ALJ erred.[1] Thus, we agree with the respondent that the ALJ's order of temporary disability benefits is interlocutory and not currently subject to review.

II.

The ALJ awarded penalties against the respondent in the amount of $50 per day, for 92 days, for violation of §8-42-101(1)(a), C.R.S, §8-43-404(5)(a), C.R.S. and WCRP 8-2(a)(1), for the employer's failure to provide a designated provider list in the first instance. We conclude that the ALJ's findings of fact are insufficient to permit appellate review and the conflicts are not resolved in the evidence. We, therefore remand the matter to the ALJ for additional findings and entry of a new order.

Under §8-43-304(1), C.R.S., penalties may be imposed against an insurer who "violates any provision" of the Workers' Compensation Act (Act) or "fails or refuses to perform any duty lawfully enjoined" for which no penalty is specifically provided. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Case law has held that an insurer's failure to comply with a rule of procedure constitutes the

[1] It is also not clear the issue of responsibility for termination of employment was endorsed as an issue for determination by the ALJ and the parties therefore may not have had sufficient notice of its applicability.

failure to perform a duty lawfully enjoined or the violation of an order within the meaning of §8-43-304(1), C.R.S. *See Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007)(violation of WCRP 16-10(F), is a violation of an "order").

The determination of whether an insurer is subject to penalties under § 8-43-304(1), C.R.S., requires a two-step analysis. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). First, the ALJ must find a violation of the Act or an order. Second, the ALJ must determine whether the challenged conduct was unreasonable as measured by an objective standard. *Pueblo School District No. 70 v. Toth*, *supra*. The reasonableness of the insurer's actions depends upon whether the actions were predicated on a rational argument based on law or fact. *Diversified Veterans Corporate Center v. Hewuse, supra.*

As the respondent points out, the ALJ's order did not allocate specific penalties to specific violations of the Act. The order generally found that a $50 per day penalty was warranted for violations of §8-42-101(1)(a), C.R.S., §8-43-404(5)(a) and WCRP 8-2(a)(1). We agree with the respondent that without an exact amount attributed to each particular violation, the order is not sufficiently clear to permit appellate review as we are unable to determine whether the ALJ intended to find violations for each of the statutes listed or whether there were multiple reasons for a violation of one of the provisions listed.

Moreover, if the award of penalties was predicated on the violation of §8-42-101,(1)(a), C.R.S., the order is in error. The record indicates that the respondent timely denied the claim. Respondent Exhibit L. While it is true that §8-42-101, C.R.S. provides that every employer shall furnish such medical treatment as may reasonably be needed at the time of the injury and thereafter during the disability to cure and relieve the employee from the effects of the injury, the claimant's entitlement to medical care under in §8-42-101 is premised upon the establishment of a compensable injury. *Urtusuastegui v. JBS*, W.C. No. 4-795-733 (November 8, 2010). We are not aware of any authority for the proposition that a penalty under § §8-43-304 may be imposed on a respondent for failure to provide benefits on a denied claim. The claimant's arguments notwithstanding, §8-42-101(1)(a), does not create an implied duty to offer medical care in contravention of the respondent's right to contest a claim. *See Allison v. Industrial Claim Appeals, supra*, (ALJ must look to the express duties and prohibitions imposed by the statutory language, and should not create implied duties and responsibilities). Accordingly, there can be no violation of §8-42-101(1)(a), C.R.S. under these circumstances.

In addition, the respondent argues that in regard to a violation of § 8-43-404(5)(a)(I)(A), C.R.S., a penalty may not be assessed pursuant to § 8-43-304(1) because another penalty has been "specifically provided." That other penalty is argued to be the surrender to the claimant of the right to select the treating physician. However, the presence of this same surrender of physician selection in WCRP 8-2 (D) would not have that effect because the clause in § 8-43-304(1) pertinent to other 'specifically provided' penalties does not apply to "any lawful order made by the director" which includes regulations. *See, Fera v. Industrial Claim Appeals Office*, *supra* and *Holiday v. Bestop, Inc*., 23 P.3d 700 (Colo. 2001).

The obligations in § 8-43-404(5)(a)(I)(A) and in Rule 8-2 (A)(1) are not interchangeable. They are, in fact, mutually exclusive. Section 8-43-404(5)(a)(I)(A) requires a list of medical providers be submitted to the claimant at "the first instance" (i.e. at the time an injury is reported to the employer). WCRP 8-2 (A)(1) however, only applies where the list of providers was offered to the claimant either by a preinjury posting or verbally when the injury was reported. *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010). In that circumstance the employer has seven business days to also supply a written list of providers. Consequently, a violation of the rule only occurs when a provider list was given in "the first instance" (albeit verbally or via poster). Hence, when there is a violation of the statute, the rule does not apply. Here, the ALJ made reference to the penalty period beginning seven business days subsequent to notice being given to the employer. This suggests the ALJ determined the rule was breached. This would also lead to the conclusion there was compliance with the statute. However, the findings of fact by the ALJ pertain solely to a violation of the statute and say nothing as to an oral discussion of providers or a posted provider list. This inherent paradox must be reconciled.

The ALJ also determined the penalty should be assessed for a 92 day period. The 92 days was measured from a date seven business days after the employer received notice of the injury until the date of MMI. Both the statute in § 8-43-404(5)(a)(III)(A), and the rule in 8-5 (A), provide that the purpose of the provider list is to allow the claimant to make an initial choice of physician and to determine who they may select in the situation where they desire a change of physician. Both the selection of a physician and the change of physician must be accomplished before either the claimant reaches MMI or within 90 days of the date of injury. The ALJ determined the date of onset for the claimant's occupational disease was September 10, 2012, but awarded temporary benefits beginning August 29, 2012, which is a logical impossibility. In addition, since the date of MMI on December 21 is more than 90 days after the September 10 date of onset (as well

as the date of August 29) it is not clear why the ALJ found the provider list only became moot as of the date of MMI. This confusion, as well as the specific violation being penalized must be addressed by the ALJ.

We also note that although the ALJ's order makes reference to applying the two-step analysis in awarding penalties, the order does not make any specific findings concerning the reasonableness of the respondent's actions which resulted in the alleged violation or violations. The ALJ appears to find to the contrary because the order states that there was credible evidence presented that the employer's representatives mistakenly believed that the required information was actually provided to the claimant. (ALJ Order at 23). Although this finding might support a conclusion that the respondent's actions were objectively reasonable, it does not compel it. Therefore, we cannot resolve the issue as a matter of law and the matter must be remanded to the ALJ for entry of a new order which resolves the conflict in the evidence. On remand the ALJ shall enter specific findings of fact concerning which of the respondent's actions resulted in which violations and whether the respondent's actions were objectively unreasonable.

In view of our remand, it is premature to consider the respondent's remaining contentions concerning the award of penalties.

IT IS THEREFORE ORDERED that the respondent's petition to review the issue of temporary disability benefits in the ALJ's March 4, 2014, order is dismissed without prejudice.

IT IS FURTHER ORDERED that the ALJ's order concerning the award of penalties against the respondent is set aside and remanded for entry of a new order consistent with the views expressed herein. The order is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

David G. Kroll

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 9/09/2014 _____ by _____ RP _____ .

DENNIS MEENEN, 3103 MEGAN WAY, BERTHOUD, CO, 80513 (Claimant)
BOULDER COUNTY, C/O: ANDREA BELL, PO BOX 471, BOULDER, CO, 80306 (Employer)
TAUSSIG & TAUSSIG PC, C/O: JOHN G TAUSSIG ESQ, 5377 MANHATTAN CIR STE 203, BOULDER, CO, 80303 (For Claimant)
RITSEMA & LYON PC, C/O: NANCY C HUMMEL ESQ, 999 18TH ST STE 3100, DENVER, CO, 80202 (For Respondents)
ALJ ALLEGRETTI, % OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA MCGOVERN, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-018-793-02

IN THE MATTER OF THE CLAIM OF PAUL WILDE, Claimant, v. SEARS ROEBUCK & COMPANY, Employer, and ALLSTATE INSURANCE CO, Insurer, Respondents.	FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated June 9, 2014, that denied and dismissed the claimant's request for attorney fees and costs under §8-43-211(d), C.R.S. We affirm the ALJ's order.

This matter went to hearing on the issue of whether the claimant was entitled to attorney fees and costs for the respondents' endorsement of an allegedly unripe issue. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted back injury on March 11, 1991. The claimant was ultimately determined permanently and totally disabled and the respondents have been paying ongoing PTD benefits to the claimant. In 2013 the claimant's treating provider made a recommendation for a low back surgery. The respondents filed a Workers' Compensation Rule of Procedure (WCRP) 16, application for hearing on September 27, 2013, to contest the surgery request. Although the claimant's attorney had entered an appearance on this case at the start of the claim in the early 1990's, the claimant's counsel's entry of appearance was part of the file that had been moved to the respondents' storage and the claimant had been contacting the new adjuster on the case directly without attorney involvement. As a result, the respondents' counsel mistakenly did not send the application for hearing to the claimant's counsel.

The claimant's counsel requested that the respondents' application for hearing be stricken because he was not copied. A PALJ granted the claimant's request on November 22, 2013, and specifically indicated that he was not deciding whether the application for hearing satisfied the duty to timely respond to the WCRP 16 request. The respondents then refiled their application for hearing on November 27, 2013, still disputing the surgery request and the PALJ's pre-hearing order striking the first application for hearing. On December 31, 2013, the respondents sent an

email to a PALJ and the claimant's counsel stating that they were withdrawing the challenge to the request for surgery and dropping the hearing issues. The parties attended another pre-hearing in which the PALJ ruled that the respondents did not endorse an unripe issue by appealing the prior pre-hearing order and challenging the surgery authorization request from Dr. Baker and that the respondents could proceed with the Rule 16 challenge. The PALJ also found that the issue was moot because the respondents had authorized the surgery and dropped the hearing issues.

The ALJ determined that WCRP 16-10(E) does not create a jurisdictional bar or legal impediment to litigating a prior authorization request but, instead, merely establishes the request deemed authorized for payment if a request for hearing is not filed within seven business days of the request for prior authorization. The ALJ, therefore, concluded that the claimant failed to establish that it is more likely than not that the respondent filed an application for hearing with an unripe issue. The ALJ, therefore, denied and dismissed the claim for attorney fees and costs.

On appeal, the claimant renews his contention that the issues in the respondents' November 27, 2013, application for hearing were unripe because the first application for hearing was stricken and the second application was filed outside of the seven day time limit set forth in WCRP 16. We conclude that the ALJ correctly determined that the claimant was not entitled to attorney fees and costs, but for reasons different than those the ALJ relied upon.

The claimant's injury occurred March 11, 1991. Section 8-43-211, C.R.S., authorizing attorney fees for unripe issues, was enacted by the legislature in 1991 as part of Senate Bill 218. 1991 Colo. Sess. Laws, ch. 219 at 1319. The statute is subject to the express legislative direction that it "take effect July 1, 1991, and shall apply to injuries occurring on or after said date." 1991 Colo. Sess. Laws, ch. 219, § 61 at 1342. Section 61 of SB-218 does not contain any exception to the legislative directive that the provisions of SB-218 apply only to "injuries" occurring on or after July 1, 1991. Thus, the courts have consistently declined to apply the provisions of SB-218, including those governing attorney fees, to claims where the injury occurred prior to July 1, 1991. *See Golden Animal Hospital v. Horton*, 897 P.2d 833 (Colo. 1995); *Hrabczuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994); *Martinez v. Regional Transportation District*, 832 P.2d 1060 (Colo. App. 1992)(recognizing that Court of Appeals lacked authority to impose sanctions for a frivolous appeal where the work injury occurred before the amendment authorizing imposition of sanctions became effective and enacting language precluded a retroactive application). The claimant, therefore, did not have a claim for his attorney fees and costs under §8-43-211(d), C.R.S. *See Cody Park Prop. Owners' Ass'n, Inc. v. Harder*, 251 P.3d 1, 6 (Colo. App. 2009)(appellate court may uphold a trial court's decision that reaches a correct result, even if it uses different reasoning).

IT IS THEREFORE ORDERED that the ALJ's order dated June 9, 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

_____10/7/2014_____ by _____RP_____ .

PAUL WILDE, 5975 DEL PAZ DRIVE, COLORADO SPRINGS, CO, 80918 (Claimant)
ALLSTATE INSURANCE COMPANY, Attn: KELLY SUBIONO, P O BOX 14155, LEXINGTON, KY, 40512 (Insurer)
STEVEN U. MULLENS, P.C., Attn: STEVEN U. MULLENS, ESQ., P O BOX 2940, COLORADO SPRINGS, CO, 80901-2940 (For Claimant)
THOMAS POLLART & MILLER LLC, Attn: BRAD J. MILLER, ESQ., 5600 SOUTH QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

COLORADO COURT OF APPEALS

DATE FILED: November 6, 2014
CASE NUMBER: 2014CA297

Court of Appeals No. 14CA0297
Industrial Claim Appeals Office of the State of Colorado
W.C. No. 4-884-077-02

Craig Milroy,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and City of Colorado Springs,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE GABRIEL
Casebolt and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced November 6, 2014

Steven U. Mullens, P.C., Pattie J. Ragland, Colorado Springs, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., Gregory K. Chambers, Denver, Colorado, for Respondent City of Colorado Springs

In this workers' compensation action, claimant, Craig Milroy, seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel affirmed the decision of an administrative law judge (ALJ) denying and dismissing claimant's claim. We conclude that (1) the record is sufficient to allow us to perform a meaningful appellate review, and thus, a new evidentiary hearing is unwarranted; and (2) substantial evidence in the record supports the ALJ's findings. Accordingly, we affirm.

I. Background

Claimant has worked as a firefighter for the City of Colorado Springs (employer) since 1997. While on duty on March 30, 2012, he felt a twinge in his hip and down his legs. The next day, he again felt a twinge while sitting at his desk. He described the sensation as discomfort in his left hip and back and down his leg. This discomfort increased throughout the day, and over the next four days, claimant saw a chiropractor a total of six times and a deep muscle massage therapist once. By the end of the week, claimant felt significant relief.

A few days later, on April 11, 2012, claimant was awakened by

a fire alarm. He slid down the pole and "bunked out" (i.e., put on his fire gear). While doing so, he noted discomfort in his left leg, and this discomfort increased as he worked at the fire call. By the time claimant returned to the firehouse, he was in substantial pain and was unable to get comfortable standing, sitting, or lying down. After his colleagues administered intravenous fluids and gave him medication, he was transported to the emergency room, where he received additional medications to relieve his symptoms and pain. An MRI was taken the same day and revealed a herniated disc at L4-5.

Claimant sought workers' compensation benefits, and employer contested that claim. On June 25, 2013, the ALJ conducted a videoconference hearing at which claimant and his expert, Dr. Jorge Klajnbart testified. Six days later, however, the ALJ emailed counsel for the parties to advise them that the hearing likely was not recorded due to an error on the ALJ's part.

Thereafter, employer submitted the post-hearing evidentiary deposition of its expert, Dr. Elizabeth Bisgard, and both sides submitted position statements. In addition, claimant filed a

stipulated motion requesting that the ALJ's notes of the videoconference hearing be transcribed and submitted to the parties for inclusion in the record, "in order to preserve Claimant's case-in-chief." The ALJ granted this motion on July 30, 2013, and the order states that it was served on claimant's counsel on July 31, 2013. The ALJ's detailed notes were then made part of the record, although the record does not reflect precisely when this occurred.

On August 12, 2013, the ALJ issued his Findings of Fact, Conclusions of Law, and Order. As pertinent here, the ALJ found that claimant had failed to establish that he had sustained an injury arising out of and within the course of his employment. The ALJ thus concluded that claimant's claim was not compensable and denied and dismissed that claim.

The Panel subsequently affirmed the ALJ's decision, and claimant now appeals.

II. Adequacy of the Record

Due to an error by the ALJ, the videoconference hearing was not recorded, and thus, no transcript of that hearing exists. (The transcript of Dr. Bisgard's post-hearing evidentiary deposition,

however, is in the record.) Claimant asserts that (1) the ALJ's failure to record the hearing was in violation of applicable statutory law, (2) claimant was deprived of the opportunity to attempt to reconstruct the transcript, and (3) any such reconstruction is now impossible because the ALJ has retired. Claimant thus contends that a new evidentiary hearing is required. We are not persuaded.

All testimony and argument at a workers' compensation hearing "shall either be taken verbatim by a hearing reporter or shall be electronically recorded by the division." § 8-43-213(1), C.R.S. 2014. The absence of a transcript, or a portion thereof, in a civil proceeding, however, does not necessarily bar appellate consideration or warrant a new hearing. *See, e.g., Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1046 (Colo. App. 1993) ("Even if there are some omissions in the transcript, if the relevant portions of the transcript are sufficient to allow review of the dispositive issues on appeal, the record is not insufficient to permit review.")

To obtain a new trial as relief for an inadequate record, an appellant must do three things:

> "[A]n appellant seeking a new trial because of a missing or incomplete transcript must 1) make a specific allegation of error; 2) show that the defect in the record materially affects the ability of the appeals court to review the alleged error; and 3) show that a [C.A.R.] 10(c) proceeding has failed or would fail to produce an adequate substitute for the evidence. We believe these factors would be presented only in rare circumstances."

Knoll v. Allstate Fire & Cas. Ins., 216 P.3d 615, 617-18 (Colo. App. 2009) (quoting *Bergerco, U.S.A. v. Shipping Corp. of India*, 896 F.2d 1210, 1217 (9th Cir. 1990)).

Claimant has not met this burden here. Although he argues that he has been irreparably prejudiced because his entire case-in-chief is missing from the record, he makes no specific allegation of error, and he fails to acknowledge the import of the ALJ's detailed hearing notes, which were made part of the record at claimant's request and specifically to preserve claimant's case-in-chief.

Nor has claimant shown how the missing transcript materially affects our ability to review any alleged errors, particularly given that the record includes (1) the ALJ's detailed hearing notes; (2) all of the parties' exhibits, including claimant's personally-prepared chronology of events and voluminous medical records and reports;

(3) the transcript of Dr. Bisgard's post-hearing deposition; and (4) both parties' post-hearing position statements, which summarized the evidence in detail. In this regard, we note that claimant points to no errors or omissions in the ALJ's detailed hearing notes. Moreover, the ALJ's Findings of Fact substantially track the factual statement contained in claimant's position statement, belying any showing of prejudice.

And claimant has not shown that a C.A.R. 10(c) proceeding to complete the record has failed or would fail to produce an adequate substitute for the missing transcript. Claimant never made any effort to settle the record pursuant to C.A.R. 10(c). Moreover, although claimant repeatedly asserts that reconstruction of the record is impossible because the ALJ has retired, it is unclear to us why this is necessarily so. This is particularly true here, where the ALJ's detailed notes are in the record and would have guided the parties and any newly-appointed ALJ in settling the record, had any disputes about the evidence arisen.

For these reasons, we conclude that claimant has failed to show that this case comprises one of those "rare circumstances" in

which a missing transcript requires an entirely new evidentiary hearing. *See Knoll*, 216 P.3d at 617-18.

We are not persuaded otherwise by claimant's assertion that he was denied an opportunity to reconstruct the record because the appeals specialist for the workers' compensation division decreed the record complete just one day after claimant received the ALJ's notes. The record contains no evidence as to when claimant received the ALJ's notes. In any event, claimant did not make this argument before the Panel. Accordingly, we will not consider it. *See Arenas v. Indus. Claim Appeals Office,* 8 P.3d 558, 561 (Colo. App. 2000) (declining to address an argument that the claimant did not raise before the Panel).

Because the ALJ's error in not recording the videoconference hearing has not materially impaired our ability to conduct a meaningful appellate review, we conclude that a new evidentiary hearing is unwarranted.

III. Substantial Evidence

Claimant next contends that the ALJ abused his discretion by denying and dismissing claimant's claim. Specifically, claimant argues that substantial evidence in the record shows that he sustained an accidental injury arising out of and in the course and scope of his employment. He further asserts that the ALJ applied the wrong legal standard when he characterized claimant's injury as an occupational disease, rather than as an injury resulting from an acute event occurring within the course and scope of claimant's employment. We are not persuaded.

A. Standard of Review

Before any compensation is awarded, a claimant must prove causation of an injury by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). Whether a claimant has met his or her burden of establishing that an injury is compensable is a question of fact for the ALJ's determination. *See H&H Warehouse v. Vicory*, 805 P.2d 1167, 1170 (Colo. App. 1990) ("The ALJ has great discretion in determining the facts and deciding ultimate medical issues."). If

substantial evidence supports the ALJ's findings of fact, we are bound by and may not alter them. *See* § 8-43-308, C.R.S. 2014; *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007). This is true even when the evidence was conflicting and would have supported a contrary result. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001). We must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence, and we may not substitute our judgment for that of the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

B. Discussion

Here, claimant's expert, Dr. Klajnbart, testified at the videoconference hearing that claimant's herniated disc resulted from an acute event that occurred when he was responding to a call on April 11, 2012, and not from any outside work that he may have performed. Specifically, Dr. Klajnbart testified that claimant's disk herniation was caused by sliding down the pole and putting his bunkers on.

In contrast, employer's expert, Dr. Bisgard, testified that her

review of claimant's records and her conversation with claimant revealed no specific isolated event that brought on his symptoms. Rather, he was merely sitting in a chair when the symptoms developed, and sitting in a chair would not be considered a risk factor for the development of a herniated disk.

Having thus found no acute event that caused claimant's disk issue, Dr. Bisgard proceeded to evaluate whether claimant's general work activities resulted in a compensable occupational disease to his low back. Although Dr. Bisgard noted the high force and intensity of firefighting, she observed that this intensity was for short and infrequent durations, giving the body significant "down time" for recovery. She thus concluded that claimant did not meet the threshold for duration and frequency necessary to allow her to conclude that claimant had suffered a compensable occupational disease. As a result, Dr. Bisgard opined that claimant's back pain was most likely the result of "an insidious onset of a herniated disk regardless of his occupation" and that his condition was "just something that evolved over a period of time."

The ALJ found that Dr. Bisgard's opinions were "credible and

more persuasive" than those of Dr. Klajnbart and rejected Dr. Klajnbart's testimony that claimant's injury was the result of an acute event occurring in the course of his employment. These findings are supported by substantial evidence in the record. For example, evidence in the record shows that:

- Claimant noted a twinge on March 30, 2012 and then again on March 31, 2012.
- In the chronology that he prepared, claimant never mentioned any acute injury from sliding down the pole.
- When Dr. Bisgard specifically asked claimant if he was injured coming down that pole, he denied that he was and said that sliding down the pole was "nothing that made him say 'ouch.'"
- Dr. Bisgard testified that Dr. Klajnbart's April 2012 clinical note made no mention of any acute onset of pain that occurred when claimant slid down the pole. To the contrary, the note specifically said, "No acute event."
- Claimant saw Dr. Greg Sabin at Sabin Chiropractic and told Dr. Sabin that his pain came "out of [the] blue" with no lifting or acute aggravation.

- Claimant saw a massage therapist on April 4 and April 6, 2012, and the therapist's clinical notes do not document claimant's having had any kind of acute injury that caused the onset of his low back pain.
- When claimant went to the emergency room on April 11, 2012, he reported that (1) he had been having left hip and back pain for approximately one week; (2) he had been doing better; and (3) that morning, when getting off the fire truck on a call, his back "kind of seized up."
- On April 11, 2012, claimant saw Dr. Miguel Castrejon. Claimant reported to Dr. Castrejon that he initially noticed discomfort to his low back on the morning of March 31, 2012, as he was sitting at his desk. He further stated that on April 11, 2012, as he was getting out of bed in response to an alarm, he noticed an increase in low back pain. Dr. Castrejon noted in his report that claimant could not recall any particular activity resulting in either low back or left leg pain.
- On or about April 16, 2012, claimant saw Dr. Susan Dern, and he was unable to isolate a specific injury that caused the

onset of his low back and left leg pain. Rather, he noted that he was awakened to answer a fire call and felt back, hip, and leg discomfort.

- On April 24, 2012, claimant told Dr. Joseph Illig that his symptoms gradually began toward the end of March 2012. Dr. Illig noted that claimant did not have "a specific clear precipitating event which led to these symptoms."
- Although Dr. Klajnbart testified at the hearing that claimant had an acute injury from sliding down the pole and putting his bunkers on, Dr. Klajnbart's clinical notes and an undated report in the record proffer no such opinion. Nor did he ever opine that claimant's work activities rose to the level of a compensable occupational disease.

As noted above, we must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence, and we may not substitute our judgment for that of the ALJ. *Metro Moving & Storage Co.*, 914 P.2d at 415; *see also Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990) (noting that the weight to be accorded expert testimony is a matter exclusively

within the discretion of the ALJ as fact-finder). Because substantial evidence supports the ALJ's findings here, we are bound by and may not alter those findings. *See* § 8-43-308; *Leewaye*, 178 P.3d at 1256.

We are not persuaded otherwise by claimant's assertion that the ALJ never considered claimant's position regarding his alleged acute injury but rather focused exclusively on the issue of occupational disease, thus applying the wrong compensability test. For the reasons discussed above, the ALJ properly rejected Dr. Klajnbart's testimony regarding claimant's alleged acute injury and considered the possibility of compensable occupational disease only after having done so.

Accordingly, we conclude that the Panel did not err in affirming the ALJ's decision.

IV. Conclusion

For these reasons, the order is affirmed.

JUDGE CASEBOLT and JUDGE ROMÁN concur.

COLORADO COURT OF APPEALS

DATE FILED: December 11, 2014
CASE NUMBER: 2014CA1281

Court of Appeals No. 14CA1281
Industrial Claim Appeals Office of the State of Colorado
W.C. No. 4-761-359

April Samuels,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Deli Zone, and Sentinel Insurance Company,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE GABRIEL
Casebolt and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced December 11, 2014

The Frickey Law Firm, Janet Frickey, Lakewood, Colorado, Dean Neuwirth P.C., Dean Neuwirth, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Law Offices of Scott Tessmer, Matthew C. Hailey, Greenwood Village, Colorado, for Respondents Deli Zone and Sentinel Insurance

In this workers' compensation proceeding, April Samuels (claimant) seeks review of the final order of the Industrial Claim Appeals Office (Panel) upholding the denial of benefits for her right knee condition. We conclude that (1) the Panel correctly determined that the report of the follow-up division-sponsored independent medical examination (DIME) was ambiguous; (2) the record, however, does not support the Administrative Law Judge's (ALJ's) interpretation of that report; and (3) the ALJ had jurisdiction to consider the parties' dispute as to causation, notwithstanding the fact that Deli Zone (employer) did not apply for a hearing to contest the initial DIME report in this case. Accordingly, we set aside the order and remand this case for further proceedings, as more fully described below.

I. Background

In 2007, claimant injured her left knee in a slip and fall while working as a catering manager for employer. She received treatment over several years, including three arthroscopic surgical procedures, and her authorized treating physician (ATP) placed her at maximum medical improvement (MMI) on June 16, 2010.

Claimant contested the MMI determination and requested a

DIME. The DIME physician examined claimant in November 2010, disagreed with the ATP's MMI finding, and recommended additional conservative treatment on claimant's left knee. The DIME physician further noted that claimant had experienced right knee pain, which she had reported in February, May, and August 2010. Under the section of his report headed, "IMPRESSION," the DIME physician wrote, as pertinent here, "chondromalacia, patella of the right knee. Rule out internal derangement." He then concluded, "Within reasonable medical probability, I feel the right knee symptoms were due to [claimant's] altered gait and excessive weight bearing, which were caused from the 11/01/2007 accident. I believe she needs x-rays of the right knee along with MRI and should be seen in followup by her orthopedic surgeon."

Thereafter, claimant received additional medical treatment for her left knee. In addition, a few months after the DIME, her ATP evaluated her right knee. The ATP found claimant's emerging symptoms consistent with patellofemoral arthritis, which, given the information then available to him, he could not attribute to her left knee injury. To the contrary, he testified in a later deposition that claimant's right knee symptoms were not causally related to the

2007 injury but rather reflected the "nearly ubiquitous degenerative medical condition of chondromalacia patella," which he stated affects in excess of eighty percent of fifty-year-old people. He further opined that claimant's right knee condition was "a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury."

An orthopedic surgeon to whom claimant was referred examined her after her ATP did. This surgeon reported that (1) his inspection of claimant's right knee and lower leg revealed that both were normal; (2) claimant demonstrated full range of motion without pain; (3) she exhibited normal muscle strength, stability, and alignment; and (4) provocative tests were negative. The orthopedic surgeon placed claimant at MMI for her left knee on February 28, 2013.

The DIME physician then conducted a follow-up DIME and issued a new report. In this report, he concluded, as pertinent here, "I agree with [the orthopedic surgeon's] date of maximal medical improvement of 02/28/2013. . . . My opinion is unchanged on the right knee from my previous report." He further rated the

permanent impairment of claimant's left knee at twenty-one percent of the left lower extremity, which was an eight percent whole person impairment.

Employer and its insurer, Sentinel Insurance Company, filed a final admission of liability for temporary total disability and permanent partial disability benefits based on the DIME physician's MMI determination and permanent impairment rating. Claimant then applied for a hearing on whether her right knee problems were related to the work injury at issue and, if so, whether (1) medical care and treatment were necessary and related to the injury and (2) she was at MMI.

Following an evidentiary hearing, the ALJ concluded that the DIME physician's reports were "equivocal regarding causation of chondromalacia patella disease process in claimant's right knee." The ALJ noted that the DIME physician attributed the onset of claimant's right knee symptoms to excessive weight-bearing and altered gait, but the ALJ found that the DIME physician had failed to explain how those factors had contributed to the underlying chondromalacia patella disease process. The ALJ also noted that in the DIME physician's initial report, he had recommended diagnostic

testing and an evaluation of claimant's right knee, in order to rule out symptoms from internal derangement. The ALJ found it significant, however, that in the follow-up DIME report, the physician no longer recommended such an evaluation, placed claimant at MMI, and rated her injury based only on her left knee impairment, without conditioning MMI on treatment of the right knee. From these facts, the ALJ inferred that the DIME physician had determined that the chondromalacia patella disease affecting claimant's right knee was not a component of her left knee injury.

The ALJ then concluded that claimant had failed to overcome the DIME report by clear and convincing evidence, and he thus denied and dismissed claimant's request for benefits related to the right knee condition.

Claimant then appealed to the Panel. As pertinent here, the Panel agreed that the DIME physician's discussion of claimant's right knee condition was ambiguous, and the Panel concluded that the ALJ's resolution of that ambiguity was reasonable and supported by the record. The Panel thus affirmed the denial of claimant's request for benefits relating to her right knee.

Claimant now appeals.

II. C.A.R. 28 Compliance

Claimant contends, and we agree, that employer's answer brief fails to contain appropriate citations to the record, as required by C.A.R. 28(b) and 28(e). Accordingly, employer's brief is subject to being stricken. *See* C.A.R. 38(e); *People v. Perry*, 252 P.3d 45, 46 (Colo. App. 2010). Nonetheless, in the interest of judicial economy, and because we do not perceive any significant facts as being in dispute, we have taken it upon ourselves to review the record. Counsel is reminded, however, that the Colorado Appellate Rules are not mere technicalities; they have a purpose, and we expect counsel to follow them. *O'Quinn v. Baca*, 250 P.3d 629, 631 (Colo. App. 2010). By failing to cite the record properly, employer placed on us the burden of searching the record. *Id.* We, however, were under no obligation to undertake such a search, and in the future, counsel should not expect us to peruse the record without the help of pinpoint citations. *Id.* at 631-32.

III. Standard of Review

We may not alter the ALJ's factual findings if substantial evidence supports them. § 8-43-308, C.R.S. 2014; *Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 12, 284 P.3d 202,

206. In reviewing for substantial evidence, we must consider the evidence "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." *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). If two equally plausible inferences may be drawn from the evidence, we may not substitute our judgment for that of the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

We review de novo questions of law or the application of law to undisputed facts. *Hertz Corp. v. Indus. Claim Appeals Office*, 2012 COA 155, ¶ 12, 296 P.3d 338, 342.

In addition, whether a document is ambiguous is a legal issue that we review de novo. *See Colo. Div. of Ins. v. Auto-Owner's Ins. Co.*, 219 P.3d 371, 377 (Colo. App. 2009). When a written instrument is ambiguous, however, the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996). A document is ambiguous when it is fairly susceptible of more than one interpretation. *See id.*

IV. Ambiguity and Interpretation of DIME Report

Claimant first contends that the ALJ erred as a matter of law in determining that the follow-up DIME report was ambiguous and that the DIME physician had changed his opinion and no longer considered claimant's right knee problems to be related to the admitted left knee injury. We conclude that the follow-up DIME report was ambiguous but that the record does not support the ALJ's interpretation of that report.

A DIME physician's MMI and impairment findings consist not only of the initial report but also of any subsequent opinions given by the physician. *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330-31 (Colo. App. 2005). The physician's opinions concerning MMI and permanent impairment inherently require him or her to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the work injury. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). These opinions are given presumptive effect and may be overcome only by clear and convincing evidence. § 8-42-107(8)(b), C.R.S. 2014; *Meza v. Indus. Claim Appeals Office*, 2013 COA 71, ¶ 15, 303 P.3d 158, 161;

Leprino, 134 P.3d at 482-83.

When a DIME report contains ambiguous or conflicting opinions, an ALJ appropriately determines the DIME physician's true opinion as a matter of fact. *See Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000) (noting that the DIME report at issue was subject to conflicting inferences concerning the claimant's MMI status and that the Panel had appropriately determined that, in those circumstances, the meaning of the DIME report presented a question of fact for the ALJ to resolve).

Here, although the DIME physician's statement in the follow-up DIME report regarding claimant's right knee is unambiguous when standing alone, we agree with the ALJ that when viewed in the context of the surrounding circumstances, the statement's meaning is unclear. For example, in his follow-up report, the DIME physician recounted his initial opinion about the nature and cause of claimant's right knee symptoms, but he also referred to the ATP's later evaluation and opinion that the right knee symptoms were degenerative and not attributable to the left knee injury. Similarly, although the DIME physician reiterated his prior diagnosis of

chondromalacia patella of the right knee, he never eliminated internal derangement as the possible root cause of claimant's right knee problems. Nor did he explain how any excessive weight-bearing or altered gait may have contributed to the underlying disease process in claimant's right knee.

Finally, although the DIME physician indicated that his prior opinion regarding claimant's right knee had not changed, he proceeded to determine a permanent impairment rating and did not state that his rating was incomplete or partial. Accordingly, one could interpret the follow-up DIME report as determining an impairment rating solely as to claimant's left knee, while reiterating that claimant's right knee was still to be evaluated and treated. Conversely, one could interpret the report as suggesting that the DIME physician had decided to exclude claimant's right knee symptoms as a component of the admitted left knee injury.

In these circumstances, we conclude that the ALJ properly found that the follow-up DIME report was ambiguous. The question thus becomes whether the record supports the ALJ's further finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the admitted left knee

injury. We conclude that it does not.

As noted above, in the follow-up DIME report, the DIME physician stated that his opinion regarding claimant's right knee was unchanged from his previous report, which clearly and unequivocally stated that claimant's right knee symptoms were due to her altered gait and excessive weight-bearing, which were caused by the work-related accident at issue. Although we agree with the ALJ and the Panel that the circumstances here support a finding that the DIME physician's intention was unclear, we perceive no evidence in the record to support the ALJ's finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the admitted left knee injury. To the contrary, such a finding, which suggests that the DIME physician had changed his opinion, is directly at odds with the physician's statement that his opinion was *un*changed from his previous report.

Nor do we see any evidence in the record to support the ALJ's choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations. The mere fact that the report was fairly susceptible of more than one interpretation, which is the very definition of an ambiguous document, *see Dorman*,

914 P.2d at 912, cannot alone support a finding that one possible interpretation versus any other reflected the DIME physician's true opinion.

Accordingly, we remand this case to the division with instructions that the division (1) reconsider and make record-supported findings regarding the meaning of the follow-up DIME report and (2) conduct such additional proceedings as may thereafter be necessary and appropriate. In order to carry out the requirements of this remand order, the ALJ may take such additional evidence as he or she deems necessary and appropriate.

V. Jurisdiction

Claimant next contends, in the alternative, that the ALJ lacked jurisdiction to consider the dispute over the existence of a causal relationship between the left knee injury and claimant's right knee symptoms because employer did not apply for a hearing to contest the first DIME report. We disagree.

Section 8-42-107.2(4)(c), C.R.S. 2014, requires an employer's insurer to file an admission of liability or to request a hearing to contest one or more of the DIME report's findings or determinations within twenty days after the date of the mailing of the division's

notice that it had received the DIME report. Absent an objection to the DIME report's findings, the ALJ lacks jurisdiction to resolve any dispute over those findings. *See Leprino*, 134 P.3d at 482.

Here, however, claimant's successful challenge to the ATP's MMI determination left the DIME process open. *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006); *Sanco Indus. v. Stefanski*, 147 P.3d 5, 7 (Colo. 2006). Accordingly, no obligation to request a hearing or to file an admission of liability arose until the DIME process had been completed through a follow-up exam. *See Williams*, 147 P.3d at 36; *Sanco Indus.*, 147 P.3d at 7. Thus, the ALJ retained jurisdiction to resolve any dispute regarding the follow-up DIME report's findings.

To the extent that *Leprino* contains language that can be construed to support claimant's jurisdictional argument, we consider that case distinguishable for two reasons. First, *Leprino* predated the supreme court's opinions in *Williams* and *Sanco*, which first recognized the requirement for a follow-up DIME as a necessary precondition to a final admission. Second, unlike here, no party in *Leprino* alleged either that the DIME report was ambiguous or that the DIME physician had changed his opinions.

VI. Conclusion and Remand Order

For these reasons, the order is set aside, and the case is remanded to the division with instructions that the division (1) reconsider and make record-supported findings regarding the meaning of the follow-up DIME report and (2) conduct such additional proceedings as may thereafter be necessary and appropriate. The ALJ may take such additional evidence as is necessary to carry out the requirements of this remand order.

JUDGE CASEBOLT and JUDGE ROMÁN concur.

United States Court of Appeals
For the First Circuit

No. 13-2251

JEFFREY F. RYAN,

Appellant,

CHEVONNE SIUPA,

Plaintiff,

v.

ASTRA TECH, INC.; JOE JOHNSON; STEVE CYR,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Leo T. Sorokin, U.S. Magistrate Judge]

Before

Torruella, Thompson, and Kayatta,
Circuit Judges.

Arnold R. Rosenfeld, with whom Camille F. Sarrouf and Sarrouf Law, LLP were on brief, for appellant.

Andrea C. Kramer, with whom Hirsch Roberts Weinstein, LLP was on brief, for appellees.

November 14, 2014

KAYATTA, Circuit Judge. Attorney Jeffrey Ryan ("Ryan") appeals from the district court's revocation of his permission to practice pro hac vice for the plaintiff in the underlying lawsuit that gave rise to these proceedings.[1] The district court revoked Ryan's pro hac vice admission after finding that he lied to the court about attempting to interfere with the deposition of his client. Finding no error, we affirm.

I. Background

The conduct that led to the revocation challenged on this appeal occurred during a deposition of Ryan's client by defense counsel on October 24, 2012. The deposition transcript shows that a half hour into the deposition, defense counsel asked Ryan's client, the plaintiff, about an interrogatory answer. After the plaintiff struggled for more than one minute to answer defense counsel's question, the following exchange between the attorneys took place:

> [Defense counsel]: I would like the record to reflect Mr. Ryan is writing notes to his client while she is answering a question. If he wishes to prove that's not true rather than going on a rampage, he can turn back over the notepad that he just turned over, and he can show us all what he wrote on it. But I will, again, be bringing up to the court that he was writing on a notepad. And when I looked at him, he turned it over.

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[1] The parties consented to proceed before a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). The magistrate judge thus had authority to "conduct any or all proceedings" in the matter, id., so we refer to relevant rulings as those of "the district court," or simply "the court."

> It was clear that [the plaintiff's] eyes were looking at the notepad as well.
>
> Mr. Ryan: Nothing that [defense counsel] said in that last statement was accurate. 100 percent false.
>
> [Defense counsel]: Then I would request that you bring that notepad to the court and let the court look at it.

Defense counsel then asked the plaintiff while she was still under oath whether she had seen Ryan flip the notepad over. The plaintiff admitted that "[t]he notepad has been flipped over and reflipped over," and "I saw something in my peripheral vision." The plaintiff denied looking at the notepad. After further skirmishes, the deposition was suspended, with defense counsel announcing that she was calling the court.

After a forty-minute recess, Ryan and the plaintiff made statements on the deposition record. Ryan stated his position that defense counsel was wasting her allotted deposition time, and Ryan and the plaintiff both accused defense counsel of writing notes during prior depositions of the defendants. Ryan also announced that he was "prepared to show to the judge the notepad, which, as I accurately stated, only contains the information about the address of the courthouse which we're going to . . . later today."

A status conference with the district court had already been scheduled for 4:15 that afternoon to resolve unrelated deposition scheduling disputes. After the court addressed the scheduling issues, defense counsel described the notepad incident

and made an oral motion for monetary sanctions, including costs for the court reporter and to have future depositions video-recorded.

Ryan began his rebuttal by showing the court a notepad that Ryan said was the notepad he had at the deposition. The only writing on the notepad was the address of the courthouse. Ryan denied that defense counsel saw him writing a note because defense counsel's binders on the table would have obstructed her view of his notepad. He accused defense counsel of writing notes to her clients during prior depositions. Ryan did admit to flipping the notepad over but maintained that he had only written the address of the courthouse on the notepad before doing so. When the court asked Ryan why he did not simply show defense counsel the notepad, Ryan at first answered that defense counsel did not ask to see the notepad, and if she had, he would have shown her: "All she had to do was ask. I would have handed it to her, your Honor. She did not ask to see it." In fact, the deposition transcript shows that opposing counsel did invite Ryan to turn the notepad over. Pressed on why he did not volunteer to show the notepad and resolve the dispute, Ryan stated that he was "deeply offended" and accused defense counsel of whispering to deposition witnesses.

The district court then heard testimony from the deposition's court reporter. She testified that Ryan wrote something on the notepad and moved it toward his client, the plaintiff. He then flipped the notepad over when accused by

defense counsel. The court reporter could not read what Ryan had written, but she could see that there were two distinct pieces of writing on the notepad, one at the top and one further down the page. She recalled that, after the deposition was suspended, Ryan left the room with the notepad for less than a minute. When he returned, he held the notepad up, made some sort of offer that it was available for viewing, and placed it on the table. The court reporter was unsure whether defense counsel heard Ryan's announcement or looked at the notepad.

Most significantly, the court reporter testified that the writing on the notepad that Ryan placed on the table after reentering the room was not the same as the writing on the notepad that he had moved toward the plaintiff during the deposition. It was missing a few words or a sentence that had appeared under the writing at the top of the notepad. Likewise, the court reporter testified that the notepad that Ryan showed the court during the hearing was similarly missing the writing that was on the notepad that he had moved toward his client during the deposition.

The plaintiff also testified. She denied that she looked at the notepad on the table while a question was pending. She confirmed that Ryan flipped the notepad over after defense counsel went on the record about the notepad. She also opined that the court reporter could not have seen what was on the notepad because the reporter continued transcribing during the incident. The

plaintiff had "no idea" what Ryan had taken out of the room when he left the deposition room. She did testify that Ryan showed her the notepad before he left the room and the notepad contained the courthouse address.

At the end of the hearing, defense counsel made an oral motion to revoke Ryan's pro hac vice admission because the court reporter's testimony showed that he had offered false evidence to the court. The court denied the motion without prejudice but told defense counsel that she could renew it in writing, after which "[Ryan] has an opportunity to respond to it."

One week later the district court issued an order granting defendants' motion for discovery sanctions. The district court found the court reporter's testimony "wholly credible" and not undermined by the plaintiff's testimony.[2] Siupa v. Astra Tech, Inc., No. 10-10525-LTS, 2012 WL 5385681, at *6-7 (D. Mass. Oct. 31, 2012). The court made the following specific findings of fact:

> Mr. Ryan wrote something on his legal pad while the Plaintiff struggled to answer a question, pushed the pad toward his client, and then flipped it over to shield it from defense counsel's view. Immediately thereafter, Mr. Ryan failed to do what the Court would expect a lawyer to do in this circumstance: either show the legal pad to defense counsel when she stated her beliefs, or place the pad in a sealed envelope (if, for instance, it contained

[2] Although the court found the plaintiff credible, when she testified about the contents of the notepad "her demeanor reflected that her answer was tentative, and she already had admitted she was under stress at the time based on the manner in which her deposition was suspended." Siupa v. Astra Tech, Inc., No. 10-10525-LTS, 2012 WL 5385681, at *7 (D. Mass. Oct. 31, 2012).

> privileged information), taking steps to memorialize either action on the record during the deposition . . . . Instead, Mr. Ryan, in a patently false statement, denied having taken the actions defense counsel (and the court reporter) had witnessed. When the deposition was temporarily suspended, he took the legal pad, left the room, somehow disposed of the relevant writing, and returned. He later made another false statement on the record, before the parties left defense counsel's conference room, regarding the content of the writing on the legal pad.
>
> . . . [A]t the hearing before this Court, Mr. Ryan again falsely denied his actions and knowingly presented as evidence a legal pad that he had intentionally altered.

Id. at *7.

In short, the district court found as a matter of fact that Ryan attempted to communicate surreptitiously with his client while a question was pending at a deposition, that Ryan manufactured false evidence, and that Ryan lied to the court. The court put these findings in the context of Ryan's prior conduct during the case. This conduct included adding a jury demand to a filed amended complaint after obtaining opposing counsel's assent and the court's permission to file an amended complaint without a jury demand, disobeying a court order about discovery, attaching personal and irrelevant information as exhibits to a hearing request, and threatening to embarrass a defendant's wife. The court ordered Ryan to pay monetary sanctions consisting of fees and costs for litigating the motion for sanctions, the court reporter's time, and videotaping the plaintiff's and all subsequent depositions. The court also directed Ryan to show cause why it

should not revoke his pro hac vice admission for flagrant violations of the Massachusetts Rules of Professional Conduct. Id. at *1, *8; Mass. R. Prof'l Conduct 3.3(a)(1) & (4), 3.4(a) & (b), 4.1(a). The court gave Ryan two weeks to file a response and, at Ryan's later request, a one week extension.

Ryan's response to the show cause order totaled more than 100 pages, including a memorandum of law, his declaration, the plaintiff's declaration, the declaration of a paralegal who worked with Ryan, results from a polygraph exam Ryan took with questions about the notepad, excerpts from deposition transcripts that Ryan argued showed defense counsel coaching witnesses, and several other exhibits. Soon after filing his response, Ryan also filed a motion for reconsideration of the monetary sanctions the court had already imposed, arguing that "new evidence ha[d] been presented" in his response to the show cause order that undermined the court's factual findings. After the defendants' opposition filing, Ryan filed a sur-reply. Neither side requested that the court take any additional testimony, hold oral argument, or follow any particular procedures.

After conducting a de novo review of the entire record in the case, including testimony during the October 24 hearing and Ryan's filings in response to the show cause order, the district court again found that Ryan lied to the court and opposing counsel and submitted false evidence. The court observed that our circuit

has not set standards for the revocation of pro hac vice status once it has been granted. The court decided to apply the general due process requirements discussed in Johnson v. Trueblood, in which the Third Circuit concluded that "some type of notice and an opportunity to respond are necessary when a district court seeks to revoke an attorney's pro hac vice status." 629 F.2d 302, 303 (3d Cir. 1980). The court concluded that the order to show cause sufficed as notice and that Ryan had adequate opportunity to be heard in his substantial written filings. On December 18, 2012, the district court issued an order revoking Ryan's pro hac vice admission and denying the motion for reconsideration of the monetary sanctions. Siupa v. Astra Tech, Inc., No. 10-10525-LTS, 2012 WL 6622492, at *8 (D. Mass. Dec. 18, 2012).

At a subsequent January 16, 2013, status conference, Ryan, now represented by his own attorney, voiced to the district court due process concerns about the revocation of his pro hac vice admission. In particular, Ryan asked the court either to grant another evidentiary hearing or to strike the sanctions because of the potential adverse consequences the revocation could have for Ryan's legal career. The court gave Ryan leave to make yet another filing in order to spell out a request for different punishment or an additional evidentiary hearing:

> To the extent you want me to reconsider, if you will, the consequence or the punishment I impose, or you wish me to reopen it for a hearing, then file a short motion explaining to me what the different issues are and why

> you think I should do it, and if I reopened it or had a further hearing, what it would be about and who would testify and why it would be a useful expenditure of time.

In response, Ryan filed a memorandum of law that asserted that the court denied Ryan notice and an opportunity to be heard in violation of his due process rights and the sanctions were disproportionate to the alleged misconduct. His filing ended with a request for a hearing ("Ryan requests a hearing"), but it contained no detail about who the witnesses would be, what they would testify about, or why a hearing "would be a useful expenditure of time."[3] Ryan also objected that he did not have prior notice that the finding that he wrongfully inserted the jury demand into the amended complaint was a potential ground for revocation of his pro hac vice admission. Ryan did not attempt to controvert the finding itself.

On February 5, 2013, the district court denied Ryan's requests for reconsideration and a hearing. Siupa v. Astra Tech,

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[3] The closest Ryan came to proposing testimony to be offered at a hearing was in his argument that the October 24, 2012, hearing was deficient: "[Ryan] should have been accorded at least notice of the purpose of the October 24, 2012 hearing and a separate opportunity to be heard, to confront his accuser, and even possibly to testify." Given notice and a chance to prepare, Ryan asserted that he could have prepared direct and cross examinations of the court reporter and the plaintiff, obtained photographs and a reconstruction of the deposition table to "analyze[] the lines of sight of the witnesses, a key factor in their testimony," obtained separate counsel, and called defense counsel as a witness. In fact, the record is undisputed that Ryan knew at least four hours beforehand exactly what the subject of the October 24 hearing would be--his behavior at the deposition--and he did not seek any greater opportunity to prepare for that hearing.

Inc., No. 10-10525-LTS, 2013 WL 450149, at *3 (D. Mass. Feb. 5, 2013). The court concluded that no due process violation occurred and Ryan failed to justify another evidentiary hearing. As for the amended complaint, the court noted that Ryan must have known that the complaint was at issue because he addressed it in his initial response to the show cause order. Ryan now appeals the revocation of his pro hac vice admission and the imposition of monetary sanctions,[4] neither of which was mooted by the eventual settlement of his client's claim. See Obert v. Republic W. Ins. Co., 398 F.3d 138, 143 (1st Cir. 2005) (potential damage to attorneys'

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[4] Ryan filed a joint notice of appeal with the plaintiff after the defendants prevailed in the underlying employment discrimination case. The joint notice of appeal announced Ryan's intention to "appeal[] the revocation of his pro hac vice admission to the United States District Court, District of Massachusetts, by Chief Magistrate Judge Leo T. Sorokin, on October 31, 2012, reconsideration denied, on December 18, 2012, in the above entitled case." Although it would have been preferable for Ryan to file a separate notice of appeal challenging the sanctions order, we nonetheless have jurisdiction over Ryan's appeal from the revocation of his pro hac vice admission. See In re Plaza-Martínez, 747 F.3d 10, 13 (1st Cir. 2014).

Ryan's intent to appeal the monetary sanctions order is not so clear. He seeks in a supplemental letter brief to clarify that he also appeals the order imposing monetary sanctions. We have an "oft-stated policy of affording liberal construction" to the notice requirement in Federal Rule of Appellate Procedure 3. Id. Both orders referenced in the joint notice of appeal concerned the monetary sanctions as well as Ryan's pro hac vice admission. These references, along with our policy of liberal construction, are enough for us to assert jurisdiction over Ryan's appeal of the monetary sanctions. See Fed. R. App. Proc. 3(c)(1)(B) ("The notice of appeal must . . . designate the judgment, order, or part thereof being appealed.").

reputations from findings of ethical violations was sufficient to avoid mootness).

II. Standard of Review

Although the district court did not explain the basis of its authority to revoke Ryan's pro hac vice admission, it relied on the district court's inherent power to sanction. See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (federal courts have inherent power "to discipline attorneys who appear before it"). We review the imposition of a sanction pursuant to the court's inherent power for an abuse of discretion. United States v. Agosto-Vega, 731 F.3d 62, 64 (1st Cir. 2013); see also In re Cordova-González, 996 F.2d 1334, 1335 (1st Cir. 1993)(per curiam)(reviewing disbarment for abuse of discretion). Importantly, we accept all findings of fact unless clearly erroneous. F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R., 563 F.3d 1, 6 (1st Cir. 2009).

III. Analysis

We begin with the obvious. Trial courts have ample authority pursuant to Fed. R. Civ. P. 30(d)(2) to impose sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent." The rule itself spells out no specific procedure, but the procedure the district court followed at the request of both counsel is standard: counsel suspended the deposition to bring the issue to the court, and the court heard arguments from both counsel, took testimony and evidence as

reasonably proffered, and later issued a decision imposing monetary sanctions. Under Rule 30(d)(2), this procedure was unassailable, and Ryan offers no precedent suggesting otherwise. Ryan does correctly argue that monetary sanctions of this type are more fair when accompanied by notice and an opportunity to be heard. See Agosto-Vega, 731 F.3d at 66 ("[T]he sua sponte issuance of a sanction order, staking out a view and judgment without any warning or opportunity to be heard, increases the likelihood of error and the appearance of unfairness."). Here, though, the sanctions were issued at the request of a party, and Ryan was heard before any decision was made. The issue, too, was quite simple, and turned entirely on the testimony of four people, all of whom were present at the hearing.

Unable to assail the procedures followed by the district court in resolving the discovery dispute with an award of sanctions, Ryan raises three challenges to the court's revocation of his pro hac vice admission. First, he argues that the district court failed to follow the procedure for attorney discipline in District of Massachusetts Local Rule 83.6. Second, he argues that the procedure the court did follow violated his due process rights. Finally, Ryan challenges the court's decision on the merits by arguing that there was insufficient evidence to support the fact findings upon which both the revocation of his pro hac vice

admission and the preceding discovery sanctions were predicated. We address each challenge in turn.[5]

A. Applicability of the Local Rules governing attorney discipline

Ryan argues that the district court failed to follow two provisions of the district court's local rule governing disciplinary proceedings. See D. Mass. Local R. 83.6(4), (5). The first provision provides that "[f]or misconduct defined in these rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant." D. Mass. Local R. 83.6(4)(A). Misconduct includes "[a]cts or omissions . . . that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts." D. Mass. Local R. 83.6(4)(B). The court fully complied with Local Rule 83.6(4) before revoking Ryan's admission to practice before the court. Ryan received notice in the order to show cause informing Ryan that the court was

[5] Ryan does not actually challenge in his brief the award of monetary sanctions per se. The only argument Ryan devotes to the issue is a short statement in his reply brief that the notice of appeal also included the monetary sanctions. See Rodríguez v. Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011) ("It should go without saying that we deem waived claims not made or claims adverted to in a cursory fashion, unaccompanied by developed argument."). Even if Ryan had not waived this claim, however, we would find the monetary sanctions proper for the same reasons we find the revocation of his pro hac vice admission proper.

considering revoking his pro hac vice admission based on two and a half pages of factual findings describing Ryan's "serious misconduct."

Ryan also had sufficient opportunity to be heard. The district court gave Ryan all the time he requested in order to file a response to the order to show cause. Ryan took advantage of this opportunity to file declarations, exhibits, and argument. The court also entertained a motion for reconsideration challenging the monetary sanctions and a "sur-reply" to Astra Tech's filing in support of the revocation and monetary sanctions. The court even allowed Ryan, through counsel, to file an additional memorandum continuing to re-argue the issues even after entry of the order revoking Ryan's pro hac vice status. These filings provided Ryan ample opportunity to contest the proposed revocation.

The second local rule Ryan relies on sets out a more detailed referral and hearing procedure for court-initiated attorney disciplinary proceedings. D. Mass. Local R. 83.6(5). The rule states in relevant part that

> When misconduct or allegations of misconduct that, if substantiated, would warrant discipline as to an attorney admitted to practice before this court, is brought to the attention of a judicial officer, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the judicial officer may refer the matter to counsel for investigation, the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

D. Mass. Local R. 83.6(5)(A). If the independent counsel decides that formal disciplinary proceedings are appropriate, the court may issue an order for the respondent-attorney to show cause why the attorney should not be disciplined. D. Mass. Local R. 83.6(5)(C). If the respondent-attorney raises "any issue of fact" or "wishes to be heard in mitigation," then the chief judge "shall set the matter for prompt hearing before three (3) judges of this court." D. Mass. Local R. 83.6(5)(D). The complaining judge may not sit on this panel. Id.

Local Rule 83.6(5) does not unambiguously indicate whether it is a mandatory or discretionary procedure for disciplining an attorney. The rule's language that the district court "may" refer the matter to independent counsel suggests that the rule's disciplinary procedure is merely an option available to the district court and not a prescribed course of action. Certainly the district court possesses inherent authority to levy sanctions and control who may appear before it. See Chambers, 501 U.S. at 42-46; Agosto-Vega, 731 F.3d at 64. It seems unlikely that the Massachusetts district court intended to restrict the exercise of its broad and important inherent authority so significantly and cumbersomely without doing so expressly and unambiguously.[6] In

[6] Other district courts in the First Circuit have chosen to make referral to independent or bar counsel expressly mandatory. See, e.g., D. Me. Local R. 83.3(e)(1) ("[T]he Judge shall refer the matter to counsel for investigation and the prosecution of a formal proceeding or the formulation of such other recommendation as may

fact, the Local Rules expressly preserve the district court's inherent power to sanction attorneys appearing before it. See D. Mass. Local R. 83.6(11)(A) ("Nothing contained in these rules shall be construed to deny to the court such powers as are necessary for the court to maintain control over proceedings conducted before it . . . ."). In at least one instance, the district court itself has expressed doubt about whether referral to bar counsel is always "effective and efficient" and treated the procedure as discretionary. United States v. Jones, 620 F. Supp. 2d 163, 177 (D. Mass. 2009) (stating intention to instead rely on criminal contempt authority pursuant to 18 U.S.C. § 401 and Fed. R. Crim. P. 42(a) to sanction prosecutors who withhold exculpatory evidence); see also United States v. Roberts, 978 F.2d 17, 20 (1st Cir. 1992) ("A district court possesses great leeway in the application and enforcement of its local rules."). Further, an interpretation that the extensive procedure in Local Rule 83.6(5) is mandatory would make superfluous the more general "notice and opportunity to be heard" requirement in Local Rule 83.6(4) for disciplining an attorney for misconduct.

On the other hand, it also seems unlikely that the district court would create such a detailed and resource-intensive procedure if individual district court judges could decline to follow it. And, once the judicial officer triggers the Local Rule

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be appropriate.").

83.6(5) procedure by referring the matter to independent counsel, the rest of the steps in the process appear to be mandatory.

In the end, we need not decide this question because Ryan never asked the district court to follow the Local Rule 83.6(5) procedure. Ryan did not so much as mention the relevant local rule in any of his district court filings or appearances, his voluminous response to the order to show cause, or his sur-reply. Even after he retained counsel, counsel too made no belated request or argument that the rule's procedure be invoked. Ryan had ample opportunity to argue below that Local Rule 83.6(5) dictated a specific procedure, but he failed to do so.

We therefore review the district court's alleged failure to follow Local Rule 83.6(5) for plain error. See Tasker v. DHL Retirement Sav. Plan, 621 F.3d 34, 40-41 (1st Cir. 2010). To overcome plain error review, Ryan must show "(1) an error occurred (2) which was clear or obvious and which not only (3) affected [Ryan's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings." Id. (internal quotations omitted). Given the lack of clarity that we have already discussed concerning whether the rule's procedure must always be invoked in such cases, we cannot find the failure to follow the procedure in the local rule clear or obvious error. Nor has Ryan given us reason to believe that the outcome of his case would have been any different if the district

court had followed the local rule procedure. Ryan has therefore failed to establish plain error.

B. Alleged due process violations

That brings us to Ryan's more general challenge that the district court violated his right to procedural due process under the Fifth Amendment. In particular, Ryan claims that he was entitled to prior notice, an opportunity to be heard, and an evidentiary hearing. We have not yet decided whether an attorney's pro hac vice admission is a property interest protected by due process, and, if so, what procedural safeguards due process requires before the district court may revoke that admission. We need not answer these questions today, however, because the district court afforded Ryan each of the procedural protections to which he claims he was entitled.[7]

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[7] Other circuits have concluded that attorneys admitted pro hac vice are entitled to notice and an opportunity to be heard before the court revokes their admission. See Belue v. Leventhal, 640 F.3d 567, 577 (4th Cir. 2011) ("[O]nce [pro hac vice] status is granted, attorneys must receive some modicum of due process before it is revoked.") (collecting cases); Lasar v. Ford Motor Co., 399 F.3d 1101, 1112 (9th Cir. 2005) ("[W]e have held that a district court need only provide notice and an opportunity to be heard before revoking an attorney's pro hac vice status."); Johnson, 629 F.2d at 303 ("[W]e believe that some type of notice and an opportunity to respond are necessary when a district court seeks to revoke an attorney's pro hac vice status."). These courts have declined to require additional procedural safeguards. See Belue, 640 F.3d at 577 ("While courts are generally in agreement that pro hac vice attorneys must receive notice of the specific grounds for revocation and a meaningful opportunity to respond, none have been willing to extend due process protections beyond those baselines."). We have reached the same conclusion for attorneys facing disbarment. In re Cordova-González, 996 F.2d 1334, 1336

To the extent due process required prior notice and an opportunity to be heard, those requirements mirror those in Local Rule 83.6(4) and were satisfied by the October 31 order to show cause and the opportunities to file several written responses in the district court. This is not a case in which the district court disciplined an attorney without warning or a chance to explain alleged misconduct. Cf. Plaza-Martínez, 747 F.3d at 14 (reversing sanctions when "[t]he district court acted here without giving the appellant any notice that it was considering sanctions or any opportunity to tell her side of the story"); Lasar, 399 F.3d at 1113 (due process violation when district court imposed lifetime ban on attorney's pro hac vice appearance and show cause order did not clearly raise ban as a possibility). Nor is this a case in which the court sanctioned conduct that was not obviously sanctionable. Cf. Agosto-Vega, 731 F.3d at 65 (district court cannot "sanction counsel for defying the court's unstated expectations").

Ryan's assertion that the court was somehow required to notify him that it was considering revocation before the October 24, 2012, evidentiary hearing confuses the imposition of monetary

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(1st Cir. 1993) (per curiam) ("[T]he due process rights of an attorney in a disciplinary proceeding do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case. Rather, an attorney facing discipline is entitled to procedural due process, including notice and an opportunity to be heard." (internal quotations and citations omitted)).

sanctions under Fed. R. Civ. P. 30(d)(2) and the revocation of his pro hac vice admission for misconduct under Local Rule 83.6(4). The evidentiary hearing on October 24, 2012, was about monetary sanctions for deposition misconduct under Fed. R. Civ. P. 30(d)(2) brought to the court's attention on oral motion by defense counsel. At that hearing, and without objection by Ryan, the court did exactly what any court would do in such a situation: it heard out all counsel, accepted the evidence offered by each counsel, and then decided what happened at the deposition. There was nothing wrong with this procedure.

Nor was it improper for the court to consider its factual findings adopted in resolving the discovery dispute when subsequently deciding to revoke Ryan's admission. Courts regularly rely on fact findings from an earlier proceeding when the principles of issue preclusion apply. See, e.g., Negrón-Fuentes v. UPS Supply Chain Solutions, 532 F.3d 1, 7-8 (1st Cir. 2008); González-Piña v. Rodríguez, 407 F.3d 425, 430 (1st Cir. 2005). And Ryan makes no argument that those principles do not support such reliance here. Moreover, the record here shows that the court allowed Ryan to file any additional evidence that he wished to file, considered that evidence, and reconsidered its prior findings de novo. Ryan, in turn, requested no further hearing before the court ruled. Nor can we fault the district court for rejecting the later belated and perfunctory request for a further hearing. When

Ryan's counsel orally requested an evidentiary hearing at a motion hearing one month after the revocation order, the court invited Ryan to submit his request in writing and describe the evidence he expected to produce during the hearing. Ryan failed to follow the court's instructions and instead submitted an eleven-page memorandum of law with no responsive description. We find no error in the denial of Ryan's perfunctory request.

To the extent Ryan also argues that due process required the judge to recuse himself or refer the pro hac vice matter to another judge, Ryan is incorrect. This is not a case in which the cause for the disciplinary action taken by the judge is a personal attack on that judge in circumstances in which reasonable observers might regard the judge as having lost the ability to remain detached. See Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971). Rather, this is a case in which the judge, in finding facts necessary to resolve a discovery dispute, determined that those same facts likely warranted further ramifications, gave Ryan several attempts to show otherwise, and then deliberatively addressed and resolved the matter in a manner that was hardly surprising or disproportionate. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-

seated favoritism or antagonism that would make fair judgment impossible."). Nor, finally, could Ryan shop for judges simply by suggesting in his briefing on the pro hac vice matter that the judge was biased. See Isaacson v. Manty, 721 F.3d 533, 536, 539-40 (8th Cir. 2013) (holding no obvious error occurred when judge did not sua sponte recuse herself from contempt proceeding against party who accused the judge "of bigotry, prejudice, and conspiracy").

In sustaining the process afforded Ryan here, we are not saying that process does not matter. It does, and courts should take care before levying a sanction as serious as pro hac vice revocation. See Agosto-Vega, 731 F.3d at 66 (reversing a sanction order and noting "the importance of care and circumspection in the exercise of the court's inherent sanction power"). We are saying, instead, that the process was robust with many opportunities for Ryan to present evidence and dispute the facts and the punishment. That he did not timely ask for additional process below underscores the adequacy of the district court's procedure.

C. Sufficiency of the evidence to support the sanctions

We turn finally to Ryan's challenge on the merits of the district court's rulings. He argues that there was insufficient evidence of his misconduct and that the sanctions were disproportionate to any wrongdoing. Ryan directs us to authority from other circuits for the proposition that the standard of proof

in attorney disciplinary proceedings ought to be clear and convincing evidence. See, e.g., Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th Cir. 2000) ("[A]ttorney discipline proceedings require proof only by clear and convincing evidence."). But see In re Barach, 540 F.3d 82, 85 (1st Cir. 2008) ("[T]he use of a preponderance of the evidence standard in bar disciplinary proceedings does not offend due process."). He cites no controlling First Circuit authority, nor can we find any. We need not decide today whether the district court should have used an elevated standard of proof because there was clear and convincing evidence to support the court's findings of Ryan's misconduct.

The most serious instances of Ryan's misconduct are compellingly supported by the court reporter's testimony that a notepad Ryan slid toward the witness had a note in addition to the courthouse address. If the court reporter was correct, then Ryan lied to the court and submitted falsified evidence during the evidentiary hearing when he denied writing a note and offered a notepad without the writing that the court reporter had seen. The court found the court reporter "wholly credible." Ryan now responds by characterizing the court reporter's testimony as "addled" and "rife with interruptions, confusion, and contradictions," but the court disagreed and "[d]istrict court determinations of credibility are of course entitled to great

deference." Jennings v. Jones, 587 F.3d 430, 444 (1st Cir. 2009). The court reporter may have been nervous after finding herself in the unusual position of testifying, but we see no basis in the transcript of her testimony to conclude that her testimony was unreliable. The court reporter testified consistently that Ryan wrote something on his notepad and pushed it toward his client while a question was pending, flipped the notepad over when defense counsel accused him on the record, left the deposition room with the notepad for less than a minute after the deposition was suspended, reentered the room, and announced that the notepad was available for examination. Most important, she testified consistently that the top sheet of the notepad contained two distinct pieces of writing before Ryan left the room but only one piece of writing when he reentered, and that the altered notepad was the one Ryan showed the court.

Ryan makes much of the court reporter's admission that she could not read the note Ryan wrote on the notepad or tell whether Ryan's client could read his note, but in doing so he entirely misses the point. The court revoked Ryan's pro hac vice status primarily because he lied and presented false evidence. And in assessing Ryan's conduct in this context, it matters little whether his client actually read the note. See In re BellSouth Corp., 334 F.3d 941, 951 (11th Cir. 2003) ("A court's inherent power to disqualify an attorney . . . is rooted in concern for the

integrity of the judiciary and the public's perception thereof. It does not further those ends to punish only successful attempts at tampering with the judicial process . . . ."). Moreover, given the supported finding that he lied, it follows that he destroyed the only evidence of what he actually wrote on the notepad. Hornbook spoliation principles dictate an adverse inference that he did attempt to coach his witness. See Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1158-59 (1st Cir. 1996) ("When a document relevant to an issue in a case is destroyed, the trier of fact sometimes may infer that the party who obliterated it did so out of a realization that the contents were unfavorable.").

Ryan's account of the events and his actions during the deposition do not inspire confidence in his truthfulness. If all he had written was the court address, why not flip over the notepad and show defense counsel? Ryan's answer to this question (he would have done so if asked) only dug a deeper hole because the transcript shows he was invited to do so, and he refused.

We think it important, too, that Ryan's statements to the court were not spontaneous. This was not a fleeting moment of weakness under pressure without premeditation, later recanted. Ryan had four hours between the time the deposition was suspended and the status conference during which to decide what to say to the court about what he wrote on the notepad. That he used that time

in part to create a false document to present to the court certainly works against him.

Ryan also complains that, in ordering the monetary sanctions and issuing the order to show cause, the district court cited prior conduct by Ryan in this lawsuit that reflected unfavorably on Ryan. Specifically, Ryan had unilaterally added a jury demand to an agreed and approved copy of an amended complaint without notice to counsel or the court, he had threatened to use publicity (and incorrect information) to publicly embarrass a third party if the case did not settle, and he had included gratuitous name-calling in a prior submission. Siupa v. Astra Tech, Inc., No. 10-10525-LTS, 2012 WL 5385681, at *1-3 (D. Mass. Oct. 31, 2012). Ryan makes no argument that this conduct did not occur. Rather, he argues that it was "no harm, no foul," that his client was entitled to the jury trial he unilaterally sought to secure, that he was "careless," and that the conduct in question was irrelevant to the sanctions motion. We disagree. In exercising its discretion to issue or not issue a sanction for misbehavior by counsel, the court may certainly consider the extent to which counsel's misconduct is aberrational. That Ryan had already staked out a position at the corner-cutting end of the spectrum weighed in the discretionary selection of an appropriate sanction. Nor should any lawyer confuse the combative aggressiveness manifest in much of Ryan's behavior with the professional resolve of an effective advocate.

See American College of Trial Lawyers, Code of Pretrial and Trial Conduct 3-8 (2009).

IV. Conclusion

Reduced to its nub, this is a simple, but important case. With notice, an opportunity to be heard, and ample, very convincing evidentiary support, the district court found that Ryan falsified evidence and lied point blank with premeditation to the court. Rejecting no procedure timely requested by Ryan or required by due process, and after further notice and opportunity to be heard, the court decided to withdraw its permission that Ryan could appear as counsel in this case. Anyone who thinks it important that lawyers not lie to judges would be surprised if the court had done otherwise. We therefore affirm the orders revoking Ryan's pro hac vice admission and imposing monetary sanctions.