

# **BROWN BAG SEMINAR**

**Thursday, February 19, 2015**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> Street

## **2nd Floor Conference Room**

**(use elevator near Starbucks)**

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

January 9, 2015 through February 13, 2015

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**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-915-420-01

IN THE MATTER OF THE CLAIM OF  
TIMOTHY FORTUNE,

Claimant,

v.

RESTAURANT TECHNOLOGIES INC.,

Employer,

and

HARTFORD FIRE INSURANCE COMPANY,

Insurer,  
Respondents.

ORDER

This matter is before us pursuant to the respondents' Motion for Extension of Time to Allow Filing of Brief In Support of Petition to Review Supplemental Order. We issue this order pursuant to §8-43-301(9), C.R.S., which grants us power to "issue such procedural orders as may be necessary to carry out" our appellate review.

On June 23, 2014, ALJ Jones issued an order finding that upon termination of the claimant's employment, the respondent employer continued to pay two thirds of the COBRA cost of health and dental insurance for the claimant. Thus, the ALJ ruled that pursuant to §8-40-201(19), C.R.S., the cost of continued health and dental benefits would not be included in a calculation of the claimant's average weekly wage (AWW).

Thereafter, the claimant filed his petition to review and brief in support, and the respondents filed their brief in opposition. As pertinent here, in his brief in support, the claimant argued that the ALJ erred in failing to increase his AWW by the cost of his health and dental insurance. The claimant contended that the only evidence provided at the hearing was the claimant's testimony that the employer was not paying two thirds of the cost of his health and dental insurance.

Subsequently, on October 9, 2014, ALJ Jones issued her Supplemental Order determining that the respondents are, in fact, liable for an increased AWW in an amount equal to the claimant's cost of obtaining replacement health insurance coverage. In her

Supplemental Order, the ALJ stated that if either party was dissatisfied with the order, then a Petition to Review may be filed within 20 days after mailing or service of the order. The ALJ referenced §8-43-301(2), C.R.S. for further information regarding procedures to follow when filing a Petition to Review.

On October 16, 2014, the respondents filed their Petition to Review, but no brief in support accompanied the Petition to Review. The claimant filed his brief in opposition to the respondents' Petition to Review on November 25, 2014.

Thereafter, on December 8, 2014, the respondents received notice from the Industrial Claim Appeals Office notifying them that the record received from the Office of Administrative Court did not contain a brief in support of the Petition to Review.

The respondents now have requested an extension of time to file their brief in support of their Petition to Review. The respondents argue, in part, that the ALJ's Supplemental Order does not state any requirement of filing a brief in support contemporaneously with the Petition to Review. The respondents argue that the Supplemental Order specifically references only §8-43-301(2), C.R.S., which does not set out the requirement of filing a brief in support at the time of filing a Petition to Review.

Section 8-43-301(6), C.R.S. provides that a party dissatisfied with a supplemental order may file a petition for review, and the petition shall be accompanied by a brief in support:

(6) A party dissatisfied with a supplemental order may file a petition for review by the panel. The petition shall be filed with the division if the supplemental order was issued by the director or at the Denver office of the office of administrative courts in the department of personnel if the supplemental order was issued by an administrative law judge. The petition shall be filed within twenty days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. The petition and brief shall be mailed by petitioner to all other parties at the time the petition is filed. All parties, except the petitioner, shall be deemed opposing parties and shall have twenty days after the date of the certificate of mailing of the petition and brief to file with the division or the Denver office of the office of administrative courts, as appropriate, briefs in opposition to the petition.

The failure to file a brief in support of a petition to review is not a jurisdictional defect and thus, neither is the failure timely to file a brief. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986). It is provided in §8-43-301(11), C.R.S., that we must act within sixty days of the receipt of the certified record or the order of the ALJ shall be deemed the order of the Panel. Thus, an extension of time under these circumstances is not optimal. Nevertheless, given the ALJ's Supplemental Order which references §8-43-301(2), C.R.S. rather than §8-43-301(6), C.R.S., we grant the respondents' Motion for Extension of Time and give them up to and including January 20, 2015, within which to file their brief in support of the Petition to Review. In turn, the claimant shall have up to and including January 26, 2015, within which to file his brief in opposition.

**IT IS THEREFORE ORDERED** that the respondents' Motion for Extension of Time is granted, and the respondents have up to and including January 20, 2015, within which to file their brief in support of the Petition to Review. The claimant shall have up to and including January 26, 2015, within which to file his brief in opposition.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Kris Sanko

TIMOTHY FORTUNE  
W. C. No. 4-915-420-01  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/12/2015 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

LEVINE LAW, LLC, Attn: PATRICK A. BARNES, ESQ./JASON L. WALKER, ESQ., 4500  
CHERRY CREEK DRIVE SOUTH, SUITE 400, DENVER, CO, 80246 (For Claimant)  
HALL & EVANS, LLC, Attn: MEGAN E. COULTER, ESQ., 1001 SEVENTEENTH ST.,  
SUITE 300, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-915-420-01

IN THE MATTER OF THE CLAIM OF  
TIMOTHY FORTUNE,

Claimant,

v.

**CORRECTED FINAL ORDER**

RESTAURANT TECHNOLOGIES INC.,

Employer,

and

HARTFORD FIRE INSURANCE COMPANY,

Insurer,  
Respondents.

Pursuant to §8-43-302(1)(b), C.R.S., the following Corrected Final Order is issued to correct an error made in the original Order that the Panel issued on January 26, 2015. In our original Order, we stated that the respondents did not file a brief in support of their petition to review in this matter. This is incorrect. The respondents did, in fact, timely file their brief in support.

Prior to issuing our January 26, 2015, order the respondents argued that the ALJ's supplemental order provided a statement regarding the procedure to appeal the supplemental order and referenced §8-43-301(2), C.R.S. instead of §8-43-301(6), C.R.S. Section 8-43-301(6), C.R.S. pertains to supplemental orders and instructs the appealing party to include a brief in support of the petition to review along with the petition to review. The respondents had not done so, however. The respondents therefore requested that we allow them additional time to provide such a brief. We did, and in an order dated January 12, 2015, we instructed the respondents to file the brief in support by January 20, 2015. The respondents submitted a brief mailed on that day to the ALJ. The respondents did not send us a copy. The ALJ graciously passed along a copy of the brief she received on January 23, 2015. However, we did not receive that copy of the brief until January 29, 2015. Because we must issue an order within 60 days of the receipt of the file from the ALJ pursuant to §8-43-301(11), C.R.S., we issued our order on January 26, 2015, without benefit of the respondents' absent brief. Nevertheless, we have reviewed the

respondents' brief in support and are not persuaded to modify our original Order aside from correcting our original Order to reflect that the respondents timely filed their brief in support and asserting those arguments made in their brief in support. Aside from these corrections, this Corrected Final Order remains identical to that Order issued on January 26, 2015.

The respondents seek review of a supplemental order of Administrative Law Judge Jones (ALJ) dated October 9, 2014, that increased the claimant's average weekly wage (AWW) based on the cost of continuing health insurance. We affirm.

On March 15, 2013, the claimant was injured during the course and scope of his employment. The respondents filed a General Admission of Liability, admitting liability for an AWW of \$781.01, and temporary total disability (TTD) benefits from March 16, 2013, and continuing. At the time of his injury, the claimant maintained health insurance coverage for himself and his wife, which included medical, dental, and vision.

The employer eventually terminated the claimant's employment on August 15, 2013. The employer sent the claimant a COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985) event form on August 16, 2013. The claimant's cost of continuing health insurance coverage is as follows: \$1,012.53 (medical plan), \$62.67 (dental plan), \$11.02 (vision plan).<sup>1</sup> The total cost of continuing health insurance coverage for the claimant equaled \$1,086.22, which converts to a weekly cost of \$271.56.

The ALJ subsequently entered her supplemental order increasing the claimant's AWW by \$271.56, the weekly cost of continuing health insurance coverage. The ALJ rejected the respondents' argument that since the employer would have continued to pay a portion of the claimant's medical and dental insurance premiums, the claimant would not have continued coverage at his own cost and, therefore, his AWW should not be increased by such amount under §8-40-201(19), C.R.S. Thus, the ALJ ordered the respondents liable for benefits based on an increased AWW in the amount of \$1,052.57.

In their brief in support, the respondents contend that because they continued to pay their portion of the claimant's group health insurance premium, the ALJ erred in adding the costs to continue that insurance coverage to the AWW. Applied to another case, that argument may have merit. In this matter however, the respondents admit the employer "would have paid" a portion of the premium "if" the claimant had elected to

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<sup>1</sup> In her supplemental order, the ALJ found that the cost of continuing the dental plan coverage was \$62.27. Both parties, however, submitted the cost of continuing dental coverage as instead being \$62.67. Consequently, in our order, we have reflected this amount as the cost of continuing dental coverage.

continue to pay his portion of the premium pursuant to the COBRA notice. However, the respondents then observe that the “claimant did not elect a COBRA plan.” Accordingly, the respondents did not continue to pay any health insurance premiums. As such, the respondents’ argument does not persuade us that the ALJ erred in increasing the claimant’s AWW by the cost of continuing health insurance coverage.

Section 8-40-201(19), C.R.S. provides that the term “wages” shall include the amount of the employee’s cost of continuing the employer’s group health insurance plan. That statute provides in pertinent part as follows:

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan . . . **If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.** . . . (emphasis added)

This provision reflects a legislative compromise intended to value health insurance once the employer stops paying premiums and to add that amount to the claimant’s wages. *Gonzales v. City of Fort Collins*, W.C. No. 4-365-220 (November 20, 2003), *aff’d*, *Gonzales v. Industrial Claim Appeals Office*, (Colo. App. No. 03CA2381, July 22, 2004) (NSOP).

In *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), the Colorado Supreme Court held that §8-40-201(19)(b), C.R.S. does not require claimants who lose their jobs to actually purchase continuing or converted health insurance under COBRA in order for the cost of such health insurance to be included in calculation of their AWW. The Court also overruled *Midboe v. Industrial Claim Appeals Office*, 88 P.3d 643 (Colo. App. 2003), to the extent it was inconsistent with its decision in *Ray*.

Here, there was no evidence introduced during the hearing demonstrating that after the claimant was terminated from his job, that the respondent employer continued to pay the cost of his continuing health insurance coverage. The claimant testified that since his termination, he has not received any insurance benefits. Tr. at 9-10. While the claimant was advised by the respondent employer that if he wanted to continue his health

insurance benefits, he would have to pay a portion of the cost himself, he declined to do so because he could not afford it. Tr. at 16-17. Thus, due to the fact that at the time his health insurance was terminated, the claimant was enrolled in the insurance plan, the cost of continuing such coverage should be included in his AWW. The fact that the claimant did not actually continue his health insurance coverage is inconsequential to whether the AWW should include the amount of the claimant's cost of continuing an employer's group health insurance plan. *Industrial Claim Appeals Office v. Ray, supra; Sears Roebuck & Co. v. Industrial Claim Appeals Office*, 140 P.3d 336 (Colo. App. 2006)(claimant is not required to purchase insurance before an increase in amount of employer's COBRA notice is added to AWW); *cf. Salazar v. Sodexo*, W.C. No. 4-794-844 (Nov. 2, 2010)(claimant's AWW must include cost of continuing employer's group health insurance plan regardless of whether claimant purchased the insurance). Thus, we perceive no grounds for disturbing the ALJ's supplemental order.

**IT IS THEREFORE ORDERED** that the ALJ's supplemental order dated October 9, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



\_\_\_\_\_  
David G. Kroll



\_\_\_\_\_  
Kris Sanko

TIMOTHY FORTUNE  
W. C. No. 4-915-420-01  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/30/2015 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

LEVINE LAW, LLC, Attn: PATRICK A. BARNES, ESQ./JASON L. WALKER, ESQ., 4500  
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SUITE 300, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-819-127-07

IN THE MATTER OF THE CLAIM OF

JANINE JONES-ROBERTS,

Claimant,

v.

**FINAL ORDER**

FRONTIER AIRLINES,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Margot Jones (ALJ) dated August 21, 2014, that determined the claimant failed to overcome the opinion of the Division Independent Medical Examination (DIME) physician on maximum medical improvement (MMI), denied the request to convert the impairment rating to a whole person and denied the claimant's request for permanent total disability benefits. We affirm the order in part and set aside and remand the issue of conversion to a whole person rating for further findings.

This matter went to hearing on the issue of whether the claimant overcame the opinion of the DIME by clear and convincing evidence on the issue of MMI, the correct scheduled impairment rating and conversion of that impairment rating to a whole person rating, the claimant's request for additional temporary disability benefits, ongoing maintenance medical benefits, disfigurement and permanent total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on December 5, 2009, when she slipped on some ice in the parking lot at Denver International Airport. X-rays taken the next day showed no fracture, dislocation or other significant bony or joint space abnormality. A subsequent MRI revealed a sprain of the medial meniscus, chondromalacia and no acute tear. A degenerative cyst was also noted but the MRI was otherwise normal. The physician's examination showed normal tracking, no crepitus or

JANINE JONES-ROBERTS

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effusion, no instability and cruciate ligaments intact. The claimant was released to full duty on December 14, 2009, but was subsequently given seated work restrictions after she returned to work as a flight attendant for one day. Over the next few months the claimant received cortisone injections and physical therapy.

The claimant was next seen by Dr. Anderson-Oeser on June 21, 2010. Dr. Anderson-Oeser prescribed an EMG nerve conduction study of her left lower extremity to rule out nerve injury. The study came back normal. The claimant began to complain that she had episodes where her lower extremity turned “black and blue.” The physicians, however, noted that there were no color or trophic changes apparent during the physical examination. The claimant then began receiving sympathetic blocks. On December 22, 2010, a function imaging was performed to rule out complex regional pain syndrome (CRPS). The clinical examination did not meet the modified criteria for the left lower extremity CRPS. A subsequent triple-phase bone scan also showed no evidence of reflex sympathetic dystrophy (RSD).

The claimant began treating with Dr. Carbaugh on March 4, 2011. The claimant was mostly seen by Dr. Carbaugh’s assistant, Jane Cameron. Cameron reported that the claimant believed she had developed RSD and was totally preoccupied with her somatic complaints. Cameron also reported that the claimant had significant anger issues related to the claimant’s perceived mistreatment by her employer following her injury. Cameron concluded that there were significant psychosocial issues impacting the claimant’s pain presentation.

On March 28, 2011, Dr. Anderson-Oeser placed the claimant at MMI and rated her with 26 percent impairment for the left lower extremity.

The claimant requested a DIME which was performed by Dr. Fall on September 29, 2011. The DIME physician stated that the claimant was not at MMI because of the lack of active physical therapy following surgery or sympathetic blocks. The DIME physician recommended physical therapy two times a week for four to eight weeks for aggressive stretching, functional activities and any modalities necessary to assist such as e-stimulation, ultrasound for the claimant to achieve MMI.

After the DIME, the claimant relocated to Nebraska and was seen by Dr. Diamant on June 18, 2012. Dr. Diamant also recommended an aquatic physical therapy program to be followed up with a land based physical therapy program and he referred the claimant to Dr. Arias, a neuropsychologist, for cognitive behavioral therapy. Although the claimant began physical therapy she was ultimately discharged on August 31, 2012,

due to lack of contact with the therapist.

At the respondents' request, Dr. Cebrian performed an independent medical examination in January, 2013. In Dr. Cebrian's opinion, the claimant was at MMI. Dr. Cebrian also stated that the claimant's objective complaints were out of proportion to objective findings. The respondents forwarded Dr. Cebrian's report to Dr. Arias and Dr. Diamant. In a report dated February 21, 2013, Dr. Arias noted a strong psychological overlay to the claimant's physical complaints and symptom magnification on testing. Dr. Arias placed the claimant at MMI. Dr. Diamant also placed the claimant at MMI in a report dated March 14, 2013. Dr. Diamant also reported that there was no objective medical testing that supported a conclusion of CRPS.

The claimant returned for a follow-up DIME with Dr. Fall. The DIME physician determined that the claimant reached MMI as of August 31, 2012 with an impairment rating of 11 percent for the left lower extremity, and indicated that no maintenance medical would be recommended.

Dr. Cebrian performed another IME and issued a report on November 15, 2013, in which he concluded that the medications the claimant was receiving were not due to her December 5, 2009, injury and should not be provided under the injury because they only reinforced non-physiological presentation and psychological overlay. In another report dated May 15, 2014, Dr. Cebrian addressed the claimant's drug seeking behavior and stated that the continued use of opiate medication is unnecessary and unrelated.

The ALJ determined that the claimant failed to overcome the DIME physician's MMI opinion by clear and convincing evidence. The ALJ noted that the DIME physician prescribed physical therapy which the claimant underwent in Nebraska. The ALJ also noted that the claimant herself contends that she is at MMI prior to Dr. Diamant's determination. The ALJ credited the testimony of Dr. Cebrian, Dr. Diamant and the DIME physician that the claimant has remained at MMI as of August 31, 2012. The ALJ also denied the claimant's request for temporary disability benefits after this time period.

The ALJ also concluded that the claimant failed to meet her burden of proof that her lower extremity rating should be the 26 percent extremity rating given by Dr. Anderson-Oeser as opposed to the 11 percent rating given by Dr. Fall. The ALJ determined that Dr. Fall's 11 percent rating was more accurate than Dr. Anderson-Oeser's 26 percent rating. The ALJ noted that Dr. Anderson-Oeser's rating was given three years earlier and did not account for the physical improvement that occurred during that time period.

The ALJ also concluded that the claimant failed to establish that her rating should be converted to a whole person rating stating that the claimant failed to present credible evidence that her functional impairment was not limited to her lower extremity. ALJ Order at 14 ¶ 13. The ALJ rejected the claimant's assertion that she is functionally impaired beyond the lower extremity. The ALJ further rejected the claimant's contention that she is entitled to a whole person rating due to the diagnosis of CRPS. In this regard the ALJ stated that the claimant, "failed to establish that her rating should be converted to the whole person due to the diagnosis of CRPS as she failed to overcome the DIME determination that she does not have that condition."

Noting that the claimant carries the burden to prove, by a preponderance of the evidence, that she is permanently and totally disabled, the ALJ further concluded that the claimant failed to meet that burden here. The ALJ credited the testimony and reports of Dr. Cebrian and vocational counselor, Sara Nowotny, that the claimant is physically and vocationally capable of earning wages. The ALJ accordingly denied the claimant's request for permanent total disability benefits.

The ALJ also denied the claimant's request for the prolotherapy as maintenance medical benefits and awarded the claimant \$1500 in disfigurement.

On appeal, the claimant contends the ALJ erred in determining that the DIME physician's MMI opinion had not been overcome by clear and convincing evidence in view of the claimant's noted physical improvement between August 2012 and March 2013. We are not persuaded the ALJ erred.

The claimant also contends on appeal that the ALJ erred in denying her request for permanent total disability benefits alleging that the ALJ denied the claimant's request for permanent total disability benefits based on the conclusion that the claimant failed to overcome the DIME's opinion on causation of the CRPS. We, however, do not read the ALJ's order as denying permanent total disability benefits on this basis and perceive no reversible error in this determination.

The claimant alternatively argues that the ALJ erred in her determination that the claimant is not entitled to a whole person rating. Because it appears that the ALJ may have misapplied the law, we remand the matter for further findings on this issue.

I.

The ALJ issued an order in this case dated August 15, 2014, but the certificate of mailing indicates it was mailed on August 14, 2014. The ALJ subsequently issued a "Corrected Order" dated August 21, 2014, which appears to only correct the caption title of the earlier order. The claimant filed a petition to review on September 3, 2014, appealing the ALJ order dated "August 14, 2014." The record does not contain a petition to review that specifically mentions the August 21, 2014, order. Under the circumstances of this case, however, it does not appear that the claimant's failure to specifically state that she is appealing the August 21, 2014, order is fatal to the appeal. *See Michalski v. Industrial Claim Appeal Office*, 757 P.2d 1146 (Colo. App. 1988). We, therefore, consider the claimant's substantive arguments.

II.

We are not persuaded that the ALJ erred in her determination that the claimant failed to overcome the DIME physician's MMI opinion by clear and convincing evidence. In case of a DIME, the opinion of the DIME physician concerning MMI is presumptively correct and can be overcome only by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. The determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. The question whether the claimant has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This is true despite the elevated standard of proof required to overcome a DIME. *Id.* Therefore, the standard of review remains whether the ALJ's findings of fact are supported by substantial evidence in the record. *Id.*; § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Id.* This standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert, supra.*

In our view, there is substantial evidence in the record supporting the ALJ's determination that the DIME physician's opinion on MMI had not been overcome. In the initial DIME opinion, the DIME physician recommended only four to eight weeks of

physical therapy. This would have would have put the claimant at MMI by the end of 2011. Dr. Diamant stated in his March 14, 2013, report that the claimant was at MMI based on the evaluation by Dr. Arias, who agreed with Dr. Cebrian and Dr. Anderson-Oeser. The DIME physician cited the reports of Dr. Diamant, Dr. Anderson-Oeser, Dr. Cebrian, and Dr. Arias detailing the claimant's status in her MMI report. Respondents' Exhibit C at 126.

The claimant's arguments notwithstanding, there is substantial evidence to support the ALJ's finding that the DIME physician was correct in determining that the claimant had reached MMI in August 31, 2012. Consequently, the existence of other evidence which, if credited, might support a contrary determination does not afford us grounds to grant appellate relief. *See Colorado Fuel and Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). We, therefore, perceive no basis to disturb the ALJ's order.

### III.

Nor are we persuaded that the ALJ erred in her determination that the claimant is not permanently and totally disabled. We initially note that contrary to the claimant's assertion, we do not understand the ALJ's order to rely solely on the DIME physician's determination that the claimant does not have CRPS to deny permanent total disability benefits.

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant carries the burden of proof to establish permanent total disability. In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Our review indicates that the ALJ properly applied the law and that there is substantial evidence to justify the findings of the ALJ on the issue of permanent total disability. The ALJ discussed the applicable legal standard and addressed the various permanent total disability factors. The ALJ relied on the vocational evaluation of Ms.

Nowotny based on the sedentary restrictions provided by Dr. Anderson-Oeser and the report of Dr. Cebrian to support the finding that the claimant is capable of earning a wage. The ALJ also specifically noted the claimant's education which included at least some classes toward a Masters in Business Administration. These factors constitute substantial evidence in the record which support the findings and the order of the ALJ. We do not detect any insufficiency in those findings or in the ALJ's conclusion. Section 8-43-301(8), C.R.S.

#### IV.

The ALJ also determined that the claimant failed to prove that she sustained a whole person impairment. In paragraph 14 on page 15 of the ALJ's order, the ALJ states that the claimant "failed to establish that her rating should be converted to the whole person due to the diagnosis of CRPS as she failed to overcome the DIME determination that she does not have that condition." This is an incorrect statement of the law and we therefore, set aside the ALJ's determination on this issue and remand for further findings.

The question of whether the claimant sustained scheduled impairment within the meaning of §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must first determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

In *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) the court, citing *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996), noted that whether a particular component of the claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the AMA Guides. Therefore, the *Egan* court determined that in order to challenge and overcome the causation conclusion by the DIME physician a party must present clear and convincing evidence. However, the *Egan* court further explained that the statutory scheme, requiring causation questions to be challenged through a DIME, applies only to injuries resulting in whole person impairment. The *Egan* court concluded that when there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute. Thus, the determination of the situs of functional impairment is separate and distinct from the claimant's medical impairment rating. Further, the DIME physician's opinion is only

entitled to special weight concerning the extent of whole person impairment if the ALJ finds functional impairment not listed on the schedule of disabilities. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Moreover, functional impairment need not take any particular form. Accordingly, discomfort which interferes with the claimant's ability to use a portion of the body may be considered "impairment." *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), *aff'd*, *Popejoy Construction Co., Inc.*, (Colo. App. No. 96CA1508, February 13, 1997) (not selected for publication) (claimant sustained functional impairment of the whole person where back pain impaired use of arm). Thus, referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person.

At hearing the claimant described various problems that affected her beyond the schedule of disabilities because of her work related injury. To the extent that the ALJ required the claimant to prove by clear and convincing evidence that the DIME's diagnosis of CRPS was incorrect in order to convert the claimant's scheduled rating to a whole person impairment, the ALJ erred. The DIME physician's causation determination is not afforded any special weight in a scheduled disability. *Cordova v. Industrial Claim Appeals Office, supra*. Thus, the ALJ must first determine if the claimant sustained functional impairment on or off the schedule without regard to the increased burden of proof attributable to the DIME physician's opinion. *Egan v. Industrial Claim Appeals Office, supra*. ; *Hernandez v. Photonics*, W.C. No. 4-390-943 (July 8, 2005)

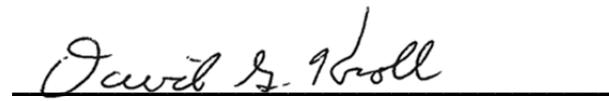
We cannot say the ALJ's error was harmless because we cannot infer that the result would have been the same had the ALJ applied the correct burden of proof. Under these circumstances we must remand the matter to the ALJ for additional findings and the entry of a new order. On remand the ALJ should determine whether the claimant sustained an injury enumerated on the schedule of disabilities based upon the evidence in the record and applying the burden of a preponderance of the evidence.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 21, 2014, insofar as it denies the claimant's request for conversion to a whole person rating, is set aside and remanded for further findings consistent with the views expressed herein. The ALJ's order is otherwise affirmed.

JANINE JONES-ROBERTS  
W. C. No. 4-819-127-07  
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INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
David G. Kroll

JANINE JONES-ROBERTS  
W. C. No. 4-819-127-07  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 2/2/2015 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

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THE FRICKEY LAW FIRM, Attn: JANET FRICKEY, ESQ., 940 WADSWORTH BLVD.,  
4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)

RITSEMA & LYON, P.C., Attn: KYLE THACKER, ESQ., 999 18TH STREET, SUITE 3100,  
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CO 80203

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-735-853-05

IN THE MATTER OF THE CLAIM OF

PATRICK PETSCHL,

Claimant,

v.

ORDER OF REMAND

CITY OF MONTROSE,

Employer,

and

CIRSA,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated August 18, 2014, that granted the respondents' request to offset previously paid permanent partial disability (PPD) benefits against the current obligation to pay temporary total disability (TTD) benefits pursuant to *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). We set aside the ALJ's order and remand the matter for further findings.

The ALJ's findings of fact are summarized as follows. The claimant sustained an admitted injury to his right foot on September 11, 2007. The claimant sustained multiple fractures that eventually resulted in surgical amputation. The respondents filed an amended final admission on January 12, 2012, admitting for PPD based on a 21 percent whole person rating. The respondents eventually paid \$57,703.01 in PPD benefits.

In an order dated October 17, 2013, an ALJ granted the claimant's request to reopen his claim and ordered the respondents to pay temporary partial disability (TPD) benefits beginning August 29, 2012 through March 21, 2013 and to pay TTD benefits from March 22, 2013 and continuing until terminated by law or statute.

The respondents filed an amended general admission of liability showing that the claimant was previously paid PPD in the amount of \$57,703.01 and admitting for TPD and TTD benefits as ordered. The ALJ found that the claimant was eventually placed back at MMI by his treating physician and provided with a new impairment rating. The respondents filed a request for a Division Independent Medical Examination (DIME) and they continued to pay temporary disability benefits. The respondents continued to pay TTD benefits through the date of the hearing. As of the date of the hearing, the respondents had paid combined indemnity benefits including PPD, TTD and TPD in the amount of \$93,925.30.

At hearing the respondents requested that they be allowed to terminate or suspend TTD benefits pursuant to *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*. The claimant argued that the ALJ did not have jurisdiction to address the issue because of the pending DIME. The ALJ determined that the facts of this case were analogous to the facts in *Donald B. Murphy Contractors* and, therefore, that case was controlling. The ALJ noted that in *Donald B. Murphy Contractors*, the court of appeals held that when further benefits are sought after the 25 percent or less limit of §8-42-107.5, C.R.S., has been applied, the respondents are entitled to offset any PPD benefits against TTD owed. The ALJ, therefore, concluded that because the claimant here had received a prior impairment rating of less than 25 percent and the respondents have paid indemnity benefits in excess of the \$75,000 cap, *Donald B. Murphy Contractors* applies and the respondents were entitled to offset the amount of previously paid PPD against the current obligation to pay TTD.

On appeal the claimant renews his argument that the ALJ did not have jurisdiction to address the issue of MMI and impairment because a DIME was pending. The claimant also contends that the facts of this case can be distinguished from the facts in *Donald B. Murphy Contractors* and, therefore, *Donald B. Murphy Contractors* is not applicable. The claimant also alternatively contends that *Donald B. Murphy Contractors* should be overturned. We agree with the claimant that this case presents a unique set of facts that distinguish it from *Donald B. Murphy Contractors, Inc.*, and conclude that the matter must be remanded for further factual findings to determine the proper application of the statutory cap in §8-42-107.5, C.R.S.

Section 8-42-107.5, C.R.S., provides, in pertinent part:

No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments.

In *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, the claimant suffered an admitted work-related injury in 1991 for which he received TTD benefits. The claimant reached MMI in 1993, and the respondents filed a final admission. The respondents paid PPD benefits to reach the applicable \$60,000 limit at that time set forth in §8-42-107.5, C.R.S. for medical impairment ratings of twenty-five percent or less. The claimant's condition then worsened and his authorized treating physician determined that another surgery was appropriate. The claimant sought TTD benefits in addition to medical benefits. The respondents objected, arguing, in part, that they already had paid the limit of available temporary and permanent benefits. While the court of appeals recognized that the impairment rating could not be determined while the claimant still was undergoing medical treatment, it nevertheless concluded that no further payment was required. As recognized by the ALJ, the court held that "when further benefits are sought after the twenty-five percent or less limit of §8-42-107.5, C.R.S. has been applied, the [respondents] are entitled to offset any permanent partial benefits paid against [TTD] benefits." *Id.* at 614. The court explained that allowing an offset requires the claimant to allocate the PPD benefits already paid toward his current inability to earn wages until such time as permanent medical impairment can be calculated. Once MMI is established, then the claimant may obtain additional benefits under the limits of §8-42-107.5, C.R.S.

The panel has repeatedly recognized that the court's holding in *Donald B. Murphy Contractors*, which awarded a credit to the respondents, was not based on speculation of the claimant's ultimate impairment and thus, is not dependent upon whether there is evidence to suggest that the claimant's impairment is likely to increase

or decrease after reopening. Rather, the court in *Donald B. Murphy Contractors* merely held that when further benefits are sought after the twenty-five percent or less limit of §8-42-107.5, C.R.S. has been applied, the respondents are entitled to offset any PPD benefits paid against TTD benefits. *Rogan v. Industrial Claim Appeals Office*, 91 P.3d 414 (Colo. App. 2003); *See also Reynal v. Home Depot, Inc.*, W.C. No. 4-585-674 (January 17, 2012); *Addington v. United Airlines*, W.C. No. 4-732-201 (November 9, 2010) (while it was possible that claimant might be declared permanently and totally disabled, the panel was not persuaded that *Donald B. Murphy Contractors* could be distinguished on that ground; probability of whether a claimant's ultimate impairment will exceed twenty-five percent does not appear to be determinative in any role in court's reasons for fashioning the credit given to respondents).

However, the present case is procedurally different from *Donald B. Murphy Contractors*. The parties here agree the claimant has most recently been placed at MMI by his current treating physician and that physician has provided an impairment rating. The respondents have requested a DIME review of the rating. That DIME examination occurred one week prior to the July 22, 2014, hearing and no DIME report has been submitted. In *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996), and in *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002), it was held that absent a DIME review, an ALJ may not entertain a dispute over a treating doctor's finding of MMI. The ALJ must accept that there is a finding of MMI. Once the DIME process is complete the validity of the MMI determination may be challenged at hearing.

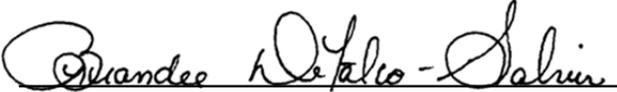
We have recently held the same standard applies in regard to a treating physician's determination of the impairment rating for purposes of applying the statutory cap in §8-42-107.5, C.R.S. *Heckler v. Wern Air, Inc.* W.C. No. 4-877-223 (December 16, 2014). Until the DIME process is complete, an ALJ must apply the treating physician's impairment rating for purposes of the combined benefits cap. Accordingly, in this matter, the ALJ must note the impairment rating provided by the claimant's most recent treating physician given at the point of the second, most recent, finding of MMI. The parties are not in agreement as to whether the most recent impairment rating is 15 percent, which should be combined with the previous 21 percent impairment rating, or whether the 15 percent is the current rating for all of the claimant's disability stemming from his September 11, 2007, work injury. This is an ambiguity that must be resolved by the ALJ

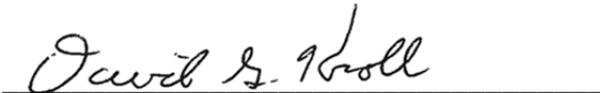
before he can determine that the first combined benefits cap may be applied as of the date of the July 22, 2014, hearing. However, the ALJ did not render an interpretation of the treating physician's rating, as to whether it is above 25 percent, so as to decide the significance of the benefits cap. We, therefore, must remand the matter to the ALJ for such a determination. We note that this remand is not asking the ALJ to determine the validity or the correctness of the authorized treating physician's impairment rating, which in view of the pending DIME, he does not have the jurisdiction to do. Section 8-42-107 (8)(c), C.R.S. The ALJ does, however, have the authority to determine whether the authorized treating physician made a determination of permanent impairment and the amount of impairment assigned. *See Town of Ignacio v. Industrial Claim Appeals Office, supra.; Calvillo v. Intermountain Wood*, W.C. No. 4-462-497 (September 24, 2002)

On remand the ALJ may wish to convene another hearing to allow the parties to present the DIME opinion which would be the controlling rating if one was issued. Section 8-42-107 (8)(c), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 18, 2014, is set aside and remanded for further findings.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

  
\_\_\_\_\_  
David G. Kroll

PATRICK PETSCHL  
W. C. No. 4-735-853-05  
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CERTIFICATE OF MAILING

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80203

14CA1257 Gonzales v ICAO 02-12-2015

COLORADO COURT OF APPEALS

DATE FILED: February 12, 2015  
CASE NUMBER: 2014CA1257

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Court of Appeals No. 14CA1257  
Industrial Claim Appeals Office of the State of Colorado  
WC Nos. 4-851-350 & 4-865-972

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Carolina G. Gonzales,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; University of Colorado  
Health; and Travelers Indemnity Company,

Respondents.

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ORDER AFFIRMED

Division IV  
Opinion by JUDGE HAWTHORNE  
Bernard and Miller, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced February 12, 2015

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Ingold Law, LLC, Christopher L. Ingold, Walnut, California, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Andrew R. Bantham, Douglas L. Stratton, Fort Collins,  
Colorado, for Respondents University of Colorado Health and Travelers  
Indemnity Company

In this workers' compensation action, claimant, Carolina G. Gonzales, seeks review of a final order of the Industrial Claim Appeal Office (Panel) affirming the order of an administrative law judge (ALJ) denying and dismissing her claims with prejudice. We affirm.

### I. Procedural History

Claimant filed two claims for occupational diseases in 2009 and 2010 asserting that she suffered repetitive motion and/or strain injuries to her wrists while working for employer, University of Colorado Health. Employer contested both claims. Claimant's counsel entered his appearance in both claims in September 2011.

In April 2013, after no further action had been taken to prosecute the claims, employer filed petitions to close them. In response, claimant filed an application for hearing. An ALJ issued an order to show cause why the claims should not be closed because of inactivity. The order was eventually discharged after the parties "engaged in activity in furtherance of prosecution."

In May and June 2013, employer served claimant's counsel with requests for releases for employment and medical records, interrogatories, and requests for production of documents. Because

claimant had not responded to the discovery requests and had not signed the releases, employer filed a motion to compel on October 6, 2013. Claimant did not file a written response to the motion. A prehearing ALJ (PALJ) held a prehearing conference at which counsel for both parties appeared by telephone. The PALJ granted the motion and ordered claimant to “provide responses to [employer’s] interrogatories and request for production of documents . . . and also [to] provide authorizations for release of records . . . within [ten] days from the date of the signed order.” The order was dated October 24, 2013.

Two months later, having received no responses or releases, employer filed a motion to dismiss the claims with prejudice. Claimant filed a response to the motion, arguing that the “discovery sought by [employer] ha[d] been provided,” that “litigation-ending” and “draconian” sanctions would not be appropriate and are “never favored,” that any gross negligence committed by her counsel should not be imputed to her, and that a hearing should be held to determine whether her failure to respond to the discovery was willful. She also filed a “motion for such additional time as may be necessary to cure any prejudice asserted by [employer] regarding

discovery.” There, she asserted that “[i]f any cause resulted in the state of affairs now complained of by [employer], that would be the health of [her counsel].” She provided no details of her counsel’s alleged ill health, but stated that her counsel was

prepared to testify and provide such detail and evidence as deemed necessary by the Court to establish how the health of [counsel] has caused the failures complained of by [employer]. The bad health of [counsel] was particularly bad through June and July of 2013, and although drastic steps were taken to (sic) at the time to mitigate these health issues, significant health problems for [c]laimant’s counsel linger to date. There has been a slow and steady improvement since last July, but (obviously) these concerns posed greater problems than were believed at the time up through the fall.

Claimant did not explain why her counsel’s alleged ill health, which she described as being “particularly bad in June and July 2013,” resulted in a six-month delay in responding to discovery requests. Nor did she explain why she did not address her counsel’s illness at the October 2013 prehearing conference concerning employer’s motion to compel.

The ALJ found that claimant willfully failed to comply with the PALJ’s order compelling her to sign releases and answer discovery.

Noting that dismissal was a permissible sanction under C.R.C.P. 37(b)(2)(C), he concluded that dismissal was the “appropriate remedy” because “claimant ha[d] ignored the procedural rules requiring the return of signed releases” and had “failed to answer interrogatories and requests for production of documents.”

Further, the ALJ found that “claimant’s failure to comply with the October 24, 2013 order compelling signed releases and discovery responses [was] willful.” He therefore denied and dismissed claimant’s claims with prejudice without conducting a hearing.

Finding no abuse of discretion or due process violation in the ALJ’s decision, the Panel affirmed.

## II. Analysis

Claimant contends that the ALJ erred by dismissing her claims without conducting a hearing. She argues that a hearing is required under the Workers’ Compensation Act (Act) and that addressing “substantive issues” and disposing of the action “by motion and briefing was not appropriate.” She further contends that by failing to hold a hearing the ALJ violated her rights to both substantive and procedural due process. She also argues that even if the ALJ had the authority to dismiss the action without

conducting a hearing, she should not have been sanctioned for her counsel's gross negligence or illness. She reasons that because she had no knowledge "of any alleged failure to comply with discovery obligations," her actions could not have been willful and did not warrant the "imposition of draconian sanctions." We are not persuaded by these arguments to set aside the Panel's or the ALJ's orders.

#### A. Sanction May be Ordered Without a Hearing

Section 8-43-207(1), C.R.S. 2014, provides that "hearings shall be held to determine any controversy concerning any issue arising under" the Act. This section also grants ALJs other broad powers, including the power to make evidentiary rulings, rule on discovery matters, dispose of procedural requests upon written motion, issue orders, "[d]ismiss all issues" in a case "for failure to prosecute," and "[i]mpose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to" the Act. § 8-43-207(1)(c), (e), (g), (k), (n), (p). In addition, the applicable rules of procedure state that if any party fails to comply with an order of an

ALJ, the ALJ “may impose sanctions upon such party pursuant to statute and rule.” Dep’t of Labor & Emp’t Rule 9-1(E), 7 Code Colo. Regs. 1101-3. And, the sanction of dismissal for failure to comply with an order to provide discovery is expressly anticipated by C.R.C.P. 37(d). § 8-43-207(1)(p); *see also* C.R.C.P. 37(b)(2)(C).

Despite this express statutory authority, claimant contends that the ALJ violated the Act by dismissing her claim without a hearing. We disagree and conclude for the reasons discussed below that dismissal of a claim is expressly permitted without a hearing by the applicable rules of procedure and the Act.

Claimant’s reading of section 8-43-207(1) ignores the subsections discussed above. But, we cannot do so. We must read all the subsections harmoniously to give full effect to all of the statute’s provisions. *See Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 327 (Colo. 2004) (“In construing provisions of the Act, we read the statute as a whole and, if possible, construe its terms harmoniously, reconciling conflicts where necessary.”).

The provision upon which claimant relies applies generally to all litigated workers’ compensation matters, but the subsections described above grant specific powers to ALJs. Where a general

provision irreconcilably conflicts with a specific or special provision, “the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.” § 2-4-205, C.R.S. 2014; *see also People v. Cooper*, 27 P.3d 348, 355 (Colo. 2001) (The legislative directive by which specific statutory provisions trump general ones “is consistent with common law principles of statutory construction.”); *Martin v. People*, 27 P.3d 846, 860 (Colo. 2001) (“If a conflict between two statutory provisions is irreconcilable, a special or local provision prevails as an exception to a general provision, unless the general provision is the later adoption and the legislative intent is that the general provision prevail. . . . This interpretation of these statutes acknowledges the general rule of statutory construction that a specific provision acts as an exception to a general provision.”). Thus, because the subsections granting ALJs the authority to, among other things, dispose of procedural requests upon motion, dismiss all issues for failure to prosecute, and impose sanctions “for willful failure to comply with any order,” are specific, *see* sections 8-43-207(g), (n), (p), they operate as exceptions to the general

provision mandating that hearings be held. *See* § 2-4-205; *Cooper*, 27 P.3d at 355; *Martin*, 27 P.3d at 860.

Moreover, in our view, the ALJ's ruling dismissing the claims falls squarely within the specific grants of power given to ALJs by sections 8-43-207(g) and (p). Claimant's position rests on the assumption that the ALJ's order of dismissal substantively addressed her claim. It did not. Rather, the order dealt with a procedural issue raised by employer. Indeed, in its motion seeking dismissal, employer requested that the "sanction of dismissal" be entered against claimant. It did not request that dismissal be entered after substantive consideration of the claims' merits.

Sanctions are authorized by the Colorado Rules of Civil Procedure, namely, C.R.C.P. 37(d). The C.R.C.P. is designed to facilitate smooth pretrial and trial proceedings by enumerating the procedures each party must follow, to ensure the sound and consistent administration of judicial proceedings, and to eliminate surprise and unpredictability at trial. *See Cameron v. Dist. Ct.*, 193 Colo. 286, 292, 565 P.2d 925, 930 n. 5 (1977) (noting that "the most fundamental policies of our rules of civil procedure [is the] expedient resolution of controversies based upon knowledge of the

whole truth.”). More broadly, the rules of civil procedure “are designed as a procedural system to provide a just and speedy determination of civil litigation.” *Trinity Petroleum, Inc. v. Scott Oil Co.*, 735 N.W.2d 1, 11 (Wis. 2007). And, in particular, the goals of procedural rules applicable to discovery “included ‘the elimination of surprise at trial, the discovery of relevant evidence, the simplification of the issues, and the promotion of expeditious settlement of cases.’” *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 460 (Colo. 2011) (quoting *Silva v. Basin W., Inc.*, 47 P.3d 1184, 1188 (Colo. 2002)). The supreme court has “distinguished between rules governing procedural issues and rules governing substantive issues, noting that ‘rules adopted to permit the courts to function and function efficiently are procedural whereas matters of public policy are substantive and are therefore appropriate subjects for legislation.’” *Borer v. Lewis*, 91 P.3d 375, 380 (Colo. 2004) (quoting *People v. Wiedemer*, 852 P.2d 424, 436 (Colo. 1993)).

With these goals, purposes, and distinctions in mind, we conclude that the ALJ’s order dismissing claimant’s workers’ compensation action was a procedural action sanctioning claimant for failing to comply with an order. The ALJ’s action consequently

falls squarely within the authority expressly granted him by section 8-43-207(g) — to dispose of procedural requests upon written motion — and by section 8-43-207(p) — to impose sanctions as provided by the C.R.C.P. against a party for willful violation of an order.

Accordingly, we reject claimant’s assertion that the ALJ erred in dismissing her claims.

#### B. No Due Process Violation

Claimant next asserts that dismissing her claim without a hearing violated her rights to substantive and procedural due process. Claimant reasons that the Act does not expressly authorize “dispositive determinations from motions practice.” She contends that, absent a hearing, the ALJ could not fulfill the statutory mandate to enter factual findings to resolve the dispute between the parties, and that any order disposing of the case without factual findings violates that mandate and due process. We disagree that any statutory or due process violation occurred.

First, as we note above, the ALJ *was acting* within his express statutory authority. By incorporating the discovery sanctions and procedures anticipated by C.R.C.P. 37, the Act, by extension,

expressly authorizes an ALJ to dismiss an action for discovery violations. The ALJ was thus authorized to impose the very sanction he entered against claimant. See § 8-43-207(1)(p).

Second, contrary to claimant's assertion, due process does not guarantee that factual findings will be entered in every case and all evidence will be considered in every hearing. Rather, "[t]he fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office*, 250 P.3d 755, 758 (Colo. App. 2010) (quoting *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990)). Although it is true that workers' compensation benefits are a constitutionally protected property interest, those property rights are protected by the due process guarantees of notice and an opportunity to be heard. See *Whiteside v. Smith*, 67 P.3d 1240, 1247 (Colo. 2003). Because it is a flexible standard, no specific procedure is required "as long as the basic opportunity for a hearing and judicial review is present." *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 899 (Colo. App. 2009); see also *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1195 (Colo. App. 2002); *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995).

It is undisputed that claimant received employer's discovery requests as well as employer's motion to compel production. It is also undisputed that claimant's counsel appeared at the prehearing conference commenced at employer's behest to address the motion to compel. Claimant also received and responded to employer's motion to dismiss. She therefore had notice of employer's motions and an opportunity to be heard by written response and at a prehearing conference.

Over a period of eight months, claimant had the opportunity to provide sufficient affidavits or other evidence concerning her counsel's alleged ill health to establish a need for a hearing to resolve any disputed factual issues. She did not do so. Claimant ultimately filed a motion for additional time to cure any prejudice to employer, in which she merely provided unverified, conclusory statements about her counsel's alleged ill health. So, the record indicates there was no factual dispute to resolve and, therefore, the ALJ did not abuse his discretion in entering the dismissal sanction without a hearing. Consequently, claimant was not deprived of her due process rights before her claim was dismissed. *See Franz*, 250 P.3d at 758 (certain due process requirements apply "[i]n an

administrative hearing turning on questions of fact” (quoting *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990)).

Claimant’s citations to *Big Top, Inc. v. Hoffman*, 156 Colo. 362, 399 P.2d 249 (1965), and *Frank v. Industrial Commission*, 96 Colo. 364, 43 P.2d 158 (1935), do not persuade us otherwise. Her reliance on *Big Top* for the principle that factual findings must be entered in each case is misplaced. In *Big Top*, an administrative officer entered factual findings and a ruling without personally conducting the administrative hearing or first reviewing the transcript of the proceeding. The supreme court held that it “is basic that one who decides without hearing an administrative matter should at least read and consider the evidence not taken in his presence.” *Big Top*, 156 Colo. at 365, 399 P.2d at 251.

In contrast, the ALJ here reviewed employer’s motions, the accompanying attachments, and claimant’s responses before issuing his ruling. He made factual findings determining that claimant failed to comply with the PALJ’s order and disregarded discovery requests. It is true he did not decide the matter on its merits, but he acted within his statutory authority when he

sanctioned claimant for violating the PALJ's order and discovery obligations. Unlike the administrative officer in *Big Top*, the ALJ here personally conducted the motions proceedings.

As for *Frank*, its holding does not advance claimant's position. *Frank* did not address due process, but instead held generally that the industrial commission must restrict its findings to the evidence presented before it. It did not suggest that a hearing is always required nor that sanctions are inappropriate in the absence of a hearing. See *Frank*, 96 Colo. at 373-74, 43 P.2d at 162.

We therefore conclude that the absence of a hearing in this case did not violate claimant's right to substantive or procedural due process. See *Franz*, 250 P.3d at 758 (no due process violation where order changing claimant's medical provider was issued in absence of an evidentiary hearing); *Rook v. Indus. Claim Appeals Office*, 111 P.3d 549, 553 (Colo. App. 2005).

### C. Gross Negligence of Counsel

Claimant challenges the propriety of the sanction entered against her. She contends that no discovery sanction should have been entered against her because she was never "served directly" with discovery requests, motions, or orders. Rather, she attributes

her failure to respond to her attorney's illness and his resulting gross negligence, which, she maintains, should not be imputed to her. Alternatively, she argues that the sanction imposed was too "draconian" and that a less severe sanction would have sufficed. We are not persuaded by these arguments to set aside the ALJ's or Panel's orders.

An ALJ has discretion to enter discovery sanctions for a party's "willful failure to comply with any order of" an ALJ. § 8-43-207(p). A party acts willfully in failing to comply with a discovery order "if [the] party's disobedience of discovery orders is intentional or deliberate or if the party's conduct manifests either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." *Reed v. Indus. Claim Appeals Office*, 13 P.3d 810, 813 (Colo. App. 2000). Under the applicable rule of procedure, a party's failure to comply with an order compelling discovery "shall be presumed willful." Dep't of Labor & Emp't Rule 9-1(G), 7 Code Colo. Regs. 1101-3.

We will not set aside a sanction imposed by an ALJ absent a showing of abuse of discretion. *See Sheid v. Hewlett Packard*, 826

P.2d 396, 399 (Colo. App. 1991). An ALJ abuses his or her discretion if the sanction imposed “exceeds the bounds of reason.” *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993) (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985)). In determining whether a sanction constituted an abuse of discretion, “courts may specifically consider whether an award is supported by the applicable law.” *Id.*

The record makes clear that years elapsed between claimant’s filing of her claim and any action in the litigation. Even after employer filed its motion to close the case for failure to prosecute, claimant held employer’s discovery requests for six months without any response. And, when employer moved to compel production, she ignored the PALJ’s order compelling her to respond.

She argues that her actions should not be considered “willful” because she was never “served directly” with discovery requests, motions, or orders. But, the applicable rule of procedure specifies that when a party is represented by counsel, “service shall be made on the attorney.” Dep’t of Pers. and Admin. Rule 6(A), 1 Code Colo. Regs. 104-3. So, serving the discovery requests and motions on claimant’s counsel was not only proper, it was mandatory. *See*

*Pearson v. Pearson*, 141 Colo. 336, 341, 347 P.2d 779, 783 (1959).

Claimant also contends that the regulatory presumption of willfulness found in Rule 9-1(G) should not apply because “irrebuttable presumptions are disfavored.” *See People in Interest of S.P.B.*, 651 P.2d 1213, 1217 (Colo. 1982). However, we are not convinced by this argument, either, because nothing in the rule suggests that the regulatory presumption of willfulness is irrebuttable. *See* Rule 9-1(G). Rather, the ALJ specifically found that the claimant’s disregarding the order compelling discovery was willful, from which we can infer that the ALJ concluded claimant failed to overcome the regulatory presumption.

Claimant points out that the discovery sought was produced, “albeit . . . late,” to employer after employer filed its motion to dismiss. This assertion appears to be accurate, as employer disclosed at oral argument that claimant indeed provided the requested discovery on January 3, 2014, nearly two weeks after employer filed its motion for sanctions dismissing the case. This history does not change the outcome, however, because regardless of her eventual disclosure, it is undisputed that claimant did *not* comply with the order compelling her to provide the requested

discovery within ten days. Consequently, we perceive no error in the ALJ's determination that claimant failed to comply with the order.

Finally, we are not persuaded by claimant's contention that she should be insulated from dismissal because fault for her failure to respond to discovery requests lies with her grossly negligent counsel. She argues that her counsel's illness caused him to miss deadlines negligently, but that his gross negligence should not be imputed to her.

In general, "[t]he ordinary negligence of an attorney may be imputed to his client, . . . and generally such negligence does not constitute 'excusable neglect' which would justify relief from a judgment. However, the *gross* negligence of counsel will not be imputed to the client and may be considered excusable neglect entitling the client to relief from judgment." *Valley Bank of Frederick v. Rowe*, 851 P.2d 267, 269 (Colo. App. 1993) (citations omitted). Gross negligence is "conduct that is more than negligent and less than intentional." *Pfantz v. Kmart Corp.*, 85 P.3d 564, 568 (Colo. App. 2003). "Excusable neglect involves a situation where the failure to act results from circumstances which would cause a

reasonably careful person to neglect a duty.” *Farmers Ins. Grp. v. Dist. Ct.*, 181 Colo. 85, 89, 507 P.2d 865, 867 (1973). Excusable neglect usually involves “unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility. Failure to act due to carelessness and negligence is not excusable neglect.” *Id.*

Claimant correctly notes that her counsel’s illness could support a showing of excusable neglect. But, the totality of the circumstances persuades us otherwise. First, we disagree that claimant’s counsel “made clear” that he was unwell. The record indicates that claimant never mentioned her counsel’s illness until she responded to the motion to dismiss and contemporaneously filed a motion for additional time to cure any prejudice to employer. His illness was not raised in response to the motion to compel. When the illness was finally disclosed in response to the motion to dismiss, no details were provided, nor any affidavit attached swearing to the truth of the allegations of illness. The response was bereft of guidance on the degree or duration of counsel’s incapacity.

Assuming that claimant's counsel was ill, her brief and response to the motion to dismiss only state that her counsel was "particularly bad" in June and July 2013. She sheds no light on the cause of the other four months' delay.

Under the circumstances, we perceive no abuse of discretion in the ALJ's determining that claimant's discovery violations were so egregious that dismissal was warranted.

### III. Attorney Fees

Finally, in its answer brief, employer requests attorney fees for defending against claimant's appeal pursuant to C.A.R. 38 and section 13-17-102(4), C.R.S. 2014. Employer argues that claimant's appeal, particularly her "bald assertions of attorney negligence," are substantially groundless and fail to articulate a legal basis for setting aside the Panel's order.

We note that, even when a contention is rejected, an appeal is not automatically frivolous and sanctions may be denied. *See Price v. Conoco, Inc.*, 748 P.2d 349, 351 (Colo. App. 1987). Because we cannot conclude that claimant's contentions presented "no rational argument based on the evidence or the law to support" them, or that the claims were "not supported by any credible evidence," we

decline to award any attorney fees here. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 151 (Colo. App. 2003); *see also Adams v. Land Servs., Inc.*, 194 P.3d 429, 434 (Colo. App. 2008) (rejecting request for attorney fees because claims were not frivolous).

#### IV. Conclusion

For the foregoing reasons, we conclude that the Panel did not err when it affirmed the ALJ's order dismissing claimant's claims with prejudice.

The order is affirmed.

JUDGE BERNARD and JUDGE MILLER concur.

14CA1245 Milazzo v ICAO 02-12-2015

COLORADO COURT OF APPEALS

DATE FILED: February 12, 2015  
CASE NUMBER: 2014CA1245

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Court of Appeals No. 14CA1245  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-852-795

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Karyn Milazzo, a/k/a Karen Trujillo,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Total Long Term Care,  
Inc.; and Pinnacol Assurance,

Respondents.

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ORDER SET ASIDE AND CASE  
REMANDED WITH DIRECTIONS

Division III  
Opinion by JUDGE DAILEY  
Webb and Richman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced February 12, 2015

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

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Total Long Term Care,  
Inc., and Pinnacol Assurance

In this workers' compensation action, claimant, Karyn Milazzo, a/k/a Karen Trujillo, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the decision of an administrative law judge (ALJ) that found employer, Total Long Term Care, Inc., was entitled to reimbursement of an overpayment from claimant, who was injured in an automobile accident while on the job. The parties had settled the claimant's underlying tort claim, but employer argued that the overpayment was omitted from those settlement negotiations. The ALJ and the Panel agreed, and ordered a refund of the overpayment. Claimant contends that the overpayment amount should have been included in the settled subrogated lien. We agree and therefore set aside the Panel's order.

### *I. Background*

In 2010, claimant sustained admitted, compensable injuries to her neck, shoulders, and elbows when she was rear-ended in an automobile accident while she was en route from a client's home to employer's office. In addition to medical benefits, employer's insurer, Pinnacol Assurance, paid claimant temporary total disability (TTD) benefits for the period during which she could not

work as a result of her compensable injuries. Claimant started working for a different employer sometime in 2011 or 2012 but admits that she continued receiving TTD benefits. According to employer, the benefits continued because claimant failed to provide it with a completed return to work questionnaire. Because employer could not fully document claimant's return to work, the division of workers' compensation would not release it from paying claimant TTD benefits. Employer therefore later claimed an overpayment of \$8451.08 on its final admission of liability (FAL).

In addition to receiving workers' compensation benefits, claimant also pursued an action against the driver who rear-ended her. The other driver's insurer offered to settle with claimant for the policy limit of \$50,000.

Because it had a statutory subrogation right to compensation it had paid to claimant, Pinnacol participated in the settlement negotiations with the other driver's insurer and the attorney representing claimant in the automobile action. See § 8-41-203(1), C.R.S. 2014. At the time of the settlement negotiations, Pinnacol's lien totaled \$44,739.39, which represented the total amount of

worker's compensation benefits Pinnacol had paid to claimant to that date. The three parties agreed to divide the settlement proceeds as follows: \$18,000 payable to Pinnacol; \$13,000 payable to claimant; and, the remainder (\$19,000) payable to claimant's automobile accident attorney. Claimant's workers' compensation counsel apparently was not involved in the negotiations.

The letter memorializing the parties' agreement makes no mention of the overpayment. The letter states: "This letter is to confirm that Pinnacol Assurance has accepted your offer of \$18,000.00 for full and final settlement of its third party subrogation lien in the above-matter." The letter went on to invite claimant to "contact [Pinnacol's subrogation counsel] immediately in the event this correspondence does not accurately reflect the terms of our agreement or should you have additional questions/concerns."

Several months after the distribution of the settlement funds, Pinnacol claimed reimbursement of the overpayment. Pinnacol maintained that because the overpayment was not addressed in the settlement negotiations, it was excluded from the settlement

proceeds. In proceedings before the ALJ, Pinnacol's subrogation attorney testified that had Pinnacol intended to include the overpayment in the settlement, it would have specifically so stated. Conversely, claimant testified that she understood that the settlement included the overpayment.

The ALJ was persuaded that the overpayment "was not considered or negotiated as a part of the resolution between the claimant and the respondent-insurer over division of the negligent third-party's settlement proceeds." He therefore found that Pinnacol was entitled to recoup the overpayment of \$8451.08 from claimant's future benefits. The Panel affirmed, noting that whether an insurer intended to waive its right to recoup an overpayment is a question of fact for the ALJ to determine.

## *II. Analysis*

On appeal, claimant contends that the ALJ and Panel erred in finding that the overpayment was excluded from the settlement proceeds. We agree.

"The interpretation of a settlement agreement, like any contract, is a question of law that we review de novo." *Ringquist v.*

*Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007).

“When a contract is unambiguous, the court must give effect to the contract as written, unless the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity.” *Id.*

When a document is ambiguous, a court may consider parol evidence to explain or clarify the meaning of a document or the effect of its provisions. *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005). Courts do not, however, “consider parol evidence unless the contract is so ambiguous that the intent of the parties is unclear.” *Janicek v. Obsideo, LLC*, 271 P.3d 1133, 1138 (Colo. App. 2011).

“Whether a contract is ambiguous . . . presents a question of law that we review de novo.” *Gagne v. Gagne*, 2014 COA 127, ¶ 50.

Here, the letter memorializing the parties’ settlement agreement specified that it was for “full and final settlement” of Pinnacol’s “subrogation lien.” A “full and final settlement” necessarily entails a settlement of all claims and debts associated with a claim. It constitutes resolution of the entire dispute between

the parties. *See, e.g., River Bend Capital, LLC v. Lloyd's of London*, 63 So. 3d 1092, 1096 (La. Ct. App. 2011) (further discovery and hearing unnecessary to ascertain meaning of “in full and final settlement” because “language is clear and unambiguous”).

Because the settlement letter at issue here incorporated the phrase “full and final settlement of [Pinnacol’s] third party subrogation lien,” the settlement unambiguously encompassed all portions of the lien, including the overpayment.

Indeed, the circumstances surrounding the parties’ agreement confirm that the settlement included the overpayment. *See New Design Constr. Co., Inc. v. Hamon Contractors, Inc.*, 215 P.3d 1172, 1179-80 (Colo. App. 2008) (“We apply the plain meaning of the words used, subject to interpretation in light of the context and circumstances of the transaction.”). As claimant points out, Pinnacol’s subrogation counsel acknowledged that the total lien amount paid by Pinnacol to claimant included the overpayment. In particular, she conceded that the lien amount of \$44,739.39 represented all payments Pinnacol made to claimant, including the \$8451.08 overpayment. The settlement of the lien thus necessarily,

and “mathematically,” incorporated the overpayment.

Because, our view, the settlement unambiguously included the overpayment, the ALJ erred in considering and in relying on parol evidence to the contrary.

Accordingly, we conclude that the ALJ erred in finding that the settlement of the lien omitted the overpayment. Because the “full and final settlement” necessarily included all claims, including the overpayment, the ALJ erred in ordering claimant to repay the overpayment. The Panel consequently erred when it affirmed the ALJ’s order.

The order is set aside and the case remanded with directions to enter an order in accordance with the views expressed herein.

JUDGE WEBB and JUDGE RICHMAN concur.