COLORADO
Department of
Labor and Employment

**Division of Workers' Compensation**
633 17th Street, Suite 400
Denver, CO 80202-3660
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# February Case Law Update

**Presented by Judge Craig Eley and Judge David Gallivan**

**This update covers ICAO and COA decisions issued between January 13, 2018 to February 12, 2018**

## Colorado Court of Appeals



## Industrial Claims Appeals Office Decisions



## Formal Ethics Opinion



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COLORADO COURT OF APPEALS

DATE FILED: February 1, 2018
CASE NUMBER: 2017CA568

Court of Appeals No. 17CA0568
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-978-510

Sinke Mulgeta,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; ISS Facility Services, Inc.; and XL Specialty Insurance Company,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE DUNN
Román and Welling, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced February 1, 2018

Alston Law Firm LLC, Nelson Alston, Aurora, Colorado, for Petitioner

No Appearance for Industrial Claim Appeals Office

Pollart Miller LLC, Robert Johnson, Greenwood Village, Colorado, for Respondents ISS Facility Services, Inc., and XL Specialty Insurance Company

¶ 1 In this workers' compensation action, Sinke Mulgeta seeks review of a final order of the Industrial Claim Appeals Office (Panel), affirming the denial and dismissal of her claims for permanent partial disability (PPD) benefits and penalties. We affirm.

## I. Background

¶ 2 ISS Facility Services, Inc., (ISS) employed Ms. Mulgeta as a janitor at Denver International Airport. In February 2015, Ms. Mulgeta injured her back while working. Although she neither missed work nor lost wages, Ms. Mulgeta sought medical treatment for her symptoms on several occasions.

¶ 3 ISS filed a general admission of liability (GAL) "[a]dmitting for medical benefits," but did not admit to or address disability benefits.

¶ 4 A few months later, Ms. Mulgeta's authorized treating physician, Dr. Albert Hattem, determined she had reached maximum medical improvement (MMI) with a whole person impairment rating of five percent. Together with lifting and pulling restrictions, he recommended that Ms. Mulgeta remain seated for half of the workday. Because ISS could not reasonably accommodate these restrictions, it terminated her employment.

¶ 5 In response to Dr. Hattem's report, ISS requested a division-sponsored independent medical examination (DIME) to challenge Dr. Hattem's impairment rating. *See* § 8-42-107.2(2)(b), C.R.S. 2017. But before the DIME examination, ISS retained Dr. Tashof Bernton to evaluate Ms. Mulgeta. After examination, Dr. Bernton found no basis to support a permanent impairment rating. He thus disagreed with Dr. Hattem's impairment rating.

¶ 6 Several months later, Dr. Hua Chen performed the DIME. Dr. Chen noted the work-related injury, but concluded that Ms. Mulgeta exhibited "no pain when she was in sitting position" and "[n]o pain behavior, no rigidity[,] or spasticity before examination." But on spinal examination, Dr. Chen reported that Ms. Mulgeta felt pain from her neck to her lower back, "showed moderate difficulty in moving her arms and back," and "would not sit straight on [the] examination table." Ms. Mulgeta "would not . . . [allow] further examination including [a] range of motion test."

¶ 7 Ultimately, Dr. Chen agreed with Dr. Hattem that Ms. Mulgeta had reached MMI but concluded that Ms. Mulgeta had "no permanent impairment" from the work-related injury.

¶ 8 After the DIME, ISS filed a final admission of liability (FAL).

¶ 9 Ms. Mulgeta objected to the FAL and filed an application for hearing asserting compensability and seeking PPD and temporary partial disability benefits. And she also requested penalties on the grounds that ISS discharged her "as a direct result of medical restrictions issued by treating physician. Conduct violated [section] 8-43-304[, C.R.S. 2017]."

¶ 10 Ms. Mulgeta later endorsed two additional penalty claims. Specifically, she argued that she was entitled to penalties because ISS (1) violated Workers' Compensation Rule of Procedure (W.C.R.P.) 5-5 by failing to include the basis for its denial of temporary and permanent benefits in its GAL, *see* Dep't of Labor & Emp't Rule 5-5, 7 Code Colo. Regs. 1101-3; and (2) failed to pay her continuing PPD benefits from the time ISS terminated her employment until the completion of the DIME process.[1]

¶ 11 The ALJ found that Ms. Mulgeta had "failed to overcome by clear and convincing evidence" Dr. Chen's conclusion that Ms. Mulgeta had no permanent impairment from her work injury. In so finding, the ALJ expressly found the opinions of Drs. Chen and

[1] And it was these two penalty claims that the administrative law judge (ALJ) ultimately addressed.

Bernton "credible and persuasive." And the ALJ found Ms. Mulgeta's testimony and reports incredible, unpersuasive, and "inconsistent with objective" medical findings.

¶ 12 Next, the ALJ concluded that Ms. Mulgeta was not entitled to continuing PPD payments from the time of her termination until the completion of the DIME process; that ISS therefore did not violate any provision of the Workers' Compensation Act (Act); and that, in the absence of any violation, Ms. Mulgeta was not entitled to penalties.

¶ 13 Finally, the ALJ rejected Ms. Mulgeta's contention that ISS had violated W.C.R.P. 5-5, finding the claim was time barred, and, in the alternative, no penalty was warranted.

¶ 14 The Panel affirmed the ALJ's order.

## II. Overcoming The DIME

¶ 15 Ms. Mulgeta contends that the ALJ erred when she found that Ms. Mulgeta did not overcome Dr. Chen's zero impairment rating by clear and convincing evidence. Specifically, she argues that she met her burden by showing Dr. Chen failed to conduct a spinal examination in accordance with the American Medical Association

Guides to the Evaluation of Permanent Impairment (3d ed. 1991) (AMA Guides). We disagree.

¶ 16 DIME physicians must use the AMA Guides in making their physical impairment ratings. § 8-42-101(3.7), C.R.S. 2017; *see Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). The DIME physician's impairment rating is binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. 2017. That is, a party seeking to overcome a DIME physician's impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's rating is incorrect." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) (citation omitted).

¶ 17 Whether a party has overcome the DIME physician's impairment rating is a question of fact to be resolved by the ALJ. *Wilson*, 81 P.3d at 1118. As is whether the DIME physician correctly applied the AMA Guides. *See id.* And we may not set aside these factual determinations if they are supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2017; *Wilson*, 81 P.3d at 1119.

¶ 18 Ms. Mulgeta presented no medical evidence to refute Dr. Chen's zero impairment rating. Instead, Ms. Mulgeta points only to Dr. Chen's failure to complete a full spinal evaluation and examination. Because the AMA Guides require a full spinal evaluation, Ms. Mulgeta contends this alone is sufficient to overcome the DIME report and Dr. Chen's zero impairment rating.

¶ 19 But this is not a case where a spinal examination was not done at all. Dr. Chen recognized the need to perform a full spinal evaluation and tried to do just that. But she was not able to complete it because Ms. Mulgeta would not allow "further examination including range of motion test"; "[s]he cried and asked for break after 5 seconds of motor exam"; and her "crying from pain after muscle testing" made it impossible to perform a "[c]oordination examination." Dr. Chen concluded that Ms. Mulgeta's pain was "non-physiological" and "out of distribution of her injury and out of proportion of [her] injury," and she agreed with Ms. Mulgeta's psychologist's diagnosis of somatoform.

¶ 20 The ALJ therefore found, with record support, that Dr. Chen's failure to perform range of motion tests "was not due to [Ms. Mulgeta's] injury or any objective limitation from an injury but was

due to [Ms. Mulgeta's] own decision not to perform the tests." *Cf. Wilson*, 81 P.3d at 1119 (noting that a DIME physician's failure to record certain measurements "did not require the ALJ to conclude that the required measurements were not done or done improperly"). The ALJ noted that Dr. Chen could not "force or require a claimant to complete testing" and that Ms. Mulgeta self-limited.

¶ 21 That Dr. Chen tried — but was unable — to complete the full spinal examination as a result of Ms. Mulgeta's self-limitation is not evidence that Dr. Chen failed to comply with the AMA Guides. And it is not clear and convincing evidence sufficient to overcome Dr. Chen's DIME report or impairment rating.

¶ 22 Dr. Chen's examination here then is unlike a physician simply failing to comply with AMA Guides. *See, e.g.*, *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME was overcome where DIME physician "refused to rate" the claimant's back injury, which deviated from the AMA Guides). Unlike the DIME physician in *McBride*, Dr. Chen tried to comply with the AMA Guides. She

began Ms. Mulgeta's spinal examination, but Ms. Mulgeta prevented its completion. So *McBride* is not helpful.[2]

¶ 23 To the extent Ms. Mulgeta argues that we should credit her testimony that she did not refuse to participate in the spinal examination, we are not at liberty to do so. Dr. Chen reported that Ms. Mulgeta "could not complete" and "was unable to finish" the testing. The ALJ credited Dr. Chen's account, not Ms. Mulgeta's. It is the ALJ's prerogative to evaluate witness credibility and resolve evidentiary inconsistencies. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). We are bound by the ALJ's credibility determinations and resolution of disputed facts. *See id.*

¶ 24 We perceive no basis for setting aside the ALJ's conclusion that Ms. Mulgeta did not present clear and convincing evidence to overcome the DIME report and the zero permanent impairment

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[2] Ms. Mulgeta also relies upon the Panel's decision in *Lafont v. Wellbridge*, W.C. No. 4-914-378-02, 2015 WL 3966083, at *3 (Colo. I.C.A.O. June 25, 2015). But "we are not bound by the Panel's decisions in other workers' compensation cases." *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). In any event, *Lafont* is equally unhelpful. As in *McBride*, the DIME physician in *Lafont* "failed to follow the AMA Guides." *See Lafont*, 2015 WL 3966083, at *3. That is not the case here.

rating. The Panel, therefore, correctly affirmed the ALJ. *See Wilson*, 81 P.3d at 1119.

## III. Entitlement to PPD

¶ 25 Ms. Mulgeta next contends that she was entitled to PPD benefits from the time of her termination until the DIME process had been completed. We disagree.

¶ 26 ISS chose to contest Dr. Hattem's five percent whole person impairment rating and seek a DIME, which it was entitled to do. *See* § 8-42-107.2(2)(b), C.R.S. 2017; Dep't of Labor & Emp't Rule 11-3(A)(1), 7 Code Colo. Regs. 1101-3. Ms. Mulgeta points to nothing in the Act or workers' compensation rules requiring employers to pay PPD benefits while contesting an impairment rating or waiting for the DIME determination.

¶ 27 Thus, we perceive no error in the Panel's conclusion that Ms. Mulgeta was not entitled to receive PPD benefits while awaiting the completion of the DIME.[3]

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[3] We also note that PPD benefits are tied to an impairment rating and are intended to compensate a claimant for the loss of the ability to earn wages due to the impairment. *Ray v. Indus. Claim Appeals Office*, 920 P.2d 868, 870 (Colo. App. 1996); *accord Colo. AFL-CIO v. Donlon*, 914 P.2d 396, 403 (Colo. App. 1995). Because the ALJ determined that Ms. Mulgeta had zero impairment and, in addition,

## IV. Penalties

¶ 28 Last, Ms. Mulgeta contends the ALJ erred in denying her requested penalties. We disagree.

### A. Penalties for Failure to Pay PPD Benefits

¶ 29 Ms. Mulgeta's first penalty claim hinges on her contention that she was entitled to PPD benefits while awaiting the outcome of the DIME. As already discussed, because Ms. Mulgeta cannot show that ISS violated a provision of the Act, the Panel did not err in affirming the ALJ's decision denying Ms. Mulgeta's request for penalties for not paying PPD benefits. *See Pena v. Indus. Claim Appeals Office*, 117 P.3d 84, 87 (Colo. App. 2004) (to succeed on a penalty claim, a claimant must show the employer violated the Act); *see also* § 8-43-304(1).

### B. Penalties for Failure to Properly Complete GAL

¶ 30 Ms. Mulgeta also contends that she was entitled to penalties because ISS violated W.C.R.P. 5-5 by failing to identify its position on temporary disability benefits in its GAL and that the ALJ erred in finding this claim time barred.

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no evidence suggested she suffered any wage loss, we see no basis for the PPD claim under the Act.

¶ 31 "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." § 8-43-304(5).

¶ 32 ISS filed its GAL and mailed it to Ms. Mulgeta on April 30, 2015. Ms. Mulgeta testified that she received the GAL, understood it, and was represented by counsel at the time. But she did not seek penalties for the alleged violation of W.C.R.P. 5-5 until August 2016, nearly seventeen months later.

¶ 33 Ms. Mulgeta now contends that, despite her testimony, she was not represented until September 15, 2015, and did not understand the GAL when she received it. She maintains that her testimony should "be interpreted to mean she reviewed and understood the GAL after she reviewed it with her attorney sometime after September 15, 2015" and that her claim did not begin to accrue until September 15, 2015, making her penalty claim timely. We don't agree for a few reasons.

¶ 34 First, the ALJ — with record support — found Ms. Mulgeta received the GAL, reviewed it with an attorney, and understood it in April 2015. Although Ms. Mulgeta now asks us to reinterpret her

testimony, "we may not substitute our judgment for that of the ALJ." *Metro Moving*, 914 P.2d at 415. Second, lack of counsel does not excuse a party from a filing deadline. "A pro se litigant is presumed to have knowledge of the applicable statutes and must be prepared to accept the consequences of her own mistakes if she elects to represent herself . . . ." *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821, 823 (Colo. App. 2001). We presume therefore that Ms. Mulgeta knew the deadline for the filing of any penalty claim based on the GAL. *See* § 8-43-304(5) (providing that a request for penalties must be filed within one year after the date the claimant knew the facts giving rise to a possible penalty).

¶ 35 And finally, even if we assume Ms. Mulgeta's testimony should not be taken at face value and that she did not know the statutory deadline to assert a penalty claim, even if she retained counsel in September 2015, that was seven months before the statutory deadline. Because Ms. Mulgeta was represented well in advance of the deadline, her failure to file her penalty claim within one year of employer's GAL cannot be excused.

¶ 36 We therefore conclude that Ms. Mulgeta's request for penalties based on ISS's alleged failure to identify its disability benefits

position on the GAL was barred by the applicable statute of limitations. *See id.*

## V. Conclusion

¶ 37 The Panel's order is affirmed.

JUDGE ROMÁN and JUDGE WELLING concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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DATE FILED: February 8, 2018
CASE NUMBER: 2017CA322

SUMMARY
February 8, 2018

**2018COA19**

**No. 17CA0322, *Montoya v. ICAO* — Labor and Industry — Workers' Compensation — Temporary Partial Disability**

In this workers' compensation action, a division of the court of appeals considers whether a panel of the Industrial Claim Appeals Office erred in requiring a claimant seeking temporary partial disability benefits to demonstrate both medical incapacity and loss of wage earnings. The majority concludes that, although the concept of "disability" incorporates both medical incapacity and loss of wage earnings, a claimant is not required to prove both components to establish entitlement to disability benefits under the Workers' Compensation Act. Because the claimant here showed that she lost wages due to a work-related injury, she was entitled to temporary partial disability benefits.

Accordingly, the division sets aside the order of the Industrial Claim Appeals Office panel.

The dissent relies on a two-part definition of "disability" set forth in *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999), to conclude that the Industrial Claim Appeals Office panel did not err. Because the claimant here did not demonstrate that any medical incapacity prevented her from doing her job, the dissent would affirm the order holding that she was not entitled to temporary partial disability benefits.

COLORADO COURT OF APPEALS **2018COA19**

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Court of Appeals No. 17CA0322
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-974-821

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Myra Montoya,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Ethan Allen Retail, Inc.; and Travelers Indemnity Company,

Respondents.

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ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Richman, J., concurs
Furman, J., dissents

Announced February 8, 2018

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McDivitt Law Firm, Aaron S. Kennedy, Colorado Springs, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ray Lego & Associates, Michael J. Buchanan, Gregory W. Plank, Greenwood Village, Colorado, for Respondents Ethan Allen Retail, Inc., and Travelers Indemnity Company

¶ 1 In this workers' compensation action, claimant, Myra Montoya, seeks review of a final decision of the Industrial Claim Appeals Office (Panel) holding that she was not entitled to temporary partial disability (TPD) payments because her injury did not meet the criteria for a "disability." We conclude that the Panel interpreted "disability" too narrowly and therefore set aside its decision.

## I. Background

¶ 2 Claimant worked as an interior designer for employer, Ethan Allen Retail, Inc. On December 30, 2014, claimant suffered admitted, work-related injuries to her left ankle and foot, as well as to her back and shoulders. Her treatment included numerous medical, physical therapy, massage therapy, chiropractic, and dry needling appointments. Although she attended many medical appointments, claimant was neither given work restrictions nor medically limited in her ability to work.

¶ 3 Claimant's income was entirely based on commissions. While she was undergoing treatment for her work-related injuries, she was required to schedule some medical appointments during her normal working hours. Because of the appointments, she was

absent from the showroom floor and could not meet potential and current clients. She testified that those absences — all of which occurred in 2015 in the twelve months after her injury — caused her to lose more than $20,000 in commission earnings, as evidenced by the difference between her 2014 earnings ($69,701.04) and her 2015 earnings ($44,853.82). She also testified that, at the time of the hearing in June 2016, her earnings had rebounded and she had earned over $45,000 during the first half of 2016 alone.

¶ 4 After conducting a hearing, the administrative law judge (ALJ) concluded that "there was no evidence in the record . . . that [c]laimant's ATP [authorized treating physician] took her off work when she had medical appointments." Similarly, he concluded "there was no evidence [c]laimant was unable to perform her job duties, although she testified she had [received] assistance and also had to leave on occasion because of medical appointments." However, the ALJ also found that claimant lost commissions as a result of her work-related injuries. Specifically, he concluded that claimant "sustained a wage loss, despite having a full duty release to return to work." Based on these findings and conclusions, the

ALJ awarded claimant TPD benefits to compensate her for the commissions she lost while attending medical appointments.

¶ 5 The Panel affirmed that part of the ALJ's order determining that claimant overcame the rating of the division-sponsored independent medical examination physician and that she was entitled to additional permanent partial disability benefits. However, the Panel set aside that part of the ALJ's order awarding claimant TPD benefits. The Panel reasoned that disability benefits are only available if a claimant demonstrates both "'medical incapacity' evidenced by loss or impairment of bodily function" and "temporary loss of wage earning capacity, which is evidenced by the claimant's inability to perform his or her prior regular employment." Here, because the ALJ had found that claimant had no work restrictions and was able to perform all her job duties, albeit with some assistance, the Panel held that she did not establish the requisite "medical incapacity" prong of disability and therefore, as a matter of law, was not entitled to receive TPD benefits. Claimant now appeals.

## II. Analysis

¶ 6 Claimant contends that the Panel's interpretation of "disability" is too narrow. She argues that the Panel misinterpreted the Workers' Compensation Act (Act) by disregarding a key difference between the statutes providing for the automatic termination of TPD and temporary total disability (TTD) benefits. In addition, claimant argues that the Panel improperly ignored its own precedent by failing to acknowledge that her health care providers had "implicitly imposed" restrictions on her. We agree with claimant's conclusion, but reach it by a different analysis.

### A. Definition of Disability

¶ 7 In reaching its decision, the Panel relied on a 1999 Colorado Supreme Court decision that described disability benefits. The court noted:

> Workers' compensation benefits include elements of medical impairment compensation and wage loss protection. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 404 (Colo. App. 1995). The "disability concept is a blend of two ingredients, whose recurrence in different proportions" has received a great deal of legislative and judicial attention. The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is

> wage-earning incapacity evidenced by an employee's inability to resume his or her prior work.

*Culver v. Ace Elec.*, 971 P.2d 641, 649 (Colo. 1999) (quoting 4 Arthur Larson, *Larson's Workers' Compensation Law* § 57.11, at 10-16 (1994) (now found at 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 80.02 (2015)); *see also Donlon*, 914 P.2d at 404 (noting that disability benefits "are intended to compensate a claimant for the extent to which his or her physical impairment impacts upon that claimant's past and future ability to earn wages"). However, we conclude that the Panel's reliance on the *Culver* court's definition of "disability" in Colorado is misplaced.

¶ 8 Although the *Culver* court described "disability" as having both medical and wage loss components, it does not necessarily follow that both elements must be met to justify a disability award. *Culver* derived its characterization of "disability" directly from *Larson's Workers' Compensation Law*. Scrutinizing the excerpt in *Larson's*, however, quickly reveals that the supreme court quoted only a portion of the *Larson's* discussion. When read in context, it is clear that *Larson's*, and thus the supreme court, did not intend to

mandate evidence of both prongs in order for a claimant to receive disability benefits. *Larson's* states:

> It has been stressed repeatedly that the distinctive feature of the compensation system, by contrast with tort liability, is that its awards, apart from medical benefits, . . . are made not for physical injury as such, but for "disability" produced by such injury. The central problem, then, becomes that of analyzing the unique and rather complex legal concept which, by years of compensation legislation, decision, and practice, has been built up around the term "compensable disability."
>
> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.
>
> The two ingredients usually occur together; *but each may be found without the other*: A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living. Conversely, a claimant may be able to work, in both the claimant's and the doctor's opinion, but awareness of the injury may lead

> employers to refuse employment. These two illustrations will expose at once *the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability*. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage loss as the test would deprive the claimant in the former illustration of an award, thus not only penalizing his or her laudable efforts to make the best of misfortune but also fostering the absurdity of pronouncing a person nondisabled in spite of the unanimous contrary evidence of medical experts and of common observation. *The proper balancing of the medical and wage-loss factors is, then, the essence of the "disability" problem in workers' compensation.*

Larson & Larson, § 80.02 (emphases added) (footnotes omitted). Plainly, then, a thorough reading of the *Larson's* passage upon which the supreme court relied reveals that the treatise cautions against the path followed by the Panel — requiring a claimant to prove both medical incapacity and loss of wage earnings to establish "disability."

¶ 9 Moreover, a close reading of *Culver* reveals that the supreme court's description of disability was not dispositive of the issue raised in that case. In *Culver*, the issue was the calculation of

Social Security benefits offsets against workers' compensation disability payments. No party to *Culver* challenged the affected workers' disability status; rather, the issue raised was the propriety of and order in which offsets should be calculated. *See* 971 P.2d at 647-54. We therefore conclude that the quoted language from *Culver*, on which the Panel relied, was dictum and thus not binding on us here.

¶ 10 Instead, we look to previous cases that clearly and unambiguously defined "disability." As early as 1940, the supreme court expressed its view that "disability" "means industrial disability or loss of earning capacity and not mere functional disability." *Byouk v. Indus. Comm'n*, 106 Colo. 430, 434, 105 P.2d 1087, 1089 (1940). Two decades later, the supreme court repeated this definition. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 24, 379 P.2d 153, 156 (1962). A division of this court again echoed this definition in 1980. *Matthews v. Indus. Comm'n*, 627 P.2d 1123, 1124 (Colo. App. 1980) ("'disability' means loss of earning capacity"). By the 1990s, the definition was slightly refined, but the same basic meaning remained. *See Baldwin Constr. Inc. v. Indus. Claim Appeals Office*, 937 P.2d 895, 897 (Colo. App. 1997) ("[A]n

impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities."); *Boice v. Indus. Claim Appeals Office*, 800 P.2d 1339, 1341 (Colo. App. 1990) ("[T]he term 'disability' means loss of earning capacity or an inability to work as effectively or as efficiently as claimant did prior to the injury."). Notably, *none* of these cases expressly defining "disability" has mandated that a claimant must establish *both* "medical incapacity" and "loss of wage earnings" to qualify for disability benefits. Further, the supreme court has not explicitly overturned any of these cases defining "disability."

¶ 11 We therefore conclude that although the concept of disability incorporates both "medical incapacity" and "loss of wage earnings," a claimant need not prove both components to establish entitlement to disability benefits under the Act.

¶ 12 Because we have concluded that the Panel's two-pronged test for "disability" too narrowly limits the scope of the term, we need not address claimant's contention that differences between section 8-42-103(1), C.R.S. 2017, on the one hand, and section 8-42-105(3), C.R.S. 2017, and § 8-42-106(2), C.R.S. 2017, on the

other hand, illustrate that the legislature did not intend "disability" to be read as narrowly as the Panel held. The latter two sections claimant points to address the *termination* of disability benefits, not their commencement, and therefore are inapposite here. Nor do we address claimant's reliance on the Panel's earlier decision in *Boddy v. Sprint Express Inc.*, W.C. No. 4-408-729, 2000 WL 1368970 (Colo. I.C.A.O. Aug. 15, 2000). Although we defer to the Panel's reasonable interpretations of the Act, *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App. 2005), *aff'd*, 134 P.3d 407 (Colo. 2006), we are not bound by earlier Panel decisions. *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1258 (Colo. App. 2007).

B. Claimant's Entitlement to TPD Benefits

¶ 13 Having determined that the Panel erred by requiring claimant to demonstrate both "medical incapacity" and "earning wage loss," we turn to the question whether the evidence supported claimant's TPD award.

¶ 14 "Whether a claimant's industrial disability has caused or contributed to his reduced earnings is a question of fact, and the ALJ's resolution of this issue, if supported by substantial evidence,

is conclusive on review." *City of Aurora v. Dortch*, 799 P.2d 461, 463 (Colo. App. 1990) (citation omitted).

¶ 15 Here, the ALJ found that claimant's documented commission decrease was attributable to her numerous medical and therapy appointments. Through her own testimony and submitted pay stubs, claimant showed that during the year she underwent treatment for her work-related injury she earned approximately $20,000 less than she had earned the previous year. She testified that she took no other significant time off work and was not absent for any length of time for any reason other than her medical and therapy appointments. Employer does not dispute this evidence. We conclude that this evidence amply supports the ALJ's finding that claimant's wage loss was attributable to her admitted work-related injury. *Id.*

## III. Conclusion

¶ 16 Because substantial evidence supports the ALJ's factual findings, and the ALJ properly applied the law to this case, we hold that the Panel erred in setting aside the ALJ's decision.

¶ 17 We therefore set aside the Panel's decision and remand the case with instructions to reinstate the ALJ's order concluding that

claimant was entitled to receive TPD benefits from December 31, 2014, through September 2, 2015, and ordering employer to pay any outstanding TPD amounts accrued during this period.

JUDGE RICHMAN concurs.

JUDGE FURMAN dissents.

JUDGE FURMAN, dissenting.

¶ 18 I respectfully dissent from the majority because in my opinion the two-part definition of "disability" described in *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999), is binding on this court. Based on this binding law, I agree with the Industrial Claim Appeals Office (ICAO) panel that Montoya did not establish that she has a disability entitling her to temporary partial disability benefits.

¶ 19 Section 8-42-103(1), C.R.S. 2017, provides that a claimant be paid disability indemnity as wages "[i]f the injury or occupational disease causes disability." The statute does not define "disability," but our supreme court described it this way:

> Workers' compensation benefits include elements of medical impairment compensation and wage loss protection. *See Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 404 (Colo. App. 1995). The "disability concept is a blend of two ingredients, whose recurrence in different proportions" has received a great deal of legislative and judicial attention. 4 [Arthur Larson, *Larson's Workers' Compensation Law*], at § 57.11, 10-16 [(1994)]. The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is wage-earning incapacity evidenced by an employee's inability to resume his or her prior work. *See* 4 Larson, *supra*, at § 57.11, 10-16.

*Culver*, 971 P.2d at 649.

¶ 20 Both the ICAO panel in its order and employer, Ethan Allen Retail, Inc., in its answer brief cited this definition as "well settled." In her opening brief, Montoya cited this two-part definition, and the *Boddy* case on which she relies also cited this definition. *Boddy v. Sprint Express Inc.*, W.C. No. 4-408-729, 2000 WL 1368970, at *1 (Colo. I.C.A.O. Aug. 15, 2000).

¶ 21 In this case, it was undisputed that Montoya was released by the attending physician to regular duty without restrictions just one day after her injury. The ALJ found that the *injury* did not impair Montoya's ability to perform the duties of her employment. And, there is nothing in the record to establish that Montoya had any sort of medical incapacity that prevented her from being able to do her job.

¶ 22 Accordingly, because I believe the ICAO panel's interpretation of law was correct and its findings are supported by the record, I would affirm the order.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

***Notice to self-represented parties***: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* *http://www.cba.cobar.org/repository/Access%20to%20Justice/AppelateProBono/CBAAppProBonoProg_PublicInfoApp.pdf*

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-013-170-02

IN THE MATTER OF THE CLAIM OF:

VELMA BROOKS,

Claimant,

v.

FINAL ORDER

AURORA PUBLIC SCHOOL DIST.,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated October 19, 2017 which affirmed the decision of the DIME physician (Division selected Independent Medical Examiner) that determined the claimant was at maximum medical improvement (MMI) and assigned a permanent impairment rating. We affirm the decision of the ALJ.

The claimant worked for the respondent as a substitute schoolteacher. The claimant slipped and fell in the school parking lot on January 14, 2016. The claimant began treating with Dr. Lugliani. In her pain diagram presented to Dr. Lugliani on January 22, the claimant indicated injuries to her right knee, left leg, bilateral shoulders and the left side of her lower back.

The claimant received conservative treatment including physical therapy and chiropractic manipulation. By May of 2016, the claimant was noted by her physical therapist to have attained full range of motion of her shoulders. The claimant was referred to Dr. Primack due to her complaints of low back and right knee pain. Dr. Primack also evaluated the claimant's shoulders and observed no compromise in shoulder movement or strength. He diagnosed the claimant as suffering from arthritis in her knee and degenerative conditions in her back. On May 25, 2016, Dr. Lugliani determined the claimant was at MMI. The doctor diagnosed the claimant as suffering from symptoms of arthritis, which were exacerbated by her fall at work. He recommended further pain

management treatment with Dr. Primack, including ultra sound for her shoulders. However, the claimant refused to treat any further and requested Dr. Lugliani provide a permanent impairment rating for her back, shoulders and right knee. The doctor noted no specific diagnosis for the shoulders or low back and declined to assign an impairment rating. He calculated an 18% rating of the lower extremity based on range of motion deficits affecting the right knee.

The claimant obtained an MRI study of her shoulders on June 23. The MRI revealed a left shoulder SLAP tear and partial tear of the supraspinatus tendon. The right shoulder was shown to feature a 75% tear of the supraspinous tendon. Dr. Lugliani reviewed the MRI reports on August 10. He determined to revise his previous MMI determination, recommended additional treatment for the shoulders, including possible surgery, and advised that permanent impairment of the shoulders would need to be rated. Dr. Primack examined the MRI reports on November 3. Noting the previous inconsistent reporting of the claimant concerning her shoulder pain and previous near normal range of motion measurements, the doctor concluded the rotator cuff tears appearing in the MRIs were not related to her fall at work in January, 2016. Subsequent to Dr. Primack's November report, Dr. Lugliani agreed. The doctor again revised his opinion stating the shoulder tears were not due to events at work, and the claimant remained at MMI.

The claimant arranged to have surgical repairs performed on both shoulders by Dr. Sears outside of the worker's compensation system. Dr. Sears authored a report stating the type of tear he repaired coincided with the claimant's fall at work and the symptoms she experienced following that event. He concluded the injuries "certainly could be as a direct result of the fall."

The claimant requested a DIME review of Dr. Lugliani's finding of MMI. The review was performed by Dr. Fall on March 2, 2017. Dr. Fall agreed with the May 26, 2016, date of MMI. She also concurred with Dr. Primack that the tears in the claimant's rotator cuffs could not be seen as caused by the claimant's fall at work. Dr. Fall pointed to the prior full range of motion measurements and the sporadic reports of pain by the claimant. Dr. Fall assigned the claimant a 20% impairment of the right lower extremity for her knee injury. In addition, the doctor observed no further medical maintenance treatment could be attributed to the work injury. The respondents filed a Final Admission of Liability for the 20% rating and denied liability for future medical benefits.

The claimant had discharged her attorney and filed an application for a hearing endorsing as issues permanent partial disability benefits, permanent total benefits, medical benefits and overcoming the determinations of the DIME physician. Following a

prehearing, it was ordered by the prehearing ALJ that the scheduled hearing would be limited to the question of whether the DIME opinions were overcome. All other issues were to be held in abeyance. The parties proceeded to hearing on October 4, 2017. The claimant participated without benefit of legal counsel. Following the hearing, the ALJ ruled the claimant had not overcome the DIME physician's decisions concerning either MMI or the permanent impairment rating. Any other issues were reserved for future determination.

On appeal, the claimant takes issue with a handful of statements included in various medical reports and some of the findings of fact made by the ALJ. The claimant attaches to her Petition to Review copies of portions of the medical documents entered into evidence, which she has highlighted and annotated. The claimant has not provided a transcript of the testimony submitted at the October 4 hearing.

The claimant, as the party seeking review, is responsible for presenting a record sufficient to demonstrate error, and assertions contained in her brief may not substitute for that which must appear of record. *Fleet v. Zwick*, 994 P.2d 480, 483 (Colo. App. 1999); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987). Consequently, in the absence of a transcript we must presume that the ALJ's factual determinations are supported by substantial evidence in the record. *Nova v Industrial Clam Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

Section 8-42-107(8)(b)(III), C.R.S. provides that the DIME physician's finding of MMI 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.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

Here, the ALJ found the May 25, 2016, date of MMI had been selected by Dr. Lugliani and he had later reconfirmed that MMI finding. The ALJ determined Dr. Fall's adoption of that date to be reasonable. The ALJ noted the conclusion of both Dr. Lugliani and of Dr. Fall that the claimant's shoulder pain was not related to her fall at work, originated with Dr. Primack and was consistent with the reports of the claimant's chiropractor. The ALJ referenced Dr. Fall's discussion stating the claimant's complaints

and the measurements of full range of motion in the shoulder belied the notion the shoulder rotator cuff tears occurred in January 2016. Those circumstances indicated the tears were not likely acute injuries. The ALJ determined the contrary opinion of Dr. Sears was dubious when he did not include any reference to the prior reports of Dr. Lugliani, Dr. Primack or of Dr. Fall. The ALJ also found curious Dr. Sears failure to assert the cause of the tears was 'probably' due to the claimant's fall at work. Dr. Sears offered no more than to say there "could" be a link, or the fall at work "would be consistent" with the history of the injury. The ALJ deemed it more likely the shoulder symptoms were not work related. Accordingly, he concluded no further work related medical care was justified subsequent to May 25, 2016, and that date represented the point of MMI. The ALJ resolved the claimant had not overcome Dr. Fall's DIME findings by clear and convincing evidence. The ALJ's decision was supported by substantial evidence in the record. 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 date of MMI. We similarly sustain the ALJ's determination the 20% extremity rating was appropriately calculated.[1]

It is the prerogative of the ALJ to resolve conflicts in the evidence and determine the credibility of witnesses and the probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). So long as such determination is supported by substantial evidence in the record, it is binding on review.

[1] We do note the ALJ misapplied the burden of proof when he ruled the claimant had not overcome the DIME's impairment rating by 'clear and convincing' evidence.' Because the permanent impairment rating was limited to a portion of the body included on the list of scheduled ratings in § 8-43-107(2)(a), the burden of proof to establish the impairment rating was a 'preponderance of the evidence.' *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.*, W.C. No. 4-981-218-04 (January 25, 2018); *see generally Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013)(no presumptive weight afforded DIME physician concerning scheduled injuries; DIME opinion unnecessary to determination of scheduled impairment), *aff'd Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP). Accordingly, the respondent was also not required to file an admission for the DIME's 20% lower extremity rating, as opposed to Dr. Lugliani's 18% rating. *Meza v. Industrial Claim Appeals Office*, 303 P.3d 158, 162-63 (Colo. App. 2013). However, because the respondent did so, and because the DIME rating was higher than that of Dr. Lugliani, we do not understand the claimant to be disputing that choice. The claimant seeks an impairment rating for the upper extremities but she has not introduced into the record a rating opinion from a physician pertinent to the upper extremities. The ALJ then would have no basis to order an impairment rating distinct from that of Dr. Fall's DIME rating. *See* § 8-42-101(3.6)(b) (impairment evaluations must be provided by physicians that have completed the level II accreditation program, thereby excluding a rating formulated solely by the ALJ). We therefore conclude the ALJ's incorrect application of the burden of proof to constitute harmless error.

*See May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988). Substantial evidence is probative evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory or contrary inferences. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). *Ackerman v. Hilton's Mech. Men*, 914 P.2d 524, 527-28 (Colo. App. 1996). We may not interfere with the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Claimant's arguments notwithstanding, we perceive no extreme circumstances here.

**IT IS THEREFORE ORDERED** that the ALJ's order dated October 19, 2017 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

2/2/18 by TT .

VELMA BROOKS, 12808 E PACIFIC DR APT 301, AURORA, CO, 80014-5341 (Claimant)
RITSEMA & LYON PC, Attn: PAUL KRUEGER ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-453-994-04

IN THE MATTER OF THE CLAIM OF:

FRANK MAJOR,

Claimant,

v.

FINAL ORDER

XCEL ENERGY,

Employer,

and

SELF-INSURED,

Respondent.

The respondent seeks review of an order of Administrative Law Judge Spencer (ALJ) dated September 18, 2017, that denied its request to terminate ongoing maintenance medical benefits. We affirm.

This matter went to hearing on whether the claimant's ongoing medical treatment, including medication refills, epidural steroid injections, facet joint injections, rhizotomies, and SI joint injections, are causally related to his admitted March 3, 2000, industrial injury, and whether the treatment regimen prescribed by Dr. Finn was reasonably necessary.

After the hearing, the ALJ found that the claimant sustained an admitted industrial injury on March 3, 2000, due to a large explosion while checking a natural gas leak. He was thrown approximately 20-25 feet, and a wall collapsed on top of him. As a result of the accident, the claimant injured his left shoulder, low back, and bilateral elbows, and sustained hearing loss.

A subsequent lumbar MRI showed degenerative changes at L3-4 and L4-5, moderate bilateral neuroforaminal stenosis with facet degeneration, and an L4-5 annular tear.

The claimant has had persistent low back pain since his industrial injury. The claimant has received relatively aggressive nonsurgical treatment for his low back injury,

including facet injections, epidural steroid injections, radiofrequency neurotomies, and SI joint injections.

Authorized treating physician, Dr. Finn, ultimately placed the claimant at maximum medical improvement (MMI) on March 19, 2002, with an impairment rating of 11% whole person for the lumbar spine. The respondent filed a Final Admission of Liability (FAL) on May 16, 2002, based on Dr. Finn's impairment determination. The respondent's FAL also admitted for "Grover medical." The claimant subsequently was taken off of MMI in 2004 for bilateral carpal tunnel surgery. But, Dr. Finn placed the claimant back at MMI on September 29, 2004, with no change to his impairment rating. The respondent filed a FAL on November 16, 2004, admitting for reasonable, necessary, and related *Grover* medical benefits.

Treatment since MMI primarily has been directed to the claimant's ongoing low back pain. The claimant has seen Dr. Finn regularly for maintenance care since being put at MMI. He has received periodic lumbar ESIs, facet injections, rhizotomies, and SI joint injections. These treatments have relieved the claimant's pain and allowed him to be more functional. Dr. Finn also provides ongoing medication refills, which include narcotic pain medications. The claimant takes Exalgo (a long-lasting narcotic), Dilaudid (for breakthrough pain), Zanaflex (a muscle relaxer), and Movantik (for opioid-induced constipation). These medications also have served to relieve the claimant's pain and assist him to perform his daily activities.

The claimant had a history of chronic intermittent low back pain before the industrial accident, which he primarily treated with periodic chiropractic manipulation. His symptoms were relatively mild. There was no persuasive evidence that the claimant's pre-existing back pain substantially limited his ability to perform vocational, recreational, or other activities.

At the request of the respondent, the claimant underwent an independent medical examination (IME) with Dr. Beatty on May 26, 2016. Dr. Beatty did not question the claimant's low back complaints, but he opined that his ongoing symptoms are not causally related to the March 3, 2000, industrial injury. He specifically opined in pertinent part as follows in his report:

> Recent MRIs revealed degenerative disk disease and facet arthrosis with developing spinal stenosis, all of which I do not believe are related to the injury of 2000 but is a chronic ongoing degenerative process related to age along with wear and tear. It is noted there were no major injuries on the

> initial MRIs for example fractures or herniated discs and there were degenerative changes already noted at L3-L4 and L4-L5 with moderate bilateral neural foraminal stenosis at L4-5, due predominately to facet degeneration and hypertrophy. He has already been treating for intermittent back pain prior to this injury and I believe the natural course of the degenerative changes found on the initial MRIs would have brought him to the point where he is today with a gradual worsening of his condition.

Dr. Beatty subsequently testified that the claimant's need for additional low back treatment, including injection therapy and medications, is not causally related to the March 3, 2000, industrial injury. Dr. Beatty explained that the claimant's pre-existing degenerative condition would inevitably have progressed regardless of the industrial accident. He also opined there was no evidence in the original MRI that the accident had accelerated the underlying degenerative process. Dr. Beatty further opined that regardless of causation, further treatment with narcotics is not reasonable and necessary. Rather, he recommended the claimant transition to Suboxone with the eventual goal of weaning off all medications.

After receiving Dr. Beatty's IME report, the respondent denied the claimant's request for additional injections and narcotic medication. Consequently, the claimant filed an application for hearing, listing medical benefits and reasonably necessary as issues to be considered.

During the hearing, Dr. Finn testified that the claimant had a history of chronic low back pain prior to the industrial injury, but that he sustained a significant injury when the house blew up next to him and this aggravated his pre-existing condition. He further opined that he does not believe the claimant has returned to his pre-injury levels of pain. Dr. Finn testified that if it had not been for the industrial injury, he probably would not have been treating the claimant. With regard to the medications, Dr. Finn stated that while he was not excited that the claimant is on chronic opioids for his chronic back pain, the claimant reports that they allow the pain to be tolerable and manageable and also allow him to function. With regard to Dr. Beatty's recommendation that the claimant transition to Suboxone, Dr. Finn explained that Suboxone is an opioid so "it's almost robbing Peter to pay Paul." Dr. Finn described the claimant as very compliant and he has no concerns that he abuses the medications.

Crediting Dr. Finn's opinions over those of Dr. Beatty, the ALJ ultimately denied the respondent's request to terminate the claimant's ongoing maintenance medical treatment. He found that the respondent failed to prove that none of the treatment by Dr.

Finn is causally related to the work injury. He found that since the injury, the claimant's low back pain has been more severe and constant than it was before the accident, and his need for treatment escalated dramatically. He also found that the claimant's symptoms never returned to their pre-injury baseline level, and there was no persuasive evidence of any significant change in his underlying condition sufficient to sever the admitted causal connection between his symptoms and the industrial injury. Rather, the ALJ found that the claimant's symptoms have remained largely the same since he was put at MMI. The ALJ further rejected Dr. Beatty's opinion that the claimant's degenerative changes would have progressed regardless of the industrial injury. He also concluded the claimant had demonstrated that the medications prescribed by Dr. Finn and the periodic injections and rhizotomies are reasonably necessary to relieve the effects of his injury and prevent deterioration of his condition. He ordered the respondent liable for all reasonably necessary treatment to relieve the effects of the claimant's injury or prevent deterioration of his condition, including the medications prescribed by Dr. Finn and periodic epidural steroid injections, facet injections, rhizotomies, and SI joint injections.

On appeal, the respondent argues that the ALJ erred in finding that the claimant is entitled to maintenance medical benefits, including medications prescribed by Dr. Finn, and periodic epidural steroid injections, facet injections, rhizotomies, and SI joint injections. The respondent reasons that the ALJ's order is not supported by substantial evidence, and that the "overwhelming evidence" instead supports the conclusion that the claimant's current low back condition is caused by the natural progression of his pre-existing and unrelated degenerative low back issues.[1] We disagree.

The claimant is entitled to maintenance medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of an industrial injury or to prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Milco Construction v. Co*wan, 860 P.2d 539 (Colo. App. 1992). Once the claimant establishes the probability of a need for future treatment,

[1] The respondent's argument alternates between an assertion that the claimant is not "entitled to ongoing maintenance medical benefits for his March 3, 2000 injury" and the contention the claimant's "current need for low back treatment" is not related to the work injury. The former is a request to relieve the respondent from any future back treatment. The latter contests solely the treatment prescribed at the moment. In *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838-01 (Oct. 1, 2013), we noted an argument complaining that a medical condition which had previously been the basis for admitted maintenance medical benefits was no longer attributable to the work injury was a request to withdraw a prior admission. In that case §8-43-201(1), C.R.S. placed the burden of proof on the respondents. Conversely, if the respondents are disputing liability solely for a particular treatment on the basis it is not reasonable, the burden of proof is with the claimant. In this matter, as in *Dunn*, the ALJ made optional findings which alternated the burden of proof between both parties. Accordingly, the assignment of that burden is not a basis for finding error in the ALJ's decision.

the claimant is entitled to a general award of future medical benefits, subject to the respondents' right to contest the compensability of any particular treatment on the grounds the treating physician is not authorized to treat the injury, or the treatment is not reasonable or related to the industrial injury. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The mere admission that an injury occurred and that treatment is needed cannot be construed as a concession that all conditions and treatment that occur after the injury were caused by the injury. In *Snyder*, the Colorado Court of Appeals explicitly held that "in a dispute over medical benefits after the filing of a general admission of liability, an employer can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment." *Id*. at 1339.

Here, the respondent's argument notwithstanding, the ALJ's order is supported by substantial evidence in the record. As found by the ALJ, Dr. Finn testified that the care he has provided to the claimant is related to the industrial injury. He explained that if it were not for the injury, he probably would not be treating the claimant. Dr. Finn also testified that while the claimant had chronic low back pain leading up to the industrial injury, the industrial accident caused a permanent aggravation to the claimant's pre-existing condition and was a cause of his need for treatment. Depo. of Dr. Finn at 17-19. Dr. Finn also testified that the care he is recommending for the claimant is reasonable and necessary and will allow his pain to be manageable and tolerable. Depo. of Dr. Finn at 37-38. Section 8-43-301(8), C.R.S.

Throughout its brief, the respondent cites to evidence in support of its argument, including the opinions of Dr. Beatty. However, the ALJ found the opinions of Dr. Finn more persuasive than those of Dr. Beatty, which was his sole prerogative. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)(weight and credibility to be assigned expert testimony is matter within discretion of ALJ). We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). That is not the case here. Regardless, the existence of conflicting testimony or evidence that would support a contrary result does not provide a basis for setting aside the order. *See Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). Additionally, to the extent the respondent argues that the ALJ failed to consider Dr. Beatty's opinions or failed to resolve a contradictory opinion raised by Dr. Beatty, we are not persuaded there is any error. Initially, an ALJ is presumed to

consider all the evidence presented at the hearing. *See Crandall v. Watson-Wilson Transportation System, Inc.*, I71 Colo. 329, 467 P.2d 48 (1970). It is sufficient for the ALJ to enter findings concerning the evidence he considers dispositive of the issues, which he did here, and evidence and inferences inconsistent with the order are presumed to have been rejected. *Magnetic Engineering Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Consequently, we have no basis to disturb the ALJ's order.

**IT IS THEREFORE ORDERED** that the ALJ's order dated September 18, 2017, 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

1/23/18 by TT .

HEUSER & HEUSER LLP, Attn: GORDON J HEUSER ESQ, 625 N CASCADE AVENUE SUITE 300, COLORADO SPRINGS, CO, 80903 (For Claimant)
HALL & EVAN LLC, Attn: DOUGLAS J KOTAREK, 1001 17TH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-893-631-07

IN THE MATTER OF THE CLAIM OF:

LEAH TURNER,

Claimant,

v.

FINAL ORDER

CHIPOTLE MEXICAN GRILL,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurer,

Respondents.

The claimant seeks review of an order of Administrative Law Judge Cayce (ALJ) dated September 12, 2017, that determined the claimant was responsible to repay, in $250.00 monthly installments, a $97,641.12 overpayment of temporary total disability (TTD) benefits. We affirm.

This matter previously was before us. A brief factual history of this case is necessary to understand the issues on appeal.

This matter went to hearing before ALJ Cayce on July 25, 2017, on the issue of the repayment terms for a $97,614.12 overpayment of TTD benefits. After the hearing, the ALJ found that the claimant had suffered admitted industrial injuries on May 9, 2012. The respondents filed a General Admission of Liability on August 14, 2012, admitting for TTD benefits beginning on July 16, 2012.

On July 24, 2014, the respondents requested a Division-sponsored Independent Medical Examination (DIME). The claimant underwent the 24-month DIME with Dr. Beatty on October 20, 2014. Dr. Beatty determined that the claimant had reached MMI on June 15, 2012, for her left shoulder and cervical spine injuries. He assigned a 16% whole person impairment rating.

Dr. Beatty thereafter reviewed extensive video surveillance and medical records of the claimant. He subsequently issued a supplemental report opining that the claimant reached MMI on June 15, 2012, with a 0% whole person impairment rating.

On February 13, 2015, the respondents filed a Final Admission of Liability consistent with Dr. Beatty's supplemental report that the claimant reached MMI on June 15, 2012, with a 0% whole person impairment rating. Since Dr. Beatty's MMI date preceded the first TTD payment, the respondents asserted an overpayment of all TTD benefits from July 16, 2012, and continuing for a total of $97,641.12.

ALJ Cannici subsequently issued an Order on September 23, 2016, determining that the respondents were entitled to recover the overpayment of TTD benefits in the amount of $97,641.12. However, ALJ Cannici did not address the specific terms of the repayment.

The respondents and the claimant subsequently appealed ALJ Cannici's Order. The respondents appealed solely on the ground that the Order did not specify the repayment terms of the overpayment. The claimant also appealed, arguing that ALJ Cannici applied an incorrect burden of proof under §8-42-107(8)(b)(II)(B), C.R.S. The Panel ultimately affirmed ALJ Cannici's Order. With regard to the respondents' argument that ALJ Cannici erred in failing to specify the terms of the repayment, the Panel held that since ALJ Cannici's Order contemplated the possibility of future litigation concerning the repayment terms of the overpayment, it was not a final order on this issue. Neither party appealed the Panel's Order.

The respondents then filed an Application for Hearing endorsing the sole issue of the repayment terms of the overpayment. In her response, the claimant asserted that the respondents were precluded from obtaining a retroactive repayment of the overpayment since she was lawfully and statutorily entitled to receive the TTD benefits when they were paid to her.

During the ensuing hearing before ALJ Cayce, no testimony was presented by either party. Instead, counsel for both parties made brief arguments regarding the issue of the overpayment and the repayment terms. The respondents specifically requested repayment at the rate of $732.57 per week, or the rate at which the claimant previously was paid TTD benefits. The claimant made no request as to a repayment amount or schedule.

ALJ Cayce subsequently issued her order, denying the respondents' request for repayment at the rate of $732.57 per week. Instead, ALJ Cayce ordered the claimant to repay the $97,641.12 overpayment in monthly installments of $250.00.

The claimant has appealed the ALJ Cayce's order. The claimant initially argues that it was the respondents' burden to prove entitlement to an overpayment in the first instance, and that ALJ Cayce erred in failing to require the respondents to put on evidence to meet its burden. The claimant further argues that ALJ Cayce exceeded her legal authority in ordering a retroactive recoupment of the overpayment. Moreover, the claimant argues that ALJ Cayce erred in using an improper burden of proof when ordering repayment terms. We are not persuaded there is any error.

Section 8-42-113.5(1)(c), C.R.S. provides that the insurer is authorized to seek an order for repayment of an overpayment, and ALJs are expressly granted authority in §8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ's schedule for recoupment of an overpayment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994). An abuse of discretion is not shown unless the order is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. *See Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

Here, in her Brief on appeal, the claimant essentially challenges the respondents' right to recover the overpayment. Again, the claimant specifically contends that ALJ Cayce should have required the respondents to put on evidence to prove entitlement to the overpayment, and the retroactive relief sought. However, as explained above, ALJ Cannici's Order determined that the respondents were entitled to recover an overpayment of TTD benefits in the amount of $97,641.12, the Panel affirmed ALJ Cannici's Order, and neither party appealed the Panel's Order. Consequently, the claimant is precluded from contesting, at this juncture, the respondents' entitlement to repayment of the $97,641.12 overpayment. *See Verzuh v. Rouse*, 660 P.2d 1301 (Colo. App. 1982).

In any event, the Colorado Court of Appeals and the Panel previously have held that the respondents may retroactively recover an overpayment of benefits. *See Simpson v. Industrial Claim Appeals Office, supra*; *see also Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). Additionally, the retroactive recoupment of an

overpayment of benefits is not limited to those cases where a claimant is paid duplicate benefits. *Josue v. Industrial Claim Appeals Office*, W.C. No. 4-954-271-04 (June 17, 2016), *aff'd* 16CA1036 (March 2, 2017)(NSOP); *Moreno v. Sysco Corp*., W.C. No. 4-917-763 (June 24, 2016); *Heffner v. Wal-Mart Stores Inc*., W.C. No. 4-869-417-02 (April 26, 2016); *Grandestaff v. United Airlines*, W.C. No. 4-717-644 (Dec. 12, 2013); *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (July 25, 2013); *Haney v. Shaw, Stone & Webster*, W.C. No. 4-790-763 (July 28, 2011). Further, as noted above, the Colorado Court of Appeals has held that ALJs have discretion to fashion a remedy with regard to overpayments, which is what the ALJ did here. *See Louisiana Pacific Corp. v. Smith, supra*. Thus, under these circumstances, we are unable to conclude the ALJ abused her discretion with regard to the repayment terms.

To the extent the claimant also argues that the ALJ used an improper burden of proof in ordering repayment terms, we again perceive no error. During the hearing, the respondents argued that the claimant should be ordered to repay the overpayment at the rate of $732.57 per week or the claimant's prior TTD rate. The ALJ was not persuaded by the respondents' argument or the evidence submitted, and she instead fashioned a remedy and ordered the claimant to repay the overpayment in $250.00 monthly installments. *See Louisiana Pacific Corp. v. Smith, supra*. As noted above, in her Brief, the claimant does not contest the $250.00 monthly repayment terms. Rather, the claimant states that ALJ Cayce "made a very fair and reasonable determination of the amount of the monthly retroactive repayment. . . and takes no issue with the fair determination of the *amount* of the retroactive repayment." (emphasis in original) Brief at 3. Consequently, we have no basis to disturb the ALJ's order.

**IT IS THEREFORE ORDERED** that the ALJ's order dated September 12, 2017, 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

2/8/18 by TT .

BACHUS & SCHANKER, LLC, Attn: JAMES W. OLSEN, ESQ,, 1899 WYNKOOP STREET, SUITE 700, DENVER, CO, 80202 (For Claimant)
POLLART & MILLER LLC, Attn: BRAD J. MILLER, ESQ., 5600 SOUTH QUEBEC STREET, SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-971-646-03

IN THE MATTER OF THE CLAIM OF:

VICTORIA GAGNON,

Claimant,

v.

ORDER

WESTWARD DOUGH OPERATING CO. d/b/a KRISPY KREME,

Employer,

and

TECHNOLOGY INS. CO,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cayce (ALJ) dated June 22, 2017, that construed the report of the Division sponsored Independent Medical Examiner (DIME), and as determined, affirmed the DIME's finding of maximum medical improvement (MMI) and of permanent impairment. We affirm the decision in part and remand a portion of the order for additional findings.

The claimant worked for the employer in a donut shop. The claimant suffered an injury to her left arm on December 28, 2014, when she reached into an extruder machine and began to scoop out donut dough in five pound segments. She had to reach above her head to do so and developed pain in her left chest, shoulder, and arm. The claimant had previously injured her cervical spine in a 2009 motor vehicle accident. She treated until she was involved in a second motor vehicle accident in July 2014. These injuries featured symptoms in the claimant's neck, in her left shoulder and as a closed head injury. The left shoulder was diagnosed as an impingement syndrome for which she was provided corticosteroid injections. MRIs revealed central canal stenosis at multiple levels of the cervical spine. The claimant had also treated with insulin during the preceding eight years for Type 2 diabetes.

Following her work injury, the claimant treated with Dr. Hughes. He prescribed physical therapy. Dr. Hughes diagnosed a work related left shoulder strain, and the development of tendinosis. The doctor felt the diabetes was a contraindication for a

surgical repair. Dr. Hughes concluded the claimant reached MMI on July 14, 2015, and calculated a 13% upper extremity permanent impairment rating. The respondents filed a Final Admission of Liability for this rating on September 11, 2015.

The claimant requested a DIME review, which was performed by Dr. Kawasaki on April 15, 2016. Prior to the DIME procedure, the claimant obtained a report from Dr. Sanders. His review of the records suggested the claimant had sustained a thoracic outlet syndrome. He attributed the claimant's symptoms of numbness and tingling in her arms to this condition. Dr. Sanders deemed the claimant to be a candidate for pectoralis minor tenotomy surgery and suggested she was not at MMI. At the respondent's behest, Dr. Bernton reviewed Dr. Sanders's report. Dr. Bernton pointed out the symptoms characteristic of thoracic outlet syndrome were present prior to the claimant's work injury. He reasoned the claimant only sustained a muscular strain at work in December 2014. Dr. Bernton felt the claimant should be assigned a 7% upper extremity impairment rating for which half, or roughly 3%, would be attributed to preexisting conditions.

Dr. Kawasaki surmised the claimant did suffer symptoms of thoracic outlet syndrome. He determined the claimant was not at MMI. Dr. Kawasaki suggested a psychologic evaluation, cognitive behavioral therapy if indicated and biofeedback therapy. He recommended an advisory impairment rating of 11% of the upper extremity. This rating was comprised of 5% for range of motion deficits and 6% for neurologic numbness.

The respondents requested a hearing to challenge the DIME findings. Counsel for the respondents took the deposition of Dr. Kawasaki on March 28, 2017. After examining again the medical records related to the claimant's condition prior to her work accident, Dr. Kawasaki revised his opinion at the deposition. He observed the claimant's neurologic symptoms were attributable to the claimant's earlier motor vehicle accidents and any treatment for those conditions were not part of her workers' compensation claim. Dr. Kawasaki concluded the claimant was at MMI on July 14, 2015, as noted by Dr. Hughes, and her permanent impairment rating was only 5% of the upper extremity.

Although the record reveals the claimant was variously represented by three different attorneys through the course of her claim, she appeared at the May 16, 2017, hearing without the benefit of counsel. At the outset of the hearing, the ALJ approved motions by the respondents that sought sanctions against the claimant for frustrating a Prehearing ALJ's order that the claimant undergo an evaluation and treatment with Dr. Cebrian, and for disobeying another PALJ order that the claimant respond to discovery requests. Accordingly, the ALJ barred the claimant from submitting into the record a

statement she had written, several documents written by Dr. Sanders including an impairment rating, an evaluation completed the day prior to the hearing, and several audio recordings of Dr. Hughes. When the claimant sought to attach to her post hearing statement several additional documents as evidence, the ALJ granted a motion to strike that new evidence. The claimant was invited to testify at the hearing but declined to do so. The only witness at the May 16 hearing was Dr. Bernton.

The ALJ determined the actual findings of the DIME physician were those expressed by Dr. Kawasaki in his March 28 deposition. The ALJ ruled Dr. Kawasaki concluded the claimant was at MMI on July 14, 2015, that the claimant's symptoms of thoracic outlet syndrome were preexisting conditions that were not work related, and that the claimant's permanent impairment rating was 5% of the left upper extremity. The ALJ then observed the claimant failed to overcome Dr. Kawasaki's actual findings concerning MMI and the permanent impairment rating by clear and convincing evidence. Accordingly, the ALJ affirmed those determinations of the DIME physician.

On appeal, the claimant submits several pages of complaints dealing with circumstances and procedures that have little to do with the ALJ's decision. Most turn on events and circumstances, which are not present in the record thereby rendering them impossible to evaluate. The claimant's essential point on appeal is her contention that she did overcome the determinations of the DIME doctor.

The claimant did not obtain a transcript of the May 16 hearing to assist with her appeal. The claimant, as the party seeking review, is responsible for presenting a record sufficient to demonstrate error, and assertions contained in her brief may not substitute for that which must appear of record. *Fleet v. Zwick*, 994 P.2d 480, 483 (Colo. App. 1999); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987). Consequently, in the absence of a transcript we must presume that the ALJ's factual determinations are supported by substantial evidence in the record. *Nova v Industrial Clam Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

The DIME physician's findings concerning the date of MMI and the degree of whole person medical impairment are binding on the parties unless overcome by clear and convincing evidence. Sections 8-42-107(8)(b) (III) & (8)(c), C.R.S. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *aff'd, Stephens v. Industrial Claim Appeals Office* (Colo.

App. 05CA0491, January 26, 2006) (NSOP). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported). We may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra; see also Dazzio v. Rice & Rice, Inc.*, W.C. No. 4-660-149 (June 30, 2008).

Here, the ALJ determined with record support that subsequent to the DIME physician's original report the DIME physician reviewed the medical reports predating the claimant's work accident and concluded the symptoms he originally attributed to the work injury were actually due to earlier, non-work, causes. Kawasaki Depo. (3/28/2017) at 59, 72, 74. The DIME physician, after reviewing the medical records, and the subsequent report of Dr. Gutterman, revisited his rating, which resulted in a new rating that was 5 percent of the upper extremity. Because the DIME physician resolved that symptoms of thoracic outlet syndrome were not work related, there was no further need to treat those symptoms as part of the claimant's workers' compensation claim. Dr. Kawasaki necessarily changed his earlier position to state the claimant was now at MMI on July 14, 2015. Thus, there is record support for the ALJ's determination that the DIME physician changed his initial determination regarding MMI and 11 percent rating to 5 percent of the upper extremity and that the 5 percent rating and the MMI date then became the DIME physician's opinion. The ALJ's determination represents a plausible interpretation of the DIME physician's opinion as reflected in his deposition. Therefore, we may not interfere with the ALJ's findings concerning the DIME physician's determinations regarding MMI and impairment.

As noted above if a DIME physician issues conflicting or ambiguous opinions concerning the claimant's MMI status, it is the ALJ's province to determine the DIME physician's true opinion as a matter of fact. Once the ALJ determines the DIME physician's opinion concerning MMI, the party seeking to overcome that opinion bears the burden of proof. *Clark v. Hudick Excavating, Inc.*, W. C. No. 4-524-162 (November 5, 2004). In *Fera v. Resources One, LLC, D/B/A Terra Firma*, W. C. No. 4-589-175

(May 25, 2005) *aff'd , Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006) the panel found that when the ALJ determined the DIME physician's true opinion on MMI, the ALJ did not err in assigning the respondents the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. *See also Viloch v. Opus Northwest*, LLC, W. C. No. 4-514-339 (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883 (December 26, 2001). Given the nature of the record and the medical dispute involved, we cannot say the ALJ committed error in adopting the DIME date of MMI.

However, we conclude the ALJ misapplied the burden of proof when she adopted Dr. Kawasaki's impairment rating by reasoning the claimant failed to demonstrate by clear and convincing evidence that the DIME committed error. The claimant has only been provided scheduled ratings corresponding to a permanent impairment of the upper extremity. To the extent her shoulder is characterized as the object of the permanent impairment, it also represents a body part appearing in the schedule of disabilities in § 8-43-107(2)(a). The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), states that "[w]hen an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The calculation of permanent impairment pertinent for scheduled injuries is not made subject to a DIME review. The court of appeals has stated in this respect that:

> Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of §8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

*Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Here, the ALJ misapprehended the applicable burden of proof. The burden of proof pertinent to a dispute concerning the impairment rating of a scheduled injury is a preponderance of the evidence. It is not by clear and convincing evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.*, W.C. No. 4-981-218-04 (January 25, 2018); *see generally Wagoner v. City of Colorado Springs*, W.C. No. 4-817-985-03 (Oct. 21, 2013)(no presumptive weight afforded DIME physician concerning scheduled injuries; DIME opinion unnecessary to determination of scheduled impairment), *aff'd Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP).

Because no statutory or presumptive weight is to be accorded a DIME's opinion concerning a scheduled impairment rating, the claimant does not have the burden of proof in this matter to challenge the DIME's rating. *Mesa v. Industrial Commission*, 303 P.3d 158, 162 (Colo. App. 2013). The respondents filed a Final Admission of Liability on September 11, 2015, admitting for an impairment rating of 13% of the left upper extremity. Pursuant to § 8-43-201(1) "a party seeking to modify an issue determined by a … final admission … shall bear the burden of proof for any such modification." Accordingly, the respondents bear the burden of proof by a preponderance of the evidence to set aside the rating provided by the authorized treating physician, Dr. Hughes, and not the rating of the DIME physician.

On remand, the ALJ shall enter a new order and determine whether the respondents overcame the opinion of the authorized treating physician, Dr. Hughes, on the matter of a permanent impairment rating by a preponderance of the evidence. In reaching this result, we should not be understood as expressing any opinions concerning this factual issue, which the ALJ must now resolve.

**IT IS THEREFORE ORDERED** that the ALJ's order dated June 22, 2017 is affirmed insofar as it ruled the date of MMI is July 14, 2015, and otherwise is set aside, and the matter is remanded for entry of a new order pertinent to the applicable permanent impairment rating consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

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# 128

**ETHICAL DUTIES OF LAWYER WHO CANNOT CONTACT CLIENT**
Adopted October 17, 2015

## ETHICAL DUTIES OF LAWYER WHO CANNOT CONTACT CLIENT

### INTRODUCTION AND SCOPE

The problem of the "missing client" arises when the lawyer does not know where the client is or when the client is not responding to the lawyer's communications. Many situations exist in which a lawyer retained to represent a client in a civil matter cannot initiate or maintain contact with that client. Perhaps the client retained the lawyer to pursue a lawsuit but then vanished during discovery or settlement discussions. A client may go missing between a lawyer's initial meeting with the client and the expiration of the statute of limitations for the client's claim, requiring the lawyer to consider whether to timely file a complaint to protect the client's interests.

Alternatively, the lawyer might have been retained by the client's insurance company to defend the client/insured in a lawsuit, but the lawyer cannot locate and communicate with the client in formulating a defense.[1] This typically occurs pursuant to insurance policies in which the insured gives the insurer the right and duty to defend the insured against liability claims that the policy may cover. However, the lawyer may have difficulty locating the insured after receiving the referral. This scenario has become more common in Colorado since the enactment of C.R.S. § 42-7-414, which requires a purchaser of a motor vehicle liability policy to designate an insurance carrier as the agent for service of process in the event that the insured cannot be located. Since this statute permits substitute service on the insurer for service on the insured, the fact that the defendant has gone missing does not prevent the lawsuit from moving forward. The "missing client" problem raise the following ethical questions: What happens if the lawyer is unable to make contact with a client in time to satisfy the deadline to file a

[1] This opinion uses "client" to refer to the insured person whom the insurer retains the lawyer to defend. "[T]he insured is unquestionably a client to whom the attorney owes the ethical duties owed to any client. . . . [T]he carrier is not a client simply by retaining the attorney to defend its insured. . . ." CBA Op. 91, "Ethical Duties of Attorney Selected by Insurer to Represent Its Insured" (1993, Addendum 2013) (CBA Op. 91).

pleading or otherwise act? May the lawyer undertake the representation on behalf of a missing client, and if so, what actions may the lawyer take on the client's behalf? This opinion outlines the lawyer's ethical duties and limitations in these situations.

In considering these questions, the Colorado Bar Association Ethics Committee (Committee) recognizes that other jurisdictions have reached divergent conclusions on issues involving missing clients. *Compare* N.C. State Bar Formal Ethics Op. 1, "Representation of Insurance Carrier after Insured Disappears" (2010) (concluding that a lawyer retained by an automobile insurance carrier to defend its missing insured in a negligence action may not file pleadings or appear in court on the insured's behalf) *and* Utah State Bar Ethics Advisory Op. 04-01a (2004) (Utah Op. 04-01a) (opining that a lawyer representing an employer may not also represent a missing former employee because "the lawyer cannot receive any direction regarding the objectives of the representation" from the missing former employee and "the lawyer runs the risk of acting in contravention of the desires of the former employee."), *with* State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct Formal Op. 1989-111, "What are the ethical responsibilities of an attorney representing the defendant in a civil action wherein a complaint has been filed and served on the defendant, an answer is now due and the client cannot be located?" (1989) (Cal. Op. 1989-111) (opining that "the attorney may file an answer to the complaint to avoid reasonably foreseeable prejudice" to a client who goes missing after a complaint is filed) *and* Ky. Bar Ass'n Ethics Op. E-433, "Ethical obligations of a lawyer who is unable to locate a client in a civil matter" (2012) (Ky. Op. E-433) (concluding that the lawyer may answer or file an "appropriate pleading to protect the client's interests" in certain "rare situations in which, prior to disappearing, the client expressly or impliedly authorized the filing of a claim or an answer, and provided the lawyer with sufficient information to do so"). The Committee believes that opinions allowing a lawyer to minimize prejudice to the client by taking actions to protect the client's interests represent the better approach. The Committee notes, however, that there may be circumstances when the lawyer cannot take such actions without implicating other ethical considerations or when acting without conferring with the client would prejudice the client. In all circumstances, a lawyer must balance various ethical factors, including the duties of diligence, communication, and confidentiality to the client; the duty of candor toward a tribunal; and the duty not to make a false statement of material fact to third parties.

This opinion does not address the limitations that may arise in the insurance defense context with regard to the lawyer's ability to inform the insurer of difficulties in locating the client. An insured client who fails to stay in contact with the retained lawyer may violate the cooperation clause typically found in liability insurance policies. *See* CBA Formal Op. 91, (discussing the lawyer's ability to inform the

insurer of information that may affect the client's insurance coverage). This opinion does not address representation in criminal matters.

**SYLLABUS**

When the lawyer's client is missing from the outset of the engagement or has gone missing since the representation began, the lawyer must take reasonable steps to locate the client and, whenever possible, seek continuances of court deadlines while continuing efforts to contact the client. If the lawyer concludes that a lawyer-client relationship exists, the lawyer may ethically undertake the representation and take such action as may be necessary in order to prevent immediate prejudice to the client's interest. If, however, the litigation continues and the client cannot be located despite a diligent search, the lawyer ultimately may be required to withdraw from the representation.

**ANALYSIS**

**I. Creation of the lawyer-client relationship**

Before undertaking the representation of a missing client, the lawyer must make a threshold determination of whether, in the lawyer's professional judgment, a lawyer-client relationship exists. "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists . . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Colorado Rules of Professional Conduct (Colo. RPC) Preamble, cmt. [17].

Although the existence of a lawyer-client relationship is a substantive legal issue, there are ethical considerations as well. First, the client must consent to the representation. "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation." *Comm. on Prof'l Ethics and Grievances of Virgin Islands Bar Ass'n v. Johnson*, 447 F.2d 169, 174 (3d Cir. 1971). "The lawyer may not ethically represent a vanished former employee unless the lawyer has an existing attorney-client relationship or the former employee agreed to the representation at the company's expense prior to vanishing . . . ." Utah Op. 04-01a. Second, if the insurance company will be paying the lawyer's fees, the client must consent to this arrangement. "A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent . . . ." Colo. RPC 1.8(f).

In the insurance defense context, the matter of consent must be evaluated in light of the language of the insurance contract. "The formation of a relationship between an attorney and his or her client is based upon contract, which may be either express or implied by the conduct of the parties." *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998). The terms of the contract may delegate to the insurer permission to form the relationship. "[T]he insurance company can, on behalf of the insured, formulate the requisite attorney-client relationship between the defense counsel and the insured until such time as the insured manifests such action by word or deed as to disavow the attorney-client relationship. The consent of the insured to the establishment of the attorney/client relationship in this manner is implied by the insurance policy which has language to the effect that 'We will defend at our expense, with attorneys of our choice, any suit against the insured.'" Penn. Bar Ass'n Ethics Op. 97-123 (1997). Alternatively, the insured's consent may be inferred from the decision to purchase the policy in the first instance. *See Hornberger v. Wendel*, 764 N.W. 2d 371, 376 (Minn. App. 2009) (holding that insurer's retention of defense counsel pursuant to a liability insurance policy created a lawyer-client relationship as a matter of law); *Burke v. Lewis*, 122 P.3d 533, 542-43 (Utah 2005) (holding that "appointment of counsel" for a missing defendant "was the best means of effectuating a just process and a fair result and that [the missing client's] consent to such representation could be fairly implied" from the circumstances and his purchase of a malpractice insurance policy). *See also* Colo. RPC 1.0, cmt. [7] ("In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.").

A lawyer retained by an insurer should consider Colo. RPC 1.8(f), which permits a lawyer to accept payment of a legal fee from a source other than the client only if three requirements are met: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent judgment or the client-lawyer relationship; and (3) lawyer-client confidentiality is preserved. These requirements are individually defined in Colo. RPC 1.0(e) (informed consent), Colo. RPC 5.4(c) (independent judgment), and Colo. RPC 1.6 (confidentiality). As with the creation of the lawyer-client relationship, in the insurance defense context the absent client's informed consent to third-party payment may be inferred from the terms of the insurance contract.

## II. The lawyer's ethical duties upon commencement of the representation

**A. Cases in which the lawyer actually communicates with the client at the outset of the representation**

Diligence at the outset of a representation can avoid many "missing client" problems. "An attorney should be encouraged to treat most clients as though they are likely to disappear because doing so will significantly reduce the chances of it happening." Allison Elizabeth Williams, *Missing Clients: What to Do When Your Client Has Vanished*, 28 J. LEGAL PROF. 247, 254 (2003-2004). When possible at the outset of a lawyer-client relationship, a lawyer should obtain information from the client that would enable the lawyer to make reasonable efforts to locate the client throughout the course of the representation. This could include obtaining multiple telephone numbers, physical addresses, and e-mail addresses for the client and obtaining contact information for other persons who may know the client's whereabouts. A lawyer should direct a client to inform the lawyer if the client's contact information changes.

When appropriate, a lawyer should advise the client at the outset of the representation that it is important for the lawyer always to be able to locate the client during the course of representation. Subject to Colo. RPC 1.2(c), the lawyer and client may agree to a course of action if the lawyer cannot locate the client, for instance, setting out the methods the lawyer will use to attempt to contact the client or actions the lawyer will take if the lawyer cannot locate the client. *See* CBA Formal Op. 95, "Funds of Missing Clients" (1993) (CBA Op. 95) (authorizing use of client funds to locate missing client). The client and lawyer may agree that if the client does not respond to the lawyer's efforts to locate the client, the lawyer may terminate the representation. Colo. RPC 1.16(b)(5). The client also may authorize the lawyer to take some action on the client's behalf, such as filing a complaint before a statute of limitations expires. As stated in comment [3] to Rule 1.2:

> At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

Similarly, the lawyer may ask the client for advance authority to settle a claim within a certain range. *See* Ky. Op. E-433 ("There may be rare cases where, prior to the client's disappearance, the client set specific settlement parameters and authorized the lawyer to settle on his behalf. If the lawyer

has clear authority, he or she may be able to act for the client, assuming there is no foreseeable prejudice to the client. . . ."); Williams, 28 J. LEGAL PROF. at 250 (stating that "when a client is missing, the best situation is for the attorney to have authority to consent to a settlement favorable to the missing client's interests"); *but see* State Bar of Ariz. Ethics Op. 06-07, "Communication; Settlement Authority; Fee Agreements; Conflict of Interest" (2006) (opining that a lawyer may not use a fee agreement giving the lawyer unfettered discretion to unilaterally settle cases).

**B. Cases in which the representation is initiated by contract without the client's actual involvement**

When a lawyer-client relationship exists, but the lawyer has not previously received direct instruction from the client and has not received direction from the client on how to act, for instance, in the insurance defense context, then immediately upon receiving the assignment the lawyer should exercise reasonable efforts to locate the client. This may include, as appropriate, hiring a professional investigator, searching public records, and/or contacting family or friends of the client. Alaska Bar Ass'n Ethics Op. 2011-4, "Duties of an attorney in a criminal appeal when the client cannot be contacted" (2011) (Alaska Op. 2011-4) ("A 'reasonable inquiry' may consist of, but is not limited to, attempts to contact the client by telephone, letter to client's last known address, personal visit to the client's last known address, electronic mail inquiry, internet search, post office search, registry of motor vehicle search, or newspaper publication."). "In all cases the attorney must expend a reasonabl[e] amount of time and funds so as to insure that the attorney makes a diligent effort to locate the client. Since each case is unique, the attorney should evaluate what methods of search would be reasonable to locate the client." Cal. Op. 1989-111. "Even without such a provision in a retainer agreement, a lawyer may expend a reasonable amount of the client's unexpended funds in order to locate the client." CBA Op. 95.

Even if the client cannot be located, the lawyer still owes the client duties of diligence, loyalty, and communication. "A lawyer shall act with reasonable diligence and promptness in representing a client." Colo. RPC 1.3. "Loyalty [is an] essential element[] in the lawyer's relationship to a client." Colo. RPC 1.7, cmt [1]. When someone other than the client retained the lawyer, the lawyer represents the client, not the third party. CBA Op. 91 ("This Committee has concluded that in the context of this tri-partite relationship, the better rule is that the lawyer's client is the insured and not the carrier."). The lawyer must protect the interests of the client, even though the insurer may be exercising control over,

and paying for, the defense. "The attorney's ethical duty is to assure that the interests of the insured are protected, while at the same time fulfilling the insured's contractual obligations to the carrier against a backdrop where the insurance company, by virtue of financing the defense, may effectively control the result and may have its own interests at stake." CBA Op. 91.

A lawyer also has a duty to communicate with the client. "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Colo. RPC 1.4, cmt [1]. However, "a standard of reasonableness under the circumstances determines the appropriate measure of consultation." Restatement (3d) Law Governing Lawyers (Rest.) § 20, cmt. c (2000); *see also Burke*, 533 P.3d at 540 (permitting representation of a missing client and finding that "just because representation of [the missing client] will not neatly accord with the general assumptions underlying the communication requirements contained in the rules of professional conduct, it does not necessarily follow that the rules prohibit the representation entirely"). The Committee recognizes that in situations where the lawyer cannot locate the client, the lawyer's duties of diligence and communication may be in tension. On the one hand, if the lawyer takes action without first communicating with the client, the client may be deprived of the opportunity to direct the objectives of the representation. On the other hand, if the lawyer refrains from taking action until the client can be located, the client may suffer prejudice from, for example, missing a statute of limitations or having a default judgment entered.

The Committee concludes that this tension should be resolved in favor of protecting the absent client's interests. This conclusion is supported by the Committee's previous statement regarding a lawyer's duties representing clients in dependency and neglect proceedings: "An attorney may not decline to advocate on behalf of the client simply because the client does not attend court hearings or provide direction to the attorney. An attorney must still exercise professional judgment as to how to advocate for the client's best interests." CBA Formal Ethics Op. 114, "Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings" (2006, modified 2010). Although that opinion addressed a different area of practice, its conclusion offers guidance with respect to a lawyer's duty to take action to protect the client who is not available to consult about decisions.

## III. What action may the lawyer take?

In determining the extent of actions a lawyer may take on behalf of an absent client, the primary consideration should be avoiding prejudice to the client to the extent feasible. Cal. Op. 1989-111. This

may include filing pleadings or briefs to preserve a client's rights or delaying proceedings to allow the lawyer more time to locate the client. Alaska Op. 2004-3, "Responsibilities of an Attorney When a Client Cannot Be Contacted" (2004) (Alaska Op. 2004-3) (a lawyer may file a complaint before a statute of limitations expires "if she believes that failing to file would materially and adversely affect the client's interests"); Rest. § 134, cmt. b ("In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict."). Whether a pleading can be prepared will depend on the facts and circumstances of each case. The lawyer must consider whether the client has authorized the action and whether the lawyer has enough information to act. *See* Ky. Op. E-433 (lawyer may provide "temporary protection" for the client by answering or filing other pleadings if the lawyer has the express or implied authorization and sufficient information).

A lawyer may take action on behalf of a client as is impliedly authorized to carry out the representation. Colo. RPC 1.2(a). If a lawyer reasonably believes the client has authorized the lawyer to take some action and is relying on the lawyer to do so, the lawyer may act on behalf of the client. Alaska Op. 2004-3. The client's prior communications with the lawyer may provide authorization to take actions like filing pleadings or briefs. Alaska Op. 2011-4 (lawyer must file notice of appeal and may file briefs when client previously directed filing of notice of appeal). In some circumstances, when a client has previously directed a lawyer to take action and the lawyer cannot communicate with the client following this direction, the lawyer must take the directed action. Colo. RPC 1.2, cmt [3].

Consent may be determined from circumstances other than the client's communications. For instance, when an insurance policy expressly calls for the insurer to provide a defense, the client has impliedly consented to the insurance company's payment of the lawyer's fees and the lawyer's preparation of a defense simply by purchasing the policy. Colo. RPC 1.0, cmt. [7]; Colo. RPC 1.4, cmt. [2]. Rest. § 134, cmt. d ("Informed client consent may be effective with respect to many forms of direction, [including] informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction.").

The lawyer may have enough information to prepare a pleading from prior consultation with the client or may obtain information from a third party, for instance, the client's insurance company, concerning the facts of the case. However, if there is not enough information available, the lawyer must

consider whether there is an adequate basis for preparing the pleading. In some circumstances, the lawyer will not have enough information to act on the client's behalf. Colo. RPC 3.1 ("What is required of lawyers … is that they inform themselves about the facts of their clients' cases … and determine that they can make good faith arguments in support of their clients' positions."); *see also* C.R.C.P. 11(a). The lawyer also must be careful to avoid misleading the court with false statements of fact regarding the scope of the lawyer's investigation or the client's participation in preparing the pleading. Colo. RPC 3.3. The lawyer representing an absent defendant must consider whether the client has compulsory counterclaims and, if so, must take appropriate action not to waive such counterclaims. This is pursuant to the principle that even if the lawyer's retention is limited to defending claims against the client and not to prosecute counterclaims, "[t]o avoid loss of a counterclaim, insurance defense counsel should inform the insured about potential counterclaims to the extent necessary so the insured can decide whether to seek independent counsel." CBA Op. 91.

In other circumstances, the lawyer may seek to postpone proceedings to allow additional time for the lawyer to locate the client. For example, Colo. RPC 1.2(a) mandates that "[a] lawyer shall abide by a client's decision whether to settle a matter." If mediation is scheduled but the lawyer cannot locate a client prior to mediation and the client has not authorized the lawyer to settle the case, the lawyer should postpone the mediation until the lawyer can locate the client. *See also* Williams, 28 J. LEGAL PROF. at 254 (noting that a lawyer may settle a case on behalf of a client only if the client has previously authorized the lawyer to settle).

Just as an insurance policy may provide the client's implied consent to the creation of a lawyer-client relationship, the policy may give the insurer the right to exercise the client's control of settlement of claims covered by the insurance. The lawyer should consider carefully the extent to which the insurance contract gives the insurance company authority to settle. If (1) the insurance contract clearly gives the insurer the right to settle claims without the consent of the insured, (2) the lawyer has made reasonable efforts to contact the client regarding the settlement proposal, (3) the proposal does not impose obligations on the client to the claimant beyond what the insurer is paying under the settlement, (4) the lawyer determines in the exercise of independent professional judgment that the settlement is appropriate for the client, and (5) the lawyer has not received express instructions to the contrary from the insured client, then the lawyer may settle a claim if such action is warranted. *Mitchum v. Hudgens*, 533 So.2d 194, 202 (Ala. 1988) (where an insurance policy gives the insurer the exclusive right to settle, a lawyer may follow the insurer's settlement instructions without prior approval from the client). In evaluating a settlement proposal covered by

insurance, the lawyer also should consider whether the settlement would cause negative consequences for the client, such as the reporting of the settlement to a professional licensing authority. Authority to settle claims against an insured client would not, by itself, authorize the lawyer to agree to a release or dismissal with prejudice of counterclaims that the client might have against the claiming party. Outside the context of settling a claim covered by insurance, the Committee is unaware of circumstances in which a lawyer could enter into a settlement agreement without the client's express authorization. Ky. Op. E-433 (stating it is very unlikely that a lawyer could ever negotiate a settlement on behalf of a missing client); Colo. RPC 1.2(a); *see also* Or. State Bar Ass'n, Formal Ethics Op. 2005-33, "Declining or Terminating Representation: Withdrawal When Client Not Found" (2005) (stating that a lawyer may not accept even a favorable settlement proposal for her client absent the client's consent).[2]

If the lawyer cannot locate a client prior to the deadline to respond to interrogatories served under C.R.C.P. 34(a), the lawyer should request an extension of time to permit the lawyer more time to locate the client. As with filing a complaint or answer without conferring with the client, the lawyer should be mindful of Colo. RPC 3.3 and Colo. RPC 4.1 and not make any false statements of material fact to a tribunal or third party regarding the client's availability or participation in the preparation of the pleading.

In preparing an answer for a missing client in the insurance defense context, the lawyer should be attentive to issues in the case relating to insurance coverage. As the Committee stated in Opinion 91, "Defense counsel must be alert to ethical duties which prohibit actions by the attorney which favor the non-coverage interests of the carrier over the interests of the insured to establish coverage . . . . The existence of a coverage question should not be allowed to interfere with the lawyer's duty to exercise independent professional judgment on behalf of the insured."

The lawyer must determine whether the lawyer's decision to undertake representation of the absent client might otherwise be detrimental to the client's interests. The lawyer should not enter an appearance for a missing client (even if the client or the insurance carrier previously authorized such

[2] The Colorado Supreme Court has not addressed the issue of the client's contractual delegation of settlement decision-making authority to the insurer. However, in older cases, the Court addressed the client's express settlement authority. *Cross v. Dist. Ct.*, 643 P.2d 39 (Colo. 1982) (holding "an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client"); *Radosevich v. Pegues*, 292 P.2d 741 (Colo. 1956) (same); *Lewis v. Vache*, 20 P.2d 554 (Colo. 1933) (same); *Hallack v. Loft*, 34 P. 568 (Colo. 1893) (same).

entry) if to do so would be prejudicial to the client or would compromise the defense of the case:

> Because the lawyer cannot receive any direction regarding the objectives of the representation, the lawyer runs the risk of acting in contravention to the desires of the [absent client] . . . . [I]f the lawyer took action that subjected the [absent client] to the jurisdiction of the court, then the [absent client] could be substantively prejudiced by lawyer's actions.

Utah Op. 04-01a.

## III. Limitations on the lawyer's representation

Because consent is predicate for many aspects of the lawyer-client relationship, the lawyer must avoid taking action that fails to fully take into account the missing client's right to give–or to deny–necessary consents. For example, an absent client is unable to provide consent to waive a concurrent conflict of interest. Colo. RPC 1.7. Therefore, in the insurance defense context, the lawyer should carefully review any reservation of rights letter before accepting the referral. Similarly, the lawyer should decline the joint defense of an employer and an absent former employee because the former employee cannot consent to the potential conflict of interest between the two clients. *See* Colo. RPC 1.7(b)(4) (requiring "informed consent, confirmed in writing" of a concurrent conflict of interest); Colo. RPC 1.7, cmt. [18] ("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved,"); *see also* Utah Op. 04-01a (advising against joint representation of employer and absent former employee because "the attorney cannot make the explanation required by the rule, cannot obtain the [absent] client's consent to representation and would therefore violate Rule 1.7").

After acting on behalf of the client, the lawyer should consider whether continued representation of the absent client is possible. Withdrawal or terminating the lawyer-client relationship may be required if the client cannot be located within a relatively short period of time. *People v. Silvola*, 915 P.2d 1281, 1284-85 (Colo. 1996) (sanctioning lawyer for purporting to represent absent client for 19 months). Other jurisdictions are in agreement:

> [W]hat are the ethical obligations of a lawyer who, for reasons beyond his control, is

> unable to communicate with or secure instructions from his client in a pending action? His duty would appear to be to protect the interests of his client to the extent that he can reasonably do so and, when the lawyer cannot reasonably carry out his employment effectively, he should relieve himself from those duties by seeking withdrawal . . . taking care to obtain permission of the court where needed . . . and to avoid foreseeable prejudice to the rights of the client.

State Bar of Ariz. Ethics Op. 80-11 (1980). *Accord* Cal. Op. 1989-111 ("Under the facts presented, the attorney is severely limited in the ability to act on behalf of the client without the client's express authority. The attorney has a sufficient basis to withdraw . . . ."); Ky. Op. E-433 ("In most civil matters, the lawyer will have to withdraw, because the lawyer will likely be unable to meet the ethical obligations imposed by the Rules of Professional Conduct without the client's participation.").

As with the decision to act on behalf of an absent client, if the lawyer continues to be unable to contact the client and therefore has grounds to withdraw, the lawyer's primary consideration in deciding when to withdraw should be minimizing the potential prejudice to the client. Generally speaking, the lawyer should stay in the case as long as it is feasible to do so. The need to obtain information from the client should be balanced against preventing prejudice to the client if possible. When withdrawing from representation due to a client's unavailability or unresponsiveness, a lawyer "shall take steps to the extent reasonably practicable to protect a client's interests." Colo. RPC 1.16(d). When a lawyer has reason to believe that the client is receiving communications from the lawyer but not responding to them, the lawyer must inform the client of the lawyer's intent to withdraw from the representation prior to withdrawing. The lawyer should pursue means similar to those previously used to locate the client to notify the client of the withdrawal and should "take care to document all steps taken to give notice to the client." Cal. Op. 1989-111. The lawyer should be mindful of the fact that the court is under no obligation to grant a request for withdrawal.

**IV. Disclosure that the client is unavailable**

Ordinarily the lawyer's pleading should not suggest that the absent client played a role in its preparation. This suggestion could violate Colo. RPC 3.3.

In discussing the propriety of the lawyer's disclosure of the unavailability of the client to opposing counsel and the court, a California opinion states the factors to be considered:

> The attorney has a duty to maintain inviolate the confidence of his client and at every peril to himself to preserve the secrets of his client. The attorney also has a duty not to mislead the judge or a judicial officer by an artifice or false statement of fact or law. The concealment of material information is as misleading as an overtly false statement. Disclosure of the inability to locate the client could be detrimental to the client's interests.
>
> Clearly, the attorney is under no obligation to inform opposing counsel that the client cannot be located. However, the attorney may reveal such information as may be necessary to formulate the basis for a motion to withdraw.

Cal. Op. 1989-111 (citations omitted).

There may be circumstances where disclosing the client's absence will be detrimental to the client's interests. *Id.* However, if the desire to preserve the confidence of "information relating to the representation" conflicts with the lawyer's duty of candor to the court, then the lawyer must truthfully inform the court of the client's absence. Colo. RPC 1.6; *see also* CBA Op. 123. However, the lawyer should take care to reveal such information only to the extent reasonably necessary to comply with Colo. RPC 3.3 or as otherwise permitted by Colo. RPC 1.6. Colo. RPC 3.3, cmt. [15].

**CONCLUSION**

Many missing client problems can be avoided through careful client intake procedures, including obtaining multiple means of contacting the client and obtaining the client's informed consent to methods the lawyer will employ to handle the case should the client become unavailable. Obtaining permission to file pleadings or settle the case within a predetermined range can resolve future problems. A lawyer who has formed a lawyer-client relationship with an absent client may file pleadings on the client's behalf to avoid the expiration of a statute of limitations or to prevent entry of a default judgment against the client. However, any such pleadings must not imply that the client actively participated in their preparation. If the lawyer conducts a diligent and well-documented search but remains unable to locate an absent client, and has reached the point that further representation is impossible without input from the client, the lawyer should withdraw. In preparing the withdrawal, the lawyer must again be diligent in attempting to contact the client to notify the client of the withdrawal, and may reveal to the court and

opposing counsel the minimum information necessary to support withdrawal. Even in the course of withdrawing, the lawyer must endeavor not to prejudice the interests of the absent client.