

# **BROWN BAG SEMINAR**

**Thursday, February 21, 2013**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> Street

2nd Floor Conference Room  
(use elevator near Starbucks)

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation  
**Free**

This outline covers ICAP and appellate decisions issued from January 11, 2013 through  
February 15, 2013

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**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-780-377

IN THE MATTER OF THE CLAIM OF

GARY BEGORDIS,

Claimant,

v.

CATERPILLAR SERVICES,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurer,  
Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Broniak (ALJ) dated July 25, 2012, that ordered them responsible to pay the claimant temporary total disability (TTD) benefits, and temporary partial disability (TPD) benefits. We affirm.

This case has a long procedural history and has been before the Panel on two separate occasions. It is necessary to recite the procedural history for purposes of the issues presently on appeal.

ALJ Broniak found that the claimant suffered a compensable back injury on October 28, 2008. The claimant initially was treated by Dr. Fox. By November 6, 2008, Dr. Fox had released the claimant from care and placed him at maximum medical improvement (MMI).

On November 12, 2008, the claimant returned to see Dr. Fox and complained of severe pain in his left thigh. Dr. Fox was unable to state with greater than 50 percent probability that the claimant's leg pain was related to the October 28, 2008, incident. The claimant again returned to see Dr. Fox on December 1, 2008, at which time Dr. Fox recommended a MRI. Dr. Hattem also recommended a MRI, but the respondent insurer denied authorization.

On March 20, 2009, Dr. Fox released the claimant to return to regular employment. Dr. Fox did not place the claimant at MMI but noted that the claimant was discharged due to non-compliance. Dr. Fox's note did not explain the basis for the claimant's non-compliance.

The claimant eventually underwent the MRI in April 2009. Dr. Fox reviewed the MRI and opined that the industrial accident did not cause the pathology found on the MRI. Dr. Fox instead opined that the pathology on the MRI was degenerative.

The respondents ultimately denied liability for the claimant's workers' compensation claim. After a hearing before ALJ Cannici, he concluded that the industrial accident aggravated, accelerated, or combined with the claimant's pre-existing back condition of ankylosing spondylitis to produce the need for treatment. ALJ Cannici awarded TTD for the period of November 9, 2008, through March 20, 2009. He terminated TTD based on Dr. Fox's March 20, 2009, release to regular duty pursuant to §8-42-105(3)(c), C.R.S.

The respondents appealed ALJ Cannici's order. In their appeal, the respondents argued that ALJ Cannici erred in awarding TTD benefits since Dr. Fox, an attending physician, placed the claimant at MMI on November 6, 2008. The Panel set ALJ Cannici's order aside and remanded for entry of a new order to resolve conflicting or ambiguous opinions expressed by Dr. Fox concerning whether or not the claimant had reached MMI.

On October 6, 2010, ALJ Cannici issued his order on remand, finding that Dr. Fox issued conflicting opinions which suggested he retracted his November 6, 2008, MMI determination and did not subsequently place the claimant at MMI. ALJ Cannici found that the claimant was entitled to TTD benefits beginning on November 9, 2008, and ending on March 20, 2009, when Dr. Fox released the claimant to regular employment. The respondents again appealed, arguing that ALJ Cannici erred in awarding the claimant TTD benefits on remand without affording them the opportunity to an additional evidentiary hearing to address the issue of the withdrawal of the MMI determination. The Panel affirmed, determining that the respondents themselves raised the issue of the effect of the attending physician's opinion on MMI, and that ALJ Cannici's determination was in part based on medical records that the respondents placed into evidence and medical records that the claimant placed into the record without objection. Thus, the Panel determined that the respondents were not denied an opportunity to present evidence and argument on the attending physician's opinion regarding MMI.

The claimant eventually returned to see Dr. Hattem on June 17, 2011. Dr. Hattem concluded that the claimant's ongoing symptoms were not related to his work injury and instead were related to the ankylosing spondylitis. Dr. Hattem relied on Dr. Fox's interpretation of the claimant's April 2009 MRI report when formulating his opinions concerning relatedness. As such, Dr. Hattem released the claimant to full duty work and discharged him from further medical care on June 17, 2011.

In March 2012, the claimant's counsel wrote a letter to Dr. Fox, inquiring what work restrictions Dr. Fox would have imposed in March 2009 had he not released the claimant due to non-compliance. Dr. Fox responded on April 4, 2012, opining that he would have issued work restrictions that prohibited the claimant from squatting, crawling, kneeling, and ladder work. Dr. Fox also limited climbing stairs to occasionally and limited lifting to 10 pounds occasionally and five pounds frequently. He also limited standing and walking to 0-2 hours and sitting to 6-8 hours.

A hearing subsequently was held before ALJ Broniak on the issues of TTD and TPD. ALJ Broniak found that the claimant established he was entitled to TTD commencing on March 21, 2009, until August 14, 2011, after which he was entitled to TPD until terminated pursuant to statute. ALJ Broniak determined that ALJ Cannici already found that the claimant's degenerative condition was accelerated or aggravated by the industrial injury, and that the claimant was entitled to TTD. ALJ Broniak also found that the basis for terminating TTD as of March 20, 2009, was erroneous. She found Dr. Fox failed to issue work restrictions because he did not believe the claimant's condition and need for restrictions was related to the industrial accident. Once Dr. Fox learned the claimant's condition was related to his industrial accident, he issued work restrictions effective March 20, 2009. ALJ Broniak inferred that by retroactively issuing such restrictions, Dr. Fox rescinded his initial opinion that the claimant should be released to full duty as of March 20, 2009. ALJ Broniak also found that these restrictions would have prevented the claimant from performing his usual job duties as of March 20, 2009. ALJ Broniak further found that although Dr. Hattem is an ATP, his opinion concerning relatedness of the claimant's ongoing symptoms as of June 17, 2011, was not persuasive. ALJ Broniak found that Dr. Hattem failed to consider that ALJ Cannici already had determined that the claimant's industrial accident aggravated, accelerated, or combined with the pre-existing condition to produce the need for treatment. ALJ Broniak also found that to the extent the opinions of the ATPs concerning release to full duty can be construed as conflicting, she found Dr. Fox's opinions "more persuasive." Further, ALJ Broniak found that the claimant began a part-time work study position on August 15, 2011, working 16 hours per week.

#### I.

On appeal, the respondents argue that ALJ Broniak erred in awarding temporary disability benefits and disregarding Dr. Hattem's return to regular work release on the basis that it was "not persuasive." Relying on *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997), the respondents argue that the ALJ is not allowed to question the persuasiveness of an attending physician's determination that the claimant may return to regular work. Rather, the respondents assert that under §8-42-105(3)(c), C.R.S., the ALJ was required to determine who was the attending physician at the time of the completed report regarding work restrictions. We are not persuaded the ALJ erred.

Section 8-42-105(3)(c), C.R.S. mandates the termination of TTD benefits when the attending physician releases a claimant to return to work. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Since §8-42-105(3)(c), C.R.S. mandates termination of TTD benefits if the attending physician gives the employee a written release to return to regular employment, the courts have determined that an ALJ may not disregard the attending physician's opinion that a claimant is released to return to regular employment. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000); *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

The courts have held that the term "attending physician," as used in §8-42-105(3)(c), means a physician within the chain of authorization who takes care of the claimant. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). The *Popke* Court added that although the claimant may have multiple attending physicians, the statute does not authorize a release by "any" attending physician. Rather, a release to return to regular employment is not effective unless it is issued by "the attending physician." The identity of "the attending physician" is a question of fact for determination by the ALJ. *Id.*

The *Popke* Court did not identify a definitive set of factors to be considered by the ALJ. It suggested that the ALJ might consider the identity of the initial treating physicians, the length of time the claimant treated with a particular physician, and whether a release to regular employment was approved by the initial treating physician. *Herb v. Mariner Post Acute Network*, W. C. No. 4-496-527 (May 19, 2003).

Here, in her order, ALJ Broniak found that both Dr. Fox and Dr. Hattem both were authorized treating providers. ALJ Broniak ultimately determined, however, that Dr. Fox was the attending physician for purposes of determining whether the claimant could return to regular employment. The respondents' argument notwithstanding, ALJ Broniak's reference to Dr. Fox's opinion being "more persuasive" than that of Dr. Hattem's, does not require us to reverse her determination or remand for further findings on this issue. ALJ Broniak held a hearing after which she resolved the conflicting medical evidence in favor of claimant. ALJ Broniak's findings concerning Dr. Fox and his opinion regarding the claimant's work restrictions reflect an underlying conclusion that Dr. Fox was the attending physician. *See Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). We further note there is no dispute that Dr. Fox first treated the claimant after his industrial injury and continued to treat him for some time, and that in his original order, ALJ Cannici also found Dr. Fox to be the claimant's attending physician. Consequently, we are not persuaded to disturb the ALJ's order on this basis.

## II.

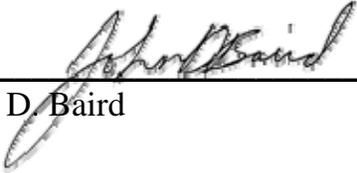
The respondents further contend that ALJ Broniak erred when she allegedly disregarded the final order of ALJ Cannici that terminated TTD as of March 20, 2009. The respondents argue that ALJ Cannici already determined that the attending physician opined the claimant could return to work as a basis for terminating TTD as of March 20, 2009. Thus, the respondents assert that the doctrine of issue preclusion prohibited ALJ Broniak from reconsidering this very same issue. We are not persuaded by the respondents' argument.

Under the issue preclusion doctrine, once a court has decided an issue necessary to its judgment, the decision will preclude relitigation of that issue in a later action involving a party to the first case." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001). Issue preclusion completely bars relitigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 47. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Here, we agree with the claimant that issue preclusion does not apply to ALJ Broniak's ordering of TTD to commence on March 21, 2009. The respondents' argument notwithstanding, the issue that ALJ Broniak addressed is not identical to the issue actually determined by ALJ Cannici. That is, in the prior hearing before ALJ Cannici, he determined the claimant was entitled to TTD benefits beginning on November 9, 2008, and ending on March 20, 2009, when Dr. Fox initially released the claimant to regular employment. ALJ Broniak found, however, that by retroactively issuing work restrictions, Dr. Fox rescinded his initial opinion that the claimant should be released to full duty as of March 20, 2009. *See Imperial Headware, Inc. v. Industrial Claim Appeals Office, supra* (treating physician's report which said claimant was able to return to work, but was also based, in part, on "medical noncompliance," was internally conflicting, and thus, subject to interpretation by ALJ who concluded claimant had not been released to return to regular employment). Consequently, ALJ Broniak ordered the respondents to pay the claimant TTD as of March 21, 2009, until August 14, 2011, after which time she ordered the respondents to pay the claimant TPD from August 15, 2011, until terminated by law. Hence, ALJ Broniak addressed an issue and ordered TTD benefits for a period of time that was not at issue at the hearing before ALJ Cannici. Further, ALJ Broniak also addressed and ordered the respondents to pay the claimant TPD, which also was not at issue at the hearing before ALJ Cannici. Consequently, we decline to disturb ALJ Broniak's order on this basis.

**IT IS THEREFORE ORDERED** that the ALJ's order dated July 25, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
John D. Baird

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

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/18/2013 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

GARY BEGORDIS, 70 S JAY STREET, LAKEWOOD, CO, 80226 (Claimant)  
CATERPILLAR SERVICES, Attn: BRIAN SCHNAUBER, 4705 E 48TH AVENUE,  
DENVER, CO, 80216 (Employer)  
LIBERTY MUTUAL INSURANCE COMPANY, Attn: MARGARET RODRIGUEZ, 2100 W  
WALNUT HILL LANE, SUITE 100, IRVING, TX, 75038 (Insurer)  
THE ELEY LAW FIRM, Attn: CLIFFORD E. ELEY, ESQ., 1873 SOUTH BELLAIRE  
STREET, SUITE 1200, DENVER, CO, 80222 (For Claimant)  
LAW OFFICES OF CHAD A. ATKINS, Attn: DAVID G. KROLL, ESQ./APRIL D. MOORE,  
ESQ., 5670 GREENWOOD PLAZA BLVD., SUITE 400, ENGLEWOOD, CO, 80111 (For  
Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-799-095

IN THE MATTER OF THE CLAIM OF

WAYNE BURGESS,

Claimant,

v.

ORDER

VERHOEFF FARM,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated September 17, 2012, that denied the claimant's motion for relief from a prior order. We dismiss the claimant's petition to review without prejudice for lack of a final order.

The following facts appear to be undisputed. The claimant sustained a compensable injury on June 25, 2009. The insurer filed a final admission of liability on July 10, 2012. The claimant filed a timely objection and a notice and proposal to select an independent medical examiner. On July 30, 2012, the claimant filed a motion to withdraw the objection and notice and proposal and to administratively close the claim. The motion was signed by the claimant's counsel and the certificate of service was signed by the claimant's counsel's legal assistant. ALJ Friend issued an order on August 1, 2012, granting the motion.

On September 7, 2012, the claimant filed an opposed motion requesting relief from the August 1, 2012, order based C.R.C.P. 60(b), for an alleged mistake, inadvertence or excusable neglect. On September 17, 2012, ALJ Walsh issued an order denying the claimant's motion for relief, which is the subject of this appeal. On appeal the claimant argues that the ALJ erred in denying the motion. We agree with the respondents that the September 17, 2012, order does not award or deny a benefit or penalty and, therefore, is not a final order subject to review.

Section 8-43-301(2), C.R.S., provides that a dissatisfied party may file a petition to review any order “which requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty.” Orders which do not require the payment of benefits or penalties, nor deny the claimant benefits or penalties are interlocutory and not subject to review. *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003) Furthermore, orders concerning procedural issues do not satisfy the statutory definition of an appealable order. *American Express v. Industrial Commission*, 712 P.2d 1132 (Colo. App. 1995).

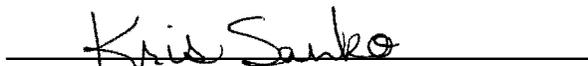
The ALJ’s order in this case is purely a procedural order which does not award or deny a benefit or a penalty. Nor does the ALJ’s order effectively preclude the claimant from seeking further benefits in the future. *See* 8-43-303, C.R.S. Consequently, the order is not a final order subject to review pursuant to §8-43-301(2), C.R.S.

**IT IS THEREFORE ORDERED** that the claimant’s petition to review the ALJ’s order dated September 17, 2012, is denied and dismissed without prejudice.

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

\_\_\_\_\_ 2/4/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

WAYNE BURGESS, P O BOX 82, HASTY, CO, 81044 (Claimant)  
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY  
BLVD., DENVER, CO, 80230 (Insurer)  
MCDIVITT LAW FIRM, PC, Attn: JORDAN M. FRAKES, ESQ., 19 EAST CIMARRON,  
COLORADO SPRINGS, CO, 80903 (For Claimant)  
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: VITO RACANELLI, ESQ., 1401  
SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-857-851-01

IN THE MATTER OF THE CLAIM OF

AARON DUNGY,

Claimant,

v.

ORDER

U.S. JESCO,

Employer,

and

NON-INSURED,

Insurer,  
Respondent.

The respondent seeks review of an order of Administrative Law Judge Stuber (ALJ) dated August 13, 2012, that ordered the claimant's claim compensable, and ordered the respondent to pay the claimant temporary total disability (TTD) benefits at an increased rate as provided by § 8-43-408(1), C.R.S. and to post a \$72,000 bond with the Division of Workers' Compensation. We set aside ALJ Stuber's order and findings that the respondent was uninsured at the time of the claimant's injury and remand for further findings and a new order on this issue, and otherwise affirm.

A hearing was held on the issues of compensability, medical benefits, disfigurement, TTD benefits, temporary partial disability benefits, penalties for the respondent's failure to carry workers' compensation insurance, and other issues. After hearing, the ALJ found that the claimant was employed by the respondent employer to demonstrate cutlery in retail stores. The claimant worked for the respondent employer off and on for about six years. The employer provided training for the claimant, directed the claimant about the locations for him to perform demonstrations, and paid the claimant directly based upon a straight commission of the gross sales of product.

The employer sent the claimant from Colorado to California in February 2011 to work. On February 27, 2011, the claimant stayed at a motel in Merced, California and awoke with bed bug bites. This case is designated W.C. No. 4-857-850. A hearing was held before ALJ Walsh on this case, and he found that the claimant was an employee of the respondent, that he sustained a compensable injury, and that the claimant was in travel status at the time of his injury.

The employer then sent the claimant to Las Vegas, Nevada to perform demonstrations. One of the claimant's assigned locations was in a retail store on an Air Force Base. The claimant stayed in a motel while on travel status for the employer. On March 28, 2011, the claimant awoke with new bed bug bites on his arms, sides, and hands. He had painful bites and also suffered phlegm production, nasal discharge, and a sore throat.

The claimant then called the employer's corporate office and was orally threatened with termination of his employment if he did not show up for the demonstration as scheduled. Due to the effects of his March 28, 2011, work injury, the claimant was unable to perform the usual work duties for the employer commencing on March 28, 2011. The employer then terminated the claimant's employment.

During the hearing, ALJ Stuber orally ruled that the respondent was barred from arguing that the claimant was an independent contractor. ALJ Stuber ruled that this was an affirmative defense that the respondent failed to raise in response to the claimant's application for hearing.

In his subsequent written order, ALJ Stuber stated that "[t]he parties stipulated that the employer was uninsured for workers' compensation liability." ALJ Stuber also held that the doctrine of issue preclusion prevented the respondent from re-litigating the claimant's employment status with the employer. ALJ Stuber concluded that the claimant had proven by a preponderance of the evidence that he suffered an injury on March 28, 2011, arising out of and in the course of his employment with the employer. ALJ Stuber also concluded that the claimant was in travel status on the date of the injury and that he had not engaged in a deviation from his travel. As such, ALJ Stuber concluded that the claimant's claim was compensable and that the respondent was liable for medical treatment, TTD, and disfigurement. ALJ Stuber found that the claimant earned an average weekly wage of \$1000. Further, ALJ Stuber found that the employer was uninsured for workers' compensation liability insurance on the date of the claimant's injury. Findings of Fact at 3 ¶15. Consequently, ALJ Stuber concluded that pursuant to §8-43-408(1), C.R.S., the claimant was entitled to an additional 50% TTD and disfigurement benefits, and he ordered the respondent to post a \$72,000 bond within 10 days of his order.

## I.

On review, the respondent argues that ALJ Stuber erred in finding that its Vice President, Ms. Eastwood, stipulated to being uninsured for workers' compensation liability for its employees. The respondent contends that Ms. Eastwood stated she had insurance coverage for employees. The respondent further argues that after the hearing, it provided ALJ Stuber with its workers' compensation insurance policies for 2011 and

2012 as exhibits to its post-hearing motion to extend the time to post the \$72,000 bond. The respondent therefore contends that ALJ Stuber's finding regarding the stipulation is erroneous, and we must set aside the stipulation, the bond order, and the 50% penalty as a result. We conclude that ALJ Stuber erred in determining that the respondent stipulated it was uninsured for workers' compensation liability for employees and therefore set aside the stipulation, the bond order, and the 50% penalty. We remand for further findings and a new order on whether the respondent complied with its mandatory insurance requirements under §8-44-101, C.R.S. at the time of the claimant's injury.

Under the Colorado's Workers' Compensation Act (Act), it is the responsibility of the employer to secure compensation for all employees. Section 8-44-101, C.R.S. The employer is allowed under the Act to accomplish this in different ways, including securing an insurance policy. If an employer fails to procure workers' compensation insurance as required under the Act, however, then § 8-43-408, C.R.S. provides a remedy for the claimant. Section 8-43-408(1), C.R.S. specifically provides that the employee may claim the compensation and benefits provided in said articles, and the amounts of compensation or benefits provided in said articles shall be increased fifty percent. *See Merchants Oil, Inc. v. Anderson*, 897 P.2d 895 (Colo. App. 1995) (additional compensation in the amount of 50% awarded when employer neglected or refused to purchase workers' compensation insurance).

Here, at the commencement of the hearing, Ms. Eastwood called in to the hearing without representation by counsel. As the claimant's counsel and Ms. Eastwood discussed the issues in the case, ALJ Stuber questioned Ms. Eastwood regarding whether the employer was uninsured for workers' compensation liability:

THE COURT: . . . Do both parties agree that the employer here, U.S. Jesco, was not insured for Workers' Compensation liability?

MS. EASTWOOD: Are you asking me if we were or are currently?

THE COURT: Did you have Work Comp insurance at the time of this March 28 allegation?

MS. EASTWOOD: Not on him. Only for employees. He's not - - he's a nonemployee, as per the IRS.

THE COURT: Okay. But, so you don't have a policy that would have covered him?

MS. EASTWOOD: No.

THE COURT: That's true, you did not have such policy?

MS. EASTWOOD: Not to cover nonemployees. (Tr. at 11)

As noted above, in his order, ALJ Stuber determined “[t]he parties stipulated that the employer was uninsured for workers’ compensation liability.” Order at 2. Ms. Eastwood, however, did not stipulate that the employer was uninsured for workers’ compensation liability for employees. Rather, Ms. Eastwood asserted that the employer did, in fact, have workers’ compensation insurance for employees. We recognize that no carrier has entered on the claimant’s claim, and the respondent does not state in its brief in support that it had in effect a policy of workers’ compensation insurance, or a self insurance certificate, or a self-insured permit issued by the Executive Director that covered the claimant at the time of his injury. Section 8-44-101, C.R.S. Nevertheless, ALJ Stuber’s finding that the employer was uninsured for workers’ compensation liability insurance was based on Ms. Eastwood’s alleged stipulation. Findings of Fact at 3 ¶15. Since Ms. Eastwood did not make such a stipulation, we remand for further findings and a new order on whether the respondent had in effect a policy of workers’ compensation insurance, or a self insurance certificate, or a self-insured permit issued by the Executive Director that covered the claimant at the time of his injury. Section 8-44-101, C.R.S. As such, we necessarily set aside ALJ Stuber’s findings and order regarding the stipulation, the bond order, and the 50% penalty entered as a result of the employer’s alleged failure to comply with its mandatory insurance requirements under §8-44-101, C.R.S.

## II.

Next, the respondent argues sufficient factual findings are lacking to permit appellate review on whether Colorado has subject matter jurisdiction over the claimant’s claim. The respondent argues that even though ALJ Stuber found the claimant was hired in Colorado, there was no evidence adduced at the hearing regarding the parties’ intent, the legal consideration of contract for hire, or the mutuality of obligations between the parties. The respondent also argues that there are insufficient facts in the record to support the factual finding that the hiring occurred in Colorado. We disagree with the respondent.

Subject matter jurisdiction involves a court’s power to resolve a dispute in which it renders judgment. A court has subject matter jurisdiction if “the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.” *Horton v. Suthers*, 43 P.3d 611, 615 (Colo. 2002) (quoting *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986)); see also *Leeway v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Subject matter jurisdiction can be raised at any time, even after judgment. See *Mesa County Valley Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200 (Colo. 2000); *Hoyman v. Coffin*, 976 P.2d 311 (Colo. App.1998).

Section 8-41-204, C.R.S. provides that Colorado has jurisdiction over injuries suffered outside the state of Colorado, if the injured employee was "hired or is regularly employed in this state." This provision applies "only to those injuries received by the employee within six months after leaving" the state, unless prior to the expiration of the six-month period, the employer has filed a notice with the division that it has elected to extend such coverage.

A contract of hire is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994). The place of contracting is generally determined by the parties' intention, and it is usually the place where the offer is accepted, or the last act necessary to the meeting of the minds or to complete the contract is performed. *Denver Truck Exchange v. Perryman*, *supra*.

Here, not only did ALJ Stuber make sufficient findings of fact regarding the contract of hire between the claimant and the respondent, but there also is ample evidence supporting such findings and demonstrating that Colorado has subject matter jurisdiction. ALJ Stuber found, with record support, that the claimant was employed by the respondent in Colorado, that the employer directed the claimant about the locations for him to perform cutlery demonstrations, that the employer paid the claimant directly based upon a straight commission of 22% of the gross sales of product, that the employer sent the claimant to Las Vegas to perform cutlery demonstrations, and that the claimant was injured while in Las Vegas. During the hearing, the claimant testified that he is a Colorado resident, that he was hired in Colorado by the respondent, that he had worked for the respondent on and off for about a six-year period, that he never has been out of the state of Colorado for more than six months, that the respondent sent him to Las Vegas to perform cutlery demonstrations, and that he sustained an injury while in Las Vegas. The claimant further testified that the respondent paid him 22% off the actual sale of every item he sold. Tr. at 17-18, 19-20, 27-28. Consequently, ALJ Stuber's findings support the determination that the respondent entered into a contract of hire with a Colorado resident, and that Colorado has subject matter jurisdiction over the claimant's claim. Thus, we are not persuaded to disturb ALJ Stuber's order on these grounds.

### III.

Next, the respondent argues that the doctrine of issue preclusion did not bar it from presenting new argument and evidence that the claimant was an independent contractor. The respondent reasons that ALJ Stuber recognized the February and March events were separate work injuries, and since the March injury involved new facts, and a

new location, time, place, and date, the doctrine of issue preclusion was inapplicable. Again, we disagree.

Under the issue preclusion doctrine, once a court has decided an issue necessary to its judgment, the decision will preclude re-litigation of that issue in a later action involving a party to the first case. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). Issue preclusion completely bars re-litigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Here, we conclude that the doctrine of issue preclusion is applicable and precluded the respondent from raising the independent contractor argument before ALJ Stuber. The issue before ALJ Walsh was whether the claimant was an employee or an independent contractor of the respondent. ALJ Walsh determined that the claimant was, in fact, an employee of the respondent in Colorado. Ex. 2 at 5. This is the identical issue that the respondent sought to litigate before ALJ Stuber. Both the respondent and the claimant were present before ALJ Walsh and ALJ Stuber, and the respondent does not contend that it did not have a full and fair opportunity to litigate the issue in the proceeding before ALJ Walsh. *See Sunny Acres Villa, Inc. v. Cooper, supra*. Additionally, the respondent argues that issue preclusion is inapplicable because the March event was a separate injury that occurred in a different location, time, place, and date. Under the particular circumstances of this case, however, we do not perceive that these factors would mandate a different result.

In any event, we note that ALJ Stuber alternatively found that the balance of factors contained within §8-40-202(2)(b)(II), C.R.S. demonstrated that the claimant was an employee of the respondent at the time of his injury. ALJ Stuber found, with record support, that the respondent provided training and tools to the claimant, established quality standards, supervised the claimant, dictated the time of performance, paid the claimant personally for his earned wages, and retained the right to terminate the claimant's employment. ALJ Stuber also found that the claimant had no trade or business name and had no independent business of performing cutlery demonstrations. During the hearing, the claimant testified that the respondent gave the claimant a weekly itinerary of what stores he needed to go to, what time he had to call in, the respondent trained him on exactly what he needed to say and how he needed to present all of the products, the respondent sent him videos and actual paperwork on how to read the actual presentation, the respondent paid him for the work he did, the respondent required him to get to work

on time so that its booths were manned, and the respondent terminated him since he did not show up for the presentation on March 28, 2011. Tr. at 18-19, 22-23, 25-26. Under these circumstances, therefore, we are not persuaded to disturb ALJ Stuber's order.

#### IV.

The respondent next contends that the award of TTD benefits is not supported by substantial evidence or applicable law. The respondent argues that the claimant failed to present evidence that he missed three days of work because of a temporary disability. The respondent further argues that the claimant's "self-evaluation" of his inability to return to work does not support an award of TTD benefits without collaborating medical evidence of his medical incapacity. We perceive no error.

A claimant is entitled to TTD benefits if his industrial injury causes disability, he leaves work because of the injury, and his temporary disability lasts more than three days. Section 8-42-103(1)(a)-(b), C.R.S. The question of whether the claimant proved such a disability is one of fact for the ALJ. *See Lyburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the claimant's inability to perform his or her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). This element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions which impair the claimant's ability effectively to perform the duties of his or her regular job. *See Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Here, during the hearing, the claimant testified that he was unable to work for at least three shifts because of his March 28, 2011, injury. The claimant explained that there is a "great psychological preparedness" that he needs to have when he is presenting a demonstration in front of 20 to 45 people every 45 minutes. The claimant testified that he would not be comfortable to even work for at least three shifts because of his injury, and that he would not be able to present his product in a manner for customers to actually want to buy his product. Tr. at 27-28. Further, the claimant testified that he had bites all over his arms, sides, and hands, and his nose was constantly running, and his hands, arms, and sides were burning and constantly itching. The claimant testified that he also was physically ill so he did not go into work that day. The claimant further testified that the actual bites last for at least a month, and that his nausea from the bites subsided within a couple of weeks. Tr. at 24-27. Moreover, the claimant testified that he had been working every day for two weeks before the bed bug incident in Las Vegas on March 27, 2012. Tr. at 34-35. Section 8-43-401(8), C.R.S. Thus, based on the claimant's testimony,

ALJ Stuber could reasonably infer that the claimant had been disabled for more than three days as a result of his injury, and that three shifts were available to him had he not been terminated. The ALJ could have made contrary findings, as suggested by the respondent, but he did not do so. *See Electric Mutual Liability Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964) (in reaching a conclusion, the ALJ may make reasonable inferences from the evidence presented); *see also Helvey v. Bison Propane Bottle Exchange*, W. C. No. 4-608-265 (July 15, 2005). It was not necessary for ALJ Stuber to enter additional findings in order to determine that the claimant was entitled to TTD benefits. *See Lymburn v. Symbios Logic, supra*.

Further, the respondent argues that the claimant failed to present medical opinion on the effects of bed bug bites, failed to present work restrictions from a medical provider demonstrating he could not perform his regular employment, and failed to present medical evidence that he was disabled or that he was medically incapacitated. The law is well settled, however, that there is no requirement that disability be proven by medical evidence. *See Lymburn v. Symbios Logic, supra* (award of TTD benefits does not have to be supported by opinion of treating physician that claimant is medically restricted from performing regular employment). Thus, we are not persuaded to disturb ALJ Stuber's order on these grounds.

## V.

The respondent argues that ALJ Stuber erred in determining the claimant was in travel status. The respondent contends there is not substantial evidence demonstrating that the claimant was in continuous travel status while he was staying overnight in Nevada. As support for its argument, the respondent points to the fact that it charged the claimant for the plane ticket when he traveled out of Colorado. Again, we disagree.

The travel status exception applies when the employer requires the claimant to travel. *Tatum-Reese Development Corp. v. Industrial Commission*, 30 Colo. App. 149, 490 P.2d 94 (1971). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location established for the performance of his duties, the risks of such travel become risks of the employment. *Staff Adm'rs, Inc. v. Industrial Claim Appeals Office*, 958 P.2d 509 (Colo. App. 1997)(citing *Martin K. Eby Construction Co. v. Industrial Commission*, 151 Colo. 320, 377 P.2d 745 (1963)), *aff'd* 977 P.2d 866 (Colo. 1999).

Here, there is substantial evidence supporting ALJ Stuber's determination that the claimant was in travel status at the time he sustained his injury. ALJ Stuber found, with record support, that the respondent sent the claimant to Las Vegas to perform demonstrations, and that one of his assigned locations was in a retail store at a Las Vegas Air Force Base. During the hearing, the claimant testified that the respondent sent him to

a Sears in the inner city of Las Vegas and then immediately, without any break, the respondent sent him to Nellis Air Force Base in Las Vegas to perform cutlery demonstrations. The claimant further testified that while he was sleeping at a new hotel in Las Vegas on March 28, 2011, he woke up and was covered with bed bug bites all over his arms, sides, and hands. Tr. at 18-20, 23-24. Thus, not only is there substantial evidence supporting ALJ Stuber's determination that the claimant was in travel status when he sustained his injury, but this determination is supported by applicable law as well. *Staff Adm'rs, Inc. v. Industrial Claim Appeals Office, supra*. Consequently, we will not disturb ALJ Stuber's order on this ground.

## VI.

Because the issue may arise on remand, we address the respondent's argument that TTD benefits can not be awarded to the claimant in this case beyond the state maximum benefit rate.

The Workers' Compensation Act (Act) establishes a formula for calculating workers' compensation benefits that proceeds in two steps. See *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777 (Colo. 2010). The employee's average weekly wage serves as the basis for computing disability benefits. Section 8-42-102, C.R.S. After the employee's average weekly wage (AWW) is determined, the statutory limit on workers' compensation benefits must be applied and then the rate of the claimant's benefits is calculated. The TTD rate is the lesser of either sixty-six and two-thirds percent of the employee's AWW or ninety-one percent of the state's average weekly wage. Section 8-42-105, C.R.S. (awards for TTD benefits).

Further, as noted above, Section 8-43-408(1) provides that if at the time of the injury the employer is uninsured for workers' compensation "the amounts of compensation or benefits provided in said articles shall be increased fifty percent." In this context, the term "compensation" refers to disability benefits. See *Merchants Oil, Inc. v. Anderson, supra*.

In *Merchants Oil, Inc. v. Anderson, supra*, the Colorado Court of Appeals held that § 8-43-408(1), C.R.S. is designed to provide for additional compensation, above the amounts already provided in the Act, when an employer neglects or refuses to purchase insurance:

We agree with the Panel that implicit in the plain language of § 8-43-408(1) is the recognition that there are statutory limitations on various types of workers' compensation. See, e.g., § 8-42-105(1), C.R.S. (1994 Cum.Supp.) (temporary total disability benefits are limited to 66 and 2/3%

of the average weekly wage not to exceed 91% of the state average weekly wage). However, § 8-43-408(1) is a provision for *additional* compensation, above the amounts already “provided in said articles.” *See Eachus v. Cooper*, 738 P.2d 383 (Colo.App.1986). Thus, the Panel correctly affirmed the ALJ's calculation of this “additional compensation” due claimant.

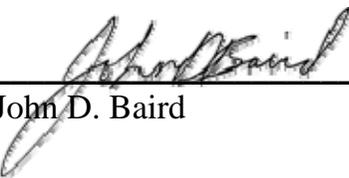
*Id.* at 896.

Thus, to the extent an employer fails to comply with its mandatory insurance requirements under §8-44-101, C.R.S., then § 8-43-408(1), C.R.S. provides for a 50% compensation increase above the amounts already provided in the Act. As such, TTD benefits can be awarded beyond the state maximum benefit rate when an employer fails to comply with its mandatory insurance requirements under §8-44-101, C.R.S. *See Cavallo v. Todd Aurit d/b/a/ T & L Transportation, Inc.*, W. C. No. 4-345-998 (April 16, 1999)(fifty percent compensation increase provided by § 8-43-408(1), C.R.S. is applicable even if claimant's TTD rate is maximum rate allowed).

**IT IS THEREFORE ORDERED** that ALJ Stuber’s order dated August 13, 2012, regarding the stipulation, the bond order, and the 50% penalty for being uninsured is set aside and remanded for further findings and a new order on whether the respondent complied with its mandatory insurance requirements under §8-44-101, C.R.S. at the time of the claimant’s injury.

**IT IS FURTHER ORDERED** that ALJ Stuber’s order is affirmed in all other regards.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
John D. Baird

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

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 2/15/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

AARON DUNGY, 2531 LAMBERT, PUEBLO, CO, 81003 (Claimant)  
U.S. JESCO, Attn: LESLIE EASTWOOD, 1421 WESTWAY CIRCLE, CARROLTON, TX,  
75006 (Employer)  
HASSLER LAW FIRM, LLC, Attn: LAWRENCE SAUNDERS, ESQ., 616 WEST ABRIENDO  
AVE., PUEBLO, CO, 81004 (For Claimant)  
LEE & KINDER, LLC, Attn: JOSEPH W. GREN, ESQ., 3801 E. FLORIDA AVE., SUITE 210,  
DENVER, CO, 80210 (For Respondents)  
MARLIN W. BURKE, Attn: MARLIN W. BURKE, ESQ., 1633 FILLMORE STREET, SUITE  
413, DENVER, CO, 80206 (Other Party)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-781-535-03

IN THE MATTER OF THE CLAIM OF

MARY FARMER,

Claimant,

v.

FINAL ORDER

OFFICEMAX INCORPORATED  
SADDLE ROCK EAST,

Employer,

and

NEW HAMPSHIRE INSURANCE  
COMPANY,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Broniak (ALJ) dated August 24, 2012, that denied and dismissed the claimant's claim for permanent total disability. We affirm the ALJ's order.

A hearing was held on the issue of permanent total disability. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows. The claimant worked for the employer as an associate in the printing department when she sustained an admitted injury to her low back on December 13, 2008. Prior to this injury the claimant had a significant non-work-related medical history. The claimant's prior diagnoses included, muscular dystrophy or myopathy, lupus, Sjorgren's disease and epilepsy. The claimant has had significant weakness in her legs and in her upper extremities that has waxed and waned over the years. The claimant also was treated for polymyositis, the primary symptoms of which are pain and weakness in the muscles, particularly involving the upper and lower extremities. Medical records show that the claimant's muscle weakness significantly impacted her ability to work and perform activities of daily living and that the claimant was approved for Social Security Disability benefits (SSDI) in 1978.

The claimant also has documented cognitive deficits, consistent with a moderate degree of underlying cerebral dysfunction, that precluded her from maintaining employment. A psychiatrist previously concluded that neuropsychological test results would support the claimant obtaining any disability income for which she may qualify.

In 2007, the claimant attempted to return to the workforce through a social security program called "Ticket to Work." This program allows a SSDI recipient to return to work in a trial capacity before SSDI payments are terminated. If a SSDI recipient is successful in the workforce, SSDI is terminated, and if not the SSDI continues. The claimant was actually unable to find work and searched for potential employment outside of the program. The employer hired the claimant on July 28, 2008. The claimant's job duties included printing, laminating, card making and design, printing graphics, maintaining printers, changing ink cartridges, providing fax services, customer service, cashiering and answering telephones. When the claimant began her employment, she advised the employer of her physical limitations and requested assistance with some of her job duties, such as bending and lifting heavy objects and a chair so she could sit down while performing her job duties. The employer initially scheduled the claimant to work 32 hours per week but reduced her hours to 18 per week.

The claimant later sustained a compensable injury to her low back and was placed at maximum medical improvement (MMI) on July 11, 2010, and given a 16 percent whole person rating. The claimant underwent a Division Independent Medical Examination (DIME) with Dr. Gronseth. The DIME physician agreed with the MMI date and concluded that the claimant sustained a 15 percent whole person impairment without apportionment. The respondents filed a final admission of liability admitting for the 15 percent rating.

On June 27, 2011, Dr. Haney completed a social security form entitled "Medical Source Statement of Ability to do Work-Related Activities (Physical)" in which he documented the claimant's physical limitations and attributed the claimant's physical limitations to the diagnosis of muscular dystrophy, seizure disorder and lupus. Dr. Haney did not assign work restrictions specifically as a result of the claimant's lumbar spine problems.

Dr. Burnham evaluated the claimant at the respondents' request. Dr. Burnham concluded that the claimant's muscle weakness is progressive due to her chronic muscle disease and is contributing to or causing the claimant's ongoing low back pain. Dr. Burnham noted that the claimant's strength in both her upper and lower extremities has deteriorated, which supports that the claimant's muscle disease has progressed. Dr. Burnham explained that the claimant's low back injury would not have impacted her upper extremity weakness and that her severe impairment never improved or resolved. Dr. Burnham concluded that the claimant's muscle weakness is the primary cause of her functional limitations rather than the low back injury and in her opinion the claimant was not capable of performing the job for the employer before she applied or accepted it. Thus, according to Dr. Burnham, the claimant's pre-existing conditions were

independently disabling regardless of the work injury. The ALJ found Dr. Burnham's opinions credible and persuasive.

The claimant's vocational expert, John Macurak, attributed the claimant's inability to work to her 2008 work injury whereas the respondents' vocational expert, Katie Montoya, related the claimant's inability to work to her pre-existing conditions. Ms. Montoya stated that the claimant's back injury is not a significant factor in her inability to return to work, noting that the claimant's attempt to return to the workforce in 2007 was unsuccessful and her SSDI benefits were not terminated. The claimant has continued to receive SSDI since 1978. The ALJ credited Ms. Montoya's opinion and found the contrasting opinion of Mr. Macurak less persuasive.

Based on these findings the ALJ determined that the claimant's work injury did not contribute nor did it directly cause the claimant's inability to earn wages. Thus, the ALJ concluded that the claimant failed to establish that she is permanently and totally disabled and denied and dismissed the claim.

On appeal, the claimant argues that the ALJ misapplied the applicable law and that she was bound by the law of the case from a prior hearing determining that the work related injury was occupationally disabling. We are not persuaded by the claimant's arguments and perceive no reversible error in the ALJ's order.

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant carries the burden of proof to establish permanent total disability. Although the claimant is not required to establish that an industrial injury is the sole cause of her inability to earn wages, the claimant must nonetheless demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). This means the claimant must establish a "direct causal relationship" between the industrial injury and the permanent total disability. *Id*; *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995), *reversed on other grounds*, *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Under this test, the ALJ must determine the residual impairment caused by the industrial injury, and determine whether it was sufficient to result in permanent total disability without regard to the effects of subsequent intervening events. Resolution of the causation issue is one of fact for the ALJ. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 869 (Colo. App. 2001).

In determining whether a claimant is permanently and totally disabled the ALJ

may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, ALJ found that the opinions of Ms. Montoya and Dr. Burnham were credible and persuasive. Both Ms. Montoya and Dr. Burnham were of the opinion that the claimant's pre-existing conditions were independently disabling regardless of the work injury. The opinions of both these experts provide substantial evidence and valid support for the ALJ's determination that the claimant's December 2008 work-related injury was not a factor in her inability to earn wages. We may not substitute our judgment for that of the ALJ concerning the credibility and persuasiveness of the evidence. Section 8-43-301(8), C.R.S. See *Metro Moving and Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The claimant contends that the ALJ's order is contrary to applicable law and that the ALJ misapplied the "full responsibility rule." The "full responsibility rule" provides that an employer takes an injured worker as it finds her, and if personal factors such as a pre-existing mental or physical condition combine with a work-related injury or disease to render the worker permanently and totally disabled, the employer must compensate the worker for the entire permanent total disability. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (1991); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 151 Colo. 18, 379 P.2d 153 (1962). However, the recognized exception to this rule is where the industrial injury is not a significant causative factor in the claimant's disability and there is not a direct causal relationship between the industrial injury and the permanent total disability. *Seifried v. Industrial Commission, supra*.

Contrary to the claimant's assertion, *United Airlines v. Industrial Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000), is not authority to the contrary. In *United Airlines*, the court held that an employer bears the burden of full unapportioned liability for permanent total disability where a prior disability has combined with the claimant's last industrial disability to render the claimant permanently and totally disabled. Here, in contrast, this is not a case of the claimant's prior disability *combining* with the industrial

disability. Rather, the ALJ determined that in this case, the claimant did not meet the threshold requirement to show that the work-related injury was a factor in the claimant's inability to work. Because the claimant was unable to prove a direct causal relationship between the work-related injury and the disability for which the claimant seeks benefits, the claim must fail. *Seifried v. Industrial Commission, supra*.

We similarly reject the claimant's argument that the ALJ misapplied §8-42-104(4), C.R.S., which precludes apportionment of permanent total disability when a work-related injury *combines* with a genetic/congenital or similar condition. This statute is not applicable given the ALJ's determination that the claimant's work-related injury did not combine with a genetic or congenital condition but rather, determined that the work-related injury was not a significant causative factor in the claimant's permanent disability.

The claimant also asserts that the ALJ was bound by a prior ALJ's finding that the claimant's claim was compensable as "law of the case." We disagree. The law of the case doctrine is a "discretionary rule of practice ... based primarily on considerations of judicial economy and finality." *Brodeur v. American Home Assurance Co.*, 169 P.3d 139 (Colo. 2007). Under the doctrine, although a court is "not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed." *In re Bass*, 142 P.3d 1259, 1263 (Colo. 2006)(quoting *People ex rel. Gallagher v. District Court*, 666 P.2d 550, 553 (Colo. 1983)). "When a court issues final rulings in a case, the 'law of the case' doctrine generally requires the court to follow its prior relevant rulings." *Giampapa v. American Family Mut. Ins. Co.*, 64 P.3d 230, 243 (Colo. 2003).

Under the issue preclusion doctrine, "once a court has decided an issue necessary to its judgment, the decision will preclude relitigation of that issue in a later action involving a party to the first case." *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007). Issue preclusion is less "flexible" than the law of the case doctrine, because it completely bars relitigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Here, while it is true that a prior ALJ concluded the claimant sustained a compensable injury to her low back, this does not preclude the respondents from

contesting the issue of permanent total disability on the basis that her inability to work is not due to that compensable injury. The issue of permanent total disability benefits is a distinct issue from compensability. Consequently, the issue resolved by the prior ALJ was not identical to the issue pending in the claim before the ALJ in this case. *See Grant v. Avalon Construction*, W.C. No. 4-532-029 (January 28, 2005); *Wright v. U.S. Home Corporation*, W.C. No. 4-312-835 (September 18, 1998); *Manzanares v. Advanced Building Movers & Rigging*, W.C. No. 3-837-674 (July 15, 1992). Absent any showing that the law of the case was improperly ignored or that issue preclusion prevented relitigation of an identical issue, we perceive no grounds for disturbing ALJ Broniak's order on these bases.

The claimant also contends that the ALJ was bound by the DIME physician's determination that she sustained a 15 percent impairment rating and was therefore disabled as a result of the work-related injury. We again disagree with the claimant's assertion. The issue for adjudication before the ALJ was permanent total disability. Consequently, the ALJ was not required to afford the DIME physician's opinion any special weight. The courts repeatedly have held that the heightened burden of proof required by §8-42-107(8)(c), C.R.S., is confined to the issues of MMI and medical impairment benefits. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Public Service Co. of Colorado v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001). Thus, an ALJ is not required to give the DIME physician's rating any presumptive effect on the question of whether the industrial injury caused the claimant to be unable to earn wages. *Sholund v. John Elway Dodge*, W. C. No. 4-522-173 (October 22, 2004); *see also Gonzales-Rivera v. Beacon Hill Investments, Inc.*, W.C. No. 4-124-250 (September 27, 1994) (DIME not a prerequisite to adjudicating permanent total disability).

Moreover, "medical impairment" is not the equivalent of disability. *Askew v. Industrial Claim Appeals Office*, *supra*. Medical impairment concerns the claimant's health status and is determined by medical means. In contrast, "disability" relates to the claimant's capacity to meet the demands of life, including occupational demands, and is determined by non-medical means. *See Martinez v. Wendy's Inc.*, W.C. No. 4-603-270 (April 20, 2010). Although the claimant had demonstrated some physical impairment due to the industrial injury, the ALJ acted well within her discretion in determining that the claimant had not demonstrated that the industrial injury was a significant causative factor in her inability to earn wages.

In our view, the ALJ's order is supported by substantial evidence and applicable law. Therefore, we see no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order issued August 24, 2012, 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

\_\_\_\_\_ 1/31/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

MARY FARMER, 22700 E. BRIARWOOD PLACE, AURORA, CO, 80016 (Claimant)  
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AURORA, CO, 80016 (Employer)  
NEW HAMPSHIRE INSURANCE COMPANY, Attn: MARGARET RODRIGUEZ, P O BOX  
168208, IRVING, TX, 75016-8205 (Insurer)  
LAW OFFICE OF O'TOOLE & SBARBARO, PC, Attn: NEIL D. O'TOOLE, ESQ., 226 WEST  
12TH AVENUE, DENVER, CO, 80204-3625 (For Claimant)  
THOMAS, POLLART & MILLER, ESQ., Attn: STACY J. TARLER, ESQ., 5600 S. QUEBEC  
ST., STE 220A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-855-895-02

IN THE MATTER OF THE CLAIM OF

JILL GOSS,

Claimant,

v.

**FINAL ORDER**

THE KROGER COMPANY,

Employer,

and

SELF-INSURED,

Insurer,  
Respondent.

The respondent seeks review of an order of Administrative Law Judge Cannici (ALJ) dated August 31, 2012, that imposed penalties for violating W.C. Rule 16-11, 7 Code Colo. Reg. 1101-3. The claimant seeks review of the ALJ's order which denied penalties for the respondent's failure to reimburse her for her pre-payment of acupuncture bills. We modify the ALJ's order and as modified, affirm.

The ALJ found that on April 14, 2011, the claimant sustained an admitted injury during the course and scope of her employment. The respondent initially denied the claimant's claim, but it eventually filed a general admission of liability (GAL) on September 7, 2011. Prior to the filing of the GAL, the claimant sought medical treatment from various medical providers. Most of the medical bills initially were paid by the claimant's health insurer. The claimant made co-payments and payments toward her deductible. In April and May 2012, the respondent reimbursed the claimant for most of the co-payments and payments toward her deductibles.

A hearing was held on the issues of whether penalties should be imposed for the respondent's violations of W.C. Rule 16-11, whether the respondent was obligated to reimburse the claimant for her pre-payment of acupuncture bills, and whether penalties should be imposed for the respondent's failure to reimburse.

During the hearing, Ms. Jensen, the claims examiner for third-party administrator, Sedgwick CMS, testified that after the GAL was filed, Sedgwick received bills for the claimant's treatment at Orthopedic Center of the Rockies (OCR), McKee Medical Center (MMC), Poudre Valley Hospital (PVH), and Colorado Rehabilitation and Occupational

Medicine (CROM). Sedgwick submitted the bills to its third-party payer, Corvel, for payment. As pertinent here, Sedgwick received bills from OCR on October 24, 2011, with dates of service on May 18, and June 3, 2011. Corvel did not initially pay them because they were not submitted by the medical provider within 120 days of the date of service. W.C. Rule 16-7(F). The bills eventually were paid, however, on April 27, 2012. Sedgwick received another OCR bill on October 24, 2011, with a date of service of August 31, 2011. Even though the bill was not stale, it took six months and four separate requests from the medical provider before payment was made. Sedgwick received a bill from MMC, on October 20, 2011, with a date of service of August 11, 2011. Payment, however, was not made until December 5, 2011. Sedgwick received another bill from PVH on January 30, 2012, with a date of service of June 9, 2011. Corvel initially denied payment because it was stale, but eventually paid the bill on April 17, 2012. Sedgwick received a bill from CROM on December 9, 2011, with a date of service of November 29, 2011. Sedgwick did not pay the bill because a medical report was not attached. The evidence demonstrated however, that Sedgwick received the medical report two days before receipt of the bill. Sedgwick ultimately paid this bill on April 27, 2011. Additionally, the claimant pre-paid \$435 for acupuncture treatment from Scott Chiropractic. The claimant has not been reimbursed for such pre-payment.

The ALJ subsequently entered an order imposing penalties under the general penalty provision contained in §8-43-304(1), C.R.S. for the respondent's violations of W.C. Rule 16-11(A)(1), (A)(2), (A)(3), and (B)(3). The ALJ found that for the medical bills from OCR, MMC, PVH, and CROM that were not timely paid, the respondent violated W.C. Rule 16-11(A)(3). The ALJ found that the reasons for the respondent's failure to timely pay such medical bills were not objectively reasonable and not predicated on a rational argument. The ALJ also found that the respondent was required to provide a written notice or explanation of benefits within 30 days from receipt of these medical bills, as required under W.C. Rule 16-11(A)(1) and (A)(2). Since there was no evidence that either the notice or explanation of benefits was submitted and there was no reason for such failure, the ALJ found the respondent violated W.C. Rule 16-11(A)(1) and (A)(2) and imposed penalties. The ALJ also found that written notice that bills from OCR, PVH, and CROM were being contested was required within 30 days of receipt pursuant to W.C. Rule 16-11(B)(3). Finding that no evidence was submitted regarding such notice, the ALJ determined that respondent violated W.C. Rule 16-11(B)(3) and imposed penalties. The ALJ ordered penalties ranging from \$5 per day to \$75 per day. For the bill from OCR that Sedgwick received on October 24, 2011, with a date of service of August 31, 2011, the ALJ imposed penalties in progressive increments due to repeated demands for payment and the respondent's failure to have any reason for the delay in payment. Relying on W.C. Rule 16-8, the ALJ also ordered the respondent to reimburse the claimant for her \$435 pre-payment for acupuncture service when the

required medical documentation was provided. Finding the respondent's failure to reimburse objectively reasonable, the ALJ denied penalties for such failure.

I. Respondent's appeal of the ALJ's award of penalties

A.

The respondent argues that the ALJ erred in awarding penalties under §8-43-304(1), C.R.S. According to the respondent, since all penalties under W.C. Rule of Procedure 16-11(A)(3) are due to a failure to timely pay medical bills within 30 days after they are submitted, this is covered by the specific penalty statute set forth in §8-43-401(2)(a), C.R.S. rather than the general penalty provision under §8-43-304(1), C.R.S. We disagree.

The specific penalty provision contained at §8-43-401(2)(a), C.R.S. provides that if an insurer knowingly delays payment of a medical benefit for more than 30 days, then the insurer shall pay a penalty of eight percent of the amount of the wrongfully withheld benefits.

The general penalty provision contained in § 8-43-304(1), C.R.S. sets forth four categories of conduct and authorizes the imposition of the described penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. See *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001). The limiting phrase contained in §8-43-304(1), C.R.S., "for which no penalty has been specifically provided" modifies the first three categories, but does not modify the fourth category, which is disobeying a lawful order. *Holliday v. Bestop, Inc.*, *supra*; *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004).

The term "order" as used in §8-43-304(1), C.R.S. includes a rule or regulation. See §8-40-201(15), C.R.S.; *Holliday v. Bestop, Inc.*, *supra*; *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010)(failure to comply with a procedural rule is a failure to obey an "order" within the meaning of §8-43-304(1), C.R.S.); *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

Here, we perceive no error in the ALJ's order assessing penalties under the general penalty provision contained in §8-43-304(1), C.R.S. for the respondent's violation of W.C. Rules 16-11(A)(1), (A)(2), (A)(3), and (B)(3), as opposed to the specific penalty

provision enunciated at §8-43-401(2)(a), C.R.S. See *Holliday v. Bestop, Inc.*, 23 P.3d at 706-707. The ALJ found, with record support, that the respondent failed to timely pay various medical bills within 30 days from the date of receipt, a violation of W.C. Rule 16-11(B)(3). Findings of Fact at 3-4 ¶¶5, 17, 18. As noted above, the failure to comply with a procedural rule is a failure to obey an “order” within the meaning of section §8-43-304(1), C.R.S. Section 8-40-201(15), C.R.S.; *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Pioneers Hosp. v. Industrial Claim Appeals Office*, *supra*.

We also reject the respondent’s contention that the basic tenets of statutory construction required the ALJ to apply the specific penalty statute contained in §8-43-401(2)(a), C.R.S. as opposed to the general penalty statute contained in §8-43-304(1), C.R.S. See §2-4-205, C.R.S.; *Martin v. People*, 27 P.3d 846 (Colo. 2001). In *Holliday*, the Colorado Supreme Court held that penalties under §8-43-304(1) “for failing, neglecting, or refusing to obey ‘any lawful order made by the director or panel or any judgment or decree made by any court as provided by [the Workers' Compensation Act]’ are available even though penalties for such conduct are elsewhere specifically provided in the Workers' Compensation Act.” *Id.* at 706-707. Similarly, In *Giddings*, the Colorado Court of Appeals held that the specific penalty provision in §8-43-401(2)(a), C.R.S. did not exclude imposition of penalties under the general penalty provision in §8-43-304(1), C.R.S.

We further note that the Colorado Supreme Court previously has held that the rule of statutory construction providing that a specific provision prevails over a general one does not apply unless the statutes conflict irreconcilably. See *People v. Cooper*, 27 P.3d 348 (Colo.2001). Based on the holdings in *Giddings* and *Holliday*, there is no irreconcilable conflict between §8-43-401(2)(a), C.R.S. and §8-43-304(1), C.R.S. See also *Martin v. People*, *supra* (statutory repeal by implication is disfavored).

B.

Next, the respondent argues that the ALJ erred in imposing penalties for its failure to forward a written notice of contest of benefits pursuant to W.C. Rule 16-11(B)(3) for medical bills from OCR, PVH, and CROM. The respondent reasons that it did not contest the medical bills from OCR and PVH. The respondent further argues that there was no evidence or testimony that Sedgwick’s request for the medical report for the bill from CROM did not comply with W.C. Rule 16-11(B)(3). Further, the respondent argues that the ALJ’s award of penalties was improper because the respondent’s delay of payment was objectively reasonable. Under the particular circumstances of this case, we are not persuaded by the respondent’s arguments.

W.C. Rule 16-11(A)(1) and (A)(2) provide in pertinent part as follows:

(A)(1) For every medical service bill submitted by a provider, the payer shall reply with a written notice or explanation of benefits. . .

\* \* \* \*

(A)(2) The payer shall send the billing party written notice that complies with 16-11(A)(1) and (B) or (C) if contesting payment for non-medical or medical reasons within thirty (30) days of receipt of the bill. . . .

Here, to the extent the respondent argues it was not required to submit a notice of contest within 30 days from receipt of the bills since it admitted the claimant's claim, we are not persuaded to disturb the ALJ's order on this basis. We recognize that during the hearing Ms. Jensen was questioned whether she submitted a notice of contest for the medical bills from CROM, PVH, and MMC (sic), and she responded that she does not issue a notice of contest on bills that are not contested. Ms. Jensen further explained, however, that the bills were sent for payment to Corvel, and Corvel denied them because they were not submitted within 120 days. Tr. at 58-59. W.C. Rule 16-7(F). Thus, based on Corvel's denial of these bills, Sedgwick was required to follow the mandates set forth in W.C. Rule 16-(11)(B)(3). Further, W.C. Rule 16-6(A) provides that use of agents, including third party administrators and bill review companies, "shall not relieve the employer or insurer from their legal responsibilities for compliance with these Rules."

Moreover, for the bill submitted from CROM for a date of service of November 29, 2011, Ms. Jensen testified that this bill was not paid initially because the medical report was not attached. The ALJ found, however, with record support, that the November 29, 2011, medical report was received by Sedgwick on December 7, 2011, two days before the bill was received. Ex. 13 at 2-3 (bates stamp). We are required to defer to plausible inferences drawn from the record. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995); cf. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996)(ALJ's finding of violation may be based on inferences from circumstantial evidence). Thus, under the circumstances presented here, we are unable to say the ALJ erred in imposing penalties for the respondent's failure to forward a written notice of contest of benefits pursuant to W.C. Rule 16-11(B)(3) for the medical bills from OCR, PVH, and CROM.

Additionally, to the extent the respondent argues that its delay of payment was objectively reasonable, we again are not persuaded to disturb the ALJ's order in this regard. The Colorado Court of Appeals has held that an insurer or employer fails to obey an order if it fails to take the action that a reasonable insurer or employer would take to comply with the order. The conduct of an insurer or employer is "measured by an objective standard of reasonableness," and its reasonableness depends on whether it was predicated on a rational argument based on law or fact. *Jiminez v. Industrial Claim*

*Appeals Office*, 107 P.3d 965 (Colo.App.2003); *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo.App.1997); *but see City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App.2003)(ALJ not required to apply “rational argument” standard); *but see Pioneers Hosp. v. Industrial Claim Appeals Office, supra* (ALJ was required to determine whether the hospital's conduct was merely unreasonable). Whether an insurer's or employer's conduct was reasonable is a question of fact for the ALJ, and we are bound by the ALJ's factual determinations if they are supported by substantial evidence in the record. Section 8-43-301(8); *Pioneers Hosp. v. Industrial Claim Appeals Office, supra*; *Christie v. Coors Transp. Co.*, 919 P.2d 857 (Colo.App.1995), *aff'd*, 933 P.2d 1330 (Colo.1997).

Once again, we are not persuaded to disturb the ALJ's imposition of penalties based on the respondent's argument that its conduct was objectively reasonable. The respondent reasons that Corvel's contest of the bills was reasonable and rational because the medical providers failed to forward their bills within 120 days of the date of service, as required under W.C. Rule 16-7(F). Further, the respondent argues that for the CROM bill for the date of service of November 29, 2011, Sedgwick initially contested the bill and any delay caused in paring the bill with its corresponding medical record was based on “excusable neglect.” W.C. Rule 16-7(F) states that “[p]roviders shall submit their bills for services rendered within 120 days of the date of service or the bill may be denied *unless extenuating circumstances exist.*” (emphasis added) The Rule provides that “extenuating circumstances” may include delays in compensability being decided. As noted above, the ALJ found the respondent initially denied the claimant's claim, but eventually filed a GAL on September 7, 2011. Thus, the claimant's medical providers billed the claimant's health insurer for medical treatment rendered. Since the ALJ implicitly determined that extenuating circumstances existed under W.C. Rule 16-7(F), we are not persuaded to disturb the ALJ's finding that Corvel's contest of the bills based on the providers failing to submit their bills within 120 days, was not reasonable or rational. Parties to a workers' compensation claim are presumed to know the applicable law and act accordingly. *See Boenheim v. Industrial Claim Appeals Office*, 23 P.3d 1247(Colo. App. 2001); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo.App.1981); *see also* W.C. Rule 16-6(A).

Moreover, the ALJ was not convinced that Sedgwick's delay in paring the November 29, 2011, bill from CROM with its corresponding medical record was reasonable. Since this was a question of fact for the ALJ, and his finding is supported by substantial evidence in the record, we may not disturb it. Ex. 13 at 2-3 (bates stamp). *Suetrack USA v. Industrial Claim Appeals Office, supra*; §8-43-301(8), C.R.S.; *Christie v. Coors Transp. Co., supra*.

C.

The respondent next asserts that it was the claimant's burden to produce evidence or testimony demonstrating that it did not forward a notice or explanation of benefits as required under W.C. Rule 16-11(A)(1) and (2). The respondent argues that the claimant failed to present such evidence or testimony and, therefore, the ALJ's findings on this issue are insufficient to support an award of penalties under §8-43-304(1), C.R.S. We are not persuaded the ALJ erred.

Under §8-43-304(1), C.R.S., the claimant must prove a violation of a rule. *See Copeland v. Vrooman Constructors, Inc.*, W. C. No. 3-860-458 (May 25, 2004). If the insurer offers no explanation for its conduct, the claimant has made a *prima facie* showing because the ALJ may infer that there was no reasonable explanation for the insurer's action. *See Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999). Similarly, where an explanation is offered, the reasonableness of the insurer's conduct presents a question of fact for the ALJ. *Jiminez v. Industrial Claim Appeals Office, supra; Davis v. K-Mart*, W.C. No. 4-493-641 (April 28, 2004).

Because these issues are factual in nature, we must uphold the ALJ's determinations if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in the light most favorable to the prevailing party, and defer to the ALJ's resolution of facts in the evidence, credibility determinations, and plausible inferences drawn therefrom. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

As noted by the claimant, in *Copeland*, the Panel addressed a situation similar to that presented here. In that case, the Panel noted that the claimant presented a *prima facie* case of the respondents' violation of former Rule XVI(K)(1)(b) by submitting a "bill" which was not paid within 30 days of receipt by the insurer. According to the Panel, the respondents then had the burden to come forward with evidence that the bill had been paid or that it was properly contested under former Rule XVI(K)(1)(b). *Cf. Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) (where claimant presents a *prima facie* case of compensability, burden of going forward shifts to employer to show claim lacks merit). Similarly, here, the claimant submitted various bills from OCR, PVH, and CROM that were not paid by Sedgwick within 30 days of receipt. Ex. 10 at 3-4; Ex. 12 at 1; Ex. 13 at 1. Testimony from Sedgwick's adjuster on this issue also was introduced into evidence. In particular, Ms. Jensen testified that while she did not issue a notice of contest because the claimant's claim had been accepted, she further testified that Corvel denied the bills from PVH, CROM, and MMC (sic) based on W.C. Rule 16-7(F). Tr. at 8-10, 36, 38-39, 40-41, 58-59. It therefore follows that it was the respondent's burden to come forward with evidence that

the bills had been paid or that they were properly contested under W.C. Rule 16-11. Thus, we are not persuaded to disturb the ALJ's order on this basis.

## II. Claimant's appeal of the ALJ's order denying penalties

The claimant argues that the ALJ erred in failing to require the respondent to reimburse her for the \$435 pre-payment she made for acupuncture treatments from Scott, and in failing to impose penalties against the respondent for such failure. The claimant reasons that the ALJ improperly relied upon W.C. Rule 16-8, which provides that a treating provider shall maintain medical records for each injured worker when the provider intends to bill for the provided services. The claimant argues that W.C. Rule 16-8 is inapplicable because she pre-paid \$435 for such services and, therefore, Scott did not intend to bill for its acupuncture services. Thus, the claimant contends that no medical documentation was required before the respondent was responsible to reimburse her for such pre-payment. We modify the ALJ's order to reflect application of W.C. Rule 16-11(G) and as modified, we affirm the ALJ's determination of this issue.

W.C. Rule 16-11(G) provides as follows:

. . . In the event the injured worker has directly paid for medical services that are then admitted or ordered as covered under the Workers' Compensation Act, the payer shall reimburse the injured worker for the amounts actually paid for authorized services within 30 days after receipt of the bill. . . Each request for a refund shall indicate the service provided and the date of service(s) involved.

Here, the ALJ found that the claimant pre-paid \$435 for acupuncture treatment from Scott, and that Sedgwick has not yet received the required medical necessity documentation regarding the acupuncture visits. The ALJ further found that the respondent does not dispute the claimant pre-paid \$435 for acupuncture treatment, or that it will reimburse the claimant the \$435 when it receives documentation regarding such treatment. The ALJ therefore ordered the respondent to reimburse the claimant once such documentation under W.C. Rule 16-8 is submitted. We affirm the ALJ's order on this issue based on different grounds. We instead conclude that W.C. Rule 16-11(G) is dispositive of the claimant's argument. As stated above, W.C. Rule 16-11(G) provides that if a claimant directly pays for medical services that are then admitted as covered, as is the case here, then the payer shall reimburse the claimant for the amounts actually paid for authorized services within 30 days after receipt of the bill. Under this Rule, the claimant's request for a refund also shall indicate the service provided and the date of service involved. Thus, while we agree with the ALJ that medical documentation is required before the respondent shall reimburse the claimant, we conclude that such medical documentation is that enunciated in W.C. Rule 16-11(G). Thus, we need not

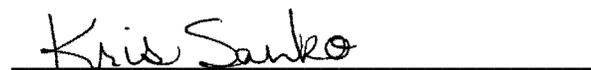
address the claimant's argument that the ALJ erred in finding she failed to provide sufficient medical documentation at the hearing to satisfy the requirements of W.C. Rule 16-8. Based on our determinations, we also are not persuaded to disturb the ALJ's order denying the claimant's request for penalties for the respondent's failure to reimburse.

Last, the claimant argues that the ALJ erred in finding that some of the acupuncture bills had been paid. According to the claimant, there is no evidence that the bills for acupuncture ever were submitted to Sedgwick or that billings even existed. Thus, the claimant contends there is no evidence to support the ALJ's findings that the respondent paid for all but two of the acupuncture visits. In its brief, the respondent agrees that the ALJ's finding on this issue is in error. Nevertheless, the respondent asserts that the error is harmless. We agree that the ALJ's finding amounts to harmless error. *Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). Again, the respondent does not dispute that the claimant pre-paid \$435 for acupuncture treatment, or that it will reimburse the claimant the \$435 when it receives documentation regarding such treatment. Consequently, we modify the ALJ's order to reflect that the respondent has not yet reimbursed the claimant for the \$435 she pre-paid to Scott for acupuncture. We further modify the ALJ's order to reflect application of W.C. Rule 16-11(G) for reimbursement of the claimant's pre-payment of acupuncture services.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 31, 2012, is modified and as modified, 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

\_\_\_\_\_ 1/14/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JILL GOSS, 4566 GLEN ISLE DRIVE, LOVELAND, CO, 80538 (Claimant)  
THE KROGER COMPANY, C/O: dba KING SOOPERS, P O BOX 5567, DENVER, CO,  
80217 (Employer)  
RING & ASSOCIATES, PC, Attn: DOUGLAS L. STRATTON, ESQ., 2550 STOVER ST.,  
BLDG C, FORT COLLINS, CO, 80525 (For Claimant)  
NATHAN BREMER DUMM & MYERS, PC, Attn: MARK H. DUMM, ESQ./TIMOTHY R.  
FIENE, ESQ., 7900 EAST UNION AVENUE, SUITE 600, DENVER, CO, 80237 (For  
Respondents)  
SEDGWICK CMS, Attn: SHARMIE JENSEN, P O BOX 14485, LEXINGTON, KY, 40512-  
4485 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-879-232

IN THE MATTER OF THE CLAIM OF

MARY S. HOLLAND,

Claimant,

v.

FINAL ORDER

ARKANSAS VALLEY REGIONAL  
MEDICAL CENTER,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Stuber (ALJ) dated August 2, 2012, that denied and dismissed the claim for compensability. We affirm the ALJ's order.

This matter went to hearing on the issue of compensability of the claimant's alleged occupational disease of bilateral carpal tunnel syndrome (CTS). After hearing the ALJ make factual findings that for purposes of review can be summarized as follows. The claimant has non-work-related pre-existing medical conditions, including lupus, arthritis and thoracic outlet syndrome. The claimant has worked for the employer for 25 years in several capacities, most recently as the emergency room receptionist for about seven years. The claimant works 12 hour shifts for three days per week. The claimant's job duties include desk work, copying, making charts, transferring packages, stapling, registering an average of 25-30 patients per shift, collecting co-payments from patients, entering orders into the computer system, pushing a door release switch on a phone about 30-40 times per shift and answering a second phone.

Sometime in 2011, the claimant felt a sharp pain in her hands, started feeling her hands fall asleep at night and began to lose grip strength. The claimant did not report a work injury and did not immediately seek medical treatment. In the fall of 2011, the claimant was moving a mattress at work and felt the onset of more constant pain. The claimant saw Dr. Schmucker and explained her symptoms. Dr. Schmucker diagnosed bilateral CTS. The claimant reported her condition to her employer on October 26, 2011. The employer suggested the condition might be a work injury and completed an injury

report form but noted that it was “unknown” if the claimant had a work related condition. The claimant was then referred to Dr. Bobba who diagnosed CMC joint and CTS and referred the claimant for electromyography/nerve conduction (EMG) studies. The EMG studies were performed by Dr. Rawat on November 21, 2011 and showed mild left and moderate to severe right CTS. Right CTS surgery was eventually recommended by Dr. Morely.

Dr. Schmucker re-examined the claimant on March 19, 2012, and in his opinion, 90 percent of the claimant’s CTS was due to work and 10 percent was due to her lupus condition.

Dr. Sollender performed an independent medical examination for the respondents on May 21, 2012. He diagnosed the claimant with bilateral CTS by history although the claimant did not have any clinical signs of CTS on examination. Dr. Sollender noted that the claimant reported to him that she spent nine and one-half hours per day on her computer and that she typed 75 percent of that time and used the mouse in her right hand for 25 percent of that time. Dr. Sollender noted that the claimant’s reported amount of keyboarding and mouse activity could potentially be sufficient as a causative factor for CTS and he ordered a jobs demand analysis.

A vocational evaluator, Mr. Blythe, performed the jobs demand analysis and observed the claimant performing her duties for four hours. This particular day was a light day for the emergency room activity. During the four hours, Mr. Blythe timed the claimant’s computer activity for three hours and measured her wrist posture for one hour. During the three hours, Mr. Blythe measured mouse use of seven and one-half minutes and keyboard use for 22.5 minutes. This equated to 22.5 minutes of mouse use and 78 minutes of keyboard use over the entire shift. Dr. Sollender noted that both activities were far below the threshold levels specified in the analysis required under the Cumulative Trauma Conditions in the Medical Treatment Guidelines WCRP 17. Dr. Sollender concluded that the claimant’s typing and other work duties did not cause CTS. Dr. Sollender testified at hearing consistently with his reports.

Based on these findings and crediting Dr. Sollender, the ALJ determined that the claimant failed to prove that she developed CTS as a natural incident of her work and denied and dismissed the claim for compensation.

On appeal the claimant argues that the ALJ erred in admitting the jobs demand analysis report because it was hearsay and the ALJ erred in admitting Dr. Sollender’s reports and testimony because it was based on the jobs demand analysis. We perceive no error in the ALJ’s order.

The claimant sustains an occupational disease when the injury is the incident of the work, or a result of exposure occasioned by the nature of the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment. Section 8-40-201(14), C.R.S. The claimant had the burden to prove the alleged occupational disease was caused, aggravated or accelerated by the claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The determination of whether there is a sufficient causal relationship between the claimant's employment and the injury or disease is one of fact, which the ALJ must determine based on the totality of the circumstances. *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Because the issue of causation is factual in nature, we must uphold the ALJ's pertinent findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires deference to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*. In particular, the weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Here, there is substantial evidence to support the ALJ's findings and his determination that the claimant did not carry her burden to show that she sustained an occupational disease of bilateral CTS resulting from her employment. The ALJ was persuaded by Dr. Sollender's opinions and determined that the claimant failed to establish that her CTS is a compensable occupational disease.

We are not persuaded by the claimant's arguments that the ALJ erred in admitting into evidence the jobs demand analysis report and Dr. Sollender's opinions based on that report. Under §8-43-207(1), C.R.S., "the ALJ is vested with wide discretion in the conduct of evidentiary proceedings." *Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009); *see also Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009) (applying an abuse of discretion standard to evidentiary rulings); *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ("An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law.").

Moreover, a party may not predicate error on the admission of evidence unless the party registered a contemporaneous objection stating the specific ground for the objection. C.R.S. 103(a)(1); *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995). A party may not raise issues on appeal which were not raised before

the ALJ. Instead, issues not raised to the ALJ are waived. *Kuziel v. Pet Fair, Inc.*, 948 P.2d 103 (Colo. App. 1997).

The claimant contends on appeal that the job demand analysis report was hearsay and inadmissible pursuant to C.R.E. 802. Our review of the record, however, does not indicate that the claimant made an objection based upon alleged hearsay or C.R.E. 802 as she now argues on appeal. Because the claimant did not object to the evidence as hearsay at hearing, she may not do so now on appeal. Section 8-43-210, C.R.S.; C.R.E. 103(a)(1).

The only objection the claimant made to Mr. Blythe's report at hearing was that it could not be admitted without foundation pursuant to §8-43-210, C.R.S., because it was not an employer record or medical report. Tr. at 5. We agree, however, with the ALJ's determination to allow the report into evidence because Mr. Blythe was a vocational consultant and the job demand analysis report was a vocational report which is specifically admissible under §8-43-210, C.R.S. ("vocational reports... are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case.").

The claimant also argues on appeal that the ALJ erred in allowing Dr. Sollender's reports and testimony into evidence, based on her assertion that his opinions were unreliable and speculative. The only objection the claimant made at hearing with regard to Dr. Sollender, was to the admission of the respondents' Exhibit F which was Dr. Sollender's opinion discussing the job demand analysis report. Tr. at 6. No further objections were made. The claimant has not directed us to, nor are we aware of, any dispute at the time of hearing regarding the claimant's contentions she is now making on appeal. Because the argument is raised for the first time on appeal we need not consider it. C.R.E. 103(a)(1). *See Public Service Co. of Colorado v. Willow Water District*, 856 P.2d 829 (Colo. App. 1993) (objection that evidence does not meet the standards for the admissibility of novel scientific evidence, may not be raised for the first time on appeal).

In any event, even if the claimant had timely objected to Dr. Sollender's testimony on this basis, the record does not compel a contrary result. In *People v. Ramirez*, 155 P.3d 371 (Colo. 2007), the court stated that scientific evidence is admissible under C.R.E. 702 if it is reliable and relevant. The court also reiterated that the reliability inquiry should be broad in its scope and should consider the totality of the circumstances. *Ramirez*, 155 P.3d at 378. A showing of relevance merely requires consideration whether the expert testimony would be useful to the fact finder. *Ramirez*, 155 P.3d at 379. Both the applicable case law and C.R.E. 702 contemplate a flexible test which allows an ALJ broad discretion to determine the admissibility of evidence based on an expert's

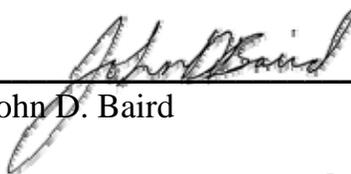
knowledge, skill, experience, training and education. *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995); *Denver Symphony Ass'n v. Industrial Commission*, 34 Colo. App. 343, 526 P.2d 685 (1974). Because the fact finder has a “superior opportunity” to assess the competence of the expert and usefulness of the opinions, the standard of review is “highly deferential.” *Ramirez*, 155 P.3d at 380.

The principles articulated in *Ramirez* pertain especially to scientific evidence that is “novel.” In our view, Dr. Sollender’s views concerning whether it was medically probable that the claimant's alleged CTS was related to her employment do not rely on novel medical theories or opinions. Those opinions were within the usual expertise of the doctors who treated, evaluated, or examined the claimant, and we perceive nothing that renders his opinion unreliable as a matter of law. Moreover, the ALJ found that the jobs demand analysis “provided the best data available.” This is supported by Dr. Sollender’s testimony that he previously had reviewed Mr. Blythe’s reports many times and when asked about the quality and accuracy of his work, stated that “he does topnotch work.” Tr. at 30 – 31).

The claimant takes issue with the amount of time the claimant was actually observed doing her job and asserts that the analysis was not “complete.” The claimant’s arguments go to the weight the ALJ chose to give to the expert’s opinion. Assessment of the sufficiency and probative weight of the evidence are matters solely within the province of the ALJ as the fact-finder. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). We may not substitute our judgment for that of the ALJ in this regard. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Thus, we conclude that the ALJ did not abuse his discretion in admitting the expert evidence in this matter.

**IT IS THEREFORE ORDERED** that the ALJ’s order dated August 2, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
John D. Baird

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

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/17/2013 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

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BLVD., DENVER, CO, 80230 (Insurer)  
HASSLER LAW FIRM, LLC, Attn: STEPHEN M. JOHNSTON, ESQ., 616 WEST  
ABRIENDO AVENUE, PUEBLO, CO, 80004 (For Claimant)  
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: LYNDA S. NEWBOLD, ESQ., 1401  
SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-869-453-01

IN THE MATTER OF THE CLAIM OF

HAROLD J. MARTINEZ,

Claimant,

v.

FINAL ORDER

JONES LANG LASALLE,

Employer,

and

HARTFORD FIRE INSURANCE,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated August 23, 2012, that denied the respondents' request to withdraw the previously filed general admission of liability and ordered the respondents to pay temporary total disability benefits. We affirm.

A hearing was held on the issues of compensability, temporary disability and medical benefits. The respondents alleged that the claimant did not sustain a work-related injury and sought to withdraw the general admission of liability. The respondents also argued that the claimant was responsible for his wage loss and, therefore, not entitled to temporary disability benefits pursuant to §8-42-103(g) and §8-42-105(4), C.R.S. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows.

The claimant was employed as a senior facility manager on September 30, 2011. On this date the claimant was inspecting one of the buildings under his charge and was standing on steps taking pictures of an overgrown weedy area when he stepped on some of the overgrown weeds and slipped and fell. The claimant fell backwards and landed on his buttocks and elbow. As he slid down the steps he felt a pulling sensation in his low back and a popping in his neck. After the fall the claimant notified the employer. The accident happened on a Friday and the claimant returned to work on the following Tuesday, October 4, 2011, and filed a workers' claim for compensation.

The first medical practitioner the claimant saw after his injury of September 30, 2011, was Joseph Mullen, PA-C, for Dr. Schwender at CCOM in Colorado Springs,

Colorado on November 7, 2011. The claimant was restricted from work as of November 3, 2011. The claimant was subsequently terminated from work on November 10, 2011.

The respondents filed a general admission of liability on November 4, 2011, admitting for medical benefits only. On November 15, 2011, the claimant was given work restrictions of no lifting over 20 pounds, 10 pounds carry restriction, and to avoid repetitive bending or lifting. The claimant testified that with these restrictions he could not do his job. The claimant testified that he still has the same problems and is still under the same restrictions.

The claimant had a prior workers' compensation injury on July 6, 2006, with a diagnosis of cervical pain and lumbar radiculitis. In 2007, Dr. Aschberger performed an independent medical examination for the 2006 injury. The parties took Dr. Aschberger's deposition in the present case and questioned him on the relatedness of the symptoms and injuries between the prior injury in 2006 and the one of 2011. Dr. Aschberger testified that "it sounds like he had an aggravation of an underlying disorder." Dr. Aschberger further noted that the claimant could have a cessation of symptoms with no care for the previous injury from 2007 to the September 30, 2011, injury.

Dr. Hall also noted that the claimant had not received any treatment from mid-2007 through September 30, 2011, and that the mechanics of the 2006 lifting injury were different from the 2011 slip and fall injury. In Dr. Hall's opinion, the September 30, 2011, injury was a new injury. The ALJ found Dr. Aschberger and Dr. Hall credible and persuasive in their opinions concerning causality of the claimant's injuries. Based on these findings the ALJ concluded that the respondents failed to establish by a preponderance of the evidence that the claimant's injuries did not arise out of his employment.

With regard to the termination of temporary disability, the ALJ found that the claimant was put on a performance plan on October 28, 2011, one month after his date of injury. The claimant was given work restrictions as of November 3, 2011, which the claimant's supervisor conceded that under these restrictions, the claimant could not do his job. The claimant also testified that he was unable to do his work based on the restrictions given to him. The ALJ found the claimant credible. The ALJ determined that the claimant was terminated from his position on November 10, 2011, for failing to meet his performance goals. The ALJ also noted however, that the claimant's arrival and departure from the office and missing two days of work were specifically cited in the reason for termination. Based on these findings the ALJ found that the claimant was not responsible for his termination and the respondents failed to establish that the claimant undertook a volitional act that led to his termination.

On appeal the respondents contend that the ALJ failed to resolve conflicts in the evidence. The respondents renew the argument made at hearing that the claimant's condition was attributable to the 2006 workers' compensation injury and the claimant's version of the accident was not credible. The respondents also assert that the ALJ's findings on the claimant's termination are not supported by the evidence and the ALJ erred in awarding temporary disability benefits without an offset for unemployment benefits. We are not persuaded that the ALJ committed reversible error.

## I.

It is generally the claimant's burden to prove his entitlement to workers' compensation benefits by a preponderance of the evidence. *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Here, however, because the respondents sought to withdraw the general admission of liability, they had the burden to prove that the claimant did not sustain a compensable injury. Section 8-43-201, C.R.S. Whether disability is the result of a new injury, or the logical and recurrent consequence of a prior injury, is a question of fact. *See F.R. Orr Constriction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). We must uphold the ALJ's factual determination if supported by substantial evidence. Section 8-43-301(8), C.R.S. Substantial evidence is "probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences." *F. R. Orr Construction v. Rinta, supra*.

The evidence concerning the September 30, 2011, incident was conflicting. The ALJ resolved the conflict by crediting the claimant and the opinions of Dr. Aschberger and Dr. Hall. These findings are supported by substantial evidence in the record. Tr. at 14-15, Dr. Aschberger depo. at 17, Claimant Exhibit 6. Therefore, the ALJ's determination must be upheld. Section 8-43-301(8), C.R.S. It is true that the respondent presented conflicting testimony, but we are not free to substitute our judgment for that of the ALJ concerning the weight of the evidence. *Martinez v. Regional Transportation District*, 832 P.2d 1060 (Colo. App. 1992). Contrary to the respondents' further contention, the ALJ was not required to detail the evidence which he found unpersuasive. *See Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986).

## II.

The respondents also contend that the ALJ's order concerning temporary disability is not supported by the evidence. The respondents allege that the ALJ allegedly ignored the employer's reason for termination and erred in accepting the claimant's explanation. We are not persuaded to disturb the ALJ's order on this basis.

Sections 8-42-105(4), C.R.S. and 8-42-103(1)(g), C.R.S. (termination statutes) contain identical language stating that in cases “where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury.” The term “responsible” reintroduced into the Workers' Compensation Act the concept of “fault.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). “Fault” requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995). An employee is not responsible for a termination from employment if the physical effects of the industrial injury preclude the performance of assigned duties and cause the termination. *Colorado Springs Disposal v. Industrial Claim Appeals Office, supra*.

The employer bears the burden of establishing evidence that a workers' compensation claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). The question whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ and we must uphold the ALJ's findings if supported by substantial evidence in the record. *Id.*; Section 8-43-301(8), C.R.S.

We disagree with the respondents that the ALJ's findings concerning the claimant's termination are not supported by the evidence. The respondents refer to the testimony of Mr. Schloff, the employer's vice president/regional manager, as support for its argument that the claimant was terminated for poor performance. However, the ALJ specifically credited the claimant's testimony concerning his termination and it is implicit from the ALJ's finding that the ALJ inferred from the evidence that the actual motivation for the employer's decision to discharge the claimant was that he was not able to perform his job within his restrictions. The claimant testified that he did not believe he was being terminated for poor performance. Tr. at 32. The claimant testified that after his injury he had problems showing up to work because of the pain he suffered from his injury which precluded him from driving. Tr. at 30. The claimant further testified that the under the restrictions provided by the treating provider, he would not be able to do his job. Tr. at 34. The ALJ also found it significant that Mr. Schloff conceded that the claimant was unable to perform his job with the medical restrictions. Tr. at 79. Moreover, the notice of termination specifically references the claimant not showing up for work after the claimant's date of injury. Respondents' Exhibit P at 235.

In our view, the ALJ could reasonably infer from evidence, as he did, that the claimant was terminated because the injury prevented him from performing his job.

Under these circumstances, the claimant is not responsible for the termination of employment. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra.* We are persuaded that the ALJ's findings are supported by substantial evidence and should not be disturbed on review. Section 8-43-301(8), C.R.S.; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

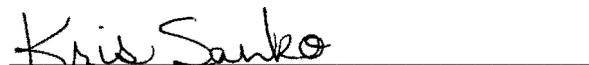
III.

The respondents finally contend that the ALJ erred in awarding temporary disability benefits without an offset for unemployment benefits. The respondents point to the claimant's response to his counsel's questioning concerning the receipt of unemployment benefits and argue that an unemployment offset is "inherent" in an award of temporary disability benefits. However, because an offset is in the nature of an affirmative defense to a claim for workers' compensation disability benefits, the respondents had the burden of demonstrating their right to an offset. *See Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). In our review of the record we do not see that the issue of unemployment offsets was raised as an issue for hearing. Thus, arguments not presented to, considered by, or ruled upon by the ALJ may not be raised for the first time on appeal. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Apache Corp. v. Industrial Claim Appeals Office*, 717 P.2d 1000 (Colo. App. 1987).

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 23, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

HAROLD J. MARTINEZ

W. C. No. 4-869-453-01

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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/23/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

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HARTFORD FIRE INSURANCE, Attn: AMANDA MCCOMAS, P O BOX 14474,  
LEXINGTON, KY, 40512 (Insurer)

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JONES LANG LASALLE, Attn: BRIAN CHESKE, 200 E. RANDOLPH DRIVE, CHICAGO,  
IL, 60601 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-871-232-01

IN THE MATTER OF THE CLAIM OF

ANDREW P. MOORHEAD,

Claimant,

v.

UNIVERSITY OF COLORADO,

Employer,

and

OFFICE OF UNIVERSITY RISK MANAGEMENT,

Insurer,

Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Henk (ALJ) dated September 12, 2012, that ordered the claimant's claim compensable and ordered the employer responsible to pay for the claimant's reasonable and necessary medical treatment. We affirm.

The ALJ found that the claimant was employed as an instructor and teaching assistant by the respondent employer. The claimant also was a graduate student of the respondent employer. On November 2, 2011, the claimant was working at the mathematics building on the respondent employer's Boulder campus. The claimant had attended a meeting at the mathematics building at about 5:00 to 6:00 p.m. After the meeting, the claimant left the mathematics building and went to a local restaurant with his colleague, Mr. Moore, and two others. While at the restaurant, the four men shared two pitchers of beer.

Shortly after 10:00 p.m., the claimant and Mr. Moore left the restaurant and walked approximately 30 minutes back to the mathematics building. The claimant walked through snow and ice, and his shoes became wet. The claimant had not intended to return to the mathematics building that night but ultimately decided to do so in order to retrieve several weeks of homework assignments that he needed to grade as soon as possible. Mr. Moore encouraged the claimant to return to the mathematics building to retrieve the papers and grade them before the next class.

When the claimant and Mr. Moore arrived at the mathematics building, the outside doors were locked. The claimant used a special key card given to him by the respondent employer in the event he needed to enter the building outside of normal school hours.

After entering the building, the claimant and Mr. Moore went to the second floor so that the claimant could collect his bag that contained the homework assignments which he needed to grade. The claimant and Mr. Moore then went to Mr. Moore's office on the third floor to retrieve Mr. Moore's bag. After retrieving Mr. Moore's bag, the claimant and Mr. Moore entered the main stairwell to exit the building. The floors in the main stairwell are smooth and become slippery when wet. The edge of each step is covered with a smooth metal edge that also can be slippery. The main stairwell is designed so that the stairs run around the exterior walls, leaving a large empty space in the middle that runs the height of the stairwell. The railing on the main staircase is approximately three feet and two inches high.

Approximately three steps from the top of the stairs, the claimant slipped or tripped on the step and he fell over the railing. The claimant fell approximately 40 feet to the basement level sustaining multiple traumatic injuries, including fractured bones, soft tissue damage, and hemorrhagic bleeding. The claimant developed cognitive issues as a result of his fall, including impaired reflexes on his right side and aphasia.

A hearing was held on the issues of compensability and medical benefits. The ALJ found that while the claimant had consumed alcohol the evening of November 2, 2011, intoxication did not cause his accident. Rather, the ALJ found that the claimant's accident was the direct result of a combination of other factors, including moisture on his shoes, lack of sufficient tread on his shoes, smooth surface of the stairs, smooth metal edges of the stairs, height of the railing on the stairs, and design of the main staircase which included an open space in the middle through which the claimant fell from the third floor to the basement level. The ALJ concluded the claimant had proven by a preponderance of the evidence that his accident on November 2, 2011, arose out of and in the course and scope of his employment for the respondent employer. The ALJ concluded that the claimant returned to the math building for the sole reason to get his backpack containing papers that he needed to grade for the respondent employer.

#### I.

The respondents first argue that there is not substantial evidence supporting the ALJ's finding that the claimant's injuries arose out of his employment. The respondents reason that the overwhelming evidence demonstrates that any actions taken after the claimant's meeting ended cannot be considered as arising out of any service to his

employer. The respondents further argue that overwhelming evidence demonstrates the claimant's injuries were not suffered in the course and scope of his employment. The respondents reason that there is no testimony or evidence that the claimant was able to or intended to grade papers on the night of his fall. We are not persuaded to disturb the ALJ's order on these grounds.

The claimant has the burden to prove he sustained an injury while "performing service arising out of and in the course of employment." Section 8-41-301(1)(b), C.R.S. The requirements of §8-41-301(1)(b), C.R.S. that the injury arise out of and in the course of employment, represent different elements. The "arising out of" test is one of causation and requires that the injury have its origin in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In contrast, the "in the course of" test refers to the time, place, and circumstances of the injury. This test ensures that the injury occurs within the time and place limits of the employment during an activity with some connection to job-related functions. See *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

Further, there is no requirement that the activity be a strict duty or obligation of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Rather, it is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). Further, pursuant to §8-40-201(1), C.R.S., a compensable injury may be an unexpected, unusual, or undesigned occurrence or effect of an employee's normal work activities. In *Reinhard v. Pikes Peak Broadcasting Co. Inc.*, W.C. No. 4-114-050 (May 20, 1993), for example, the claimant was injured while walking down a flight of stairs at the employer's premises. Because the evidence indicated the injury occurred while the claimant was going to a room where his work assignments were posted, the Panel upheld an ALJ's finding that the injury had its origin in a distinctly work-related activity. See also *Olivas v. Keebler Co.*, W. C. No. 4-418-316 (Oct. 24, 2001).

Here, we first reject the respondents' argument that there is not substantial evidence to support the ALJ's finding that the claimant's injuries arose out of his employment. During the hearing, the claimant testified that part of his job responsibilities included grading students' assignments. The claimant testified that he graded around 90 homework papers every week, and that grading could be done at any time. Tr. at 10. Mr. Moore testified that the claimant was his teaching assistant (TA) on November 2, 2011. Mr. Moore testified that the claimant primarily was the one who was in charge of grading homework and quizzes, and that after leaving the restaurant, he and the claimant returned to the Math Department to obtain his and the claimant's bag. Tr. at

19-20. Mr. Moore explained that it was his impression the claimant's bag contained many weeks' worth of recitation quizzes that the claimant was responsible for grading. He further explained that he encouraged the claimant to go back to the Math Department to get his bag so that he could grade the quizzes the next day. Mr. Moore testified that the claimant had fallen behind on grading the recitation quizzes, and that the quizzes are important because they introduce new concepts that are covered in lecture. He testified that it was good for his students to have their quizzes back so he encouraged the claimant to retrieve them and grade them before the next recitation. Tr. at 20-22. As such, we reject the respondents' argument that this evidence amounts to coincidence and speculation. Rather, similar to *Reinhard*, we conclude that this evidence supports the ALJ's finding that the claimant's injury had its origin in a work-related activity.

To the extent the respondents argue that the claimant's accident did not occur during the course and scope of his employment because the claimant was at the Math Department after hours, and after socializing and drinking with colleagues off-site, we similarly are not persuaded. The course of employment test does not necessarily require that the employee be "on the clock" so long as the employee's activity is a normal incident of the employment and is not a deviation. *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1986). In *Butland v. Industrial Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988), for example, the claimant was employed at a racetrack. One day, the employer gave the claimant and several other employees several hours off work. The claimant remained on the employer's premises and was later injured while helping repair a grader which was used to grade the track. The employer did not tell the claimant to repair the grader, and the claimant's injury occurred during a technical violation of the employer's general directive to take the rest of the day off. Nevertheless, the Court determined that the claimant's injury occurred while he was performing work which furthered the interests of the employer, and that the benefits flowing to the employer outweighed the significance of the claimant's action in violating the general directive. Thus, the claimant's injury was determined to have occurred in the course and scope of his employment.

Here, similar to *Butland*, the claimant's injury occurred at approximately 10:30 p.m., or at a time when he was not required to be on the employer's premises. Nevertheless, the ALJ found, with record support, that the respondent employer gave the claimant a special key card in the event he needed to enter the building outside of normal school hours. Tr. at 31. Additionally, the ALJ found, with record support, that the claimant could grade papers anytime. The claimant testified that he had "universally floating" job responsibilities and that his grading could be done at any time. Tr. at 10. Again, Mr. Moore testified that he encouraged the claimant to go back to the Math Department to obtain his bag so that he could grade the quizzes the next day. As noted above, Mr. Moore testified that the quizzes were important because they introduced new

concepts that are covered in lecture, and it was good for his students to have their quizzes back before the next recitation. Tr. at 20-22. Additionally, one of the responding police officers from the University of Colorado, Officer Warwick-Diaz, stated in his report that the claimant's backpack contained what appeared to be student papers. Ex. D at 35; *see also* Ex. D at 38, 65; Depo. of Officer Warwick-Diaz at 32-33; Tr. at 26. The ALJ found Mr. Moore's testimony persuasive that the claimant was performing employment duties after he had clocked out. The respondents' argument that the claimant had no intention of grading, or could not grade, the quizzes on the night of his accident, does not mandate a different result. *See Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). The ALJ credited Mr. Moore's testimony that he encouraged the claimant to return to the Mathematics Building that night in order to retrieve the quizzes so that he could grade them before the next class. Findings of Fact at 3 ¶6. The ALJ determined that the claimant intended to grade the quizzes before the next class, as part of his regular employment duties. Because substantial evidence and applicable law support the ALJ's determination that the claimant sustained an injury in the course and scope of his employment, we may not disturb the order on review. Section 8-43-301(8), C.R.S.

## II.

Next, the respondents argue that the great weight of the evidence does not support the ALJ's finding that intoxication did not cause the claimant's accident. The respondents contend that the ALJ's finding disregards the overwhelming weight of the evidence and the claimant's own alleged admission that his intoxication was a causative factor in his fall. Similarly, the respondents contend there is no evidence supporting the ALJ's finding that the cause of the claimant's fall could have been his shoe catching a metal portion of the stair. The respondents argue that such a finding amounts to mere speculation. We are not persuaded that the ALJ erred.

The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is generally one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301 (8), C.R.S. Substantial evidence is probative evidence that 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). Under this standard, we must view the evidence in the light most favorable to the prevailing party and accept the ALJ's resolution of conflicts in the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

When applying the substantial evidence test to the issue of causation, we must view the evidence in a light most favorable to the prevailing party. Further, we must defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and the plausible inferences drawn from the record. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002).

Here, the ALJ found that while the claimant had consumed alcohol on the date of his accident, intoxication did not cause his fall. The ALJ credited Mr. Moore's testimony as to the claimant's ability to walk and balance in the time leading up to the fall. Findings of Fact at 3 ¶¶5, 14. Mr. Moore testified that on the 30 minute walk back from the restaurant, the claimant did not stumble or trip, and did not have any kind of difficulty staying on his feet. Tr. at 36. Rather, the ALJ concluded that the claimant fell because he was wearing wet shoes with worn tread and because the floor in the stairwell where he fell was smooth and slick. Conclusions of Law at 7 ¶10. Mr. Moore testified that as he and the claimant entered the main stairwell to exit the building, their wet shoes were squeaking on the floor. Tr. at 82; Findings of Fact at 3 ¶9. Further, after viewing pictures of the claimant's shoes, both Mr. Moore and Officer Warwick-Diaz testified that it appeared as though the claimant's shoes had some wear. Tr. at 26; Depo. of Officer Warwick-Diaz at 33-34. Thus, we conclude that the record contains substantial evidence from which the ALJ could reasonably find that the cause of the claimant's accident was the combination of his wet shoes with worn tread, and the smooth and slick floor in the stairwell. Findings of Fact at 3 ¶¶5, 9, 10, 14, 15; Conclusions of Law at 7-8 ¶10. Since the ALJ's findings are supported by substantial evidence in the record, they are binding on review. Section 8-43-301(8), C.R.S.

Further, the respondents point to evidence in the record that supports their argument that the claimant's shoes were not soaking wet, or that the claimant had walked in a carpeted room before the fall. The existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal, however. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); §8-43-301(8), C.R.S.

Moreover, the respondents argue that the ALJ erred in finding that the claimant's shoe caught a metal portion of the stair. The respondents assert that the evidence supports the assumption that the metal lip of the stair was completely flush with the rest of the stair. In our view, although one of the ALJ's finding refers to the claimant's sole catching the edge of the metal lip, she ultimately determined that the claimant slipped because he was wearing wet shoes with worn tread and because the floor in the stairwell was smooth and slick. Conclusions of Law at 7-8 ¶10. *See George v. Industrial Commission*, 720 P.2d 624 (Colo. App. 1986) (ALJ not held to a crystalline standard). Regardless, in his report and testimony, Officer Warwick-Diaz stated that the claimant's sole or foot caught the edge of the step or caught on the stair. Section 8-43-301(8),

C.R.S. Ex. D at 35; Depo. of Officer Warwick-Diaz at 7. Consequently, we are not persuaded to disturb the ALJ's order on this ground.

### III.

The respondents further argue that the ALJ abused her discretion and that their due process rights were violated by the admission of evidence that never was disclosed during discovery and was proffered after the close of evidence. The respondents contend that the claimant improperly submitted an attached Exhibit with his proposed order. This proffered Exhibit is the Department of Public Health and Environment, Rules Pertaining to Testing for Alcohol and Other Drugs. Under the particular circumstances of this case, we are not persuaded that the ALJ committed reversible error.

The ALJ has wide discretion to control the course of a hearing and make evidentiary rulings. Section 8-43-207(1)(c), C.R.S.; *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). Parties are expected to submit their evidence at the time of the hearing. *Frank v. Industrial Commission*, 96 Colo. 364, 43 P.2d 158 (1935). As noted by the respondents, where additional evidence was proffered after the apparent conclusion of the proceedings, we previously have sought guidance from cases involving motions for a new trial due to newly discovered evidence. The factors the courts examine in deciding whether to allow additional evidence are the parties' due process rights, including the right to present evidence and confront adverse evidence, whether the requesting party could not, with reasonable diligence, have discovered and produced the evidence at issue at the first hearing, whether the evidence was material to the issue in first trial, and whether the evidence, if admitted, would probably change result of first trial. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990); *see also* W.C. Rule 9-1(D) (discovery "shall be completed no later than 20 days prior to the hearing date"), 7 Code Colo. Reg. 1103-1.

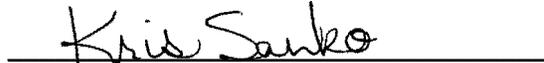
Here, we first note that after the claimant submitted his proposed order with the attached Exhibit, the respondents objected on the basis that the Exhibit had not been "entered into evidence at the time of the hearing, and is clearly hearsay, without foundation." The respondents further argued that to the extent the claimant intended such evidence to be substantive, "it should not be relied upon for a decision on the merits." The respondents' arguments notwithstanding, we conclude that any error in the ALJ's admission of the proffered Exhibit was harmless. CRE 103(a); *see also Williamson v. School District No. 2*, 695 P.2d 1173 (Colo. App. 1984)(party challenging order as abuse of discretion must show sufficient prejudice before it is reversible error). While in her

order the ALJ took judicial notice of the proffered Exhibit, the ALJ did not reference such Exhibit for, or in, any of her findings or determinations. Order at 2. *See* CRE 201. Rather, the ALJ's pertinent findings and determinations regarding the testing of the claimant's blood alcohol content are supported by the testimony and evidence submitted during the hearing. Specifically, in her order, the ALJ made findings regarding the level of the claimant's blood alcohol content, that the facility which took the claimant's blood alcohol test was not a certified forensic lab, and that the claimant's blood specimen was hemolyzed which may have affected the testing of his blood alcohol content. Findings of Fact at 5 ¶22. The respondents' Exhibit B at 22b and 22c documents the claimant's blood alcohol content on the night in question, and that the claimant's blood specimen was hemolyzed which may have affected the testing of his blood alcohol content. Further, Brandi VanPatten, the lab technician/manager for Boulder Community Hospital where the claimant was taken on November 2, 2011, for treatment, testified that the Department of Public Health does not inspect her lab, and her lab is not a Certified Forensic Laboratory. The Tr. at 65-79. Also, the ALJ noted that even assuming the claimant was intoxicated on the night of his fall, it was not a bar to compensability. *See Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra*. Consequently, we are not persuaded that the ALJ abused her discretion or that the respondents' due process rights were violated on grounds that the Exhibit was not submitted during discovery and not introduced at the hearing. Thus, we will not disturb the ALJ's order.

**IT IS THEREFORE ORDERED** that the ALJ's order dated September 12, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

ANDREW P. MOORHEAD

W.C. No. 4-871-232-01

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CERTIFICATE OF MAILING

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

1/16/2013 by RP.

ANDREW P. MOORHEAD, 325 SOUTH 43RD STREET, BOULDER, CO, 80305 (Claimant)  
UNIVERSITY OF COLORADO, C/O: MATH DEPARTMENT, 914 NORTH BROADWAY  
STREET, BOULDER, CO, 80309 (Employer)

OFFICE OF UNIVERSITY RISK MANAGEMENT, Attn: POLLY WISNIEWSKI, C/O:  
OFFICE OF RISK MANAGEMENT, 1800 GRANT STREET, SUITE 700, DENVER, CO,  
80203 (Insurer)

FRANKLIN D. AZAR & ASSOCIATES, PC, Attn: JULIE SWANBERG, ESQ./MATTHEW  
GIZZI, ESQ., 14426 EAST EVANS AVENUE, AURORA, CO, 80014 (For Claimant)

NATHAN, BREMER, DUMM & MYERS P.C., Attn: MARK H. DUMM, ESQ., 3900 EAST  
MEXICO AVENUE, SUITE 1000, DENVER, CO, 80210 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-665-039-01

IN THE MATTER OF THE CLAIM OF

DANETTE PARKER,

Claimant,

v.

HOME DEPOT USA, INC.,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurer,

Respondents.

ORDER OF REMAND

The claimant seeks review of an order of Administrative Law Judge Friend (ALJ) dated August 21, 2012, that denied the claimant's request for conversion of scheduled ratings to whole person ratings and also determined that the respondents overcame the Division Independent Medical Examination (DIME) physician's seven percent whole person rating by clear and convincing evidence. We affirm the ALJ's order insofar as he determined that the respondents overcame the DIME physician's seven percent whole person rating by clear and convincing evidence and remand the conversion issue for further findings.

The claimant sustained an admitted injury to both of her knees when she tripped at work. Dr. Sander Orent performed a DIME on August 19, 2010, and concluded that the claimant was at maximum medical improvement (MMI), and gave the claimant a 24 percent impairment of the left lower extremity and 12 percent impairment for the right lower extremity. The DIME physician also provided the claimant with an additional seven percent whole person impairment for Complex Regional Pain Syndrome (CRPS).

The respondents filed a Final Admission of Liability on September 20, 2010, admitting for the scheduled ratings and the seven percent whole person impairment rating. Claimant Exhibit at 1. The claimant objected to the final admission of liability and filed an application for hearing on the issue of permanent partial disability benefits, listing under "Other issues to be heard," "conversion of the scheduled impairment to a whole person." The parties subsequently stipulated to continue the hearing and for withdrawal of the application for hearing. The claimant then refiled the application for hearing on the issue of permanent partial disability. In response to this application for

hearing the respondents checked the box for other issues to be heard and listed “DIME report issued a permanent impairment.”

A hearing was held before ALJ Friend on the issue of converting the claimant’s scheduled ratings to whole person ratings and whether the respondents overcame the DIME physician’s seven percent whole person rating by clear and convincing evidence. Tr. at 12. Crediting the opinion of Dr. Scott Primack, the ALJ determined that the respondents overcame the DIME physician’s seven percent rating by clear and convincing evidence. The ALJ ordered the respondents to pay permanent disability benefits based on the 12 percent and 24 percent scheduled ratings.

The claimant initially contends on appeal that the ALJ did not have jurisdiction to address the seven percent whole person rating because the respondents filed a final admission of liability admitting for the rating. We are not persuaded that the ALJ erred. In *HLJ Management Group, Inc. v. Kim*, the court of appeals specifically held that an admission of liability may be contested by either party, and that the “determination of the matter thus placed in issue is subject to determination by the ALJ at the adversary hearing.” 804 P.2d at 253. The court further stated that the admission is binding only until the controverted issue is determined and the ALJ issues an order. See *Pacesetter v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The *HLJ* opinion contemplates that a respondent may controvert its own admission of liability by timely applying for a hearing or, as here, filing a response to the application for hearing. See *Id.*; *Bauer v. Boulder County*, W.C. No. 4-020-145, (March 22, 1993).

To the extent the claimant argues that the ALJ erred in his finding that the respondents overcame the DIME physician’s seven percent whole person rating by clear and convincing evidence, we disagree. Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of medical impairment “shall be overcome only by clear and convincing evidence.” The party challenging the DIME physician's impairment rating bears the burden of proof. “Clear and convincing” evidence has been defined as evidence which demonstrates that it is “highly probable” the DIME physician's opinion is incorrect. *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether a party has overcome the DIME physician by clear and convincing evidence is one of fact for the ALJ's determination. *Id.*

The standard of review is whether the ALJ's findings of fact are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Metro Moving & Storage Co. v. Gussert, supra*. Substantial evidence is that quantum of probative evidence, which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Id.* This standard of review is deferential and the

scope of our review is “exceedingly narrow.” *Id.* We may not substitute our judgment by reweighing the evidence to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990) (reviewing court is bound by resolution of conflicting evidence, regardless of the existence of evidence which may have supported a contrary result); *Rockwell Int’l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)(ALJ, as fact-finder, is charged with resolving conflicts in expert testimony). The weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.2d 186 (Colo. App. 2002).

Here, the ALJ credited the opinion of Dr. Primack who testified that the DIME physician’s decision to rate impairment was not correct because clinical examination and testing did not support a diagnosis of CRPS and level two doctors are not supposed to rate permanent impairment based on pain complaints alone. Dr. Primack Depo. at 6, 8 and 10. Dr. Primack further stated that the Division Impairment Rating Tips for CRPS do not apply to rating sympathetic pain from the spinal cord. Dr. Primack Depo. at 16-17. Thus, the evidence supports that ALJ’s determination that the respondents overcame the DIME physician’s impairment rating by clear and convincing evidence and we see no basis to disturb this portion of the ALJ’s order. Section 8-43-301(8), C.R.S.

The claimant also contends that the ALJ erred in failing to convert the scheduled ratings to whole person ratings. On this issue, we agree with the claimant that ALJ’s findings are insufficient to permit appellate review and therefore, remand for further findings.

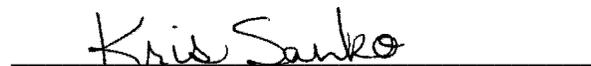
The question of whether the claimant sustained a scheduled injury within the meaning of §8-42-107(2), C.R.S. or a whole person medical impairment compensable under §8-42-107(8), C.R.S., is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant’s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

Here, the ALJ’s order does not reflect the factors he considered in awarding the claimant permanent disability benefits based on scheduled impairment. Rather, the order only speaks to the issue of whether the respondents overcame the whole person rating by clear and convincing evidence. The record, however, contains some evidence which might support a determination that the claimant sustained functional impairment which is not on the schedule. Consequently, the matter must be remanded for entry of a new order on this issue. Section 8-43-301(8), C.R.S. We should not be understood as expressing any opinion concerning resolution of this factual issue.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 21, 2012, is affirmed insofar as the ALJ determined that the respondents overcame the seven percent whole person rating and remanded for further findings on the issue of converting the claimant's scheduled ratings to whole person ratings.

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

\_\_\_\_\_ 1/14/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

DANETTE PARKER, 5817 PARFET COURT, ARVADA, CO, 80004 (Claimant)  
AMERICAN HOME ASSURANCE, Attn: APRIL GOURLEY, C/O: LIBERTY MUTUAL  
INSURANCE COMPANY, 2100 WALNUT HILL LANE, #100, IRVING, TX, 75038 (Insurer)  
ROBERT W. TURNER, LLC, Attn: ROBERT W. TURNER, ESQ., 8400 EAST CRESCENT  
PARKWAY, SUITE 600, GREENWOOD VILLAGE, CO, 80111 (For Claimant)  
DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: DAVID J.  
DWORKIN, ESQ., 3900 E. MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210 (For  
Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-778-285

IN THE MATTER OF THE CLAIM OF

MARVIN W SMITH,

Claimant,

v.

FINAL ORDER

CITY OF COLORADO SPRINGS,

Employer,

and

SELF-INSURED,

Insurer,  
Respondent.

The *pro se* claimant seeks review of an order of Administrative Law Judge Stuber (ALJ) dated November 8, 2012, that denied and dismissed his petition to reopen and his claim for additional permanent disability and disfigurement benefits. We affirm the ALJ's order.

A hearing was held on the claimant's petition to reopen. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows. On July 14, 2008, the claimant sustained an admitted work injury to his left lower leg when he slipped under a machine and sustained a laceration to the front of his leg. The claimant was placed at maximum medical improvement (MMI) on August 27, 2008, and given a two percent rating for his lower extremity. The respondent filed a final admission of liability on December 10, 2008, admitting for the permanent impairment and \$500 in disfigurement benefits. The respondent denied liability for maintenance medical benefits. The final admission contained the statutorily required notice to the claimant. The claimant did not file an objection or an application for hearing on any ripe issues within 30 days. Consequently, the claimant's claim was closed. Section 8-43-203, C.R.S.

Following this injury, the claimant returned to work with other employers and sustained two additional work related injuries to his back. The ALJ found that the claimant did not report any left leg symptoms during the course of the treatment for these two subsequent injuries.

On June 14, 2012, the claimant filed a petition to reopen the July 2008 claim based upon a change of condition. The claimant testified at hearing that he still has daily, constant pain in his left leg and states that he believed his symptoms had been severe ever since the date of the injury.

The claimant was examined by Dr. Castrejon on September 12, 2012. Dr. Castrejon diagnosed a well-healed laceration with normal examination and noted that the medical records indicated that in the last four years the claimant had not had treatment or lost time from work due to his left leg. Dr. Castrejon also noted the absence of any objective findings and concluded that he was unable to determine that the claimant's current left leg complaints were related to the 2008 work injury.

Based on these findings the ALJ determined that the claimant failed to prove by a preponderance of the evidence that he suffered a change of condition as a natural consequence of the admitted July 14, 2008, work injury. The ALJ specifically credited the opinion of Dr. Castrejon over the claimant's reports of more subjective pain. The ALJ, therefore, denied the claimant's petition to reopen.

On appeal, the claimant states he is only seeking additional disfigurement benefits because he has had to continue to take expensive medications for the pain due to the 2008 injury. The claimant states that he is "dropping the other issues." The claimant's arguments, however, do not provide us with a basis to disturb the ALJ's order.

Our authority to review the ALJ's order is set forth in §8-43-301(8), C.R.S. That statute precludes us from disturbing the order unless the ALJ's findings of fact are insufficient to permit appellate review, the ALJ has not resolved conflicts in the evidence, the record does not support the ALJ's findings, the findings do not support the order, or the order is not supported by the applicable law. None of these apply here.

The claimant makes reference to a Pre-hearing ALJ's (PALJ) disfigurement order as support for his argument. From the record it appears that the claimant submitted photographs to a PALJ and was awarded \$2500.00 in disfigurement benefits for his left leg, foot, shoulders, and face. PALJ Order dated July 6, 2012. The PALJ's order, however, states that either party may request reconsideration by filing an application for hearing and if reconsideration is requested, the "order is withdrawn and vacated." The record on appeal indicates that the respondent filed an application for hearing on the issue of disfigurement benefits and therefore, by its terms, the order was withdrawn and vacated. Because the claim was closed by operation of §8-43-203, C.R.S., the claimant was precluded from obtaining further benefits unless he first established grounds to reopen the claimant under §8-43-303, C.R.S. *See Anderson v. Longmont Toyota Inc.*, 102 P.3d 323 (Colo. 2004).

The determination of whether to reopen a claim is discretionary with the ALJ. *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). We may not disturb the ALJ's determination in the absence of fraud or an abuse of discretion. *Brunetti v. Industrial Commission*, 670 P.2d 1246 (Colo. App. 1983). The standard on appeal of an alleged abuse of discretion is whether the ALJ's determination exceeds the bounds of reason, as where it is contrary to the evidence or the applicable law. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985).

Here, the ALJ was not persuaded that the claimant had sustained a change in his condition related to the industrial injury, and his findings support that determination. The evidence was susceptible of conflicting inferences, but it is the province of the ALJ to assess credibility and resolve the conflicts. We have no basis for interfering with his assessment of the evidence. *See Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The claimant has not provided a transcript of the hearing. Under these circumstances, we must assume the ALJ's findings of fact are supported by substantial evidence in the record. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). In any case, there is substantial evidence in the medical reports of Dr. Castrejon to support the ALJ's pertinent findings. Respondent's Exhibit D. Because the ALJ's factual determinations are supported by substantial evidence in the record, we cannot say the ALJ abused his discretion in denying the petition to reopen. Therefore, we must uphold the order denying benefits.

**IT IS THEREFORE ORDERED** that the ALJ's order dated November 8, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

MARVIN W SMITH  
W. C. No. 4-778-285  
Page 5

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 2/6/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

MARVIN W SMITH, 626 MONO PLACE, COLORADO SPRINGS, CO, 80910 (Claimant)  
CITY OF COLORADO SPRINGS, Attn: STEPHEN FOX, P O BOX 1575 MAIL CODE 630,  
COLORADO SPRINGS, CO, 80901-1575 (Employer)  
DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: GREGORY  
K. CHAMBERS, ESQ., 3900 E. MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210 (For  
Respondents)