

BROWN BAG SEMINAR

Thursday, January 16, 2014

(third Thursday of each month)

Noon - 1 p.m.

633 17th 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
December 14, 2013 through January 10, 2014

Contents

Industrial Claim Appeals Office decision

Stuckman v. City Market 2

Court of Appeals decision

Memorial Gardens v. Industrial Claim Appeals Office 8

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-855-436-02

IN THE MATTER OF THE CLAIM OF

MICHAEL STUCKMAN,

Claimant,

v.

FINAL ORDER

CITY MARKET,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The respondents seek review of a supplemental order of Administrative Law Judge Mottram (ALJ) dated September 6, 2013, that ordered the claimant eligible for medical benefits after MMI. We affirm the order.

The claimant injured his low back on April 23, 2011, when he was lifting a box of limes at work for the respondent employer. At that time, he was employed in the produce department of the respondent's supermarket. The claimant was treated conservatively and was placed at maximum medical improvement (MMI) on March 28, 2012, by his treating physician, Dr. Lippman. The claimant was provided impairment ratings through a referral by Dr. Lippman and then later by a Division Independent Medical Examiner. The respondent filed a Final Admission of Liability for the latter rating on October 22, 2012. That Admission denied liability for medical benefits subsequent to the date of MMI. The claimant submitted an application for hearing on November 16, 2012. The sole issue endorsed for hearing was post MMI medical benefits. The ALJ issued an order, a corrected order, and a supplemental order. All of these orders concluded the claimant had established his need for post MMI medical treatment that was related to his work injury. The ALJ authorized treatment recommended by Dr. Lippman, including epidural steroid injections (ESI), pain medication and physical therapy.

On appeal, the respondent contends the ALJ committed error by allowing claimant's counsel to essentially place into the record medical documents and opinions by Dr. Lippman that the ALJ previously had excluded from admission into evidence. This was accomplished when claimant's counsel cross-examined Dr. Scott, the respondent's medical expert. The ALJ previously had sustained the respondent's

objection to the receipt into evidence of a March 27, 2013, report from Dr. Lippman. The report was sent to the respondent's attorney on that day. Because the hearing was convened on April 15, 2013, the report had only been sent 19 days prior to the hearing. Section 8-43-210 C.R.S. specifies that all relevant medical reports must be exchanged at least 20 days prior to the hearing date. On the basis of this statutory requirement, the ALJ excluded the March 27 report from being introduced into evidence.

The claimant had sustained prior injuries to his low back, in both 1999 and in 2003. These injuries had both resulted in surgeries. In addition, the claimant had returned to see Dr. Lippman on February 20, 2013, complaining of significantly worsened symptoms when he got out of bed on February 15. The position of the respondent asserted the claimant's current need for treatment was due to his preexisting back condition. It was the opinion of Dr. Scott that the claimant's preexisting condition was disabling and it led the claimant to experience periodic flares in symptoms. Dr. Scott testified the claimant had returned to his preexisting base line level of low back disability when he was placed at MMI on March 28, 2012. The recommendation for continuing treatment made by Dr. Lippman at that time was reasoned to actually be aimed at dealing with the claimant's ongoing, and previous, low back maladies. The respondent also contended the claimant's new onset of symptoms dating from February 15, 2013, was a new intervening injury, not related to work, which severed any connection between the April 2011, work injury and the need for additional medical treatment. Dr. Scott testified the February 15 incident was characteristic of the claimant's flares of symptoms he suffered from time to time due to his previous 1999 and 2003 back injuries.

In his February 20, 2013, report, Dr. Lippman had written the claimant sustained a "new" injury, not at work, when he twisted his back at home. However, in the excluded March 27, 2013, report, Dr. Lippman had written a clarification now explaining the February 15 incident was "an exacerbation of an old injury" which "occurred on April 23, 2011."

At the April 15 hearing, claimant's counsel first began cross-examining Dr. Scott by asking hypothetical questions assuming Dr. Lippman had made the statements regarding exacerbation in his March 27 report. Counsel then asked Dr. Scott if he had read the March 27 report. When Dr. Scott responded that he had, counsel asked him why he disagreed with Dr. Lippman's opinion there was not a new injury but just an aggravation related to the work injury. Respondent's counsel objected at several points, arguing the impropriety of basing a hypothetical question upon evidence that could not legitimately ever appear in the record. Another objection was based upon the introduction of the hearsay opinion of Dr. Lippman through the cross-exam question asking the witness to respond to the hearsay statement. The ALJ overruled the objections and allowed the questions and responses to stand. At the conclusion of the hearing, the ALJ

again denied the claimant's request to allow the March 27 reports of Dr. Lippman to be entered into evidence. However, in the ALJ's corrected order of June 4, 2013, the ALJ described the March 27 report and stated it was relied upon to justify the ALJ's conclusion that the claimant did not sustain a new injury on February 15, 2013, and the current need for medical treatment was generated by the April, 2011, work injury.

The objection of the respondent bears merit. A hypothetical question posed to an expert may not be based upon speculation or legally inadmissible evidence. *Board of County Commissioners v. Vail Associates*, 468 P.2d 842 (Colo. 1970). In addition, cross-examination of an expert witness may not be used to circumvent the rules of hearsay or to reference inadmissible evidence. *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989). See CRE 705. In *Diefenderfer*, the Court affirmed the trial court's restriction of the defense's cross-examination of the prosecution's expert witness. Featuring a situation very similar to that presented in this case, the prosecution's expert was asked if he had read a social worker's file in preparation of his opinion regarding the child abuse charge in the case. The cross-examination then asked about these hearsay reports and how they might disagree with the expert's opinion. The Court agreed with the trial judge's upholding of an objection to the cross-examination. The Court observed: "... he should cut off the attack where its purpose is to support the cross-examiner's case by bringing out inadmissible hearsay rather than simply to undermine the expert's opinion." *Id.* at 754. To the extent the cross-examination of Dr. Scott was being conducted in a similar manner, that examination was subject to objection.

In this case however, we were not alone in being impressed by the respondent's objection. The ALJ also found the objection compelling. On September 6, 2013, after the filing of the respondent's brief in support of their appeal, the ALJ submitted a supplemental order. In the supplemental order, the ALJ agreed that the use of Dr. Lippman's March 27 report was error. The supplemental order then excised reference to that evidence and made findings of fact and conclusions of law without its consideration. Based on several other pieces of evidence in the record, the ALJ came to the same conclusion as in his previous orders. He ruled the post MMI medical treatment requested was related to and caused by the April 2011 work injury. He also observed the claimant did not suffer a new injury on February 15 that was sufficient to sever the trail of causation from the April 2011 injury. Once again, the ALJ authorized the treatment recommended by Dr. Lippman.

The respondent's appeal of the supplemental order argues that because the evidence of Dr. Lippman's March 27 report "is the sole reason" for the ALJ's failure to find a subsequent intervening injury occurred on February 15, 2013, the supplemental order must be set aside and the claimant's request for medical benefits denied. This is not a fair reading of the supplemental order. The ALJ does not refer to Dr. Lippman's March

27 report. Instead, he relied on several other documents and testimony received at the hearing. In Dr. Lippman's March 28, 2012, report finding the claimant was at MMI, the ALJ noted the doctor recommended the continuing need for prescription pain medication. Although that report acknowledged the claimant was receiving this medication from his personal doctor, the ALJ reasoned that did not diminish the fact that Dr. Lippman felt the medication was reasonable and related. The ALJ also found that on December 12, 2012, the claimant attempted to arrange an appointment with Dr. Hahn for another ESI injection. The claimant testified that previous ESIs were the only treatment that had provided him significant relief. The ALJ then referenced Dr. Lippman's February 20, 2013, report which stated, in addition to its comment regarding a twisting injury at home, that the claimant was being treated by the doctor for a work injury of April 23, 2011, and for that reason was being prescribed hydrocodone, physical therapy, and another ESI. Finally, the ALJ credited the claimant's testimony that he did not experience a "twisting" injury at home and he did not mention such an activity to Dr. Lippman. Instead, the claimant testified he simply woke up on February 15 feeling considerable additional pain and stiffness in his back. He could not recall any particular incident that may have caused the worsened symptoms. Based upon these circumstances documented in the record, the ALJ deemed the claimant's need for medical treatment was work injury related. Their necessity was not caused by a sufficiently intervening event.

In order to impose liability for medical treatment, the ALJ must find the need for treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(b), C.R.S. The determination of whether the claimant proved causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc.*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). Thus, if the industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

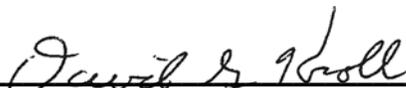
Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In this regard, it was the prerogative of the ALJ to assess the weight and credibility of the medical records and testimony offered on the issue of causation. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

The claimant argues the ALJ has made inconsistent findings by relying on only one portion of the February 20 report of Dr. Lippman while at the same time rejecting the statement in that report asserting the claimant sustained a new injury at home, not at work. 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). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). We cannot say the ALJ here has made a decision not reasonably supported by the record. In addition, The ALJ's plausible inferences may not be disturbed if drawn from substantial evidence in the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The ALJ's citation of the evidence in the record relied upon to support his conclusion can be characterized as substantial evidence which supports his findings. The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The record does reflect recommendations for future treatment of the claimant at the point of MMI, and the claimant's ongoing receipt of medication treatment and attempts to obtain additional treatment for his low back condition after MMI but prior to February, 2013. This is substantial evidence which justifies the conclusions of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's supplemental order issued September 6, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

MICHAEL STUCKMAN

W. C. No. 4-855-436-02

Page 7

CERTIFICATE OF MAILING

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

_____ 12/23/2013 _____ by _____ RP _____ .

MICHAEL STUCKMAN, 220 WEST CARSON CIRCLE, BATTLEMENT MESA, CO, 81635
(Claimant)

CITY MARKET, Attn: JEFF BLOMQUEST, 1320 RAILROAD AVENUE, RIFLE, CO, 81650
(Employer)

WITHERS SEIDMAN RICE & MUELLER, PC, Attn: SEAN E. P. GOODBODY, ESQ., 101 S.
3RD STREET, SUITE 265, GRAND JUNCTION, CO, 81501 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: JEFF FRANCIS, ESQ., 1401 17TH
STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

SEDGWICK CMS, Attn: SHARMIE JENSEN, 215 STATE STREET, SUITE 420, SALT
LAKE CITY, UT, 84111 (Other Party)

12CA951 Memorial Gardens v. ICAO 12-26-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA0951
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-384-910

Memorial Gardens and Reliance National Indemnity,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Jane McMeekin,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE FURMAN
Ney* and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced December 26, 2013

Thomas Pollart & Miller LLC, Brad J. Miller, Greenwood Village, Colorado, for
Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado, for
Respondent Jane McMeekin

* Sitting by assignment of the Chief Justice under provisions of Colo. Const.
art. VI, § 5(3), and § 24-51-1105, C.R.S. 2013.

Memorial Gardens and its insurer, Reliance National Indemnity (collectively employer) seek review of the order issued by the Industrial Claim Appeals Office (Panel) upholding the denial of their request to end the medical maintenance treatment provided to Jane McMeekin (claimant). The Panel also dismissed the part of employer's petition to review that raised issues concerning the related award of attorney fees to claimant. We affirm.

In 1997, claimant sustained an admitted injury to her back and knee while working for employer. Several years later, employer filed a final admission of liability (FAL) in accordance with the thirty-six percent whole-person impairment rating assigned to claimant in a division-sponsored independent medical examination (DIME). Employer also admitted liability for medical benefits after maximum medical improvement (MMI) "per attached division IME report . . . dated 8/27/02."

Settling a later dispute, employer entered into a stipulation in which it agreed to reimburse claimant for the cost of her authorized treating physician's (ATP) prescriptions, and to "directly pay for these prescriptions in the future." The prescriptions were for Vicodin, Phenergan, Xanax, and a muscle relaxant.

In exchange, claimant waived her right to penalties for employer's delays in paying for her medication.

Employer then applied for a hearing, endorsing the following issues concerning medical benefits: authorized provider; causation; relatedness; apportionment; whether claimant continued to require maintenance medical treatment for the work-related injury; whether any need for medical treatment was related solely to non-occupational medical conditions; and which medical treatment, if any, was reasonable, necessary, and related to the work-related injury. Employer did not contest specific medical bills or treatment.

At a hearing, employer's counsel argued that claimant's current condition did not require narcotic medications. Employer requested that claimant's medical benefits be terminated based on "the causation defense and . . . the fact that it's [sic] not reasonable and necessary."

Neither party presented witnesses. After considering the medical records submitted, the administrative law judge (ALJ) found claimant's ATP the more credible medical practitioner, and relied on his opinion that claimant's present medical care was a direct result of the admitted work injury she sustained many years

after she underwent an unrelated spinal fusion surgery. The ALJ thus determined that

- claimant's need for post-MMI treatment had been established from the time employer filed its FAL,
- claimant did not have to reestablish the need for such care as a general proposition, and
- employer's attack on the reasonableness and necessity of post-MMI medical care related only to claimant's current care and not to compensability in general.

Accordingly, the ALJ concluded claimant had established that her current treatment regimen, as prescribed by the ATP, was reasonable, necessary, and related to her work injury and denied employer's request to terminate claimant's current medical maintenance treatment.

The ALJ also found that the issue of apportionment was closed because Employer filed a FAL accepting the DIME's opinion and that issues of apportionment and authorized provider involved no justiciable questions and were unripe. The ALJ thus awarded claimant her attorney fees under section 8-43-211(2)(d), C.R.S. 2013, but directed her to submit an attorney fee affidavit. The ALJ

then determined that he would issue a separate order determining the amount to be awarded.

On review, the Panel concluded that substantial evidence supported the ALJ's findings regarding the relatedness of claimant's medical maintenance regimen and that it was both reasonable and necessary. The Panel, therefore, upheld the ALJ's refusal to terminate claimant's post-MMI medical treatment. Concluding that the attorney fee award was not final because the ALJ did not determine the amount to be awarded, however, the Panel dismissed employer's petition to review the attorney fee award.

On appeal, Employer contends that (1) the evidence does not support the ALJ's finding that the DIME report recommended post-MMI medical benefits; (2) the ALJ improperly shifted the burden of proof away from claimant to establish her right to medical benefits; (3) the ALJ erred in determining that the issue of apportionment was closed; and (4) the ALJ erred by determining that the issues of apportionment and authorized provider were not ripe when it endorsed them on its hearing application. We address each contention in turn.

I. Admission of Post-MMI Medical Benefits

We first consider whether the evidence supports the ALJ's finding that the DIME report recommended post-MMI medical benefits. We conclude it does.

Ambiguities in a DIME physician's report present a question of fact for the ALJ to resolve. *See MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001, 1005 (Colo. App. 2002) (addressing ambiguities regarding MMI).

As the ALJ acknowledged, the DIME report "did not specifically cite definitive post-MMI medical care." But, the ALJ found that the DIME report contained findings demonstrating that the DIME physician recognized claimant's need for post-MMI medical care. These findings included: the DIME physician's reference to claimant's surgically implanted spinal infusion pump which, as the operative report indicated, could not logically be regarded as either self-sustaining or not requiring future medical attention; the DIME physician's notation that the impairment rating was due in part to residual signs and symptoms; the DIME physician's observation that claimant reported experiencing pain during the last examination which she described as an eight on a ten-point scale, and the DIME physician's listing of the several

prescriptive pain medications that claimant was taking.

The ALJ also found that employer acted in conformity with an understanding that it had admitted to post-MMI medical benefits when it agreed to the stipulation requiring it to pay for the ATP's prescriptions.

We conclude, as did the Panel, that the DIME physician's findings and employer's stipulation substantially support the ALJ's determination that the DIME physician recommended medical maintenance treatment and that employer admitted responsibility for such benefits in its FAL. *See* § 8-43-308, C.R.S. 2013 (an ALJ's factual findings may not be altered on appeal if they are supported by substantial evidence).

The DIME physician's opinion that claimant may have been suffering from a probable somatoform pain disorder and that the use of narcotics in her case would not be beneficial, and more likely detrimental, does not persuade us that the ALJ misconstrued the DIME report. Employer has not challenged the ALJ's finding that employer failed to identify any specific course of treatment it was disputing. And, the DIME report and stipulation identified the medications prescribed for claimant post-MMI. Thus, even if the

DIME physician disapproved of narcotics in claimant's case, his recognition that she was receiving ongoing medical care and the absence of any findings indicating which specific treatment protocol should be discontinued or that claimant had no need for future care supports an inference that the DIME physician felt that claimant required some form of ongoing medical care. *See Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 704 (Colo. App. 1999).

II. Burden of Proof

We next consider whether the ALJ improperly shifted the burden of proof away from claimant to establish her right to medical benefits. We conclude it did not.

An employer is only responsible for medical treatment that is reasonably necessary to cure or relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. 2013. The claimant bears the initial burden to prove the causal connection between the need for future treatment and the industrial injury. *See Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office*, 18 P.3d 790, 791 (Colo. App. 2000); *see also Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 610 (Colo. App. 1995). But, once the claimant has established

a prima facie case, the burden shifts to the employer to rebut the claimant's evidence or to establish that the claim lacks merit.

Rockwell Int'l v. Turnbull, 802 P.2d 1182, 1184 (Colo. App. 1990).

The ALJ acknowledged these principles and his findings expressly reflect that he placed the burden of proof on claimant to show that her current medical maintenance care was reasonably necessary and related to the industrial injury. The ALJ also specifically recognized employer's right to contest any future claims for medical treatment on the basis that such specific treatment was unrelated to the industrial injury. With regard to contested future claims, the ALJ mentioned that claimant had retained the burden of proving by a preponderance of the evidence that the disputed medical treatment was reasonably necessary to relieve the effects of the industrial injury. The ALJ then found that claimant met her burden, as already noted, by establishing, based on her ATP's medical opinion and records that her current treatment regimen was reasonable and necessary to treat the post-MMI symptoms caused by her work injury.

These findings show that the ALJ properly allocated the burden of proof. The ALJ's reference to section 8-43-201(1), C.R.S.

2013, which imposes the burden of proof on a party who seeks to modify an issue resolved in a final admission, indicates no attempt by the ALJ to impose the burden of proof on employer. Rather, the reference, when considered in the context of the ALJ's entire order, meant only that employer's FAL, in which employer both acknowledged claimant's need for medical maintenance treatment and accepted liability for it, relieved claimant of any obligation to reestablish that need generally.

Similarly, we agree with the Panel that neither the ALJ's mischaracterization of certain evidence as inadmissible nor his discussion of reopening principles, which did not apply, resulted in reversible error. As the Panel noted, employer advanced alternate arguments regarding claimant's entitlement to further medical treatment that the ALJ addressed, suggesting that the ALJ did not ignore the mischaracterized evidence. That evidence, although mischaracterized as inadmissible in the ALJ's order, was nevertheless made a part of the record.

And, as the ALJ specified, the mischaracterized evidence related only to employer's assertion that claimant's pre-injury surgery caused her post-MMI symptoms, a theory that lost any

viability after employer filed its FAL and admitted that the work-related injury had caused her need for future medical care. Despite employer's allegation to the contrary, the ALJ's mischaracterization of the evidence in no way suggested that the ALJ overlooked or failed to adequately consider evidence of the injuries claimant purportedly suffered after her 1997 back injury.

As for the ALJ's reopening comments, they included an express acknowledgement that this case did not involve reopening. Thus, the ALJ was only analogizing to the reopening procedures and did not consider the issue of medical maintenance benefits closed subject to reopening, as employer has argued. To the contrary, the ALJ resolved the issues presented on the merits. Therefore, we agree with the Panel that the ALJ's reopening comments were intended to convey only that the underlying compensability of claimant's condition had been determined previously and could not be reconsidered.

III. Apportionment

We next consider whether the ALJ erred in determining that the issue of apportionment was closed. We conclude it did not. Employer argues that because section 8-42-104(3), C.R.S. 2013,

was not amended to prohibit any reduction in medical benefits based on a previous injury until after claimant's work injury, it retained the right to assert that her maintenance medical benefits should be apportioned. Employer also maintains that it was free to argue apportionment based on new work injuries. But, we need not decide this issue in light of the ALJ's finding, supported by the opinion of claimant's ATP, that the 1997 work injury was the only cause of claimant's need for medical maintenance treatment.

IV. Ripeness

We last consider whether the ALJ erred by determining that the issues of apportionment and authorized provider were not ripe when it endorsed them on its hearing application. We do not reach this issue. As employer concedes, the ripeness issue is not final because the ALJ did not determine the amount of the attorney fees awarded. *See Oxford Chems., Inc. v. Richardson*, 782 P.2d 843, 846 (Colo. App. 1989). Thus, like the Panel, we do not have jurisdiction to consider whether the issues of apportionment and authorized provider were ripe when they were endorsed for hearing. *See* § 8-43-307(1), C.R.S. 2013 (only final orders may be appealed); *see also Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d

448, 449-50 (Colo. App. 2008).

The order is affirmed.

JUDGE NEY and JUDGE VOGT concur.