COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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January Case Law Update

Presented by Judge John Sandberg and Judge Craig Eley

This update covers ICAO and COA decisions issued from November 15, 2018 to January 4, 2019

Industrial Claim Appeals Office

Court of Appeals

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-580-01

IN THE MATTER OF THE CLAIM OF:

MARIE FABJANCIC,

Claimant,

v.

FINAL ORDER

MAXIM HEALTHCARE,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated July 13, 2018, that determined the respondents failed to overcome the Division Independent Medical Examination (DIME) physician's maximum medical improvement (MMI) determination by clear and convincing evidence and ordered the respondents to pay for medical treatment and temporary total disability benefits from October 17, 2017, through November 1, 2017 and continuing. We affirm.

This matter went to hearing on the issues of overcoming the DIME physician's opinion on MMI and whether the claimant's need for additional low back and hip treatment is causally related to the admitted injury. The ALJ also addressed the identity of a treating provider and temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on June 21, 2017, when she was rear-ended by another driver. The claimant was seen by physician assistant (PA-C) Terry Schwartz on June 22, 2017. During her evaluation the claimant reported that she was stopped at a red light in the construction zone when she was hit from behind. The claimant immediately felt pain in her neck, left shoulder, bilateral hips and left leg. The examination demonstrated that she had lumbar paraspinal tenderness at L1-L5, S1. The claimant had a positive straight leg raise test on the left, complained of frontal headaches and marked tenderness in the left paraspinal muscles from the base of the skull to T1. X-rays

revealed degenerative disc disease at C4-C6 and lumbar disc narrowing at L5-S1. The claimant was referred to physical therapy and taken off work.

The claimant was subsequently seen by Dr. Lakin on June 26, 2017. At this time, the claimant reported that her low back was the most painful. The claimant was referred for an MRI and kept off of work. The claimant began physical therapy and between June 28, 2017 and September 8, 2017, the claimant attended 16 sessions of physical therapy. The claimant reported to her physical therapist that her right hip was locking up and that she could not move consistently without pain. An MRI revealed bulging discs in the lumbar spine.

Dr. Larson performed an IME at the respondents' request. Dr. Larson determined that the claimant was suffering from a psychiatric problem based upon his assessment that she had multiple non-physiologic symptoms and subjective complaints that could not be explained in the absence of anatomic deficits. Dr. Larson concluded that the claimant had not sustained a physical injury to her spine and was at MMI without impairment. Dr. Lakin agreed with the opinion expressed by Dr. Larson and placed the claimant at MMI as of November 2, 2017, and released the claimant from care. All workers' compensation treatment was terminated after this date. The respondents filed a final admission of liability consistent with Dr. Lakin's opinions, with the exception of admitting for October 16, 2017, as the MMI date instead of November 2, 2017.

The claimant requested a DIME which was performed by Dr. Hall. The DIME physician determined that the claimant was not at MMI and assessed the claimant with a "low back/SI injury with pelvic obliquity, SI joint dysfunction, Piriformis syndrome resulting in lower extremity symptoms, doubt radiculopathy and Myofascial pain, cervicothoracic area." In the DIME physician's opinion the claimant's symptoms were more likely related to the piriformis sciatic nerve problems rather than the degenerative findings on the MRI given that the majority of the claimant's symptoms primarily affected the right side while the MRI findings were more predominately left sided. The DIME physician recommended a "SI joint guided injection for diagnostic/therapeutic purposes," neuromuscular therapies and chiropractic work. The DIME physician further provided the claimant with physical restrictions precluding her from returning to her pre-injury job. The DIME physician testified consistent with his report.

The respondents filed an application for hearing to overcome the DIME physician's opinions. The respondents requested an IME with Dr. Ridings. Dr. Ridings did not believe that the forces generated by the claimant's car collision were sufficient

enough to cause injury. Dr. Ridings disagreed with the DIME and stated that he believed the claimant had no injury.

The ALJ was not persuaded by Dr. Ridings' opinions, specifically rejecting them by finding that Dr. Ridings was probably unaware of the claimant's physical therapy records which documented findings consistent with SI joint dysfunction or piriformis syndrome that the DIME physician diagnosed the claimant as having. The ALJ determined that the respondents failed to overcome the DIME physician's determination that the claimant was not at MMI. The ALJ also credited the opinion of the claimant's primary care physician Dr. Cavalli, and was also persuaded by the DIME physician's opinion concerning the claimant's inability to return to work. The ALJ determined that the respondents erred in terminating temporary disability benefits as of October 16, 2017, and awarded benefits for the period of October 16, 2017, through November 2, 2017. The ALJ further concluded that the claimant proved her entitlement to temporary disability benefits from November 2, 2017, and ongoing.

On appeal the respondents contend that the ALJ erred in awarding temporary total disability benefits because the authorized treating physician had determined that that the claimant had no restrictions or limitations. The respondents also contend that the ALJ erred by requiring the respondents to overcome the DIME opinion that the claimant was not at MMI by clear and convincing evidence "after respondents had overcome part of the DIME opinion as to the basis for why claimant was not at MMI." We perceive no error by the ALJ.

I.

Relying on *Burns v. Industrial Claims Appeals Office*, 911 P.2d 661 (Colo. App. 1995), the respondents contend that because the authorized treating physician, Dr. Lakin, placed the claimant at MMI on November 2, 2017, and determined that the claimant had no permanent work restrictions as a result of the June 21, 2017, work accident, the ALJ erred in awarding temporary disability benefits. We disagree that the ALJ erred and affirm the ALJ's reinstatement of temporary total benefits.

Pursuant to §§ 8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of temporary total disability benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be

entitled to temporary total disability benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001). The claimant has the burden to prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Id.*

Section 8-42-105(3)(c), C.R.S. provides that temporary disability benefits terminate when the "attending physician gives the claimant a release to return to regular employment." *Burns v. Robinson Dairy, Inc., supra*. It is well established, however, that if the record contains conflicting opinions from an attending physician concerning the claimant's ability to perform regular employment, the ALJ may resolve the conflict as a matter of fact. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App.1999)(if there is a conflict between attending physicians as to whether claimant was able to return to regular or modified employment, ALJ must resolve conflict); *Burns v. Robinson Dairy, Inc., supra* (ALJ may not disregard attending physician's release to regular employment unless there are conflicting opinions from attending physicians).

The determination of whether a claimant has been released to return to work by the attending physician is a question of fact. *See Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Thus, the ALJ has the discretion to resolve conflicts in the physician's reports. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). An ALJ's factual determinations are binding on review if there is substantial evidence in the record to support them. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993).

Here, the ALJ determined that the report of Dr. Cavalli stated that the claimant was unable to return to full duty work. Once Dr. Lakin placed the claimant at MMI, he then referred the claimant to her primary care physician, Dr. Cavalli. Respondents' Exhibit A at 8-9. The claimant was seen by Dr. Cavalli on November 17, 2017. Dr. Cavalli stated she was taking over care for the work-related accident and that the claimant was not mobile enough to perform her job. Claimant's Exhibit 9 at 201. *See Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008)(in a denied claim, referral to primary care physician determined to be made in the ordinary course of treatment).

The ALJ credited the opinion of Dr. Cavalli to conclude that the claimant is unable to return to full duty work and temporary disability benefits should be reinstated from November 2, 2017. The ALJ expressly found that the claimant left work because of her work-related medical condition and that she has not been able to return to full duty employed as evidenced by the record from Dr. Cavalli. Since we conclude the ALJ's resolution of this issue is a plausible one, and supported by substantial evidence in the record, we are not persuaded to disturb the reinstatement of temporary total disability benefits commencing November 2, 2017, and continuing. *Cf. Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000)(affirming ALJ's award reinstating temporary benefits after finding ATP issued conflicting opinions in his reports).

II.

We also disagree with the respondents that the ALJ erred in his application of the law to determine that the respondents failed to overcome the DIME physician's opinions.

The DIME physician's finding concerning the date of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also, Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002). We may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*.

Here, the ALJ determined that the respondents failed to produce unmistakable evidence establishing that the DIME physician's MMI determination is highly probably incorrect. The ALJ explained his reasoning that the persuasive evidence established that the claimant suffers from SI joint dysfunction, pelvic obliquity and piriformis syndrome and that the record contains multiple references to these symptoms through the claimant's

course of treatment that are consistent with these diagnoses. The ALJ found the respondents' evidence insufficient to support a conclusion that the DIME physician was incorrect. Based on our review of the evidence it was reasonable for the ALJ to reach this conclusion and we see no basis upon which to disturb this finding. Section 8-43-301(8), C.R.S.

The respondents cite to the opinions in *Parades v. ABM Industrial*, W.C. No. 4-862-312-02 (November 13, 2014); *Deleon v. Whole Foods*, W.C. No. 4-600-477 (November 16, 2006) and *York v. Manpower Inc.*, W.C. No. 4-837-612-04 (May 4, 2016), *aff'd York v. Industrial Claim Appeals Office*, Colo. App. No. 06CA0877 (January 26, 2017) (not selected for publication), which hold that once any part of the DIME physician's MMI or impairment rating is overcome, the question of the claimant's correct medical impairment rating or MMI determination then becomes a question of fact for the ALJ. The respondents assert that because the DIME physician testified at hearing that the claimant's myofascial pain, cervicothoracic area, the neck/upper back upper extremity symptoms were pre-existing and not work-related, the respondents effectively "overcame" part of the DIME physician's finding that the claimant was not at MMI. We disagree.

The DIME physician testified consistent with his written report that he reviewed all of the relevant medical records, including records that predate the claim. We do not read the DIME physician's report or understand his testimony to implicate the claimant's cervicothoracic area in the DIME physician's MMI determination. Rather, the DIME physician's testimony at hearing clarified that he recognized that the claimant had prior issues in the cervicothoracic region, but his report was addressing the low back. Tr. at 34. The DIME physician also detailed what pathology he believe to be caused by the work-related motor vehicle accident which only included the SI joint sprain and soft tissue injury in the lumbosacral area. Tr. at 36 and 41. Contrary to the respondents' argument, the ALJ did not determine, nor was he compelled to determine, that the respondents overcame any portion of the DIME opinion. Consequently, the respondents' reliance on *Paredes*, *Deleon* and *York* is misplaced.

The ALJ's findings are supported by the evidence in the record. Those findings, in turn, support the ALJ's conclusions of law. We have no basis to disturb the order on review. §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated July 13, 2018, 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

11/21/18 by TT .

THE BAUMBERGER LAW FIRM LLC, Attn: ROBERT BAUMBERGER ESQ, 309 SOUTH UNION AVENUE, PUEBLO, CO, 81003 (For Claimant)
RITSEMA & LYON PC, Attn: RICHARD A BOVARNICK ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-059-799-01

IN THE MATTER OF THE CLAIM OF:

BENJAMIN HEIEN,

Claimant,

v.

FINAL ORDER

DW CROSSLAND LLC,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated June 28, 2018, that reduced the claimant's compensation benefits by 50 percent for the claimant's willful failure to obey a safety rule pursuant to §8-42-112(1)(b), C.R.S. We affirm.

This matter went to hearing on the issue of the claimant's violation of a safety rule pursuant to §8-42-112(1)(b), C.R.S. and use of a controlled substance in violation of §8-42-112.5(1), C.R.S. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as a maintenance worker at a hotel. The claimant assumed night laundry duties for the employer in early September 2017. The claimant worked two days per week performing maintenance duties and two nights per week completing night laundry duties. The claimant was the only person who worked the night laundry position.

On October 14, 2017, the claimant was working the night laundry shift. He started a load of laundry in the employer's commercial washing machine at about 3:50 a.m. The claimant then folded towels in the backroom area. The claimant testified that after the washing machine had been running for approximately 30 minutes, he heard a "thumping sound" coming from the machine. The claimant stopped folding towels to determine where the sound was coming from. The claimant peered through a small glass window in the front of the washing machine and believed that he saw a partially full Coca-Cola

bottle spinning inside the machine. The claimant was concerned that the soda bottle might explode and damage the sheets he was washing. Although the machine was spinning at a high rate of speed, the claimant opened the washing machine door and reached inside the machine basket with his right arm while it was still spinning. The claimant's right arm became wrapped in a sheet and he "flipped up like a cartwheel" and landed with his back towards the washing machine. The claimant initially believed that he had broken his arm but, when he looked up, his right arm was instead severed at the elbow. The claimant was able to call 911 for medical assistance.

Sergeant Baumgartner arrived on the scene in approximately one to two minutes. He applied a tourniquet to the claimant's right arm to diminish blood loss. The Denver Fire Department arrived approximately five to ten minutes later. Firefighters found the claimant's severed right arm in the washing machine and gave it to Denver Health. No other foreign objects were found in the washing machine. The claimant was subsequently transported to Denver Health for medical treatment with a total amputation of the right mid-forearm and a partial amputation of the proximal elbow.

The claimant testified that he has an extensive history of illicit drug use. The claimant began using heroin daily approximately four to five years ago as a substitute for prescription pain medications. The claimant also received treatment and counseling from a local methadone clinic called Behavioral Health Group. Methadone acts as a replacement for heroin and is designed to allow the claimant to function through an entire day without using heroin or feeling the effects from the heroin withdrawal. The claimant testified, however, that by midnight, the effects of the methadone would wear off and once this occurred, the claimant experienced opiate withdrawal symptoms including uncontrollable sneezing, diarrhea, vomiting and shaky hands. To avoid experiencing these withdrawal symptoms while at work, the claimant used heroin during his night laundry shift, so he could function until his morning visit with the Behavioral Health Group.

The claimant testified that he used a small amount heroin, about 1/10 of a gram, at about 12:00 am on October 14, 2017. 2.7 grams of heroin belonging to the claimant was also found at the scene of the accident. When the claimant arrived at Denver Health at approximately 4:45 am, physicians took a blood sample. The Colorado State University Analytic Toxicology Laboratory, through a facility called Chematox, conducted laboratory testing. The qualitative and quantitative findings from the Colorado State University analysis were positive for methadone, morphine, codeine EDDP and amitriptyline. The laboratory physician determined that both the substances that were detected, as well as the quantity that was detected from the blood draw, indicated that

regardless of whether the heroin was used 24 hours earlier or 4 hours earlier or just before the injury, under any of these conditions the claimant was not normal and would have been adversely affected using heroin.

Dr. Verdeal testified that heroin can cause a person to behave impulsively, and cause a clouding of consciousness, disturbed cognitive effects, sedation, drowsiness, blurred vision, altered perception, illusions and auditory and visual hallucinations. Individuals who are high on heroin have a disregard for their own safety and Dr. Verdeal concluded, to a reasonable degree of forensic toxicology, the claimant's October 14, 2017, injury was the result of drug usage.

The employer's District Manager, Amar Patel, testified at hearing. He explained that the washing machine the claimant operated on October 14, 2017, was a 65 pound "Unimark Commercial Industrial style washer" that goes about 550 rpm or 75 miles per hour during the spin cycle and that it was a "pretty big, pretty powerful unit." Mr. Patel stated that the machine proceeded through various cycles in completing a load of laundry, including a soak cycle, multiple spin cycles, a rinse cycle and the final spin cycle.

Mr. Patel further testified that the claimant received proper training, documentation and guidance to properly operate the washing machine and that the employer provided employees with visual safety training consisting of how to turn the machine on, how to turn the machine off, certain safety features, how to pull laundry out of the washing machine and how to put laundry into the dryer. Mr. Patel emphasized that a district manager would not allow anyone to operate the washing machine without proper training.

Mr. Patel testified that the proper protocol to follow if an employee suspected a foreign object inside the washing machine included: (1) pressing stop button; (2) waiting for the cycle to stop; (3) pressing the door unlock button; and (4) removing the foreign object form the washer. Mr. Patel testified further that it was never justifiable to pull open the door without going through the proper protocol. Mr. Patel went on to explain that opening the washing machine door before the machine came to a complete stop constituted a violation of safety protocol. The washing machine could only be stopped mid-cycle by pushing the "stop" button on the machine or moving the emergency switch to "off" on the breaker box. Once the stop button was pressed, approximately two minutes elapsed before the spin cycle would come to a complete stop.

The washing machine provided the following notice; "Warning machine may be hot and cause burns, ***attempt no entry until basket has stopped***, serious injury may

result." (Emphasis added). The warning sign is located directly above the front door of the machine. Mr. Patel emphasized that the warning sign was enforced to ensure that employees were not opening the door while the basket was spinning. A circuit breaker that controlled power to the washing machine was located on the wall to the left of the machine. The circuit breaker would be turned on or off by the flip of switch. Once the circuit breaker was switched off, power to the machine immediately ceased.

The claimant testified that he did not receive any training regarding the operation of the employer's washing machine, but he did acknowledge that he "had someone to kind of show me the door lock mechanisms, how to program and open doors." The claimant also testified that he received training for the night laundry position from Sandy Smith that included correctly folding linens and sheets.

The claimant testified that he believed it was an emergency to pull the Coke bottle out of the washing machine but that he did not utilize the nearby emergency switch to cut the power to the device. The claimant acknowledged that there was a warning sign directly above the washing machine and that placing his arm into the spinning basket of the machine constituted a dangerous situation. The claimant agreed that the warning sign constituted a safety rule and by reaching his arm into the machine he intentionally disregarded a safety rule. The claimant stated that he "went against the posted safety code" by inserting his arm into the washing machine while it was on the spin cycle. The claimant testified that he had reached his arm into the washing machine while it was still spinning on numerous previous occasions.

The ALJ found that the claimant received basic training on compliance with safety rule and how to use the washing machine visually, through employee handbooks, job analysis forms and job descriptions. The ALJ also noted that the washing machine had a written warning notice in unobstructed plain view on the front that instructed against attempting to open the machine while the basket was still moving because serious injury could result. The claimant was also aware of the circuit breaker to the left of the machine that could be turned on or off by the flip of a switch and cause immediate termination of power to the machine. The ALJ acknowledged the claimant's concession that he went against the posted safety code by inserting his arm into the machine during the spin cycle and found that the claimant lacked a plausible purpose because the claimant was only trying to speed the completion of his job duties. The ALJ found that the claimant's activities demonstrated that he deliberately violated the employer's safety rule regarding operation of the washing machine. The ALJ concluded that this was a willful failure to obey a reasonable safety rule adopted by the employer in violation of §8-42-112(1)(b), C.R.S. and imposed a 50 percent reduction in the claimant's compensation benefits. The

ALJ did not address whether the claimant's injury resulted from the use of a controlled substance in violation of §8-42-112.5(1), C.R.S.

On appeal the claimant argues that the ALJ abused his discretion "when he ruled that evidence related to the working condition of the washing machine and whether it was reported to the employer was irrelevant." The claimant also argues that the record does not support the ALJ's findings that the employer diligently enforced the safety rule. We are not persuaded the ALJ committed reversible error.

I.

Section 8-42-112(1)(b), C.R.S, provides for a 50 percent reduction in compensation where the injury results from the claimant's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondents to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968); *see also Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondents produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra*; *Industrial Commission v. Golden Cycle* Corp., 126 Colo. 68, 246 P.2d 902 (1952).

Under § 8-42-112(1)(b), C.R.S., it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondents met their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *Id.* 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. 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 resolution of conflicts in the evidence, credibility determinations and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). We may not substitute our

judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990).

The claimant's contentions notwithstanding, the record contains substantial evidence to support the ALJ's findings that the claimant knew his conduct violated the employer's safety rule to wait for the machine to come to a complete stop before opening the door. The claimant does not deny being aware of the rule and the respondents produced evidence that the rule was communicated to the claimant when he was trained and as a written warning on the machine itself. These facts constitute ample evidence from which a reasonable person could infer that the claimant deliberately stuck his arm in the spinning machine and that his actions were not the product of mere negligence or inadvertence. Thus, this is not a case where the ALJ inferred willfulness from the mere facts that the claimant knew the rule and that an accident occurred.

II.

We are not persuaded by the claimant's argument that the ALJ erred in sustaining the respondents' objections concerning the claimant's testimony of the working condition of the machine. The claimant contends that had he been allowed to present all his testimony on this issue he would have established that he had a plausible purpose for violating the employer's safety rule.

A violation of a safety rule need not be considered willful if the employee had some "plausible purpose to explain his violation a rule." *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995). Generally, an employee's violation of a rule to facilitate accomplishment of the employer's business does not constitute willful misconduct. However, an employee's violation of a rule for the purposes of making the job easier and speeding operations is not considered a "plausible purpose." 2 *Larson's Workers' Compensation Law*, § 35.04. The ALJ found that the claimant's conduct lacked a plausible purpose because his action in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties.

The ALJ exercises wide discretion in conducting evidentiary proceedings, including making evidentiary rulings. *See* § 8-43-207(1), C.R.S.; *see also IPMC Transportation v. Industrial Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (construing predecessor statute to § 8-43-207 to provide hearing officer with

wide discretion in conduct of evidentiary proceedings). Similarly, the ALJ is afforded wide discretion to determine whether evidence is relevant, and if so, whether it should be excluded. *See Cherry Creek School District v. Voelker*, 859 P.2d 805 (Colo. 1993); *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999) (trial court's discretion to determine relevancy is broad). We, therefore, defer to the ALJ's evidentiary determinations unless his ruling constitutes an abuse of discretion by "exceeding the bounds of reason." *See, e.g., Rosenberg v. Board of Education*, 710 P.2d 1095, 1098-99 (Colo. 1985). Moreover, the party alleging an abuse of discretion must show sufficient prejudice before it is reversible error. CRE 103(a); *Williamson v. School District No. 2*, 695 P.2d 1173 (Colo. App. 1984).

In our view the claimant overstates the case by characterizing the ALJ's ruling as one concluding that the claimant's testimony concerning the working condition of the machine was irrelevant. As we read the transcript, the ALJ's ruling was not that broad and allowed the claimant to testify as to his personal knowledge of the machine. The claimant attempted to present testimony about whether he had informed the employer that the stop button on the machine did not work and what other supervisors and co-employees knew about the condition of the machine and whether he was instructed by his superiors to reach into the machine during the spin cycle. Tr. at 42, 44 and 49. The respondents objected on the basis that this evidence lacked foundation and was not disclosed in interrogatory responses. Tr. at 42, 44 and 49. The ALJ sustained the objection on the grounds that the references to other "supervisors or co-workers having gone about things this way, to remove things" was not disclosed to the respondents. Tr. at 50-54. Although the ALJ referred to the fact that the testimony was "irrelevant," the ALJ allowed the claimant to testify about his own experience with the stop button on the washing machine. Tr. at 52. The ALJ's determination in this regard was not an abuse of discretion. *See George v. Industrial Commission,* 720 P.2d 624 (Colo. App. 1986) (ALJ not held to a crystalline standard).

Even assuming the ALJ erred in limiting the claimant's testimony, the error is harmless. The claimant testified that the button has not worked since he began working with the employer and now argues on appeal that this fact provided a plausible purpose for him to open the door while the machine continued to spin. The ALJ, however, also found that there was an emergency circuit breaker immediately next to the laundry machine, that the claimant was aware of this circuit breaker and could have used it to stop the machine under the employer's safety protocol. The ALJ's conclusion that the claimant violated the safety rule, which requires the basket to be stopped before reaching into the machine, is not contingent on whether the stop button on the machine was

broken. Thus, any error in excluding evidence concerning the possibility of a faulty stop button is harmless error. §8-43-310, C.R.S. (harmless error to be disregarded).

III.

Nor are we persuaded by the claimant's contention that the ALJ erred in his determination that the employer enforced its rule to stop the machine before reaching into it. Lack of enforcement of a safety rule is some evidence from which an ALJ may infer that the rule did not actually exist, or that an alleged violation of the rule was not "willful" on the part of the claimant. *Lori's Family Dining v. Industrial Claim Appeals Office*, *supra; Pacific Employers Insurance Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943). The determination of whether the employer acknowledged and acquiesced in employee misconduct by failing to enforce its own rules is one of fact for determination by the ALJ. *Lori's Family Dining Inc. v. Industrial Claim Appeals Office, supra*. In resolving the issue, the ALJ may consider the extent of enforcement, but "enforcement is not necessarily synonymous with application of outright penalties." 2 *Larson's Workers' Compensation Law*, § 33.30.

Here, the ALJ credited the employer's evidence that it has an active safety rule to wait for the machine to stop before reaching into the machine. Further, the ALJ credited the employer's testimony that the claimant was trained on these procedures and that the procedures are on the machine itself. Under these circumstances, we cannot say the ALJ erred as a matter of law in finding that the employer enforced this safety rule and did not acquiesce in employee misconduct or convey the impression that rule violations would be tolerated. As was his sole prerogative, the ALJ, credited the employer witness testimony over that of the claimant. *See Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Therefore, there is sufficient, albeit conflicting, evidence to support the ALJ's finding that the employer enforced the order. The mere existence of conflicting evidence affords no basis for relief on appeal. *May D&F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988).

The ALJ's findings are supported by the evidence in the record and those findings, in turn, support the ALJ's conclusion that the claimant willfully violated the employer's safety rule. We perceive no basis to disturb the ALJ's order. §8-43-301, (8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated June 28, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

11/29/18 by TT .

THE ELEY LAW FIRM, Attn: SCOTT C ELEY ESQ, 2000 S COLORADO BLVD STE 2-740, DENVER, CO, 80222 (For Claimant)
LEE & BROWN LLC, Attn: JOSEPH W GREN ESQ, C/O: EVAN M THOMPSON ESQ, 3801 E FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-925-466-02

IN THE MATTER OF THE CLAIM OF:

JOSEPH PACKARD,

Claimant,

v.

FINAL ORDER

CITY AND COUNTY OF DENVER,

Employer,

and

SELF INSURED,

Respondent.

The respondent seeks review of an order of Administrative Law Judge Michelle E. Jones (ALJ) dated April 4, 2018, that determined that the claimant's application for hearing is not barred by the statute of limitations under § 8-43-103(2), C.R.S. We reverse.

The findings of fact in this claim are essentially uncontroverted and are summarized below. The claimant is employed as a firefighter. On June 13, 2013, the claimant attended an evaluation with Dr. Silverman after noticing a new mole on his back. The shave biopsy of the mole revealed that the lesion was melanoma. The melanoma was successfully excised by Dr. Vaughn on July 3, 2013.

On July 24, 2013, claimant reported to the employer that he had been diagnosed with melanoma that he believed was work related. On August 5, 2013, the respondent filed an Employer's First Report of Injury (FROI) with the Division of Workers' Compensation (Division). The Division assigned a case number to the claim. On August 6, 2013, the respondent filed a Notice of Contest with the Division. On August 7, 2013, the Division sent a letter to claimant indicating that a Notice of Contest had been filed denying liability for the claim. The letter provided instructions on requesting a hearing or an expedited hearing.

On July 18, 2014, Dr. Mayer authored a causation report, opining that the melanoma was work related. Dr. Mayer also found that the claimant was at maximum

medical improvement (MMI) and assigned an 11% whole person permanent impairment rating. On May 10, 2017, the claimant was again evaluated by Dr. Mayer who opined that the claimant was still in remission and remained at MMI.

On September 1, 2017, claimant filed an application for hearing with the Office of Administrative Courts. Parenthetically, we have previously held that an application for hearing may constitute a sufficient notice of claim for purposes of the statute of limitations. *Enright v. Super Value Stores*, W.C. No. 3-198-836 (June 30, 1995). *See also Valerie Fox v. CUC Internat'l Inc.*, W.C. No. 4-268-469 (January 29, 1999). The ALJ noted that the claimant had not filed either a workers' claim for compensation or an application for hearing within two years after the date of injury.

Hearing was held on March 8, 2018, on the issues of whether the claimant's application for hearing was barred by the statute of limitations and whether there was compliance with the requirements of § 8-43-103(2), C.R.S., which requires the filing of a notice claiming compensation with the Division within two years after an injury. The parties stipulated that should the ALJ determine that the claim was not time barred, respondent agreed to file a general admission of liability and pay reasonable and necessary medical benefits including the July 3, 2013 surgery and the co-pay of $100.00.

The ALJ determined that the forms filed by the respondent with the Division, specifically the FROI and the Notice of Contest, served as proper notice of a claim under § 8-43-103(2), C.R.S., and held that the claimant's application for hearing was not time barred by the statute of limitations. The ALJ ordered, pursuant to the stipulation, the respondent to file a general admission of liability, pay medical benefits, and reimburse co-pay benefits to the claimant.

The respondent has appealed, arguing that neither the respondent's FROI nor its Notice of Contest constitute "a notice claiming compensation" as required by § 8-43-103(2), C.R.S. We agree.

The statutory requirements for providing notice of an injury to the Division are set forth in § 8-43-103(1), C.R.S., as pertinently quoted below:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier … within ten days after the injury …. If no such notice is given by the employer, such notice may be given by any person. Any notice required to be filed by an

> injured employee … may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing …. Such notice shall be in writing and upon forms prescribed by the division for that purpose and served upon the division ….

The employer's FROI filing requirements are extended further by Rule 5-2(B), Workers' Compensation Rules of Procedure (WCRP), 7 Colo. Code of Regulations 1101-3. Rule 5-2(B) states (in pertinent part):

> (B) A First Report of Injury shall be filed with the Division in a timely manner whenever any of the following apply.
>
> * * *
>
> (2) Within ten days after notice of knowledge by an employer that an employee has contracted an occupational disease listed below, or the occurrence of a permanently physically impairing injury, or that an injury or occupational disease has resulted in lost time from work for the injured employee in excess of three shifts or calendar days. An occupational disease that falls into any of the following categories requires the filing of a First Report of Injury:
>
> * * *
>
> (b) cancer.

A respondent is compelled by rule to file an Employer's FROI—whether it admits or disputes a claim—when the claim is for occupational cancer. Here, the respondent, under such compulsion, filed the FROI and immediately disputed the claim in its Notice of Contest.

The "statute of limitation" provision is contained in Section 8-43-103(2), C.R.S., and states in pertinent part as follows:

> …the right to compensation and benefits … shall be barred unless, within two years after the injury …, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director

> within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section; but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division …, this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division.

The notice required by § 8-43-103(1), C.R.S. and/or Rule 5-2(B)(2)(b) is notice informing the Division of an alleged occurrence of a work injury, whereas the notice required by § 8-43-103(2), C.R.S., is a notice claiming compensation. The time limitation required for filing the § 8-43-103(2), C.R.S. notice depends on the employer's fulfillment of the Rule 5-2(B)(2)(b) or the § 8-43-103(1), C.R.S. notice provisions. Subsection 1 of §8-43-103, C.R.S. states that notice of an injury to the Division may be made by anyone on behalf of the claimant. However, the statutory permission for anyone to provide notice in subsection 1 is not incorporated into subsection 2 in filing a notice claiming compensation. Subsection 1 puts the onus on the respondent and violation of subsection 1 could result in penalties against the respondent or a tolling of the statute. Subsection 2 puts the onus on the injured worker to file a notice claiming compensation and failure to do so is a jurisdictional bar to the claim. In short—the distinction is provision of information in one instance versus filing of a claim for compensation in the second instance. The ALJ found that they are one in the same.

We disagree with the ALJ's ultimate conclusion because, following the ALJ's reasoning, when a respondent fails to provide notice to the Division of a reported accident, the statute of limitations is tolled "*until the required report has been filed;*" but, if the respondent does provide notice to the Division, the statute of limitations does not apply. In other words, if the required informational notice is, in and of itself, determined to be a qualifying claim for compensation, the statute of limitation would never be triggered (if notice was filed) and would always be tolled (if notice was not filed). Such a conclusion would have the practical effect of eliminating the statute of limitations from the Act once an injured worker reports an injury to the employer.

The statutory language regarding tolling of the statute of limitations is clear and dispositive in our view. We consider the interpretation of statutes de novo. *See, e.g., People v. Cross*, 127 P.3d 71, 73 (Colo. 2006) (statutory construction issues reviewed de novo.) In interpreting statutory provisions, we apply the ordinary rules of statutory construction. The purpose of statutory construction is to effect the legislative intent. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Beemer*, 955 P.2d 550 (Colo. 1998).

The last sentence of § 8-43-103(2), C.R.S. states: "…this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division." We infer from this sentence that the converse is also true; that if the required report has been filed with the Division, then the statute of limitations begins to run.

The ALJ listed the reasoning on which she relied: 1) that the Division assigned a claim number once the respondent's notice was received; 2) that the respondent had notice that the claimant was claiming compensation; 3) that had the claimant filed a workers' claim no further filings from the employer would have been required; and (4 thus the employer is not prejudiced by the claimant's failure to file a workers' claim.

In her statute of limitations assessment, the ALJ essentially found that the assignation of a claim number proves that adequate notice of a claim for compensation was provided to the Division. If such were true, the Division can itself alleviate the claimant from the statute of limitation simply by assigning a claim number to the FROI. We conclude that nothing in the Act allows the assignation of a claim number to substitute for the filing of a worker's claim for compensation.

The ALJ also relied on the lack of prejudice to the respondent. Specifically, the ALJ reasoned that had the claimant filed a claim, the respondent would not have had to make any further filings than they already made. However, the reasoning is not statutorily applicable to the facts of this claim. The lack of prejudice standard only applies when establishing to the Director that a reasonable excuse exists so as to extend the statute of limitations out to three years. Section 8-43-103(2*)*, C.R.S. Under the facts of this case, the extension of time to three years is irrelevant because the filing of the AFH occurred more than three years from the date of the respondent's FROI.

Contrary to the ALJ's reasoning that the respondent (by filing its FROI) "had notice that the claimant was claiming compensation," the facts belie that reasoning. The

FROI simply informs the employer that the claimant is alleging he contracted skin cancer as a result of his work. There is no indication in this FROI that the claimant had missed any time from work, was alleging any permanent impairment, or was seeking medical treatment. Ex. B at 0004. Essentially, the ALJ shifted the burden on the employer to extrapolate that the reported condition would give rise to compensable benefits. The standard of "knew or should have known the compensable nature of the injury" properly applies to when the statute of limitation begins to run *against a claimant*, not the respondent. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Aetna Casualty & Surety Co. v. Industrial Commission,* 474 P.2d 242 (Colo. App. 1970); *Russell Stover Candy Co. v. Turchanyi*, 474 P.2d 625 (Colo. App. 1970); *Industrial Commission v. Workman,* 165 Colo. 61, 437 P. 2d 795 (1968).

We do not view the FROI herein as the equivalent as a claim of compensation. In *McGlothlen v. Karman, Inc.*, W.C. 4-937-396-01 (April 2, 2018), we stated:

> The First Report of Injury is, however, different from a Workers' Claim for Compensation and does not control the date the statute of limitations begins to run. Section 8-43-101(1) requires the employer to file a first report of injury where the employer has notice the claimant has contracted an occupational disease, has permanent impairment or has sustained lost time from work. Nothing in § 8-43-101(1) allows the employer's First Report of Injury to substitute for a notice of claim. *Baca v. Interwest Medical Equipment*, W.C. No. 4-457-313 (November 19, 2001). To the contrary, if the filing of a First Report of Injury satisfied the claimant's duty to file a claim for compensation, § 8-43-103(2) would provide that the claim is barred unless the claimant files a claim *or* the employer files a first report of injury within two years of the injury. However, the statute does not contain any such language and we have no authority to read such a provision into the statute. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000).

Here, with undisputed record support, the claimant was aware of the nature and seriousness of his alleged occupational disease as early as July 24, 2013, but filed no AFH or claim for compensation until September 1, 2017.

We addressed a nearly identical situation in *Saxton v. King Soopers, Inc.,* W.C. No. 4-200-777 (March 11, 1997). The ALJ therein determined that the filing of a FROI and the Notice of Contest constituted notice of a claim sufficient to toll the statute of limitations. We stated:

> It is true that a timely filed notice of claim need not take any particular form. *Colorado Auto Body, Inc. v. Newton,* 160 Colo. 113, 414 P.2d 480 (1966); *Intermountain Rubber Industries, Inc. v. Valdez,* 688 P.2d 1133 (Colo. App. 1984). However, to toll the statute, an informal substitute for a claim must, at a minimum, identify the claimant, indicate that a compensable injury has occurred, and convey the idea that the claimant expects compensation for the injury. *Martin v. Industrial Commission,* 608 P.2d 366 (Colo. App. 1980). In *Martin*, the court of appeals held that the filing of an employer's report of accident was insufficient to constitute a claim. Although the report identified the claimant and details concerning the alleged injury, it failed to assert that a compensable injury had occurred, or to indicate that the claimant expected compensation for the injury.
>
> Here, neither the First Report, nor the Notice of Contest, indicates that the claimant "expects" compensation for the injury. Further, neither document establishes that a compensable injury occurred. To the contrary, the Notice of Contest evidences the respondent's position that no such injury occurred. Thus, we hold that the ALJ erred insofar as he determined that the First Report of Injury and Notice of Contest stopped the running of the statute of limitations.

In *Martin v. Industrial Commission*, 608 P.2d at 366, 369 (Colo. App. 1980), the Court of Appeals stated: "The employee did not make any timely attempt to file a notice of claim and the employer's informational report of the accident cannot be relied upon as a substitute."

We determine that the ALJ erred in concluding that the Employer's FROI either substituted for or was the equivalent of a Workers' Claim for Compensation. The claimant did not timely file a claim that would comply with § 8-43-103(2), C.R.S., thus the claimant's workers' compensation claim is barred by the statute of limitations.

IT IS THEREFORE ORDERED that the ALJ's order issued April 4, 2018, is reversed. The claimant's claim for compensation is denied and dismissed as barred by the statute of limitations.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Kris Sanko

CERTIFICATE OF MAILING

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

12/4/2018 by KG .

LAW OFFICE OF OTOOLE & SBARBARO PC, Attn: NEIL D OTOOLE ESQ, 226 W 12TH AVENUE, DENVER, CO, 80204-3625 (For Claimant)
OFFICE OF THE CITY ATTORNEY, Attn: JP MOON ESQ, C/O: EMPLOYMENT AND LABOR LAW SECTION, 201 WEST COLFAX AVENUE DEPT 1108, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-006-001

IN THE MATTER OF THE CLAIM OF:

BOLATITO AKIGBOGUN,

Claimant,

v.

FINAL ORDER

PEOPLE READY,

Self-Insured Employer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Spencer (ALJ), dated May 31, 2018, that determined the claimant was not responsible for the termination of his employment and that awarded him temporary total disability (TTD) benefits from June 16, 2017, through August 6, 2017, and from October 24, 2017, and ongoing. We affirm.

The ALJ made the following findings of fact. The claimant worked episodically for the respondent as a day laborer. On June 15, 2017, the claimant injured his right leg while operating a pallet jack. His right foot and ankle were crushed between the pallet jack and a steel beam, causing bilateral malleolar fractures. The claimant was treated at UCHealth emergency department where he was diagnosed with bimalleolar fractures and a right ankle sprain. The claimant was placed in a 3-way splint and given crutches, prescribed Percocet, and discharged with instructions to follow-up with his primary care physician.

In the days following the accident, the claimant made several attempts to contact the employer regarding treatment for his injuries. Further, a few days after the accident, the claimant smoked marijuana.

The claimant eventually spoke with an employer representative who directed him to Colorado Occupational Medical Partners. The employer also instructed the claimant to undergo a urine drug screen in accordance with its established policy regarding post-accident drug testing.

On June 19, 2017, the claimant saw Dr. Lugliani at Colorado Occupational Medical Partners. Dr. Lugliani restricted the claimant from all work and recommended he see an orthopedic surgeon "as soon as possible." Also, on June 19, 2017, the claimant provided a urine sample for a drug screen per the respondent's instructions.

On June 22, 2017, the claimant saw Dr. Gorman at the UCHealth orthopedic trauma clinic. Dr. Gorman recommended surgery to stabilize the claimant's ankle. On June 26, 2017, Dr. Gorman performed a right ankle open reduction with internal fixation.

The claimant's drug screen came back positive for marijuana. The employer has a zero-tolerance policy regarding positive drug tests, including marijuana. After receiving the results of the claimant's drug test, the employer sent the claimant a "Termination Notice" dated July 6, 2017.

At the time of the accident, the claimant had been working for the employer off and on for approximately two years. His employment contract with the employer contains several unique features owing to his status as a day laborer. The claimant's employment is entirely at will and requires a mutual offer and acceptance for each day of work. The claimant is hired and fired each day he works for the employer. The claimant's employment contract with the employer specifically provides in pertinent part as follows regarding Employment Terms & Acknowledgments:

> I understand and agree that I am not required to work or register my availability to work for the Company on any particular day. If I want to work, I may register my availability to work by text, phone, or by visiting a branch. . . *I understand that I am not employed just because I register availability to work. I am not employed until I actually begin working a job assignment, and my employment with the Company is terminated at the end of each day*. (Emphasis added.)

During the ensuing hearing, the claimant credibly testified that the respondent makes it clear there is no ongoing employment relationship beyond any particular day's assignment. The claimant is paid at the end of each day and has no obligation to return for any future assignments. Further, the respondent is not obligated to offer the claimant additional work if he requests it. Even if the particular job where the claimant was assigned needs to be staffed for longer than one day, the claimant may or may not be reassigned to that job the following day.

The ALJ found that the plain language of the claimant's employment contract with the respondent provided that his employment was terminated at the end of the workday on June 15, 2017, before he used marijuana or took the drug test. The ALJ also found that the respondent paid the claimant for his wage on June 15, 2017, and his service was concluded. At that point, neither party had any remaining obligation to the other. The claimant was not required to report to work again and the respondent had no obligation to offer him work if he requested it. The ALJ therefore concluded the subsequent drug test was of no consequence to his status as an employee because his termination had been effectuated several days before. The ALJ further added that although the respondent labeled its action as a "termination," in reality the respondent merely notified the claimant it would not accept further applications to re-employ him in the future. As pertinent here, the ALJ also determined that the "parties stipulated that if Claimant was not responsible for termination, he was disabled by the admitted June 15, 2017 injury and entitled to TTD benefits from June 16, 2017 through August 6, 2017, and from October 24, 2017 ongoing." Order at 2. The ALJ therefore awarded the claimant TTD benefits for these dates.

On appeal, the respondent argues that the ALJ misapplied applicable law by determining there was no causal connection between the claimant's failed drug test and the termination of his employment. The respondent contends the ALJ overlooked the document signed by the claimant wherein he agreed, as a condition of employment, that he was subject to post-accident drug screens and could be terminated if the screen was positive for illegal drugs or controlled substances. The respondent therefore argues the ALJ erred in awarding the claimant TTD benefits. Additionally, the respondent contends the parties did not make a stipulation regarding TTD benefits.

Sections 8-42-105(4)(a), C.R.S., and 8-42-103(l)(g), C.R.S., (the so-called "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." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." A finding of fault requires the ALJ to determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

The termination statutes provide an affirmative defense to a claim for TTD benefits, and the respondents bear the burden of proof to establish their applicability. *Witherspoon v. Metropolitan Club*, W. C. No. 4-509-612 (Dec. 16, 2004). Generally, the question of whether the claimant acted volitionally and, therefore, is "responsible" for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances. *See Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). Thus, 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 is a narrow standard of review which requires us to view the evidence in a light most favorable to the prevailing party, and to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, we perceive no error in the ALJ's determination that the respondent failed to prove it is entitled to relief under the termination statutes. The respondent argues that the ALJ's conclusion "overlooks" the documents signed by the claimant wherein he agreed he was subject to post-accident drug screens and could be terminated if the screen was positive for illegal drugs. The respondent further highlights the testimony of its human resources representative, Collette Hayward, that the claimant was still employed at the time his post-accident drug screen was collected. However, there is no dispute that the claimant used marijuana several days after the industrial accident. During the hearing, the claimant testified that he did not have any insurance, and the hospital gave him a prescription for the pain, but it cost too much for him to pay. Tr. at 19-20. Rather, the significant issue here is whether the claimant was, in fact, employed at the time he used marijuana. It is true, as the respondent alleges, that Ms. Hayward testified the claimant was employed with the respondent but not working at the time the drug screen conducted. Tr. at 39-40. However, Ms. Hayward also testified that per the terms of the employment contract, the claimant already had been terminated from the respondent as of the time the drug screen was conducted. Tr. at 46-47. The ALJ did not credit Ms. Hayward's testimony that the claimant still was employed with the respondent at the time his drug screen was conducted. The ALJ was free to credit all, part, or none of a witness's testimony. *See Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). 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. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

Rather, we conclude the ALJ reasonably interpreted and relied on the terms of the employment contract between the claimant and the respondent to determine that the

claimant's subsequent drug test was of no consequence to his status as an employee since his termination had been effectuated several days before. As detailed above, the employment contract between the claimant and the respondent specifically provides that the claimant is "*not employed until [he] actually begin(s) working a job assignment, and [his] employment with the Company is terminated at the end of each day*." (Emphasis added.) It is well settled that the interpretation of a contract is a question of law, and unless it is ambiguous, the contract must be enforced as written. *Cary v. Chevron, U.S.A.*, 867 P.2d 117 (Colo. App. 1993). There was no argument before the ALJ, and there is no argument before us, that the contract is ambiguous. The ALJ properly enforced the employment contract as written. Consequently, we have no basis to disturb the ALJ's determination on this ground. Section 8-43-301(8), C.R.S.

Additionally, according to the respondent, the ALJ's conclusion that the claimant is terminated at the end of each work day necessarily means he could not miss more than three days of work and, therefore, he is not entitled to TTD benefits under §8-42-103(1)(a), C.R.S. However, we reject the respondent's reading of §8-42-103(1)(a), C.R.S. Section 8-42-103(1)(a), C.R.S. provides that a claimant is entitled to temporary disability benefits if the *"disability"* lasts more than three days. "Disability" involves two elements. First is "medical incapacity" evidenced by loss of restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by a *claimant's inability* "to resume his or her prior work." *Montoya v. Industrial Claim Appeals Office*, 2018 COA 19 (Colo. App. 2018)(quoting *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999) and recognizing that both elements need not be satisfied to justify an award of disability benefits). Whether the claimant's position is available because of contractual reasons has no bearing on the claimant's entitlement to TTD benefits.

In any event, the ALJ found, with record support, the parties stipulated that if the termination statutes were inapplicable, then the claimant was entitled to TTD benefits. At the commencement of the hearing, counsel for the claimant informed the ALJ as follows regarding the parties' agreement on temporary disability benefits:

> [CLAIMANT'S COUNSEL]: . . . And so the threshold issue really today is termination for cause, because – and temporary disability I think we would both agree is owed if it's found that he wasn't, you know, that the termination for cause wasn't proper or not enough to withhold TTD.

> So, really, I think it's probably respondent's burden to prove the termination for cause, because now that it's been admitted, we agree that he's entitled to TTD if the Court finds that it's proper, so. . . . Tr. at 4.

While the ALJ did not immediately confirm with the respondent's counsel the agreement regarding payment of TTD benefits, at no time did the respondent's counsel object to the claimant's counsel's representation regarding the agreement on TTD benefits. Tr. at 4-8. Regardless, the ALJ subsequently asked both counsel whether there were any other preliminary type matters that should be discussed before turning to submissions. The respondent's counsel stated "I don't believe so, no." Tr. at 8. The parties then presented their evidence as well as their closing arguments. Then, after closing arguments, the ALJ asked counsel the following question on whether there was a stipulation regarding TTD benefits:

> THE COURT: Although it did sound like we had essentially a stipulation that if the termination for cause defense isn't – isn't accepted, then TTD is – is awarded at that – at least at the admitted rate, right?
>
> [DEFENSE COUNSEL]: Correct.
>
> [CLAIMANT'S COUNSEL]: Yes.
>
> [DEFENSE COUNSEL]: Yeah. Tr. at 77-78.

Despite this colloquy, the respondent nevertheless argues on appeal that there was no such stipulation on TTD benefits, and that the ALJ did not confirm such a stipulation regarding TTD benefits. It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); *Schlage Lock v. Lahr*, 870 P.2d 615, 616 (Colo. App. 1993) (petitioner bound by admission); *see Jordan v. Black Gold Asphalt Co.*, W.C. No. 4-562-913 (September 28, 2004)(parties stipulated to AWW), *aff'd on other grounds*, Colo. App. No. 05CA0198 (Aug. 25, 2005)(NSOP). "A party's participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein." *USI Properties East, Inc. v. Simpson*, 938 P.2d at 173. Courts should give effect to stipulations, but "if there is a sound reason in law or equity for avoiding or repudiating a stipulation, a party is entitled to be relieved from its requirements upon timely application." *Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co.*, 698 P.2d 1340, 1346 (Colo. 1985). Whether to

relieve a party of a stipulation is within the discretion of the trial court. *Id*. Here, we perceive no error in the ALJ's determination that the parties had a stipulation regarding the payment of TTD benefits. Contrary to the respondent's argument, the ALJ did, in fact, confirm a stipulation with the respondent on TTD benefits, as is detailed above. Tr. at 77-78. Additionally, we perceive no sound reason in law or equity for avoiding or repudiating the stipulation. Consequently, we have no basis to disturb the ALJ's award of TTD benefits. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated May 31, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

12/10/18 by TT .

BURG SIMPSON ELDREDGE HERSH & JARDINE PC, Attn: JOHN M CONNELL ESQ, 40 INVERNESS DRIVE EAST, ENGLEWOOD, CO, 80112 (For Claimant)
POLLART MILLER LLC, Attn: R JAKE JOHNSON, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-078-02 &
5-056-383

IN THE MATTER OF THE CLAIM OF:

STUART CAMPBELL,

Claimant,

v.

WRANGLER WELL SERVICE INC,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY
and/or TRAVELERS INDEMNITY CO.,

Insurer,
Respondents.

REMAND ORDER

The respondent Travelers Indemnity Co. seeks review of an order of Administrative Law Judge Felter (ALJ) dated June 15, 2018, that found the claim compensable and ordered Travelers to pay temporary disability benefits and medical benefits. We remand the matter to the ALJ for further proceedings.

This matter was the subject of an April 10, 2018, hearing. The issues submitted by the parties for hearing included the compensability of the claimant's occupational disease claim, the liability of either of the respondent insurance carriers for any compensable benefits, the average weekly wage, medical benefits and temporary disability benefits. The claimant complained of a bilateral carpal tunnel injury occurring while he worked on the employer's oil and gas drilling rigs. Claim number 5-050-078 features a date of injury of April 4, 2017 while the date of injury in 5-056-383 is May 16, 2017. The parties stipulated the employer was insured by New Hampshire Insurance Co. through April 12, 2017. The employer thereafter was insured by Travelers Indemnity Co.

The claimant and Dr. Raschbacher testified at the April 10 hearing. Following the hearing the ALJ entered his June 15 order finding the claimant suffered a compensable injury. His disability was found to be an occupational disease as defined in § 8-40-201(14), represented by his carpal tunnel injury. The ALJ ruled the last injurious

exposure referenced in § 8-41-304(1), lay with Travelers. Accordingly, the ALJ ordered Travelers liable for the payment of indemnity and medical benefits.

At the conclusion of the April 10 hearing the ALJ established a sequence for the parties to submit written post hearing position statements. While no transcript of the hearing was submitted, it is undisputed that the claimant was given until April 16 to submit his statement. New Hampshire Indemnity had until April 20 and Travelers Indemnity was provided a deadline of April 25. In the ALJ's June 15 order it is noted post hearing briefs were ordered. The ALJ states he was in receipt of the claimant's brief and the brief of New Hampshire but that "Travelers filed no responsive post-hearing briefs …."

The record transmitted by the Office of Administrative Courts contains a brief from Travelers with a certificate of mailing signed on April 25, 2018, indicating it was mailed to the other parties on that date. Following the ALJ's order of June 15, Travelers, on June 19, submitted a Motion to Reconsider asking the ALJ to reopen the matter, to review Travelers post hearing brief and to then submit a new order. Attached to the motion were copies of two emails. One email dated April 25, was directed to "oac-dvr@state.co.us" and states that attached is the Travelers brief. The second email is a response to the first, sent by the Office of Administrative Courts on April 25, announcing the Travelers email and brief were received. The ALJ did not rule on Travelers' Motion for Reconsideration.

On July 2, Travelers filed a Petition to Review listing as one of its issues error by the ALJ in failing to consider the Travelers' brief. A briefing schedule was distributed to the parties indicating Travelers was to submit its brief by October 9 and the remaining parties were given until October 29 to file responses. Travelers timely filed its brief. On October 23 the ALJ stated his determination there was no need for a supplemental order and the claim was forwarded to the Industrial Claim Appeals Office panel for review. On October 31, New Hampshire Indemnity submitted directly to the panel a copy of its brief sent to the Office of Administrative Courts on October 29. None of the parties dispute the assertion of Travelers that it sent its post hearing brief to the Office of Administrative Courts on April 25.

The only issue addressed by Travelers in its Brief in Support of Petition for Review is the failure of the ALJ to consider the Travelers post hearing brief. Travelers argues the ALJ abused his discretion by implicitly denying Travelers' Motion for Reconsideration. Travelers contends the ALJ was not advised of the Travelers' brief due to clerical error. Therefore it is argued the ALJ should have exercised his discretion to

correct the error by considering the brief and submitting a new order acknowledging Travelers' position had been considered and making any modification to the order justified by Travelers' argument. Travelers also asserts the determination of the ALJ to refuse to consider its post hearing brief is a denial of Travelers' rights to procedural due process. In response, the claimant and New Hampshire Indemnity point out that Travelers was provided an opportunity to submit evidence and the ALJ considered the evidence submitted by all the parties in arriving at his June 15 order. They assert Travelers was not prejudiced by the omission of its brief from consideration and there was no denial of due process. We find the Travelers' argument compelling.

The Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970), defined the elements of procedural due process as:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by *presenting his own arguments* and evidence orally. (Emphasis added.)

Similarly in *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990), procedural due process in the context of a workers' compensation proceeding was found to include:

> The fundamental requisites of due process are notice and the opportunity to be heard. *See Nesbit v. Industrial Commission*, 43 Colo. App. 398, 607 P.2d 1024 (1979). If, as here, an administrative adjudication turns on questions of fact, due process requires that the parties be apprised of all the evidence to be submitted and considered, and that they be afforded a reasonable opportunity in which to confront adverse witnesses and to present evidence *and argument* in support of their position. *Puncec v. Denver*, 28 Colo. App. 542, 475 P.2d 359 (1979). (Emphasis added.)

Here, the ALJ determined the parties would be allowed to present their argument through the vehicle of post hearing position statements. Failure to consider Travelers' post-hearing statement would violate due process. Because we are unable to determine whether the ALJ reviewed Travelers' post-hearing submission or Travelers' motion for reconsideration, we must remand the matter for further findings. Section 8-43-301(8), C.R.S. (In order to permit meaningful review of an ALJ's order, the ALJ must make findings and conclusions which are sufficient to indicate the basis of his decision). We therefore remand this matter to the ALJ with the direction to review the post hearing brief submitted by Travelers and then to submit a new order with any modifications the ALJ determines are justified by that review.

IT IS THEREFORE ORDERED that the ALJ's order issued June 15, 2018, is set aside and the claim is remanded to the ALJ for further proceedings as directed above.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

12/18/18 by TT .

CAMERON W TYLER AND ASSOCIATES PC, Attn: CAMERON W TYLER ESQ, 3223 ARAPAHOE AVENUE SUITE 300, BOULDER, CO, 80303 (For Claimant)
RAY LEGO & ASSOCIATES, Attn: GREGORY W PLANK ESQ, 6060 SOUTH WILLOW DRIVE SUITE 100, GREENWOOD VILLAGE, CO, 80111-5168 (For Respondents)
LEE & BROWN LLC, Attn: WILLIAM M STERCK ESQ, 3801 EAST FLORIDA AVENUE SUITE 201, DENVER, CO, 80210 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-054-279-01

IN THE MATTER OF THE CLAIM OF:

DANIEL MARQUEZ,

Claimant,

v.

FINAL ORDER

PATRICIA M. DEMPSEY TRUST
d/b/a WAPITI RANCH, and
VAN SYBRANDT d/b/a
SYBRANDT EXCAVATION

Employers,

and

NON-INSURED,

Respondents.

The respondents and the claimant seek review of a supplemental order of Administrative Law Judge Mottram (ALJ) dated September 13, 2018, that determined the claimant sustained a compensable injury while employed by non-insured employer Sybrandt d/b/a Sybrandt Excavation (Sybrandt) and the non-insured statutory employer Patricia M. Dempsey Trust d/b/a Wapiti Ranch (Dempsey) and ordered the respondents to provide medical benefits and temporary disability benefits and denied the claimant's request for penalties. We affirm the order.

This matter went to hearing on the issues of compensability, responsible employer, medical benefits, temporary disability benefits, average weekly wage, penalties against the employer for failure to timely admit or deny, failure to pay medical bills associated with the claim, failure to provide the claimant with a designated provider list of physicians and whether Dr. Patrick Johnston was an authorized treating provider. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. Dempsey owns a ranch referred to as Wapiti Ranch. Dempsey resides in Florida and travels to Colorado infrequently. Sybrandt serves as a caretaker of ranches in Routt County and has taken care of the Wapiti Ranch for Dempsey for the past 10-11 years. Sybrandt performs snow removal on the roads and maintains the ditches and fencing that run through the ranch. Sybrandt was paid in excess of $10,000 for this work.

Around May 2017, Sybrandt offered to pay Jose Loya (Loya) and the claimant $19 per hour to work on the fencing around Wapiti Ranch. Loya and the claimant started work on the project around June 1, 2017. Wapiti Ranch is approximately 200 acres and the fence line runs approximately two and one-half to three miles. The claimant and Loya were instructed to start the fencing at the entry gate and continue up the left hand side of the gate up to the creek on the hill. The claimant and Loya were then supposed to do the fence on the right side of the gate up the hill and then the back. Beetle-killed trees needed to be cleared from the pathways and the fencing replaced. Sybrandt showed up to check on the quality of the fence at least every other day. With the exception of gloves, Sybrandt provided the tools and equipment for the work.

Loya and the claimant were paid in cash except for two occasions when Sybrandt wrote a check to Loya with the understanding that Loya would split the proceeds from the check. The two checks were dated June 24, 2017, and July 1, 2017, and were made out for $798.00 and $1064.00, respectively. On the memo line for both checks, Sybrandt wrote "Dozing." The checks were paid out of an account for Sybrandt Excavation.

On conflicting evidence the ALJ credited the claimant and Loya's testimony that they returned to the property between July 5 and July 20, 2017, to continue work on the fencing project. According to Loya, Sybrandt told Loya and the claimant that he would be out of town for a few days and that they should finish the fence while he was gone. On Friday July 21, 2017, the claimant and Loya were at Wapiti Ranch fixing the fence when the claimant was injured riding an all-terrain vehicle (ATV). The ATV was being used to transport the tools, wire and staples needed to perform the fencing project. The claimant reported that he was going very slowly on an ATV when it slid going down a hill and he fell to the ground. Loya heard the claimant yell for help and when he got to the claimant he observed that the ATV had flipped over. Loya took the claimant to the hospital. Medical records show that the claimant had a laceration on his forehead and a mildly displaced fracture of the right proximal humerus. The claimant was provided with a shoulder immobilizer and instructed to rest and ice his arm.

The claimant called Sybrandt on Monday and told him that he had rolled the ATV while on the ranch. Sybrandt said that he would not pay for the medical bills and that he was going to say the claimant was drunk. Neither Sybrandt nor Dempsey had workers' compensation insurance as of July 21, 2017. Sybrandt did not provide the claimant with a list of medical providers.

The ALJ determined that the claimant was an employee of Sybrandt and Sybrandt Excavation. The ALJ rejected the respondents' contention that the claimant was an

independent contractor in view of the fact that Sybrandt provided the tools and equipment needed to perform the work and that the claimant was paid cash on an hourly rate. Crediting the testimony of the claimant and Loya, the ALJ further concluded that the claimant was on the Wapiti Ranch on July 21, 2017, completing the work he was hired to perform and that the claimant established that it is more likely than not that he was performing duties within the course and scope of his employment with Sybrandt and Sybrandt Excavation at the time of his injury. The ALJ determined that the medical treatment that the claimant received at Yampa Medical Center was reasonable, necessary and related to the injury and ordered the respondents to pay for the $3,052.46 emergency room visit.

The ALJ also determined that Dempsey is liable for the claimant's injuries as the claimant's statutory employer.

The ALJ found that the claimant's average weekly wage was $744.64, based on his concurrent employment with Sybrandt and a restaurant and awarded the claimant temporary partial disability benefits in the amount of $4,278.81 through February 28, 2018.

The ALJ further determined that neither employer obtained workers' compensation insurance as required by statute and, therefore, the claimant's non-medical benefits were increased by 25 percent pursuant to §8-43-408(5), C.R.S. The respondents were further ordered to pay the Colorado uninsured fund an additional amount of $1,069.60, pursuant to §8-43-408(6), C.R.S. based on 25 percent of the temporary partial benefits.

The claimant made several requests for penalties that were also addressed by the ALJ at hearing and are addressed in detail below. The ALJ denied the claimant's requests for penalties.

The respondents and the claimant filed timely petitions to review the supplemental order. Neither party, however, filed a brief with the petition to review as required by §8-43-301(6), C.R.S. Section 8-43-301(6), C.R.S., specifically provides that a party dissatisfied with a supplemental order may file a petition for review, and the petition shall be accompanied by a brief in support. Nevertheless, we take note that the ALJ's supplemental order references § 8-43-301(2), C.R.S., rather than § 8-43-301(6), C.R.S. with regard to the procedures to follow when filing a petition for review. The parties submitted briefs on these issues prior to the supplemental order and we have considered them on appeal. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986)

(failure to file a brief in support of a petition to review is not a jurisdictional defect and, thus, neither is the failure timely to file a brief.)

We further note that although the respondents' brief in support exceeds the 20 page limit set forth in OACRP 26(E), we consider the brief in its entirety in view of the number of issues on appeal. *See People v. Rodriguez*, 914 P.2d 230 (Colo. 1996) (court has discretion to grant permission to file oversized brief).

I. Respondents' Appeal

A.

The respondents are jointly represented by counsel and contend that several of the ALJ's findings of fact concerning compensability are not supported by substantial evidence and that the ALJ failed to consider the conflicting evidence. We disagree.

The question of whether the claimant proved an injury proximately caused by the employment is one of fact for determination by the ALJ. Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claims Appeals Office*, 989 P.2d 251 (Colo. App. 1999). This standard of review requires us to defer 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*. Testimony is not incredible as a matter of law absent extreme circumstances where the testimony is rebutted by such hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). Nor is testimony incredible as a matter of law merely because it is inconsistent or conflicts with other evidence. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Further, to the extent the testimony of a witness is internally inconsistent, or subject to conflicting inferences, the ALJ may resolve the inconsistency by crediting part or none of the testimony. *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

The respondents specifically argue that the record is replete with conflicting evidence that is not resolved by the ALJ. The ALJ, however, credited the testimony of Loya and the claimant over the respondents' witnesses. Although the respondents' witness testimony indicated that the fencing project was supposed to be done by July 1, 2017, and that the last check was issued on July 1, 2017, the ALJ was persuaded by the testimony of Loya and the claimant that the project was not completed and that they were

paid for a week in advance on or about July 20th, when Sybrandt was going away on a fishing trip. March 8, 2018, tr. at 42. This testimony was corroborated to by Sybrandt himself when he stated that he thought he gave the claimant and Loya one more payment in July because they were not finished with the job. March 8, 2018, tr. at 57. Sybrandt also acknowledged that over the July 4th weekend, when Loya and the claimant did not work, Sybrandt and his brother put up two-strand fencing on the Wapiti Ranch. Summary of Testimony, Van Sybrandt at 5.[1] Both Loya and the claimant noticed this two-strand fencing when they came back to the Wapiti Ranch after the July 4th weekend. Summary of Testimony, Loya 17 and the claimant 15. The claimant asked Sybrandt if they should complete the fencing with a third strand and Sybrandt's response was to "go for it." Summary of Testimony, Claimant at 15.

The respondents further contend that the fence had to have been completed by July 5, 2017, or the cows that had been released into the grazing area would have been on the Wapiti Ranch. However, according to the respondents' witness Matt Belton (Belton), the owner of the cows, he released the cows on the west side of the fence and he did not examine the entire fence. March 23, 2018, tr. at 16. We, therefore, see no contradiction in the ALJ's findings that the fence could have been completed on the opposite side of the land from where the accident occurred and the claimant and Loya were working. Although the evidence could have been construed differently, in our view it was plausible for the ALJ to infer that the claimant and Loya were working on the fence on July 21, 2017, when the injury occurred. *See Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981)(plausible inferences drawn by the ALJ from conflicting evidence cannot be altered on review).

It is sufficient for the ALJ to enter findings concerning the evidence he considers dispositive of the issues, and evidence and inferences inconsistent with the order are presumed to have been rejected. *Magnetic Engineering Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). The fact that the respondents are able to point to contrary 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).

B.

The respondents also argue that the ALJ failed to cite any evidence to support the award of temporary indemnity. We are not persuaded there is any error in the award of temporary disability benefits.

[1] The recording equipment malfunctioned during the March 8, 2018, hearing. The ALJ entered an order on August 24, 2018, summarizing the missing testimony based on the ALJ's notes and review by the parties.

Pursuant to §§ 8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of temporary disability benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). To prove entitlement to temporary disability the claimant must prove the industrial injury caused a "disability." §8-42-103(1), C.R.S. 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). A claimant is not required to prove both components to establish entitlement to disability benefits under the Workers' Compensation Act. *Montoya v. Industrial Claim Appeals Office*, Colo. App. No. 17CA0322 (February 8, 2018). Whether the claimant has proved disability, including proof that the injury has impaired the ability to perform the pre-injury employment, is a factual question for the ALJ. *Lymburn v. Symbios Logic*, *supra*.

In our view, it was reasonable for the ALJ to determine that the claimant met the causal connection between the industrial injury and the post-injury wage loss. The discharge instructions from the emergency room visit at Yampa Medical Center on July 21, 2017, state that the claimant was to rest and use a shoulder immobilizer. Claimant's Exhibit 1 at 24. The claimant testified that he was unable to return to work at the ranch and that he missed three days of work at the restaurant where he was also working. Summary of Testimony, Claimant at 32. When the claimant did return to work at the restaurant, he testified that he was required to use his left hand when working in the restaurant. Summary of Testimony, Claimant at 33. Wage records were also submitted into evidence showing the loss of wages from the restaurant. Claimant Exhibit at 19. Under these circumstances, it was reasonable for the ALJ to conclude that the claimant was disabled because of the injury. Because the ALJ's findings are supported by the evidence we have no basis to disturb the award of temporary disability benefits on review. Section 8-43-301(8), C.R.S.

C.

The respondents also challenge the ALJ's award of medical benefits based on the contention that the claimant's claim is not compensable. As stated above the ALJ's award of compensability is supported by substantial evidence and we see no basis for disturbing the decision or the resulting award of medical benefits on appeal. Section 8-43-301(8), C.R.S.

D.

The respondents argue that the ALJ erred in finding that there was an employer-employee relationship between Sybrandt, Dempsey and the claimant. The respondents maintain that the claimant was an independent contractor because Sybrandt did not dictate the hours the claimant was required to work, did not require the claimant to work exclusively on the fencing project and did not oversee the work. We perceive no error by the ALJ. After weighing the conflicting evidence presented by the parties, the ALJ ultimately determined that the claimant was an employee of the respondent and not an independent contractor. The ALJ balanced the factors enumerated in § 8-40-202(2) (a), C.R.S., and, after considering the nature of the relationship between the claimant and the respondents, determined that the respondents had failed to overcome the presumption that the claimant was an employee under the Workers' Compensation Act.

Pursuant to § 8-40-202(2)(a), C.R.S., "any individual who performs services for pay for another shall be deemed to be an employee … unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of the nine criteria set forth in § 8-40-202(2)(b)(II), C.R.S. *See also Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998).

The factors set forth in § 8-40-202(2)(b)(II), C.R.S., indicating that an individual is not an independent contractor include the individual being paid a salary or hourly rate instead of a fixed contract rate, and being paid individually rather than under a trade or business name. Conversely, independence may be shown if the person for whom the services are performed provides no more than minimal training to the individual, does not provide tools or benefits, does not dictate the time of performance, does not establish a quality standard for the individual's work, does not combine its business with the

business of the individual, does not require the individual to work exclusively for a single person or company, and is not able to terminate the individual's employment without liability.

In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court addressed the analysis to be used in unemployment insurance cases when determining whether a claimant is an independent contractor or an employee. The *Softrock* analysis applies to workers' compensation cases as well since the pertinent statutes in unemployment and workers' compensation are identical. *See Pierce v. Pella Windows*, W.C. No. 4-950-181 (April 26, 2016); § 8-70-115(1)(b), C.R.S.; § 8-40-202, C.R.S. In *Softrock*, the Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The Court further determined there is no dispositive single factor or series of factors. This statute, therefore, creates a balancing test to overcome the presumption of employment contained in § 8-40-202(2)(a), C.R.S., and to establish independent contractor status. *Nelson v. Industrial Claim Appeals Office, supra.* The question of whether the respondent has presented sufficient proof to overcome the presumption is one of fact for the ALJ. Accordingly, we are bound by the ALJ's determinations if supported by substantial evidence and plausible inferences drawn from the record. Section 8-43-301(8), C.R.S.

We have reviewed the record and perceive no error. The order reflects that the ALJ considered the agreement between the parties and the testimony concerning the actual relationship of the parties. The ALJ found, with record support, that the respondent provided tools, equipment and the ATV used by the claimant at the ranch. The claimant was instructed where to begin the fencing and the work was inspected by Sybrandt. The claimant was paid an hourly wage in cash rather than by check made out to a trade or business name. Moreover, there was no evidence presented that the claimant was customarily engaged in an independent trade, occupation, profession or business related to fencing. The claimant testified that he has never engaged in a fencing operation or fencing project and that this was his first fencing project. Summary of Testimony, Claimant at 3.

II. Claimant’s Appeal

A.

The claimant requested penalties of up to one days' compensation for each day the respondents failed to timely admit or deny pursuant to §8-43-203(2), C.R.S. On this issue the ALJ found that the claimant filed a workers' claim for compensation with the Division of Workers' Compensation on August 9, 2017. The workers' claim for compensation listed Wapiti Ranch as the employer. On August 17, 2017, the Division of Workers' Compensation wrote a letter to the Patricia Dempsey Trust and requested that the Trust either admit or deny liability for the claim in writing within 20 days of the order. The letter was returned to the Division of Workers' Compensation as undeliverable. An "Urgent Notice" letter was issued by the Division on October 16, 2017, noting that the Division had attempted to contact the employer and the Division was trying to determine if the employer had insurance. This letter was addressed to the claimant's attorney but not to the employer. A notice of contest was eventually filed by Dempsey on November 7, 2017. A second notice of contest with filed on January 30, 2018, on behalf of Sybrandt.

The ALJ denied the claimant's request for penalties against Sybrandt and Dempsey for failure to admit or deny because the respondents did not receive notice of the claim. Once the claimant filed an application for hearing on October 18, 2017, Dempsey filed a notice of contest on November 7, 2017. The claimant did not initially file a claim for compensation against Sybrandt and, therefore, the ALJ found no violation and no basis for penalties against Sybrandt.

Section 8-43-203(1)(a), C.R.S. provides:

> The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee or, if deceased, the decedent's dependents within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for the purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

Section 8-43-101, C.R.S., provides:

> Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule. Within ten days after notice or knowledge that an employee has

> contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury, or fatality to the division.

When interpreting statutes, the objective is to implement the legislative intent. In order to do so, we must first examine the statutory language and afford the words their plain and ordinary meanings. *Weld County School District v. RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). If the meaning of the statute is unambiguous, there is no need to resort to interpretive rules of statutory construction. *City of Thornton v. Replogle,* 888 P. 2d 782 (Colo. 1995). Where possible, we should avoid forced, subtle, or strained construction of statutory language. *Miller v. Industrial Claim Appeals Office,* 985 P.2d 94 (Colo. App. 1999).

The plain and ordinary meaning of §8-43-203(1)(a) and §8-43-101 when read together is that the duty to admit or deny liability does not arise under the statutes unless the employer has notice that the claimant has sustained more than three days of lost time from work, permanent impairment, certain types of occupational diseases not relevant here, or death. Consequently, the respondents' obligation to admit or deny liability did not arise under this statute until it obtained knowledge which should reasonably have lead the respondents to believe the claimant had sustained more than three days of lost time or a permanently impairing injury.

The ALJ here found that the Dempsey did not have notice of the claim until after the claimant filed the application for hearing on October 18, 2017. Although the claimant contends that Dempsey should have received the prior claims and correspondence from the Division, the ALJ determined that these were mailed to the incorrect address. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993)(*properly addressed* mail entitled to presumption of receipt)(emphasis added).

The ALJ also denied penalties against Sybrandt finding that he did not have notice of a lost-time claim until the claimant filed the claim against Sybrandt on January 1, 2018. Although the ALJ credited the claimant's testimony that he called the employer on July 24, 2017, and reported that he had sustained an injury, the claimant only testified that he asked Sybrandt to pay for a medical bill. Summary of Testimony, Claimant at 23. The claimant did not testify that he notified Sybrandt he had sustained a lost-time injury

or permanent disability as a result of the incident. We, therefore, find no error in the ALJ's conclusion to deny penalties under §8-43-203(2), C.R.S

For the same reasons listed above, the claimant's request for penalties under §8-43-304(1), C.R.S, for alleged violation of § 8-43-218, C.R.S.,(employer's failure to comply with the claims management efforts), was also properly denied by the ALJ. Pursuant to § 8-43-218, C.R.S., the Director may require any party to a workers' compensation claim to attend, cooperate and comply with the efforts of claim managers in managing claims and a party who willfully refuses to cooperate or comply with claims management efforts shall be subject to penalties under §8-43-304(1), C.R.S. Because the ALJ found, with record support, that the employer did not receive the claims manager's letters, the employer could not comply with the requests and the denial of penalties was appropriate.

B.

The claimant also appeals the ALJ's denial of penalties of up to $1,000 per day under §8-43-304(1), C.R.S. for the respondents' failure to have the required poster notice pursuant to §8-43-102(1)(b), C.R.S., and for the respondents' failure to provide a list of medical providers pursuant to §8-43-404(5)(a)(I)(A), C.R.S. We perceive no error.

The ALJ denied the claimant's request for penalties for violation of these statutes because § 8-43-304(1), C.R.S., only provides for a monetary penalty for a violation "for which no other penalty is provided." Here, the penalty for the respondents' failure to post the required notice in violation § 8-43-102(1)(b), C.R.S., was to toll the statute of limitations for the claimant to provide notice of the injury. Section 8-43-102(1)(a), C.R.S.; *see Robinson v. Carder Concrete Products*, W.C. No. 4-108-643, (October 15, 1992)(§ 8-43-102(1)(a) and (b) are self-contained provisions).

The penalty for the respondents' failure to provide the claimant with a list of designated providers under § 8-43-404(5)(a)(I)(A), C.R.S., allowed the claimant to select his treating physician. Consequently, the physician selected by the claimant, Dr. Patrick Johnson, became the claimant's authorized treating physician.

The court of appeals opinion in *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004) is dispositive. In *Pena*, the court held that the limiting clause in § 8-43-304, C.R.S. applies to three of the four categories for which penalties may be imposed under that provision. Section 8-43-304 provides that penalties up to $1000 per day may be assessed against "[a]ny employer or insurer, or any officer or agent of either,

or any employee, or any other person who violates any provision of articles 40 to 47 or this title, or does any act prohibited thereby, or 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 fails, neglects, or refuses to obey any lawful order made by the director or panel."

The court recognized that this provision authorizes four categories of conduct for which penalties may be imposed. *Pena* held that the limiting clause "for which no penalty has been specifically imposed" applies to the three categories that precede that clause. Thus, the limiting clause applies to the categories of penalties that may be imposed under §8-43-304 for violations of any provision of the Act and for doing any act prohibited by the Act, as well as for failing or refusing to perform any duty lawfully mandated by the Director or the Panel. Thus, where some other penalty "has been specifically provided" no penalties are permissible under § 8-43-304 for violation of the Act, for doing something prohibited by the Act, or for failing or refusing to perform a duty lawfully mandated by the Director or the Panel.

Because we agree with the ALJ that § 8-43-102(1)(b), C.R.S. and § 8-43-404(5)(a)(I)(A), C.R.S. provide for a "specific penalty" if these statutes are violated, we conclude that the general penalty provision of § 8-43-304(1), C.R.S. does not apply.

C.

To the extent the claimant disputes the ALJ's determination of average weekly wage, we find no error. Section 8-42-103(3), C.R.S., allows the ALJ to exercise discretion to reach a fair approximation of an average weekly wage. The claimant has not alleged a specific error and only states in his brief that his average weekly wage should be $720 per week. The ALJ's order reflects that he considered the wage records and testimony that was submitted and his findings are supported by the record. We see no basis to disturb the ALJ's decision on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's supplemental order dated September 13, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

John A. Steninger

CERTIFICATE OF MAILING

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

12/17/18 by TT .

MCGILL PROFESSIONAL LAW CORPORATION, Attn: WILLIAM C HIBBARD ESQ, PO BOX 2810, STEAMBOAT SPRINGS, CO, 80477 (For Claimant)
HALL & EVANS LLC, Attn: MEGAN E. COULTER ESQ, 1001 SEVENTEENTH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-975-232-02

IN THE MATTER OF THE CLAIM OF:

DANIELA GOSSELOVA,

Claimant,

v.

FINAL ORDER

VAIL RESORTS,

Self-Insured Employer,
Respondent.

The *pro-se* claimant seeks review of an order of Administrative Law Judge Margot Jones (ALJ) dated April 30, 2018, that denied unauthorized medical treatment the claimant obtained after maximum medical improvement (MMI). We affirm.

The claimant sustained an admitted injury to her right knee while working for the employer on February 9, 2015[1], as an emergency medical technician and ski instructor with Vail's ski patrol.

Hearing was held on January 18, 2018, on the issues of whether the claimant proved by a preponderance of the evidence that the respondent is liable for medical treatment from Dr. Gottlob and Axis Physical Therapy from the date of MMI through December 31, 2016. The ALJ established findings of fact which are summarized below.

The authorized treating physician (ATP), Dr. Scherr, referred the claimant to orthopedic surgeon Dr. Janes, who performed two surgeries to the claimant's right knee. Because of the claimant's frustration with the lack of expected improvement in her condition, Dr. Janes referred the claimant for additional orthopedic evaluations with Drs. Sterett and LaPrade. All three orthopedic surgeons agreed claimant would benefit from additional surgical intervention.

On April 24, 2016, Dr. Scherr reported that claimant refused to undergo the recommended surgical procedures recommended by the authorized providers and

[1] The claimant asserted in her application for a hearing the date of injury was February 4, 2015. In addition, based on a mistaken reference from respondent's counsel during the hearing (Tr. at 11), the ALJ inadvertently found the date of injury as February 4, 2015. Although the mistaken date is referenced by the claimant as an allegation of error, the inaccuracy is harmless and of no consequence to the issues before the Panel.

requested a fourth surgical opinion. Dr. Scherr refused the request and designated the claimant to have reached MMI as she would not accept the treatment recommended by her authorized providers.

The claimant challenged the finding of MMI and requested a Division sponsored independent medical examination (DIME). On October 7, 2016, Dr. Lindenbaum performed the DIME and agreed that claimant had reached MMI and opined that hardware removal could be of benefit as maintenance care. The DIME physician also opined that the claimant would not require additional physical therapy.

Before the DIME had been completed, claimant independently sought treatment with physical therapist Ms. Doyle at Axis Physical Therapy. Ms. Doyle recommended to the claimant that she be evaluated by Dr. Gottlob, an orthopedic surgeon. Between April 24 and December 30, 2016, claimant, admittedly without authorization, treated with these providers. Ultimately, the claimant underwent knee surgery with Dr. Gottlob, who, in turn, referred the claimant to Ms. Doyle for additional physical therapy. This treatment was paid through claimant's personal health insurance or out of pocket. The hearing was held on claimant's request that the respondent pay for this treatment.

In a previous hearing, claimant sought to overcome the DIME and deauthorize Dr. Scherr as the ATP. ALJ Michelle Jones determined that claimant had not overcome the DIME; denied deauthorization of Dr. Scherr as the ATP; and denied authorization of Dr. Gottlob as a treating physician.[2]

During the hearing in the claim presently before us, the claimant conceded that her physical therapy after April 24, 2016 (except for three authorized maintenance sessions), was not authorized and that she treated with Dr. Gottlob outside the workers' compensation system. Therapist Doyle did not request authorization from the claim adjuster.

The ALJ concluded that regardless of whether medical treatment after MMI was arguably reasonable or necessary, respondent was not required to pay for unauthorized treatment. Order at ¶ 6. Further, even though a pre-MMI referral to Ms. Doyle had been authorized, such referral was limited to performing physical therapy and did not provide Ms. Doyle with authority to make referrals to physicians.

[2] The claimant appealed this decision to the Panel and we affirmed. The appeal was advanced to the Court of Appeals, and on November 1, 2018, the Court in an unpublished decision, affirmed the Panel's order. 2017CA1998.

The ALJ did not credit the claimant's testimony that the closure of medical care at MMI necessarily compelled her to treat outside of the WC system. The ALJ concluded that the claimant had authorized access to three orthopedic surgeons but declined to continue treatment with any of them. Instead, the claimant chose to direct her own care. The ALJ determined that the WC Act does not compel respondent to pay for this choice.

A tangential issue arose before the ALJ as to whether the claimant was seeking reimbursement for vein treatment. The claimant, in her appeal to the Panel, stressed that she was not seeking reimbursement for such treatment and such was not an issue for hearing. The ALJ deemed that the issue was properly before her and determined that the vein treatment was not related to the industrial injury based on Dr. Scherr's opinion. The claimant does not appeal as to the merits of the vein treatment issue, other than to allege that the ALJ's consideration of an issue that was not before her generally constituted reversible error.

Ultimately, the ALJ denied the claimant's claim for the medical treatment obtained after MMI from Axis PT (Ms. Doyle) and Dr. Gottlob. The ALJ, as noted, also denied vein treatment.

The claimant filed a Petition to Review alleging error on the grounds that the ALJ's order was essentially identical to the proposed Findings of Fact, Conclusions of Law, and Order submitted by the respondent after the hearing. As further grounds, the claimant raises that certain specific findings of fact are in error and not supported by the evidence. Specifically, that the injury did not occur on February 4, 2016; that Dr. Scherr did not refer claimant to Dr. Janes, rather claimant chose Dr. Janes on her own without any referral; and that Dr. Janes did not refer claimant to Dr. LaPrade, rather claimant was referred to Dr. LaPrade by Dr. Scherr. The claimant reiterates that the ALJ erred in considering the vein treatment issue as such was not before the ALJ. The claimant argues, "Overall, the judge abused her discretion; the order is contrary to the main purpose of the WC Act and contrary to the intent of the General Assembly."

We first address claimant's contention that the ALJ erred in using the respondent's proposed Findings of Fact, Conclusions of Law, and Order as her own. Parties routinely submit proposed orders to the ALJs in the Office of Administrative Courts, and Colorado's appellate courts have declined to reverse orders because they originally were drafted by one of the parties. Under Rule 25(B) of the Office of Administrative Courts Rules of Procedure, OACRP-1 Code Colo. Reg., 104-3 at 7, a party has specific permission to file a proposed order when a request for a full order is filed. The fact that the ALJ may have adopted the respondents' proposed order as her own is not a basis for

disturbing the order on review. *See Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982); *Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 93, 420 P.2d 232, 235 (1966)("[I]f, [a]fter careful study, the trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own.") *cf. Barnett v. Elite Properties of America, Inc.*, 252 P.3d 14 (Colo. App. 2010); *see also Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-01 (April 29, 2014).

Merely because a party's proposed order was adopted by the ALJ does not dictate the conclusion that the ALJ abdicated her discretionary authority. Rather, it is presumed that the ALJ examined the proposed order and agreed that it correctly stated the facts as she found them to be. As explained by the Colorado Supreme Court in *Ficor*, otherwise, the ALJ would not have adopted them as her own. We further note that the ALJ did not adopt the respondent's proposed order verbatim. Thus, it is presumed that the order correctly reflects the independent determinations of the ALJ and, therefore, we will not disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

The claimant next argues that the issue of vein treatment was not an issue for hearing and the ALJ erred in considering it in her order. Claimant's application for hearing only listed the issue of: medical maintenance benefits—reasonable and necessary medical treatment beyond maximum medical improvement. Respondent did not counter-endorse any other issue. In her opening statement at hearing, the claimant did not raise the vein treatment issue. However, during the respondent's opening statement, counsel expressed his belief that the claimant had indicated she was seeking to have the vein treatment bills paid by the respondent. Tr. at 14. At the conclusion of claimant's testimony, the ALJ asked, "Is there anything else you want me to know?" The claimant stated, "There was a mention about vein issues." Tr. at 36. The ALJ proceeded to question the claimant at length regarding the vein treatment. The claimant explained that her varicose veins became symptomatic after her second surgery. She testified, "I did not ask Vail to pay for my vein treatment. Do I believe that it was related to the treatment of [my] work related injury? Yes, it was." Tr. at 38, 39. Later she testified, "And because my vein treatment happened before date of MMI, I am not including the reimbursement of treatment for my vein to the amount that I'm asking for." Tr. at 41. However, the ALJ specifically asked the claimant, "…there is a bill for a hundred dollars for an ultrasound that relates to the treatment of the vein? And you are seeking reimbursement for that ultrasound?" Claimant: "Yes." Tr. at 41. From this somewhat contradictory testimony, the ALJ reasonably inferred that the claimant was seeking reimbursement for the medical treatment related to her vein. We perceive no error in the ALJ considering this issue on its merits.

The determination of whether the medical treatment associated with the vein condition is compensable to this claim is a question of fact for the ALJ. Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard requires that we defer to the ALJ's resolution of conflicts in the evidence, her credibility determinations, and the plausible inferences she drew from the evidence. Accordingly, the scope of our review is exceedingly narrow. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). 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).

Here, the ALJ noted that Dr. Scherr opined that the claimant's varicose veins were not related to her work injury. Resp. Ex. L, M. The ALJ credited the opinion of Dr. Scherr in the absence of any credible medical evidence to the contrary, to conclude that the claimant's vein treatment was not related to the compensable injury or the medical treatment associated with the injury. Our review of the record finds substantial evidence to support the ALJ's factual determination that the vein treatment was not related to the work injury. Section 8-43-301(8), C.R.S.

The claimant also contends that the ALJ erred because she did not "remain neutral in interpretation of the facts and in applying the law to the facts." However, a "presumption of integrity, honesty, and impartiality" rests with the ALJ when deciding cases. *Ski Depot Rentals, Inc. v. Lynch*, 714 P.2d 516, 519 (Colo. App. 1985). Under this rule, the ALJ is presumed to be competent and unbiased until the contrary is shown. *Wecker v. TBL Excavating, Inc*., 908 P.2d 1186 (Colo. App. 1995). The claimant has failed to demonstrate, and we see no basis to conclude, that the ALJ was impartial in her factual findings or in her application of the law to the facts.

The specific facts that the claimant contends were wrongfully found by the ALJ are not relevant to the issues before us. Whether or not 1) the injury took place on February 4 versus February 9, 2015; 2) Dr. Janes was selected by the claimant rather being referred by Dr. Scherr; or 3) Dr. LaPrade was by referred Dr. Scherr rather than by Dr. Janes, are not material facts regarding post-MMI medical care. Accordingly, these allegations of error provide no basis for relief. Even assuming the ALJ erred in these

factual findings, the errors are harmless and not dispositive to the appeal. Section 8-43-310, C.R.S. (harmless error to be disregarded).

The claimant's remaining contentions of error are general statements that the ALJ abused her discretion; the order is contrary to the main purpose of the WC Act; and the order is contrary to the intent of the General Assembly. The claimant did not develop her contentions of error further, never articulating precisely how the ALJ abused her discretion, how the order is contrary to the Act, or contrary to the intent of the legislature.

The Panel's standard of review is derived statutorily from § 8-43-301(8), C.R.S. which states:

> The Panel may correct, set aside, or remand any order but only on the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the ALJ are supported by substantial evidence, they shall not be altered by the Panel.

None of the claimant's general contentions of error fit within our standard of review. Nevertheless, we review the ALJ's order under the factors contained within § 8-43-301(8), C.R.S. We first conclude that the ALJ's findings of fact are sufficient to permit appellate review. The claimant conceded she was aware that the treatment she was undergoing with Ms. Doyle and Dr. Gottlob was not authorized at the time she was treating and that it had never been authorized. This concession, in and of itself, is sufficient to permit appellate review.

Respondents are generally liable only for emergency and otherwise authorized medical treatment. Section 8-43-404(5), C.R.S. affords respondents the right to select the authorized treating physician. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Once the respondent has exercised that right, the claimant may not change physicians without approval from the respondent-insurer or the ALJ, unless the respondent impliedly gives the claimant permission to select the treating physician, or the claimant is referred to another provider in the normal progression of treatment from an authorized provider. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

We cannot ignore the uncontroverted record evidence that the respondent did not give permission for the claimant to be treated by therapist Doyle or Dr. Gottlob, the claimant did not attempt to obtain prior authorization, nor did respondent know of the treatment until after the treatment had been rendered. Claimant provided no legal authority, and we find none, that requires respondent to pay for unauthorized medical treatment whether or not the treatment was pre or post-MMI. Treatment sought by the claimant apart from that performed by the selected physicians and their referrals is not the liability of the respondent. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Workers' Compensation Rule of Procedure 16, 7 Code Colo. Reg. 1101-3, states a respondent may deny authorization or payment for a requested medical treatment solely on the basis the provider is not an 'authorized treating provider.' *See* Rules 16-9(E)(3) and 16-12(B)(1).

We conclude that the findings of fact are sufficient to permit our review; any conflicts in the evidence were resolved in the ALJ's order; the findings of fact are supported by the evidence; the findings of fact support the order and are otherwise supported by applicable law. To the extent that the ALJ's order required findings of fact, all such findings are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Accordingly, we find no basis on which to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order issued April 30, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger*

Kris Sanko*

David G. Kroll**

****Examiner Kroll submits a separate opinion concurring in the judgment and dissenting regarding the ALJ's analysis:**

I agree with a disposition of this appeal that affirms the ALJ's denial of the claimant's request for the reimbursement of medical payments. I do, however, disagree

with the analysis applied by the ALJ in reaching her conclusion.

The ALJ ruled in her Conclusions of Law, ¶ 6, that "Even if the treatment is reasonable, necessary and related, if the treatment is unauthorized, the respondents are not required to pay for it. Section 8-43-404(7); *Johnston v. Hunter Douglas, Inc*. W.C. No. 4-879-066-01 (April 29, 2014); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999)." On this basis the reimbursement request was dismissed.

The claimant here is requesting reimbursement for money she spent in obtaining physical therapy and a repeat knee surgery and for the outlays made in that regard by her personal health insurer. She testified, and asserted in her post hearing position statement, that she declined an offer for surgery by her treating surgeon because it involved two surgical procedures spaced five months apart. Her authorized treating physician, Dr. Scherr, construed this refusal of surgery, and the claimant's request for yet another surgical opinion, as an unreasonable request and determined the claimant was at MMI based on her decision to decline additional surgery. Medical maintenance treatment was denied by the respondents. The claimant stated she then obtained a surgical opinion and further surgery from Dr. Gottlob. Dr. Gottlob was not authorized by the respondents. The claimant asserts Dr. Gottlob's surgery greatly improved the function of her knee and allowed her to return to her preinjury job as a ski instructor.

The ALJ's legal analysis that "if the treatment is unauthorized, the respondents are not required to pay for it" does not address the application of § 8-42-101(6). That section provides:

> (6)(a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. …
>
> (b) If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier shall reimburse the claimant for the full amount paid….

This section allows a claimant reimbursement for reasonable and necessary medical treatment without requiring that it, or the medical provider, be authorized by the respondents. The conditions that serve as a prerequisite to an order for reimbursement include: 1) the request must be for reimbursement, i.e. the medical treatment has already been provided; 2) the claim has been admitted or found compensable by an ALJ or the Director; 3) the respondents have failed to furnish the medical treatment; 4) and the ALJ or the Director finds the medical treatment is "related … reasonable and necessary".

The section does not require the treatment have been provided by authorized medical providers. If it had, there would have been no need for this section and it would be pointless. Prior to the effective date of § 8-42-101(6), July 1, 2013, the law provided:

- The respondents were not liable for the cost of unauthorized medical care, *Pickett v. Colorado State Hospital*, 32 Colo. App. 282; 513 P.2d 228, 229 (1973; *Vandium Corp. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957.

- In the event the compensability of the claimant's injury is disputed and the respondents do not provide medical treatment, the ability to select the treating doctor passes to the claimant and when the claim is deemed compensable, the respondents are liable for the cost of the claimant's selected medical treater. *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988).

- The respondents could deny liability for an injury but still retain control of the medical treatment referrals by nominating a physician to treat the claimant. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228, 229 (Colo. App. 1999).

- An authorized provider could be reimbursed even when a treatment was not authorized by the respondents but was found to be reasonable and necessary. *Martin v. Hyams*, W.C. No. 4-781-144 (May 11, 2010) *see also*, *Oxford Chemicals v. Richardson*, 782 P.2d 843 (Colo. App. 1989)(reimbursement by one carrier to another for TTD benefits).

Accordingly, a statutory amendment allowing for reimbursement to the claimant and a private or public medical insurance carrier, limited solely to treatment from 'authorized' providers would be unnecessary. The change in the law represented by § 8-42-101(6) rests primarily in its application to unauthorized providers.

The rules for legislative construction, § 2-4-201(b), require that statutes are to be applied such that the "entire statute is intended to be effective." Here, § 8-42-101(6) applies to 'reimbursement' in the case of 'a claim that is admitted or found to be compensable', to the 'claimant', and to 'any' insurer or government program that pays for 'related', 'reasonable and necessary' 'medical treatment' that 'was provided'. There

is no limiting reference to authorized providers. To read such a limitation into the statute would render ineffective the inclusion of "any" insurer that pays for "treatment that was provided".

The ALJ cited to case authority that predated the effective date of § 8-42-101(6) (the *Johnston v. Hunter Douglas* decision dealt with transactions occurring prior to July 1, 2013). We have applied § 8-42-101(6) as an independent basis to affirm an ALJ's order to respondents to reimburse a claimant and his health insurance carrier for a related and necessary surgery. *Morin v. Ace Hardware*, W.C. No. 4-906-748-04 (May 6, 2014).

Here, rather than ruling the sole circumstance that Dr. Gottlob's surgery or the physical therapy was performed by unauthorized treaters, the ALJ should have addressed the issue of whether or not the fourth surgical opinion and the surgery was 'necessary' and whether the respondents actually 'failed' to furnish that medical treatment (the respondents contend surgery was offered, but then declined).

However, on this record the claimant's request for reimbursement must be declined for another reason. The claimant was placed at MMI in April, 2016, by her treating doctor. That MMI date was adopted by the DIME physician. The claimant challenged the MMI finding at hearing and was unsuccessful. Her surgery occurred on November 16, 2016, and her physical therapy was also post-MMI. Accordingly, regardless of whatever medical provider performed the surgery or physical therapy, the surgery was aimed at improving the claimant's condition and such treatment is not the liability of the respondents. The finding of MMI by an ATP ends the claimant's entitlement to further treatment to cure and relieve the effects of the claimant's injury. *Whiteside v. Smith*, 67 P.3d 1240, 1245 (Colo. 2003), *Portillo v. Shoco Oil*, W.C. No. 4-942-787-01 (May 1, 2017), *aff'd, Portillo v. Industrial Claim Appeals Office*, (Colo. App. No. 17CA0845, March 8, 2018)(not selected for publication). For this reason, the ALJ's order denying the claimant's request for medical cost reimbursement must be affirmed.

David G. Kroll
Examiner

***Majority addendum regarding the dissenting opinion.**

We concur with the dissent that another basis for affirming the ALJ exists here. Specifically, we agree that the determination of MMI rendered all treatment thereafter to

be non-reimbursable.

With that concurrence, our review need not proceed further. We echo the maxim of then-Judge John Roberts, "This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—*if it is not necessary to decide more, it is necessary not to decide more*—counsels us to go no further. My brethren, however, are not content with this narrow and effectively conceded basis for disposition, and instead adopt an alternative ground of far broader significance, one that precipitates disagreement among us but at the end of the day leads to the same result—[affirmance]. [We] cannot go along for that gratuitous ride." *PDK Labs, Inc. v. Drug Enforcement Admin*., 360 U.S. App. D.C. 344, 357, 362 F.3d 786, 799 (2004) (Roberts, J., concurring in part and concurring in judgment). (Emphasis added.) Here, with our unanimous affirmation of the ALJ's order, it is not necessary to review § 8-42-101(6), C.R.S.

Accordingly, we must depart from the dissent in its introduction of a new construct to § 8-42-101(6).

The dissent correctly states that the ALJ's legal analysis does not address the application of § 8-42-101(6). It is a correct statement because, 1) the claimant did not raise the statute or an interpretation thereof before the ALJ at hearing, and 2) in our judgment, the statute does not apply to the circumstances of this claim. The claimant did not raise the argument before the ALJ and does not present it to us in her brief. The dissent's activism herein smacks of ultra vires advocacy on behalf of the claimant forbidden by our governing statutes. Sections 8-1-102, 8-43-301, C.R.S.

The dissent establishes a legislative intent for the statute through a contorted process of trying to determine what the General Assembly did not say or what was not necessary to say, rather than what it actually enacted. The dissent conjures a legislative intent that in our view is inapposite to the actual legislative intent.

The Colorado Supreme Court in *Buckley v. Chilcutt (In re Statement of Sufficiency for 1997-98 #40)*, 968 P.2d 112, 117 (Colo. 1998), instructs us in statutory construction: "We apply traditional principles of statutory construction. We initially rely on the language of the statute, giving words and phrases their plain and ordinary meaning." When that language is clear and unambiguous there is no need to resort to interpretative rules of statutory construction. *Rios v. Mireles, 937 P.2d 840 (Colo. App. 1996).* However, where the language of a statute is capable of more than one interpretation, it is ambiguous and must be construed in light of the apparent legislative intent and purpose. *See Support, Inc. v. Industrial Claim Appeals Office*, 968 P.2d 174 (Colo. App. 1998). In

such circumstances, we must construe the entire statutory scheme in a manner that gives consistent, harmonious, and sensible effect to all its parts. *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). As part of our inquiry we also will consider the legislative history where instructive, *see* 2-4-203(c), C.R.S., and the potential consequences of a particular construction. *See* 2-4-203(e), C.R.S.

We do not perceive any ambiguity in the statute. Yet, to the extent the dissent suggests an ambiguity in the statute, it becomes necessary for us to address the legislative intent. *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003); *Midboe v. Industrial Claim Appeals Office*, 88 P.3d 643 (Colo. App. 2003).

Prior to the enactment of § 8-42-101(6), when a carrier denied the WC claim and refused to provide medical care, the claimant, by necessity, would select and obtain medical care at the claimant's own expense. When the claim was later deemed compensable, the carrier would submit payment for this past medical care *directly to the medical provider*—even though the claimant was usually out-of-pocket—and limit the payment to the fee schedule. The medical provider would supposedly, but rarely expeditiously, reimburse the claimant for monies that were paid, but the provider would only reimburse up to the limited monies paid to it under the fee schedule. This embroiled the claimant in a dispute with the medical provider to enforce the fee schedule and eventually obtain reimbursement for fee schedule overages. In our view, § 8-42-101(6) was intended to remedy that insufficiency in the WC Act and require reimbursement directly to the claimant (and, if applicable, to the claimant's health insurance carrier) so as to make the claimant whole. We do not believe that it was ever intended to require that a carrier pay for any unauthorized pre-MMI care, simply upon a showing of reasonableness and necessity, etc., as would be the practical effect under the dissent's reasoning.

The dissent cites to *Morin v. Ace Hardware, supra*. In that case, claimant and his health insurance carrier were reimbursed for a related and necessary surgery after the fact. However, this case is distinguishable from the present case in that the doctor that ultimately performed the surgery in *Morin* was found to be an authorized physician through the chain of referral from an authorized treating physician.

Section § 8-42-101(6) was contained within Senate Bill 13-285, ch. 301, p. 1593, § 1. The bill was a collaborative effort between the WC claimant's bar (the WC Education Association) and the WC insurance industry (primarily Pinnacol Assurance). Two of the co-sponsors of the bill, Representative Williams and Senator Tochtrop,

testified at their respective committees using identical words of explanation for the purpose of the Bill:

> If the carrier does not furnish medical care to the claimant as required by the WC Act, and the claim is *eventually* found to be compensable, the claimant is reimbursed for the cost of what the claimant paid. (Emphasis added.) (Hearing before the House Business, Labor, Economic, and Workforce Development Committee, *http://coloradoga.granicus.com/MediaPlayer.php?view_id=17&clip_id=4098) at 05:49*.)
> (Hearing before the Senate Business, Labor, and Technology Committee, *http://coloradoga.granicus.com/MediaPlayer.php?view_id=41&clip_id=3930) at 58:19*.)

We find these statements to be a clear recitation of the General Assembly's intent. It is hard to square with practical experience that Pinnacol and the insurance industry would have intended that they be liable to pay for unauthorized medical care whether that care is pre or post-MMI and especially under the circumstances of this claim. The dissent's reasoning eliminates any distinction between authorized and unauthorized medical care throughout the Act. In our view, this is an absurd result with potentially catastrophic consequences to the WC system.

Lastly, to the extent that a footnote in a prior order of the Panel conflicts with this interpretation of § 8-42-101(6)(a) and (b), C.R.S., we choose not to follow it. *See Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018)(Footnote 1).

CERTIFICATE OF MAILING

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

12/24/18 by TT .

DANIELA GOSSELOVA, PO BOX 1004, WINTER PARK, CO, 80482 (Claimant)
RITSEMA & LYON PC, Attn: PAUL KRUEGER ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

COLORADO COURT OF APPEALS **2018COA162**

Court of Appeals No. 17CA1171
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-922-618

Brian Nanez,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Mechanical & Piping, Inc.; and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE HAWTHORNE
J. Jones and Vogt*, JJ., concur

Announced November 15, 2018

Kaplan Morrell LLC, Michael H. Kaplan, Greeley, Colorado; Volant Law LLC, J. Bryan Gwinn, Englewood, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Mechanical & Piping, Inc., and Pinnacol Assurance

Burg Simpson Eldredge Hersh & Jardine, P.C., John M. Connell, Englewood, Colorado, for Amicus Curiae Workers' Compensation Education Association

Burg Simpson Eldredge Hersh & Jardine, P.C., Nelson Boyle, Englewood, Colorado, for Amicus Curiae Colorado Trial Lawyers Association

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.

VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 In this workers' compensation case, claimant, Brian Nanez, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed an order by the administrative law judge (ALJ) determining that (1) Mechanical & Piping, Inc., and Pinnacol Assurance (collectively, employer) aren't liable to pay for medically prescribed conservator and guardian services under section 8-42-101(1)(a), C.R.S. 2018; and (2) Mr. Nanez's average weekly wage (AWW) shouldn't be increased. We affirm the Panel's final order.

¶ 2 In doing so, we address an issue of first impression as to section 8-42-101(1)(a)'s language requiring "[e]very employer . . . [to] furnish such medical . . . treatment . . . as may reasonably be needed at the time of the injury . . . and thereafter during the disability to cure and relieve the employee from the effects of the injury." Specifically, we address whether this language covers the costs of providing conservator or guardian services to a permanently and totally disabled claimant suffering from a traumatic brain injury. Under the circumstances here, we conclude that the statutory language doesn't cover the costs of conservator or guardian services for Mr. Nanez because the conservator services

don't help care for or remedy his injury and Mr. Nanez didn't establish that the guardian services are reasonably needed to cure and relieve him from the effects of his injury.

I. Facts and Procedural History

¶ 3 Mr. Nanez worked as a plumber for Mechanical & Piping, Inc. As a result of a work-related accident, he sustained permanent, disabling closed head injuries, causing significant cognitive deficits. Mr. Nanez's authorized treating physician, Dr. Hugh Macaulay, and the physician who conducted a division-sponsored independent medical examination placed Mr. Nanez at maximum medical improvement (MMI) with a permanent impairment rating of forty-seven percent of the whole person, with forty percent of that being attributed to his brain injury. Employer admitted liability for permanent total disability.

¶ 4 Dr. Macaulay's MMI and impairment report noted that Mr. Nanez's brain injury prevented him from "maintain[ing] his function and independence." He described Mr. Nanez as having "executive function, but it is impaired"; "fair" short term memory; and "somewhat unreliable" recent memory. Mr. Nanez requires

assistance with everyday tasks such as grocery shopping, banking, and navigating around town.

¶ 5 Because of Mr. Nanez's cognitive impairments, Dr. Macaulay concluded that Mr. Nanez "will need to have oversight for his financial and medical management." And deeming their services to be "reasonable and necessary," Dr. Macaulay recommended that both a conservator and a guardian be appointed to function as Mr. Nanez's "peripheral brain." In a separate proceeding, a district court appointed both a conservator and a guardian for Mr. Nanez.

¶ 6 Mr. Nanez asked for a hearing, seeking an order requiring employer to pay for the conservator's and guardian's services under section 8-42-101(1)(a). He also asked that his AWW be increased to cover his lost potential earning capacity, reflecting wages he would've earned as a master plumber had he not been injured.

¶ 7 The ALJ denied both requests. Applying section 8-42-101(1)(a), he was "not persuaded that the [Workers' Compensation] Act provide[d] [him] with the authority to require [employer] to pay for a guardian and conservator to manage [Mr. Nanez's] workers' compensation benefits." And he found that the services of a conservator and a guardian were "legal in nature,"

noting that court cases allowing for housekeeping services are based on those services having relieved "the symptoms and effects of the injury and were directly associated with [the] claimant's physical needs."

¶ 8 As to the conservator's services specifically, the ALJ found that "ensuring that [Mr. Nanez] handles his finances does not cure or relieve [him] from the effects of the industrial injury," and even with such services, "[Mr. Nanez's] physical condition remains the same, although his financial situation may improve." And, as to the guardian's services, the ALJ found that "[Mr. Nanez's] medical records document a long history of medical treatment . . . prior to [him] having a guardian appointed," and that "the medical records do not document that [the issues as to Mr. Nanez's independent judgment involving his medical care, including taking medications] significantly affected [Mr. Nanez's] ability to receive appropriate medical treatment." So the ALJ found that "Mr. Nanez] ha[d] failed to establish that the duties of a guardian in managing [his] treatment and ongoing care are reasonable and necessary," and that employer "may be able to provide the same services for [Mr. Nanez] through the use of a nurse case manager."

¶ 9 The ALJ also concluded that Mr. Nanez's request to increase his AWW was "too speculative." And he noted that despite Mr. Nanez's professed intent prior to the accident to continue working as a plumber and earn his master plumber certification, it was "impossible to ascertain what would have happened with [Mr. Nanez] if not for his workers' compensation injury."

¶ 10 The Panel affirmed the ALJ's rulings. It followed the ALJ's reasoning, relying on *Bogue v. SDI Corp.*, 931 P.2d 477 (Colo. App. 1996), *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992), and *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The Panel read these cases as reflecting the court of appeals' conclusion that section 8-42-101(1)(a) doesn't allow expenses for services that merely improve a claimant's lifestyle or assist with daily tasks. And, it held that a conservator's "functions are primarily financial and are not accurately described as medical or nursing services. Accordingly, they are not compensable expenses."

¶ 11 The Panel also held that a guardian's services "fail to fall easily into the category of medical benefits." And it noted that the statute governing guardians prohibits an individual from serving as both a

guardian and a "direct service provider" to an incapacitated person, *see* § 15-14-310(5), C.R.S. 2018, and that such "activities are largely outside of a reasonable definition of medical care."

¶ 12 As to Mr. Nanez's request to increase his AWW, the Panel found that the ALJ didn't err in applying the law and didn't abuse his discretion in determining that such an increase was speculative.

II. The Conservator's and Guardian's Services

¶ 13 On appeal, Mr. Nanez doesn't clearly say how he thinks the Panel erred in its final order. Instead, he contends broadly that employer "should be liable to pay for the fiduciary services of a court-appointed [g]uardian and [c]onservator that provide relief from his brain injury" and that "fiduciary services that are required to compensate for an injured worker's lost brain functioning are medical benefits under the statute because such services relieve the effects of the brain injury."

¶ 14 Mr. Nanez also contends that employer failed to submit any rebuttal testimony or evidence at the hearing to contradict his evidence, and that the ALJ abused his discretion by disregarding the undisputed evidence that his injuries affect his ability to perform daily tasks. He asserts that his cognitive deficits render

tasks such as banking, taking medication, following physicians' instructions, and managing his money nearly impossible. He argues that the conservator and guardian carry out these functions on his behalf, essentially acting as his "peripheral brain," and thus "reliev[e] the effects" of his admitted, work-related injuries.

¶ 15 Finally, Mr. Nanez contends that substantial evidence, without any contrary evidence, supports a finding that the conservator's and guardian's services are reasonable and necessary.

¶ 16 Employer responds that we needn't interpret section 8-42-101(1)(a) to determine whether the fees for the conservator's or guardian's services constitute medical treatment that must be provided under the statute because the ALJ's factual finding that those services aren't reasonable and necessary in this case is supported by substantial evidence.

¶ 17 We disagree with Mr. Nanez and conclude that substantial record evidence supports the ALJ's finding that Mr. Nanez failed to establish that the conservator's and guardian's services are reasonable and necessary in this case.

A. Standard of Review and Law

¶ 18 We review an administrative agency's conclusions of law de novo. *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). Though we afford considerable weight to an agency's reasonable interpretation of its own enabling statute, we aren't bound by its legal interpretations. *Id.* We also defer to the interpretation of a statute adopted by the officer or agency charged with its administration as long as that interpretation is consistent with the statute. *Id.*

¶ 19 We are bound by and may not set aside the ALJ's factual findings if they are supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2018; *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 431 (Colo. App. 2010) ("When an ALJ's findings of fact are supported by substantial evidence, we are bound by them."); *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007). As the fact finder, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

¶ 20 "A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence . . . ." § 8-43-201(1), C.R.S. 2018.

B. Compensable Medical Treatment Under the Statute

¶ 21 Section 8-42-101(1)(a) requires "[e]very employer . . . [to] furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury . . . and thereafter during the disability to cure and relieve the employee from the effects of the injury."

¶ 22 We conclude that the conservator's and the guardian's services aren't medical treatment as that term is used in section 8-42-101(1)(a). It follows that employer isn't liable to pay for such services as compensable medical treatment under the statute.

¶ 23 We also conclude that substantial record evidence supports the ALJ's factual findings that (1) the conservator's services in handling Mr. Nanez's finances don't cure or relieve him of his injury's effects, and his "physical condition remains the same, although his financial situation may improve" with such services; and (2) Mr. Nanez failed to establish that the guardian's duties in

managing his treatment and ongoing care are reasonable and necessary.

¶ 24 Under the plain language of section 8-42-101(1)(a), the claimed expenses must be for medical or nursing treatment or incidental to obtaining such medical or nursing treatment. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116, 1118 (Colo. App. 1997) (citing *Country Squire Kennels*, 899 P.2d 362). And the service provided must be reasonably needed to cure and relieve the injury's effects and be related to the claimant's physical needs. *Id.* (citing *Hillen v. Tool King*, 851 P.2d 289 (Colo. App. 1993)). In other words, to be considered a medical benefit under the statute, the service must be a medical service that is reasonably necessary for treating the injury or that provides therapeutic relief from the injury's effects. *See Bogue*, 931 P.2d at 478 (applying the statutory interpretation in *Cheyenne County Nursing Home v. Industrial Claim Appeals Office*, 892 P.2d 443, 445 (Colo. App. 1995), which states that the statute requires "the apparatus *or service* have therapeutic benefit" (emphasis added), to support a claim for wheelchair-accessible van as medical "apparatus" or benefit).

1. Claim for Conservator's Services

¶ 25 Mr. Nanez's claim for the conservator's services is analogous to the claims made and rejected in *Cheyenne* and *Bogue*. Certainly, we recognize that those cases involved claims for a medical apparatus under subsection 101(1)(a), but we conclude that the principles enunciated therein are equally applicable to claims under the same statutory subsection for services asserted to be "medical treatment." After all, the statutory terms "treatment" and "apparatus" are both modified by the term "medical" and therefore refer to a treatment or an apparatus used "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a); *see ABC Disposal Servs. v. Fortier*, 809 P.2d 1071, 1072 (Colo. App. 1990) (interpreting section 8-42-101's predecessor statute and stating that the term "apparatus" refers to a medical apparatus used for treatment "to cure and relieve from the effects of the injury"; therefore, a snowblower wasn't prescribed as a medical aid to cure or relieve the claimant of symptoms of his injury, but instead to provide an easier way to perform a household chore).

¶ 26 In *Cheyenne*, another division of this court denied the request of a quadriplegic, wheelchair-restricted claimant for a stair glider to allow her access to her basement during dangerous weather. In doing so, the division relied on *Hillen*, 851 P.2d 289 (denying lawn care service not prescribed to cure or relieve symptoms of the claimant's injury, but only to relieve claimant from the rigors of yard work), and held that "the employer's obligation was limited to providing services that relieved the symptoms of the injury and which provided for the claimant's direct physical needs." 892 P.2d at 445. The division ultimately concluded that "the stair glider provide[d] no therapeutic benefit relative to [the claimant's] disabling injury," nor was it "necessary for access to health or medical necessities." *Id.* at 446.

¶ 27 The *Bogue* division relied on *Cheyenne* in concluding that, under the facts before it, a wheelchair-accessible van wasn't a compensable medical "apparatus" or benefit. *Bogue*, 931 P.2d at 478. The claimant had suffered a work-related accident that rendered him an incomplete quadriplegic. Following the *Cheyenne* division's lead, the *Bogue* division held that for a particular apparatus to be a statutory medical benefit, "it must be a medical

apparatus that is reasonably necessary for treatment of the injury or that provides therapeutic relief from the effects of the injury." *Id.* And based on this reasoning, the division concluded that the requested van wasn't a medical aid reasonably necessary for treating the claimant's injury because the van wouldn't help care for or remedy the claimant's quadriplegia, nor would it provide therapeutic medical relief from the injury's effects or symptoms. *Id.* at 479.

¶ 28 We likewise conclude that the conservator's services provided by her exercising her powers "granted in . . . § 15-14-425" for Mr. Nanez's benefit to assist him with his workers' compensation claim and with handling his finances won't help care for or remedy Mr. Nanez's cognitive deficiencies caused by his traumatic brain injury. As the ALJ found, "ensuring that [Mr. Nanez] properly handles his finances does not cure or relieve [him] from the effects of the industrial injury"; in other words, Mr. Nanez's "physical condition remains the same, although his financial situation may improve."

¶ 29 The ALJ's finding and our conclusion are supported by substantial record evidence — namely, an opinion letter from Dr. Macaulay, Dr. Macaulay's MMI report, and Dr. Macaulay's

testimony at the hearing. First, in the letter, Dr. Macaulay said that he and Mr. Nanez's psychiatrist and psychologist agree that Mr. Nanez doesn't have the ability to adequately supervise conventional functions of daily life, and "to that end," they recommended "both a guardian and a conservator to provide him with adequate management in his activities of daily living." Second, in his MMI report, Dr. Macaulay said that "Mr. Nanez has significant need for supervision," and he needs "someone to oversee his planning, use of financial resources and protect him from other individuals and facilitate interactions." Finally, Dr. Macaulay testified at the hearing that because of Mr. Nanez's brain injury, he requires assistance with everyday tasks such as taking medication, following physicians' instructions, navigating around town, grocery shopping, banking, and managing his money.

¶ 30 But "compensation is not awarded . . . if the only services being rendered to the claimant are ordinary household services." *Edward Kraemer & Sons*, 852 P.2d at 1288; *see also ABC Disposal Servs.*, 809 P.2d at 1073 (holding that snowblower wasn't prescribed as medical aid to cure or relieve injury's symptoms, but to provide easier method of performing a household chore).

¶ 31 Dr. Macaulay didn't say that the conservator's services in managing Mr. Nanez's finances were necessary for treating Mr. Nanez's brain injury or that such services would provide therapeutic relief from the injury's effects. Instead, he said that the conservator's services would act as a "peripheral brain" in the same manner that a seeing-eye dog "serves as peripheral eyesight," and that Mr. Nanez "needs help in guiding him in what he should be doing." Dr. Macaulay also described what he would want the conservator to do as to Mr. Nanez's medical treatment and keeping him safe: "In regard to his medical treatment, I would like any comments or thoughts . . . [,] but the management of the medical is going to be mine and the management of the financial is going to be [hers]." And finally, Dr. Macauley testified that "at this point, we're not going to improve [Mr. Nanez's] function."

¶ 32 Based on this substantial record evidence, we conclude that the conservator's services don't help care for or remedy Mr. Nanez's traumatic brain injury or his resulting cognitive disabilities. Nor do her services provide Mr. Nanez therapeutic medical relief from his injury's effects or symptoms. So we reject Mr. Nanez's contention that employer is statutorily liable to pay for the conservator's

services. We also reject his contention that, as to the conservator's services, the ALJ abused his discretion by disregarding the undisputed evidence that his injuries affect his ability to carry out daily tasks. As indicated above, the ALJ's finding that although the conservator's services assist Mr. Nanez in improving his financial situation, his physical condition remains the same, is supported by substantial record evidence. *See* § 8-43-308.

2. Claim for Guardian's Services

¶ 33 The ALJ found that Mr. Nanez "failed to establish that the duties of a guardian in managing [his] treatment and ongoing care are reasonable and necessary in this case." Mr. Nanez contends that substantial evidence, without any contrary evidence, supports a finding that the guardian's services are reasonable and necessary. We disagree that no contrary evidence supported the ALJ's finding.

¶ 34 Determining whether services are either medically necessary to treat a claimant's injuries or incidental to obtaining such treatment presents a factual question. *Bellone*, 940 P.2d at 1117. We must uphold an ALJ's resolution of a factual question that is supported by substantial evidence. *Id.* at 1117-18. "Substantial evidence is that which is probative, credible, and competent, such

that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory testimony or inference." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006).

¶ 35 The ALJ acknowledged Mr. Nanez's argument that the guardian's services allow him to schedule and attend medical appointments. But he found that the same type of service could be provided by a less restrictive measure. The ALJ based his finding on extensive medical records documenting Mr. Nanez's long history of medical treatment prior to the guardian being appointed. And he found that although Dr. Macaulay testified to some significant doubts about Mr. Nanez's judgment as to his medical care, including taking medications, Mr. Nanez's medical records didn't document those issues as having significantly affected his ability to receive appropriate medical treatment. The ALJ also found that employer may be able to provide the same services as a guardian in managing Mr. Nanez's treatment and ongoing care by using a nurse case manager to schedule his medical appointments and remind him of upcoming appointments.

¶ 36 As we read these findings, they rest on the premise that a nurse case manager can provide the services Mr. Nanez needs in managing his treatment and ongoing care for his work-related injury. We conclude that these findings are supported by substantial record evidence. Specifically, the record shows that a nurse case manager assisted in Mr. Nanez's care for approximately seven months. Her twenty-two pages of detailed medical review notes for that period show that, among other things, she maintained contact with Mr. Nanez's medical providers to keep updated on his progress, facilitated treatment recommendations and Mr. Nanez's compliance with those recommendations, monitored his medications and complaints for possible medical needs, and on at least one occasion attended a medical appointment with him. We have found nothing in the record, and Mr. Nanez hasn't pointed us to anything, indicating that the type of services provided by the nurse case manager were insufficient to manage Mr. Nanez's medical treatment and ongoing care. And Mr. Nanez concedes in his opening brief that "some of the [g]uardian's duties resemble services that could theoretically be provided by Pinnacol and/or a [nurse case manager]," and that Pinnacol

assigned another nurse case manager to Mr. Nanez's case after the hearing. So we conclude that substantial record evidence supports the ALJ's finding that a nurse case manager may be able to provide the same services as a guardian would in managing Mr. Nanez's treatment and ongoing care.

¶ 37 Still, Mr. Nanez argues that the guardian complements the nurse case manager by providing fiduciary services and the "sort of hand holding" his brain injury requires. But, again, the ALJ found, based on the record of Mr. Nanez's long medical history, that these issues hadn't affected Mr. Nanez's receiving appropriate medical treatment. Again, our review of the record doesn't show otherwise and Mr. Nanez hasn't pointed us to anything in the record showing otherwise.

¶ 38 We therefore conclude that the ALJ's factual findings are supported by substantial evidence, and we affirm the Panel's determination that Mr. Nanez failed to establish that the services of the guardian are reasonable and necessary in this case.

¶ 39 Finally, we note that "[t]he purpose in requiring an employer to provide medical benefits under the Act is to allow an injured worker to reach maximum medical improvement and maintain that status."

Bogue, 931 P.2d at 480 (citing *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988)). But, as with the wheelchair-accessible van in *Bogue*, the conservator's and the guardian's services here weren't prescribed as medical treatment to cure Mr. Nanez's traumatic brain injury or relieve him from its medical effects. Instead, these services were prescribed as a way of helping Mr. Nanez deal with everyday tasks of daily life. "While these are certainly salutary goals, they are beyond the intent of § 8-42-101(1)(a)." *Id.* And whether the services necessary to meet these salutary goals should be compensable under the statute is an intrinsically legislative decision that we must avoid making. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000) (it's not up to a court to make or weigh policy).

III. Requested AWW Increase

¶ 40 Mr. Nanez contends that the Panel erred in affirming the ALJ's denial of an increase to his AWW. We affirm this portion of the Panel's order.

¶ 41 The ALJ found that Mr. Nanez's request to increase his AWW based on his intent to earn a master plumber certification "would require too much speculation as to what Mr. Nanez would have

done if not for the work injury." Mr. Nanez argues that because the uncontroverted evidence established that he had "career aspirations," "plans . . . to continue in commercial plumbing," and "expectations" of obtaining his plumbers' license, his future AWW wasn't speculative but instead showed a demonstrated intent to pursue master plumber certification. Indeed, he argues, the evidence showed that his income was likely to increase. He argues that it would be "manifestly unjust" to freeze his wages at the amount he was earning when he was injured given that he potentially could have earned much more. So, he reasons, the ALJ should have acted under his discretionary authority to adopt a more equitable AWW.

¶ 42 We aren't persuaded. We agree with the ALJ and the Panel that "expectations," "a plan," and "career aspirations" don't constitute sufficient concrete steps toward Mr. Nanez's goal of becoming a master plumber to support an increase in AWW. Because any number of unforeseen barriers could have inhibited Mr. Nanez's intent to become a master plumber, we perceive no abuse of discretion in the ALJ's finding that Mr. Nanez's future earnings were too speculative to warrant increasing his AWW.

¶ 43 Under the Act, an ALJ "may compute the average weekly wage of [an] employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage." § 8-42-102(3), C.R.S. 2018. This provision grants an ALJ wide discretion to determine a claimant's AWW. Because the determination is discretionary, we won't set it aside absent a showing that the ALJ abused his discretion. "Because the authority to select an alternative method for computing the average weekly wage is discretionary, we may not interfere with the ALJ's order unless it is beyond the bounds of reason, that is, where it is unsupported by the evidence or contrary to law." *Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867, 869 (Colo. App. 2001).

> [T]he claimant's average weekly wage is to be calculated "in such other manner and by such other method as will, *in the opinion of the [ALJ]*" fairly compensate a claimant. The method of calculation to be used in the ultimate determination of the claimant's award then . . . is to be left in the first instance to the ALJ. Put simply, the ALJ should be allowed to employ the discretion accorded him or her . . . before a court expropriates that discretion by ordering a specific compensation award to the claimant.

Coates, Reid & Waldron v. Vigil, 856 P.2d 850, 857-58 (Colo. 1993) (citation omitted).

¶ 44 The ALJ found that Mr. Nanez's professed plan to earn his master plumber certification was simply that — a plan with no concrete steps taken toward its execution. Distinguishing the facts before him from those in *Pizza Hut*, the ALJ noted that unlike Mr. Nanez, the injured worker in *Pizza Hut* had completed his degree and begun a job in his field of choice. *See* 18 P.3d at 868. Mr. Nanez, by contrast, hadn't yet enrolled in classes to become a master plumber when he was injured. Thus, although Mr. Nanez testified that he had hoped to become a master plumber and own his own plumbing business, those goals were merely aspirational at the time of his accident. We can't say that the ALJ abused his discretion in deciding that Mr. Nanez's potential future wages were too speculative to warrant increasing his AWW.

¶ 45 Because the ALJ's decision declining to increase Mr. Nanez's AWW is supported by substantial record evidence, the Panel properly affirmed it. *See Coates, Reid & Waldron*, 856 P.2d at 857-58; *Pizza Hut*, 18 P.3d at 869.

IV. Conclusion

¶ 46 The Panel's final order is affirmed.

JUDGE J. JONES and JUDGE VOGT concur.

COLORADO COURT OF APPEALS

DATE FILED: December 13, 2018
CASE NUMBER: 2017CA2066

Court of Appeals No. 17CA2066
Industrial Claim Appeals Office of the State of Colorado
WC No. 3-928-088

Lori Madden-Grammer,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Poudre Valley Hospital; and Colorado Hospital Association Trust,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE DAILEY
Lichtenstein and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 13, 2018

Irwin Fraley, PLLC, Brad R. Irwin, Centennial, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Andrew R. Bantham, Douglas L. Stratton, Fort Collins, Colorado, for Respondents Poudre Valley Hospital and Colorado Hospital Association Trust

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 This workers' compensation claim asks us to review the procedures governing appeals of medical utilization reviews (MURs) under section 8-43-501, C.R.S. 2018. Since sustaining injuries in a work-related accident thirty years ago, claimant, Lori Madden-Grammer, has been receiving on-going medical maintenance benefits. Her employer, Poudre Valley Hospital, and its insurer, Colorado Hospital Association Trust (collectively employer), requested an MUR to challenge the reasonableness and necessity of some of the treatment claimant underwent. An administrative law judge (ALJ) and the Industrial Claim Appeals Office (Panel) upheld the MUR panel's recommendation for a change of provider. We likewise affirm.

I. Procedural and Factual Background

¶ 2 The record and procedural history in this case are lengthy and complex. For purposes of this appeal, we will limit our background discussion to those facts relevant to the issue currently before us.

¶ 3 Claimant sustained multiple, admitted, work-related injuries secondary to a 1988 automobile accident. She later developed complex regional pain syndrome (CRPS) as a result of those

injuries. Her symptoms subsequently worsened, and, by 2008, she was no longer able to work.

¶ 4 Thereafter, claimant moved to Nevada where, beginning in January 2009, she came under the care of Dr. Brian Lemper. Dr. Lemper treated claimant with platelet rich plasma (PRP) injections. In 2014, he testified that he had performed over 100 PRP injections on claimant. Both he and claimant praised the injections, which Dr. Lemper characterized as a "significant success" that enabled claimant to "walk with a normal appearing foot and stop using her narcotic medications." According to Dr. Lemper, there "was noted improvement of [claimant's] right ankle range of motion as well as considerable improvement of her right ankle swelling."

¶ 5 However, in 2013, employer questioned the reasonableness and necessity of so many PRP injections and applied for a hearing to challenge the treatment. As employer points out, the Medical Treatment Guidelines only authorize three PRP injections: "If PRP is found to be indicated in these select patients, the first injection may be repeated twice when significant functional benefit is reported but the patient has not returned to full function." Colo. Dept. of Labor,

Med. Treatment Guidelines, Rule 17, Ex. 6, Lower Extremity Guidelines, Sec. F(6)(d), pp. 150-151.

¶ 6 After conducting a two-day hearing on the issues raised by employer, ALJ Allegretti found that claimant does indeed suffer from CRPS, but that "the benefit of the PRP therapy is temporary and not long-term. . . . [I]t is found that overall, [c]laimant's condition has deteriorated from the time period prior to when she first received PRP injections to the present." Based on this finding, ALJ Allegretti ruled that the PRP injections were not "reasonably necessary to cure or relieve the effects of [claimant's] work injury." Her order terminated the treatment.

¶ 7 Despite ALJ Allegretti's order, Dr. Lemper continued administering PRP injections to claimant. To challenge Dr. Lemper's continued use of the treatment, employer then requested an MUR pursuant to section 8-43-501. Three physicians were selected to conduct independent reviews of Dr. Lemper's post-order treatment of claimant: Dr. Lynne Fernandez, Dr. Joseph Fillmore, and Dr. J. Ethan Moses.

¶ 8 All three physicians opined that the PRP treatments Dr. Lemper administered were not reasonably necessary and were

"excessive." Dr. Fernandez supported her conclusion with two primary observations: (1) that any relief claimant received from the treatment was temporary, lasting "6 to 8 weeks" after which "the pain returns to pre-injection levels"; and, (2) that Dr. Lemper's and claimant's self-reported improvement with the treatment was not corroborated by other physicians, whose records indicated that claimant's condition had deteriorated during the time period in question. Likewise, Dr. Moses surmised that

> Dr. Lemper's clinic note on 8/5/15 is where he begins to diverge from reasonable and necessary treatment. He states that Ms. Madden-Grammer was "pleading for PRP injections," and despite the 22 previous PRP injections into the low back and 19 into the ankle that provided no long-term benefit, he decides to move forward with even more PRP injections into multiple body parts.

Each MUR physician, having personally reviewed claimant's medical records, independently concluded that Dr. Lemper should not be permitted to continue treating claimant.

¶ 9 Noting that "the members of the reviewing committee unanimously recommended that a change of provider be made . . . [and] that the payment of fees be retroactively denied," the Director of the division of workers' compensation ordered a change of

provider and retroactive denial of payments to Dr. Lemper. Claimant admits that, in compliance with section 8-43-501(4) of the MUR statute, employer then referred her to other physicians for treatment.[1]

¶ 10 Claimant appealed the Director's decision to an ALJ. ALJ Felter reviewed the record — which included thousands of pages of medical records, as well as the opinions of the MUR panelists, and claimant's and Dr. Lemper's written statements — but he did not conduct a hearing because the MUR statute does not provide for one. After considering the voluminous documentary evidence, ALJ Felter ruled that claimant had not met her burden of clearly and convincingly overcoming the Director's decision adopting the MUR committee's recommendations. He found that all three physician members of the MUR panel recommended a change of physician, and that "it is highly likely, unmistakable, and free from serious and substantial doubt that Dr. Lemper's treatment of [c]laimant was not reasonably appropriate according to professional standards

[1] Indeed, in her statement opposing the MUR panel, claimant identified at least three physicians she saw after Dr. Lemper's care was terminated, Drs. Robert Odell, Michael Yudez, and Joshua Prager. We have not, however, found reports of those visits in the record, and neither party has pointed us to them.

to cure and relieve [c]laimant of the effects of the December 23, 1988 work-related injury." ALJ Felter therefore upheld the Director's order to change providers and relieve employer of the obligation of paying "for any of Dr. Lemper's medical services after August 20, 2015."

¶ 11 On review, the Panel affirmed his decision. The Panel rejected claimant's contention that ALJ Felter employed the wrong standard and thus misapplied the law, holding instead that claimant was confusing the test for post-MMI medical maintenance benefits with the burden of proof applicable in MUR reviews. The Panel also held that it could not disturb ALJ Felter's order because substantial evidence in the record supported it.

¶ 12 Claimant now appeals from the Panel's decision.

II. Due Process

¶ 13 Claimant first contends that the MUR statute, section 8-43-501, unconstitutionally violates her right to due process by depriving her of a protected property interest — her workers' compensation benefits — without a hearing. Specifically, claimant contends that section 8-43-501 deprives her and other litigants of due process because it omits an avenue for a claimant to request a

hearing to challenge an MUR panel's recommendations. We are not persuaded, however, that claimant suffered any deprivation of her constitutional rights.

A. Law Governing Due Process Analysis

¶ 14 "The fundamental requisites of due process are notice and the opportunity to be heard by an impartial tribunal." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). "The essence of procedural due process is fundamental fairness." *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 150 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *see also Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009) (Due process "requires fundamental fairness in procedure.").

¶ 15 A claimant asserting that a statute violates his or her rights must demonstrate that the statute "is unconstitutional beyond a reasonable doubt." *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 265 (Colo. App. 2004). And, when analyzing the statute's constitutionality, we must presume "that the statute is valid." *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474, 477 (Colo. App. 2006).

B. Claimant Cannot Establish That She Was Deprived of a Right

¶ 16 To pursue a due process claim, a claimant must first meet the threshold burden of establishing a due process violation.

> "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" It is necessary to consider whether a property right has been identified, whether government action with respect to that property right amounted to a deprivation, and whether the deprivation, if one is found, occurred without due process of law.

Whatley v. Summit Cty. Bd. of Cty. Comm'rs, 77 P.3d 793, 798 (Colo. App. 2003), (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)).

¶ 17 Claimant cannot meet this burden. The Colorado Supreme Court previously held that no workers' compensation claimant has a property interest in receiving a particular type of treatment from a specific physician. *See Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 719 (Colo. 1994). There, the supreme court held that an injured worker is *not* entitled to a de novo hearing where the worker's benefits "have been changed, not terminated." *Id.* As the supreme court explained, even though workers' compensation benefits *are* a protected property interest, *see Whiteside v. Smith*, 67

P.3d 1240, 1247 (Colo. 2003), an injured worker "has no protected property interest in receiving care from a specific health care provider or in receiving a particular type of treatment." *Nofio*, 886 P.2d at 720.

¶ 18 In *Nofio*, the injured claimant "received approximately 1,000 chiropractic treatments." *Id.* at 715. Finding that excessive, the employer invoked the MUR process. Two of the three MUR panelists "concluded that chiropractic care should have been concluded within three to six months of the injury, and recommended a change of physician and a retroactive denial of payments." *Id.* at 716. The Director adopted the majority panel's recommendation and ordered both a change in medical providers and retroactive denial of medical bills. The claimant questioned the loss of his chiropractic treatment without a hearing, but the supreme court rejected his argument and held that the claimant was not entitled to a de novo hearing because his benefits had only been changed but had not been terminated. *Id.* at 720. The supreme court concluded that the claimant therefore had not been deprived of a protected property interest. *Id.*

¶ 19 *Nofio* is dispositive here. As in *Nofio*, the compensable care claimant received from a treater — Dr. Lemper — as well as one type of treatment — PRP injection — have been ordered to cease. But, nothing in the order denies claimant treatment from other providers or other types of therapy; her access to other medical treatment has not been cut off. Indeed, claimant admitted that employer sent her to other physicians for care. She contends, rather, that only Dr. Lemper's care provided her with the relief she sought, and that only PRP injections alleviated her pain. Thus, claimant does not assert a loss of all medical benefits, but rather the loss of this specific care and these specific benefits. Under *Nofio*, though, no party has a property interest in specific care or specific benefits. *Id.* at 720. Consequently, claimant cannot meet her threshold due process burden of establishing that she was deprived of a protected property interest.

¶ 20 In so concluding, we necessarily reject claimant's assertion that, unlike in *Nofio*, cutting off Dr. Lemper's care equated to a termination, not just a change, in her benefits. As the MUR panelists observed, particularly Drs. Fernandez and Moses, contrary to claimant's positive description of the treatment, the

medical records indicate that her condition *deteriorated* while undergoing PRP injections with Dr. Lemper. In addition, although claimant implies that she is being deprived of treatment, she admitted other physicians have treated her since the MUR decision. And, the Medical Treatment Guidelines adopted by the Division of Workers' Compensation include an entire section, Rule 17, Exhibit 7, addressing the diagnosis and treatment of Complex Regional Pain Syndrome. *See* Colo. Dept. of Labor, Med. Treatment Guidelines, Rule 17, Ex. 7, Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guideline. The treatment guidelines incorporate nearly 75 pages of options for the treatment of CRPS, including other injections such as nerve blocks or epidural infusions; conservative measures such as interdisciplinary rehabilitation programs, aquatic therapy and gait training; and more invasive procedures such as neurostimulation, implantation of root ganglion stimulators, intrathecal drug delivery, and sympathectomy. The record does not clarify which, if any, of these treatments claimant's physicians have tried since the MUR panel's recommendation, but it is clear that treatments other than

PRP injections are available to claimant and that she continues to be entitled to compensable medical care.

¶ 21 Finally, we cannot, as claimant suggests we do, simply adopt the reasoning Justice Lohr set forth in his *Nofio* dissent. We are bound to follow the precedent set by the *Nofio* majority. *See In re Estate of Ramstetter*, 2016 COA 81, ¶ 40 ("[T]he court of appeals is 'bound to follow supreme court precedent.'") (quoting *People v. Gladney*, 250 P.3d 762, 768 n. 3 (Colo. App. 2010)).

¶ 22 Accordingly, we conclude that claimant has failed to establish that application of section 8-43-501 violated her right to due process.

III. ALJ Felter Did Not Misapply the Applicable Legal Standard

¶ 23 Claimant next contends that ALJ Felter misapplied the law by requiring her to show that the PRP injections provided her "functional gains." She maintains that, under *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988), she only had to show that the treatment was "reasonably necessary to relieve [her] from the effects of the work-related injury." *Id.* at 711.

¶ 24 Claimant is correct that she is entitled to treatment "reasonably necessary to relieve [her] from the effects of the work-

related injury." But as noted in the previous section, numerous types of treatments are capable of relieving her from the effects of her work-related injury.

¶ 25 "[T]he purpose of the [medical] utilization review process authorized in this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to accepted professional standards." Section 8-43-501(1). The focus of the process is, then, on the application of accepted medical standards. As we read ALJ Felter's order, when he referred to "functional gains," he was merely echoing the *medical* guidelines offered by the MUR physicians in their assessments of the effectiveness of PRP injections.

¶ 26 Paraphrasing the physicians' statements, ALJ Felter reiterated that the PRP injections "were excessive and were not providing any functional gain, which is the standard for the continued use of PRP therapy." The physicians, in turn, drew the term from the accepted Medical Treatment Guidelines. As Dr. Moses wrote:

> The Colorado Medical Treatment Guidelines are written from an evidence-based review of the medical literature. It is clear from the

> current state of the medical literature that, from a physiologic basis, . . . the method by which PRP re-initiates the healing process should produce some lasting benefit in *functional gains* or subjective pain relief after the first three injections. Ms. Madden-Grammer has received greater than 22 PRP injections in multiple areas, and she has not demonstrated any long-term benefits whatsoever. Thus, *continued PRP injections are not reasonable or appropriate according to accepted professional standards given the lack of any long-term benefit to the patient.*

(Italicized emphasis added.) ALJ Felter's use of the phrase therefore did not constitute a misapplication of the law; rather, it was a recognition of the terminology used by the medical profession to assess the success of PRP injections.

¶ 27 More importantly, a close reading of ALJ Felter's Conclusions of Law makes clear that he did not apply the "functional gains" standard as a legal test. Rather, he used it merely to define the medical standard to which Dr. Lemper needed to be held. In explaining his holding, ALJ Felter concluded that claimant "failed to prove, by clear and convincing evidence, that Dr. Lemper's treatment of [her] was appropriate according to *accepted professional standards*." (Emphasis added). Thus, the *legal standard* ALJ Felter followed was whether claimant had shown, by

clear and convincing evidence, that the MUR panel incorrectly concluded that Dr. Lemper had not followed accepted medical standards. And, it was that *medical standard* which assessed the success of PRP injections by analyzing whether a patient experienced functional gains as a result of those injections.

¶ 28 ALJ Felter was statutorily bound to adhere to this legal test. Section 8-43-501(5) mandates that the reviewing fact finder defer to the MUR panel's recommendations and only deviate from them if the challenging party overcomes them "by clear and convincing evidence."

¶ 29 We therefore conclude that ALJ Felter appropriately followed the statutory test by deferring to the MUR panel and requiring claimant to show by clear and convincing evidence that the MUR panel erred in its recommendations. *See* § 8-43-501(5). Accordingly, we agree with the Panel that ALJ Felter did not misapply the law or hold claimant to an improper burden of proof.

IV. Substantial Evidence Supports the ALJ's Findings

¶ 30 Last, claimant contends that "what little evidence" is contained in the nearly five thousand pages of medical reports comprising the record, illustrates that "the only treatment that 'relieved' [her] CRPS

symptoms was the PRP therapy provided by Dr. Lemper." She argues that consequently, substantial evidence does not support the ALJ's factual finding that "Dr. Lemper's treatment was not relieving [her] from the effects of the industrial injury." We disagree.

A. Standard of Review

¶ 31 Under the MUR statute, a claimant may seek review of an MUR panel's recommendation and a Director's order before an ALJ. However, claimant implies that she only needed to establish that Dr. Lemper's treatment relieved her of the effects of her injury to overcome the MUR panel's recommendations. This is incorrect. The "conclusions of the MUR committee are 'afforded great weight.'" *Franz v. Indus. Claim Appeals Office*, 250 P.3d 755, 757 (Colo. App. 2010) (quoting § 8-43-501(5)(a)). And, by statutory mandate, the "party disputing the finding of such utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence." § 8-43-501(5)(a).

¶ 32 We must uphold the factual determinations of the ALJ — including whether a claimant has overcome an MUR by clear and convincing evidence — if the decision is supported by substantial

evidence in the record. *See* § 8-43-308, C.R.S. 2018; *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007) ("We are bound by the factual determinations of the ALJ, if they are supported by substantial evidence in the record."); *see, e.g., Justiniano v. Indus. Claim Appeals Office*, 2016 COA 83, ¶ 19 ("Whether a party has met the burden of overcoming a [division-sponsored independent medical examination] by clear and convincing evidence is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence."). The reviewing court is bound by the ALJ's factual determinations even if the evidence was conflicting and could have supported a contrary result. It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ).

B. Analysis

¶ 33 Here, all three MUR panel members unanimously recommended a change of provider. All three agreed that Dr. Lemper's care, and, in particular, the frequent PRP injections he administered, veered from and exceeded the Medical Treatment Guidelines. Their opinions must be "afforded great weight." § 8-43-501(5)(a).

¶ 34 To counter their opinions, claimant offered her own personal statement, Dr. Lemper's statement, and additional medical records. In those statements, both she and Dr. Lemper argued that his PRP treatments relieved her from the effects of her work-related injury. But the ALJ determined that the evidence claimant offered did not amount to the clear and convincing evidence necessary to overcome the MUR panelists' unanimous opinions that Dr. Lemper used PRP injections excessively. ALJ Felter correctly expressed that the MUR panelists' opinions must be given "great weight," and concluded that because "there is no clear and convincing evidence to overcome the recommendation, the Director's order must be affirmed." *See* § 8-43-501(5)(a). And, because the weight to be assigned expert medical opinions and reports is squarely within the ALJ's discretion, "we may not substitute our judgment for that of the ALJ"

where the decision is supported by substantial evidence in the record. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002).

¶ 35 Because the MUR panel's unequivocal opinions substantially support the ALJ's factual finding that claimant failed to clearly and convincingly overcome the Director's order for a change of provider, we are bound by it and cannot set it aside. *See* § 8-43-501(5)(a); *Justiniano*, ¶ 19; *Franz*, 250 P.3d at 757; *Leewaye*, 178 P.3d at 1256.

V. Conclusion

¶ 36 The order is affirmed.

JUDGE LICHTENSTEIN and JUDGE VOGT concur.