

BROWN BAG SEMINAR

Thursday, July 17, 2014

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

**2nd Floor Conference Room
(use elevator near Starbucks)**

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued from

June 13, 2014 through July 11, 2014

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-862-853-01

IN THE MATTER OF THE CLAIM OF

BRANDY GARCIA,

Claimant,

v.

FINAL ORDER

MCDONALD'S CORP.,

Employer,

and

ZURICH C/O GALLAGHER BASSETT
SERVICES,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Henk (ALJ) dated January 2, 2014, that ordered the respondents liable for the costs of a cervical fusion surgery and other medical benefits. We affirm the decision of the ALJ.

In support of their dispute with the ALJ's decision pertinent to liability for the surgery, the respondents assert the physician performing the surgery was not an authorized physician and that the procedure was not logically made necessary by the work injury.

The claimant was working at the employer's McDonald's restaurant at the drive through window on August 7, 2011, when she was hit in the head by a large metal panel from the soft drink dispenser when it became loose and fell. The claimant was sent home that day. She reported to the emergency room the next morning. She complained of headache, dizziness, neck pain and blurry vision. The claimant was provided work restrictions which caused her to miss work. A CT scan of the claimant's cervical spine showed a left sided diffuse disc bulge with nerve impingement at C4-5 and at C5-6. This was attributed to moderate to severe degenerative disease. The scan also revealed a prior fusion at C6-7.

The claimant had previous injury to her cervical spine. She had undergone a fusion surgery in 1992 due to a work injury when she fell and hit her head. The claimant also was involved in a car accident in June, 2011. She was treated in the emergency room on June 12, 2011, and underwent a X-ray of her cervical spine. On July 1, 2011,

the claimant had completed an MRI of her cervical spine. Both showed degenerative disc disease and protrusions into the nerves at C4-5 and C5-6 causing significant foraminal stenosis.

After the August 7, 2011, industrial accident the claimant was referred by the employer to the Champs clinic. That facility informed the claimant there was no agreement for Champs to provide service for injuries at that McDonald's. The employer then referred the claimant to the Workwell clinic where she treated with Dr. Laura Caton on September 9, 2011. At that time the claimant complained of pain traveling from her neck into her right arm and also low back pain. Dr. Caton ordered a repeat MRI to allow a comparison with the July 1 MRI and to identify any further injury possibly caused by the August 7 work incident. On October 7, 2011, Dr. Caton reviewed an MRI of September 30, 2011. The doctor noted the MRI showed no progression of the cervical spine herniation since the July 1, 2011, MRI. Concluding then, that the work incident did not aggravate this herniation, Dr. Caton resolved that "we will only be able to participate in muscular rehab, ...". However, Dr. Caton did recommend "she may wish to continue her private course of seeking surgical opinion and probable surgery." The claimant received conservative treatment at the Workwell clinic through December 1, 2011.

The claimant testified she then treated with her personal physician, Dr. Jeffery Johnson. She stated Dr. Johnson eventually referred her to Dr. Hans Coester at the Colorado Health Medical Group on September 20, 2012. Dr. Coester reviewed her MRI of September 30, 2011, and recommended a surgical decompression and a further fusion at the C5-6 level. Dr. Coester's history did not include any reference to the claimant's treatment in 2011 prior to August 7 of that year. After securing an updated MRI, Dr. Coester performed a decompression and fusion surgery at the C5-6 and C4-5 level on January 28, 2013. A post-surgery examination on May 13, 2013, showed the claimant was afforded relief of previous pain in her arm but complained of headaches, pain into her hands on both sides, and a feeling of constant pressure pushed down into the thoracic region.

After hearing on October 1, 2013, the ALJ submitted an order finding the claimant's testimony of increased neck pain after the August 7, 2011, injury to be persuasive and also crediting a report and testimony by Dr. Jack Rook. Dr. Rook had viewed security video of the accident at the McDonald's on August 7. He characterized the blow to the claimant's head as likely to cause a significant trauma. He also viewed the claimant's MRIs and observed that they showed a significant encroachment by disc material which made necessary the surgery of Dr. Coester in a fairly short period of time. The ALJ concluded that Dr. Caton had referred the claimant to Dr. Coester for treatment and his January 28, 2013, surgery was a reasonable and necessary procedure to relieve the effects of the claimant's work related injury. The ALJ accepted the average weekly

wage stipulation of the parties and ordered temporary disability benefits as of August 8, 2011, and continuing. The ALJ also ordered the respondents to pay for the medical treatment provided by the North Colorado Medical Center, by Dr. Caton and by Dr. Coester, including the surgery of January 28, 2013.

On appeal, the respondents contend Dr. Coester was not in the chain of authorized referrals and was therefore not authorized to provide treatment. The respondents assert they never were informed of the surgery proposed by Dr. Coester prior to its completion on January 28, such that it was not authorized. The respondents also argue the evidence in the record shows the surgery was made necessary by the claimant's condition that existed prior to the work injury on August 7, 2011, and was not aggravated by any injury on that date.

I.

The respondents argue Dr. Caton did not refer the claimant to Dr. Coester as found by the ALJ. The ALJ's finding that Dr. Caton referred the claimant to Dr. Coester is somewhat ambiguous. The reference provided by the ALJ in her findings of fact ¶ 7 is to a report authored by Dr. Coester on September 20, 2012. The report states it is addressed to Dr. Caton and thanks her for allowing him to see the claimant. However, the claimant testified Dr. Caton did not refer her to Dr. Coester. She stated that referral was provided by her personal physician, Dr. Johnson. Tr. at. 20-21, 36-38. The record does not contain any reports from Dr. Caton or Workwell after December, 2011. We cannot say there is substantial evidence to support a specific referral directly from Dr. Caton to Dr. Coester. However, the record does support an inference the right to select a new treating physician had passed to the claimant and that she elected to treat with Dr. Coester. Dr. Caton did deny the claimant treatment in the form of surgery for a non-medical reason. The insurer's right to select the treating physician contemplates the insurer will appoint a physician willing to treat the claimant based on the physician's independent medical judgment. See *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University_of_Colorado_Health_Sciences_Center*, 768 P. 2d 1259 (Colo. App. 1988). Consequently, if the designated treating physician refuses to provide treatment for non-medical reasons, the insurer must designate a new treating physician or the right of selection passes to the claimant. The respondent must appoint a new treating physician "forthwith." See *Lutz v. Industrial Claim Appeals Office*, *supra*; *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Whether the authorized treating physician has refused to treat the claimant for non-medical reasons is a question of fact for resolution by the ALJ. *Ruybal v. University Health Sciences Center*, *supra*. We must uphold the ALJ's determination if supported by substantial evidence and plausible

inferences drawn from the record. § 8-43-301(8), C.R.S.¹

In her October 7, 2011, report, Dr. Caton was clear that she did not believe the disc herniation noted in the claimant's cervical spine was a result of any work injury. Dr. Caton had compared a September 30, 2011, MRI with an MRI from July 1, 2011, and observed that any nerve compression had not advanced in the interval. She deduced then, that she could not refer the claimant for surgery because she had authority only to treat a work injury. However, she explicitly determined the claimant's condition warranted surgery when she wrote: "she may wish to continue her private course of seeking surgical opinion and probable surgery." The denial then, of surgical treatment was due to a non-medical reason. That reason encompassed Dr. Caton's view that she was only designated by the respondents to treat an injury caused by an incident at work. That is a limitation of insurance coverage, not one of medical necessity. *See, Scoggins v. Airserv*, W.C. No. 4-642-757 (March 31, 2006); *Davis v. Interstate Brands*, W.C. No. 4-291-678 (May 17, 1999). As a consequence, the respondents were required to designate another doctor that would treat the claimant. The failure to make such a designation passed to the claimant the right to select a physician to provide the recommended medical therapy. Because the claimant then selected Dr. Coester, he became an authorized physician.

The conclusion by the ALJ that "Claimant sought surgical consultation with Dr. Hans Coester upon the referral of Dr. Caton ..." is supported by these statements in the record. Dr. Caton specifically articulated that the claimant should pursue surgery through a selection of another, "private", doctor. Accordingly, the claimant selected Dr. Coester as a private doctor to perform the surgery. When the ALJ found the need for surgery to be work related, the referral by Dr. Caton thereby became a referral to Dr. Coester for treatment of the work injury.

Although this is certainly not the only possible reading of Dr. Caton's report, it is within the province of the ALJ to weigh the medical evidence and resolve conflicts and ambiguities in that evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Because the ALJ's reading of the doctor's report is a plausible one, we decline to disturb her finding that Dr. Caton disclaimed responsibility for medical treatment in the case and, in effect, refused to treat the claimant for non-medical reasons.

The respondents also note that Dr. Coester's records show the claimant's treating physician to be Dr. Johnson and her insurance to be Medicaid. They complain that, as a result, Dr. Coester did not submit to the respondents any request to authorize the surgery,

¹ The claimant also argues on appeal that the right to select a physician passed to the claimant for the reason that the employer did not offer her a choice of two physicians at the time of the injury as required by § 8-43-404(5)(a)(I)(A). In our review of the record, it does not appear that the claimant presented this argument at hearing and we may not address it for the first time on appeal. *Apache Corp. v. Industrial Claim Appeals Office*, 717 P.2d 1000 (Colo. App. 1986).

or provide any advance notice at all. The failure, the refusal, or the lack of opportunity of the respondents to authorize a medical procedure does not preclude a claimant from taking the issue to a hearing and obtaining an order directing the respondents to pay for the treatment. W.C. Rule of Procedure 16-9(B), 7 Code Colo. Reg. 1101-3, specifies that prior authorization for medical services may be required in several circumstances. However, Rule 16-11((B)(5) provides that “lack of prior authorization for payment does not warrant denial of liability for payment.” Despite its terminology, the Rule is not referring to ‘authorization’, but rather to the ‘reasonableness and necessity’ of treatment. The Rule does provide a mechanism for a physician to obtain assurance of payment prior to proceeding through a request for preauthorization. However, the claimant may seek adjudication of the issue without prior authorization as the claimant has done in this case. *See Sanders v. Adams County*, W.C. No. 4-77-375 (December 3, 2012); *Arszman v. Target Corp.*, W.C. No. 4-798-406 (December 15, 2011).

II.

The respondents assert the ALJ’s conclusion that the claimant’s cervical spine treatment is compensable is not supported by substantial evidence in the record. They point to the significant treatment the claimant received in the past to her cervical spine. This included treatment occurring just weeks prior to the August 7, 2011, accident at work.

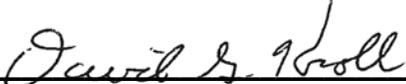
The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the claimant’s entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ’s factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). Further, the respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Here, the ALJ noted that Dr. Jack Rook testified that he had also viewed the two MRIs of the claimant's neck obtained in 2011. The first was dated July 1 and the second September 30. In between, on August 7, the claimant was hit in the head by a piece of the soft drink dispenser. Dr. Rook read the MRIs differently than did Dr. Caton. He observed that the herniation in the spine has more pronounced in the succeeding MRI. Dr. Rook also relied on the claimant's reports of increased pain after August 7. He described how the claimant was an active individual successfully working at the employer's McDonald's restaurant. After her injury on August 7, Dr. Rook noted that the claimant complained of substantially increased levels of pain in her neck and shoulder to the extent she had to stop working. On that basis, he provided his expert opinion that the August 7 work accident had substantially aggravated the claimant's cervical spine condition. This testimony, in addition to the lay testimony of the claimant, is substantial evidence to support the findings of the ALJ. Section 8-43-301(8), C.R.S. Accordingly, we decline to set aside these findings of the ALJ.

As a result, we find no compelling reason to conclude the ALJ has committed error and we affirm her findings and order.

IT IS THEREFORE ORDERED that the ALJ's order issued January 2, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G.Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 06/19/2014 _____ by _____ SF _____ .

BRANDY GARCIA, 3724 WHITNEY WAY, EVANS, CO, 80620 (Claimant)
MCDONALD'S CORP., 2915 JORIE BLVD., OAKBROOK, IL, 80620 (Employer)
ZURICH C/O GALLAGHER BASSETT SERVICES, C/O: ALIXE LANDRY, PO BOX 4068,
ENGLEWOOD, CO, 80155 (Insurer)
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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-457-02

IN THE MATTER OF THE CLAIM OF

RITA A. RAGAN
RE: BILLIE K. RAGAN (DECEASED),

Claimant,

v.

FINAL ORDER

METAL STUD FORMING
CORPORATION,

Employer,

and

COLORADO INSURANCE
GUARANTY ASSOCIATION,

Insurer,
Respondents.

The claimant appeals the order of Administrative Law Judge Walsh (ALJ) dated February 19, 2014, that granted the respondents' motion for summary judgment to deny and dismiss the dependent's claim for compensation. We affirm.

The following facts are not in dispute. On January 9, 1982, the deceased suffered a heart attack while driving a truck for Metal Stud Forming Corporation. The claim was admitted by The Home Insurance Company (The Home). (W.C. No. 3-654-552). The parties entered into a settlement under which The Home continued to pay for reasonable, necessary and related medical benefits.

On June 13, 2003, an Order of Liquidation was entered holding that The Home was insolvent and should be liquidated. The order further stated, "[t]he deadline for the filing of claims pursuant to RSA 402-C:26, II, RSA 402-C:37, I and RSA 402-C:40, II, shall be one year from the date of this Order." The Colorado Insurance Guaranty Association (CIGA) received and adjusted the claim and continued to pay for reasonable, necessary and related medical benefits.

The deceased passed away on March 18, 2013. On June 5, 2013, the claimant's

wife, Rita Ragan, filed a Dependent's Notice and Claim for Compensation (W.C. No. 4-920-457). CIGA filed a notice of contest denying the claim, contending it was not a "covered claim" under §10-4-501, *et seq.*, C.R.S. (Guaranty Act) and the Order of Liquidation. CIGA then filed a motion for summary judgment arguing that the dependent's claim was barred because it was made almost nine years after the deadline set forth in the Order of Liquidation and was barred pursuant to §§10-4-508(1)(a)(III)(A) and (B), and §10-4-508(1)(a)(I), C.R.S. In response, the claimant asserted that the dependent's claim is necessarily derived from the deceased's underlying claim and the extent of CIGA's liability for death benefits was established at the time the deceased's underlying claim was filed.

The ALJ agreed with the respondents and granted the motion for summary judgment. The ALJ determined that death benefits are entirely separate and independent from compensation benefits paid to an injured employee and because of the well-established "rule of independence," the dependent's claim for compensation is a "new claim." Therefore, under the Order of Liquidation and the relevant statutes, the claimant must have filed the claim prior to the filing deadline set forth in the Order of Liquidation. Because the dependent's claim was filed after the deadline set forth in the Order of Liquidation and by statute, the claim was barred. The claimant now appeals.

On appeal the claimant renews the argument made in response to the motion for summary judgment that the rule of independence does not determine the result in these circumstances and the ALJ erred in determining that the limits set forth in §10-4-508(1)(a), C.R.S. bar the dependent's claim for benefits. The claimant alternatively argues that §10-4-508(1), C.R.S., is unconstitutional as applied to death benefits under the Workers' Compensation Act. We are not persuaded the ALJ committed reversible error.

Office of Administrative Courts' Rule of Procedure (OACRP) 17 allows an ALJ to enter summary judgment when there are no disputed issues of material fact. See OACRP 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007). Summary Judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). In the context of summary judgment we review the ALJ's legal conclusions de novo. See *A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). We have

authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law. Section 8-43-301(8), C.R.S.

I.

Pursuant to the Guaranty Act, CIGA is a statutorily created entity the purpose of which is to pay “covered claims” of impaired insurance companies doing business within the state. Section 10-8-501, C.R.S., *et seq.* In general, CIGA steps into the shoes of the insolvent insurer to pay claims within the coverage and limits of the insurance policy. CIGA, however, was established for the purpose of providing a limited form of protection for policyholders and third-party claimants in the event of insurer insolvency. The Guaranty Act sets out a definition of what constitutes a “covered claim.” Applicable here, §10-4-508(1)(a)(III)(A) and (B), C.R.S., provide, in pertinent part;

Notwithstanding any other provision of this Part 5, a covered claim does not include any claim with the guaranty fund after the earlier of:

- (A) Twenty-four months after the date of the order of liquidation or
- (B) The final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

Thus, under the Guaranty Act, some claims that might otherwise be compensable if presented to a solvent insurer may be excluded from coverage under the Guaranty Act. *See Alexander v. Industrial Claim Appeals Office*, 42 P.3d 46 (Colo. App. 2001); *Colorado Insurance Guaranty Association v. Menor*, 166 P.3d 205 (Colo. App. 2007). For example, in *Alexander v. Industrial Claim Appeals Office*, *supra*, the claimant alleged that he was exposed to asbestos in 1986 while working and as a result became permanently disabled in 1997. In 1994 the employer’s insurer became insolvent and the court established a deadline of July 31, 1995, to file a claim. The claimant did not file a claim until 1998. The court of appeals affirmed the ALJ’s determination that the claim was not a “covered claim” and CIGA was not required to pay. *Id.*

Other states also have recognized the limits on the covered claims of a guaranty association. *See Colorado Insurance Guaranty Association v. Menor*, *supra* citing: *Strickler v. Desai*, *supra*, 813 A.2d at 656 (citations omitted) (quoting *Bethea v. Forbes*, 519 Pa. 422, 548 A.2d 1215, 1216, 1218 (1988)); *see Ill. Ins. Guar. Fund v. Farmland Mut. Ins. Co.*, 274 Ill. App.3d 671, 210 Ill. Dec. 661, 653 N.E.2d 856, 858 (1995)(although the Fund is deemed to be the insolvent insurer, “its role is ‘subject to the limitations’ of the Act”); *Shaler v. Toms River Obstetrics & Gynecology Assocs.*, 383

N.J.Super. 650, 893 A.2d 53, 57 (App. Div. 2006) (Association's obligation under New Jersey's version of the Act is limited to the payment of covered claims, and it is not a “panacea for all problems caused by insurance company insolvencies” (quoting *Carpenter Tech. Corp. v. Admiral Ins. Co.*, 172 N.J. 504, 800 A.2d 54, 66 (2002))); *Jendrzewski v. Allstate Ins. Co.*, 341 N.J. Super. 460, 775 A.2d 583, 585 (App.Div.2001) (the evident purpose of New Jersey's version of § 10–4–512 was to conserve the assets of the Fund by shielding it from liability for the obligations of insolvent insurers where there is other insurance covering the same claim that is covered by the insolvent insurer's policy); *Blackwell v. Pa. Ins. Guar. Assoc.*, 390 Pa. Super. 31, 567 A.2d 1103, 1106 (1989) (not only should a claimant not be placed in a better position, “it is equally clear that the legislature did *not* intend, in enacting the Insurance Guaranty Act, that in all cases a claimant would be placed in the *same* position he would have been in had the insurance company remained solvent”); *Va. Prop. & Cas. Ins. Guar. Ass'n v. Int'l Ins. Co.*, 238 Va. 702, 385 S.E.2d 614, 616 (1989) (rights and obligations of the Association under Virginia's version of the Act are not in all respects identical to those of the insolvent insurer, because Virginia's version of § 10–4–508 “must be read in conjunction with other sections of the Act,” which further impose limitations on the obligations of the Association, including the offset provision for duplications of recovery).

In the present case, the Order of Liquidation was dated June 13, 2003, making the deadline for filing a new claim, June 13, 2004. Section 10-4-508, (1)(a)(III)(B), C.R.S. Even assuming the 24 month provision is applicable¹, the deadline for filing a new claim was June 13, 2005. Section 10-4-508, (1)(a)(III)(B), C.R.S. Because the dependent’s claim was not filed until June 5, 2013, the claim is not a “covered claim” and CIGA is not subject to liability. Section 10-4-508(1)(a)(III)(A) and (B), C.R.S.

The claimant argues that the ALJ erred in his determination to treat the dependent claim as a new claim. The claimant asserts that because the deceased’s claim was assumed by CIGA, the Guaranty Act obligates CIGA to pay for a potential dependent claim as well. Although the claimant recognizes the “rule of independence” and that a dependent’s claim for death benefits is a separate and distinct claim from the deceased claim, the claimant nonetheless asserts that the rule of independence does not dictate the outcome here. We disagree.

The “rule of independence” provides that disability benefits awarded to a worker and death benefits awarded to the worker's dependents, constitute separate and distinct claims involving distinct rights. *Metro Glass & Glazing, Inc. v. Orona*, 868 P.2d 1178

¹ The 24 month provision in §10-8-508, (1)(a)(III)(A), C.R.S., was added by House Bill 11-1041 and became effective August 10, 2011.

(Colo. App. 1994); *State Compensation Insurance Fund v. Industrial Commission*, 724 P.2d 679 (Colo. App. 1986). Thus the “rights and liabilities of the parties [in a workers' compensation case] are determined by the statute in effect at the time of the claimant's injury” or the decedent’s death as in the case of a dependent’s claim. See *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Applying the “rule of independence,” the courts have interpreted the predecessor to § 8-42-114, C.R.S., to require that death benefits be based on the deceased worker's average weekly wage at the time of death. *Hoffman v. Industrial Claim Appeals Office*, 872 P.2d 1367, 1370 (Colo. App. 1994); citing *State Compensation Insurance Authority v. Industrial Commission*, *supra.*; *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983). Also, in *Tucker v. Claimants in the Death of Gonzales*, 37 Colo. App. 252, 546 P.2d 1271 (1975) *abrogated by statute on other grounds*, ch. 114, sec. 1, § 13-80-108, 1986 Colo. Sess. Laws 699-700, the court of appeals held that the rights and liabilities of the parties to a claim for death benefits accrue at the time of death. Therefore, the court applied the state of limitations in effect at the date of the decedent's death, rather than the law in effect at the time of the decedent's last injurious exposure to the occupational disease. See also *Claimants in Matter of Death of Garner v. Vanadium Corp. of America*, 194 Colo. 358, 572 P.2d 1205, 1206 n.2 (1977).

Under these principles, the ALJ properly concluded that the dependent claim was a separate and distinct “new claim.” The claimant’s arguments notwithstanding, *Subsequent Injury Fund v. King*, 961 P.2d 575 (Colo. App. 1998), is not authority to the contrary. *King* involved the dependent claims of two widows. In both cases the deceased were diagnosed with lung cancer in 1993 and the miners died in the fall of 1994. During this period the law was amended to close SIF for all occupational disease cases after April 1, 1994. Section 8-46-104, C.R.S. was changed to state that:

No cases shall be accepted into the subsequent injury fund... *for occupational diseases occurring on or after April 1, 1994*. When all payments have been made for all cases accepted into the fund, any remaining balance shall revert to the general fund. (*emphasis added*)

See Colo. Sess. Laws 1993, ch. 351 at 2142. The changes to § 8-46-104 took effect on July 1, 1993. Colo. Sess. Laws 1993, ch. 351 at 2145.

In *King*, SIF argued that under the “rule of independence,” the dependents' separate claims for death benefits did not “occur” until the dates of the deaths, after April 1, 1994 and, therefore, SIF was not liable for the death benefits under the amended language of §8-46-104, C.R.S. The court of appeals rejected the SIF's argument, holding that the rule of independence was not applicable in determining which version of statute was applicable to the widows' claims for workers' compensation death benefits. The

court of appeals relied on the statutory language in §8-46-104, C.R.S. to conclude that the amendatory legislation related to occupational diseases and the benefits payable therefrom which occurred after April 1, 1994, making the ultimate concern the extent of Fund's liability for consequences of worker's *occupational disease* occurring prior to Fund's closure, not the date when dependents' claims for death benefits vested.

In the present claim however, the issue is different. The language in §10-4-508, (1)(a)(III), C.R.S. does not refer to CIGA's liability for occupational diseases or injuries but instead makes a particular reference to "claims." When interpreting a statute, we must determine and give effect to the General Assembly's intent. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). If the statutory language is clear, we interpret the statute according to its plain and ordinary meaning. *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393 (Colo. 2010). Unlike the statute in the *King* case, §10-4-508, does not make the same reference to the extent of the liability for a particular condition but rather specifically depends on when the "claim" for death benefits vested.

We, therefore, reject the claimant's contention that because CIGA assumed the obligations in the deceased's claim, CIGA is also obligated to assume the dependents' claim for death benefits. The dependent's claim is a separate and distinct new claim. Because the new claim is not a "covered claim" under the terms of the Order of Liquidation and §10-4-508(1)(a)(III)(A) and (B), the claim is barred and was properly dismissed. Any inequity that may result because of this statutory interpretation is one that should be addressed to, and resolved by, the General Assembly. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo.1985); *Humane Society v. Industrial Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

II.

The claimant alternatively makes a general allegation that §10-4-508(1)(a), C.R.S. violates her due process rights. The claimant does not specify whether she is alleging a violation of substantive due process or procedural due process. Insofar as the claimant may be understood as asserting "facial" challenges to the statutory provisions, we lack jurisdiction to address the claimant's constitutional challenges. *Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971); *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Furthermore, to the extent that the claimant may be understood as asserting an "as applied" challenge to the statute, we recognize that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *Horrell v. Department of Administration*, 861 P.2d 1194, 1196 (Colo. 1993). Nonetheless, because

our analysis is so dependent upon plain and ordinary meanings of the relevant statutes, a "facial" and "as applied" challenge is so intertwined that we cannot consider the "as applied" challenges without addressing the "facial" constitutionality of the statutes. To do so would violate the principle of separation of powers. *See Denver Center for Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. App. 1985)(administrative rulings concerning "facial" challenges to statutes will not be considered "authoritative" on judicial review). Therefore, we decline to address any "as applied" argument to the extent such argument was raised by the claimant.

We note that the court of appeals in *Alexander v. Industrial Claim Appeals Office*, *supra*, previously rejected a constitutional challenge to §10-4-508(1)(a), C.R.S., determining that the statute was constitutional under the rational basis standard because the statute serves a legitimate governmental interest to avoid excessive delay in the payment and financial loss to claimant's or policyholders because of the insolvency of an insurer. We are not persuaded by the claimant's attempts to distinguish *Alexander* from the facts of this case.

We conclude that the ALJ's denial of the dependent's claim was a proper application of the law and we have no basis to disturb the order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated February 19, 2014, 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

7/9/2014 by KG .

RITA A RAGAN RE: BILLIE K RAGAN (DECEASED), 34 APPLEWOOD DR, COLORADO CITY, CO, 81019 (Claimant)
METAL STUD FORMING CORPORATION, 3900 E 68TH AVE, COMMERCE CITY, CO, 80022 (Employer)
COLORADO INSURANCE GUARANTY ASSOCIATION, C/O: WESTERN GUARANTY FUND SERVICES, 1720 S BELLAIRE ST STE 408, DENVER, CO, 80222 (Insurer)
STEVEN U MULLENS PC, C/O: STEVEN U MULLENS ESQ, 105 EAST MORENO AVE PO BOX 2940, COLORADO SPRINGS, CO, 80901 (For Claimant)
LEWIS BRISBOIS BISGAARD & SMITH LLP, C/O: KRISTIN A CARUSO ESQ, 1700 LINCOLN ST STE 4000, DENVER, CO, 80203 (For Respondents)
STEVEN U MULLENS PC, 1401 COURT ST, PUEBLO, CO, 81003 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-761-359-02

IN THE MATTER OF THE CLAIM OF

APRIL SAMUELS,

Claimant,

v.

FINAL ORDER

DELI ZONE,

Employer,

and

SENTINEL INSURANCE COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Harr (ALJ) dated January 2, 2014, that denied and dismissed the claimant's request for an award of benefits for her right knee condition. We affirm the ALJ's order.

A hearing was held on the issues of overcoming the opinion of the Division Independent Medical Examination (DIME) physician and the claimant's entitlement to benefits for an alleged work-related right knee condition. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked as a catering manager for the employer on November 1, 2007, when she slipped and fell on a wet or greasy floor and twisted her left knee. Over the next several years the claimant underwent treatment for the left knee, including three arthroscopic surgery procedures.

Dr. Hughes assumed the claimant's care on May 5, 2010. Dr. Hughes noted that the claimant reported a gradual onset of right knee pain, which the claimant attributed to compensating for her injured left knee. Dr. Hughes diagnosed a sprain and post-surgical arthritis of the left knee and the emergence of right knee signs and symptoms consistent with patellofemoral arthritis or chondromalacia patella. Dr. Hughes placed the claimant at maximum medical improvement (MMI) as of June 16, 2010. The claimant requested a DIME which was performed by Dr. Watson. The DIME physician first evaluated the claimant on November 23, 2010, and disagreed with Dr. Hughes MMI determination. Dr. Watson believed that the claimant needed additional conservative treatment for the left knee. Dr. Watson also diagnosed the claimant's right knee condition as chondromalacia patella of the right knee. The DIME physician wrote:

Within reasonable medical probability, I feel the right knee symptoms were due to her altered gait and excessive weight-bearing, which were caused from the 11/10/2007 (sic) accident. I believe she needs x-rays of the right knee along with MRI and should be seen in follow-up by her orthopedic surgeon.

The ALJ determined that the DIME physician recommended the claimant undergo evaluation of the disease process in her right knee to determine whether her symptoms were due to internal derangement. ALJ Order at 4 ¶8.

The respondents did not contest the DIME physician's determination that the claimant had not reached MMI and authorized and provided additional medical treatment for the left knee. Dr. Hughes re-evaluated the claimant on January 4, 2011, and reported that the claimant has emerging right knee signs and symptoms consistent with patellofemoral arthritis but could not attribute this to her left knee injury of November 1, 2007. The claimant was seen by Dr. Robinson on April 7, 2011, who noted that the claimant's right knee was normal with full range of motion and no pain. Dr. Hughes saw the claimant again on March 8, 2012, and noted that the claimant did not make any complaints about her right knee.

The claimant was eventually placed at MMI on February 28, 2013, and re-evaluated by the DIME physician on May 28, 2013. The DIME physician agreed with the MMI date of February 28, 2013, and gave the claimant a 21 percent scheduled rating for the left lower extremity. The DIME physician also noted, "[m]y opinion is unchanged on the right knee from my previous report." The respondents filed a final admission of liability admitting for the DIME physician's impairment rating and MMI date.

The ALJ determined that the DIME physician's reports were equivocal on the causation of the claimant's chondromalacia patella disease process. Although the DIME physician attributed the onset of the right knee symptoms to excessive weight-bearing and altered gate while the claimant rehabilitated her left knee following surgery, the ALJ found that the DIME physician failed to explain how that contributed to the underlying chondromalacia patella disease process. After recommending diagnostic testing in November of 2010 to rule out symptoms from internal derangement, the ALJ found it significant that in his May 28, 2013, report placed the claimant at MMI with permanent impairment and no longer recommended such evaluation. The ALJ, therefore, concluded that the DIME physician ultimately determined that the emerging symptoms from the chondromalacia disease process in the claimant's right knee were not related to the claimant's left knee injury.

The ALJ further determined that the claimant failed to overcome the DIME physician's opinion by clear and convincing evidence and to show that any permanent disability from her right knee condition was a component of the admitted left knee injury. The ALJ denied and dismissed the claimant's request for benefits related to the right knee condition.

On appeal the claimant contends that the ALJ erred in his interpretation of the DIME physician's report. The claimant contends that the DIME physician ultimate opinion was that the right knee was attributable to the admitted left knee injury and because the respondents did not contest the DIME physician's findings on the right knee, the ALJ was jurisdictionally barred from considering the issue of compensability of the right knee at the hearing. The claimant further argues that the respondents never provided the diagnostic testing for the right knee recommended by the DIME physician, the MMI determination was premature. We are not persuaded that the ALJ committed reversible error.

Generally, 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. Moreover, the DIME physician's opinion on the relatedness of particular components of a claimant's overall impairment and whether the claimant has reached MMI for those particular components carry presumptive weight. *Leprino Foods v. Industrial Claim Appeals Office*, 134 P.3d 475 at 482 (Colo. App. 2005) *see also*, *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

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) (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). 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). Thus, 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). 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*.

We disagree with the claimant's assertion that a reading of the DIME physician's report compels a determination that he believed the claimant's right knee condition was

attributable to the admitted left knee injury. In our view the ALJ's interpretation of the DIME physician's report was a plausible interpretation. The ALJ determined, with record support, based on all of the DIME physician's reports and the totality of the circumstances, that the DIME physician's true opinion was that the claimant was at MMI, and any permanent impairment of the claimant's right knee condition was not related to the admitted injury. Because of the ambiguity in the DIME physician's discussion concerning the claimant's right knee condition, while simultaneously placing the claimant at MMI for the work related condition, 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 claimant further contends on appeal that the ALJ lacked jurisdiction to reconsider the relatedness of the claimant's right knee and that the respondents refused to authorize the medical diagnoses and treatment recommended by the DIME. In view of the ALJ's interpretation of the DIME physician's report we perceive no error in the ALJ's resolution of the issue.

Once the ALJ determines the DIME physician's true opinion then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. Section 8-42-107(8)(b), C.R.S.; *see Leprino Foods Co. v. Indus. Claim Appeals Office, supra*. Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME'S conclusion must demonstrate that it is "highly probable" that the DIME physician's MMI finding is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, *supra*.

Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the AL J's determination. *Metro Moving and Storage v. Gussert, supra*. We must uphold the factual determinations of the ALJ if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Metro Moving and Storage v. Gussert, supra*. The substantial evidence standard also requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. *Id.* Thus, the scope of our review is "exceedingly narrow." *Id.* Moreover, where conflicting expert opinions are presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Given the fact that the ALJ determined the DIME physician's true opinion was that the claimant's right knee chondromalacia condition was not related to the work injury, the ALJ's imposition of the burden of proof was consistent with what the parties

were attempting to overcome regarding the DIME physician's findings and determinations and the ALJ's consideration of the issue was not jurisdictionally barred.

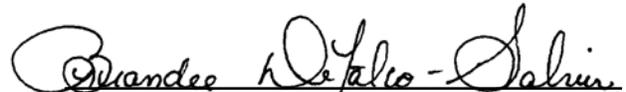
The ALJ credited the testimony of Dr. Hughes who testified that he observed no evidence of an antalgic gait on May 5, 2010, May 19, 2010, June 16, 2010, August 15, 2010, or March 8, 2011. Dr. Hughes also stated that it was medically probable that the claimant's emerging right knee symptoms were the result of a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury. Dr. Gottlob similarly documented exam findings of a normal right knee in April of 2011. The ALJ was further persuaded by the fact that the DIME physician found symmetrical patellofemoral crepitation in both knees upon physician examination in both the 2010 exam and the 2013 exam.

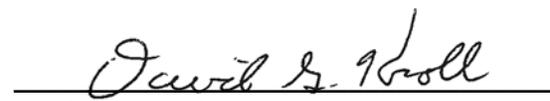
Contrary to the claimant's assertion, the ALJ was not compelled to find the claimant was not at MMI, simply because the DIME physician recommended an evaluation of the right knee in his initial report. The panel has previously held that if the DIME physician recommends additional testing to complete the DIME process an ALJ may conclude that such testing is not inconsistent with MMI because it is not primarily performed for the purpose of treatment or diagnosis, but to assist the DIME physician in performing his evidentiary role. See *Brickell v. Overhead door company*, W.C. No. 4-586-287 (February 4, 2005); *Mandel v. Sears*, W.C. No. 4-575-413 (January 24, 2005); *Beede v. Allen Mitchek Feed & Grain*, W.C. No. 4-317-785 (April 20, 2000).

The record contains substantial evidence and valid support for the ALJ's factual findings and those findings, in turn, support the ALJ's conclusion that the claimant failed to overcome the DIME physician's MMI opinion and the denial of benefits for the right knee condition. Consequently, we have no basis to disturb the ALJ's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated January 2, 2014, 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

06/18/2014 by SF.

APRIL SAMUELS, 882 E SHEFFIELD AVE, CHANDLER, AZ, 85225 (Claimant)
DELI ZONE, 1601 BLAKE ST, UNIT 100, DENVER, CO, 80202 (Employer)
SENTINEL INSURANCE COMPANY, C/O: MS. SEVIL LINK, PO BOX 14474,
LEXINGTON, KY, 40512 (Insurer)
THE FRICKEY LAW FIRM, C/O: JANET FRICKEY, 940 WADSWORTH BLVD., STE 400,
LAKEWOOD, CO, 80214 (For Claimant)
LAW OFFICES OF SCOTT TESSMER, C/O: BENJAMIN P. KRAMER, ESQ., 6430 S
FIDDLERS GREEN CIRCLE, STE 410, GREENWOOD VILLAGE, CO, 80111 (For
Respondents)

14CA0461 Bryant v. ICAO 06-19-2014

COLORADO COURT OF APPEALS

DATE FILED: June 19, 2014
CASE NUMBER: 2014CA461

Court of Appeals No. 14CA0461
Industrial Claim Appeals Office of the State of Colorado
DD No. 329-2014

Gregor M. Bryant,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; and Division of
Unemployment Insurance,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE PLANK*
Loeb, C.J., and Kapelke*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced June 19, 2014

Gregor M. Bryant, Pro Se

No Appearance for Respondents

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

In this unemployment benefits case, petitioner, Gregor M. Bryant (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel affirmed a hearing officer's decision holding that claimant was not covered by a statute that allows certain individuals to use an earlier "base period" for their claims. We affirm.

I. Background

Claimant sustained a work-related shoulder injury in December 2011. In July 2012, claimant's employer replaced him because he was still recuperating and employer was unable to continue holding the position open. Claimant collected temporary total disability workers' compensation benefits (TTD) because of the injury. Those benefits ended in February 2013 when claimant reached a settlement based on his doctor's assessment that claimant's recovery would not progress further.

Approximately ten months later in December 2013, claimant filed his claim for unemployment benefits. A deputy issued a decision concluding that claimant was ineligible to use an earlier base period for his claim because he had not filed the claim within

the period specified in section 8-73-112, C.R.S. 2013.

Claimant appealed the deputy's decision. Following a hearing, the hearing officer determined that because claimant did not file his claim within four weeks of his final workers' compensation payment as required by section 8-73-112, he could not take advantage of that statute's base period shifting provisions. The hearing officer concluded that the claim's base period would, instead, be determined from the December filing date.

On review the Panel affirmed the hearing officer's decision.

II. Analysis

In this appeal, claimant does not dispute the hearing officer's findings concerning the date he stopped receiving TTD benefits or the date he filed his claim for unemployment benefits. Instead, he asserts that he first learned of the time limitation in section 8-73-112 after he filed his claim, and that he would have filed in March 2013 had he been aware of the deadline. These assertions do not provide a basis for disturbing the hearing officer's and Panel's rulings.

The amount of unemployment compensation benefits payable

on a claim is generally based on wages paid during a claimant's base period which consists of the first four of the last five completed calendar quarters immediately preceding the filing of the initial claim. See §§ 8-70-103(2), 8-73-104(1), C.R.S. 2013.

Section 8-73-112 creates an exception to this general base period formula. As pertinent here, it provides that persons

separated from employment due to an accident or injury resulting in a temporary total disability for which [they] ha[ve] been compensated . . . shall be entitled to receive, after the termination of the continuous period of disability, benefits under this article which were available and in effect at the time of separation from employment.

When applicable, section 8-73-112 allows a claimant to use wage credits that would have been available had the claimant applied for unemployment benefits immediately upon the employment separation. *Lewis v. Colo. Dep't of Labor & Emp't*, 924 P.2d 1183, 1184 (Colo. App. 1996). It makes available wage credits that would otherwise be lost during the claimant's disability. *Fluke v. Indus. Claim Appeals Office*, 799 P.2d 468, 469 (Colo. App. 1990).

Section 8-73-112 further specifies, however, that it applies "only if a claim . . . is filed within the four weeks immediately

following the termination of the continuous period of total disability.”

Here, it is undisputed that claimant filed his claim for unemployment benefits approximately ten months after the termination of his period of TTD. Because this period exceeded the four-week time limitation in section 8-73-112, the hearing officer and the Panel correctly held that the statute did not apply and that claimant’s base period should, instead, be calculated based on the date he filed his claim.

We acknowledge that claimant may have been unaware of the statute’s time limitation. However, we may not ignore its plain language requiring that a claim be “filed within the four weeks immediately following the termination of the continuous period of total disability.” *See Laszar v. Indus. Claim Appeals Office*, 230 P.3d 1263, 1264 (Colo. App. 2010) (“[W]e must apply the statute as it is written.”). Additionally, we note that claimants are presumed to know the requirements of section 8-73-112. *See Lewis*, 924 P.2d at 1185; *see also Boenheim v. Indus. Claim Appeals Office*, 23 P.3d 1247, 1249 (Colo. App. 2001) (having sought benefits under the

statutory scheme, claimants are presumed to know the statutory requirements).

Finally, we note that, unlike certain other statutes in the unemployment scheme, section 8-73-112 does not permit untimely action based a showing of good cause. *See* § 8-74-102(1), C.R.S. 2013 (authorizing interested parties to present information out of time “if good cause is shown”); § 8-74-106(1)(b), C.R.S. 2013 (authorizing acceptance of petitions for review out of time “for good cause shown”).

The Panel’s order is affirmed.

CHIEF JUDGE LOEB and JUDGE KAPELKE concur.

13CA1748 Western States Fire v ICAO 03-27-2014

COLORADO COURT OF APPEALS

DATE FILED: March 27, 2014
CASE NUMBER: 2013CA1748

Court of Appeals No. 13CA1748
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-891-495

Western States Fire Protection/API Group, Inc. and Ace American Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Paul Olsen,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE ASHBY
Casebolt and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 27, 2014

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

No Appearance for Respondent Industrial Claim Appeals Office

The Eley Law Firm, P.C., Clifford E. Eley, Denver, Colorado, for Respondent
Paul Olsen

In this workers' compensation action, employer Western Fire

Protection Group, Inc., and its insurer, ACE American Insurance Company (collectively employer), seek review of the final order of the Industrial Claim Appeals Office (Panel), which affirmed the decision of the administrative law judge (ALJ) awarding claimant, Paul Olsen, medical benefits and temporary total disability (TTD) benefits. The ALJ found claimant sustained an occupational disease to his back as a result of sitting in and driving employer's pick-up truck. Because we conclude that substantial evidence in the record supports these factual findings, we affirm.

I. Background

Claimant worked for employer as a NICET Level 3 fire life safety technician from January 12 through June 29, 2012. Employer issued claimant a company truck – a 2004 Chevrolet Colorado with approximately 180,000 miles on it – to drive from his home in Bailey, Colorado, to employer's office in Fort Collins, and to his clients' locations in northern Colorado and southern Wyoming. Claimant testified that he "repeatedly" complained to employer that the truck's driver's seat was uncomfortable and "very well worn," that the truck's "suspension was extremely rough," and that the

more he drove the truck “the more it hurt [his] back.”

Claimant first noticed the back pain about a month after he commenced working for employer and driving the truck. Claimant testified that his back pain generally resolved itself after he got out of the truck and moved around. But, on June 29, 2012, after driving the truck approximately 400 miles and conducting a nearly two-hour conference call from the driver’s seat while the truck was parked on the side of the road, he experienced “extreme” back pain and required his wife’s assistance to get out of the truck. Since that date, claimant has not been able to return to work.

Employer contested claimant’s claim for benefits, arguing that claimant’s condition was preexisting and that the truck seat functioned properly and could not be the cause of claimant’s injury. The ALJ was not persuaded, however, and found that claimant had demonstrated by a preponderance of the evidence that his job duties had caused an occupational disease to his back. The ALJ therefore awarded claimant medical and TTD benefits, which were to continue until “termination thereof is warranted by law.” The Panel determined that substantial evidence supported the ALJ’s

decision and affirmed. This appeal followed.

II. Analysis

Employer contends that there is insufficient evidence to support the ALJ's decision. It argues that the evidence presented can only lead to the conclusion that claimant did not sustain a compensable injury arising out of his employment. It further claims that the evidence overwhelmingly establishes that the truck seat was not defective and therefore could not have caused claimant's occupational disease. We are not persuaded.

A. Governing Law

Under the Workers' Compensation Act, an occupational disease is

a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14), C.R.S. 2013. An occupational disease arises "from

a prolonged exposure occasioned by the nature of the employment.”
Colo. Mental Health Inst. v. Austill, 940 P.2d 1125, 1128 (Colo. App.
1997).

To prove the existence of a work-related occupational disease, a claimant must establish, by a preponderance of the evidence, that the disease “was directly and proximately caused by the claimant’s employment or working conditions.” *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251, 252 (Colo. App. 1999); *see also Cowin & Co. v. Medina*, 860 P.2d 535, 537 (Colo. App. 1992) (“[A] claimant must establish the existence of a disease, that it was directly and proximately caused by claimant’s employment or working conditions and resulted from exposure to a hazard presented by those conditions, and the extent of the resulting disability.”).

Whether a claimant has met this burden is a question of fact for determination by the ALJ. *See Subsequent Injury Fund v. Indus. Claim Appeals Office*, 131 P.3d 1224, 1228 (Colo. App. 2006) (whether worker’s death was caused by an occupational disease is a question of fact); *Rockwell Int’l v. Turnbull*, 802 P.2d 1182, 1183-84 (Colo. App. 1990) (affirming ALJ’s decision weighing evidence in

claimant's favor). Like the Panel, we may not disturb the ALJ's determination if it is supported by substantial evidence in the record. *See Wal-Mart Stores, Inc.*, 989 P.2d at 252.

B. Substantial Evidence Supports the ALJ's Decision

Employer argues that the evidence established that the truck's seat was not defective and was not a hazard unique to claimant's employment. It is true that an occupational disease must not arise from "a hazard to which the worker would have been equally exposed outside of the employment." § 8-40-201(14); *see also Anderson v. Brinkhoff*, 859 P.2d 819, 823 (Colo. 1993) (noting the statutory elements of an occupational disease).

Here, the ALJ found that claimant had established the statutory elements of an occupational disease, with a last injurious exposure on the day claimant's back condition became disabling. We conclude that the evidence supports this determination.

There is no evidence in the record that claimant was exposed to any other hazard or condition that aggravated his back.

Employer asserts that claimant "would have been equally exposed" to the driving hazard "outside of his employment," but offers no

evidence indicating where else claimant may have been exposed to an uncomfortable seat or other condition that may have contributed to his back injury. The evidence suggests a temporal connection between claimant's back pain and his use of the truck, as both claimant and one of his coworkers testified that claimant began to complain of back pain caused by the seat within a month after he began driving the truck. Claimant also testified that his back, even with evidence of degenerative disc disease, was asymptomatic until he drove the truck. Indeed, it is undisputed that claimant's severe and debilitating back pain commenced immediately after a particularly lengthy drive in the truck. This evidence supports the ALJ's determination that the seat caused his occupational disease.

Contrary to employer's contention, the lack of definitive evidence establishing that the seat was defective does not preclude compensation. We know of no authority, and employer has not pointed to any, mandating that claimant prove the seat was defective before benefits can accrue. As explained by a physician retained by claimant, Dr. Jeffrey Kleiner, a seat need not malfunction to be the cause of back pain; the seat could be the

source of the problem simply because it did not provide the right support for claimant “and his body habitus.”

Moreover, despite employer’s insistence that the evidence did not establish that the seat was defective, the ALJ concluded, with record support, that the tests conducted on the seat were inadequate and unpersuasive. An occupational therapist who examined the seat at employer’s request only analyzed if the seat’s mechanisms functioned; she did not drive the vehicle, observe how the seat fit claimant, or check its suspension or springs. Claimant was not present for any of the seat testing.

Employer’s own medical expert, Dr. Lawrence Goldman, testified that because claimant was not present for any of the testing of the seat, the tests did not meet his criteria or recommendation for an ergonomic evaluation. And, as Dr. Kleiner explained, because “everyone’s different,” an individual can sustain an injury “from things which wouldn’t hurt other people who are not susceptible.” Thus, Dr. Kleiner concluded, a normal, non-defective seat could cause a worker to sustain an injury like claimant’s. The record thus amply supports the ALJ’s conclusion

that the seat caused claimant's injury.

Nor are we persuaded to reach a different result by employer's suggestion that, henceforth, employers may be liable for an occupational disease to anyone who drives a couple of hours per day. In our view, this outcome is specific to the facts of this case, and the determination that the seat was a hazard to this claimant is supported by the evidence presented to the ALJ. Any future claim for back pain caused by a car's seat would have to be evaluated on the totality of circumstances unique to that case and the credibility of the evidence weighed by an ALJ on its own merits. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (appellate court defers to the ALJ's credibility determinations and resolution of conflicts in the evidence, including the medical evidence).

Finally, to the extent employer contends that the evidence does not support the conclusion that claimant sustained an injury, we note that the evidence here, too, amply supports the ALJ's factual determination. In particular, Dr. Kleiner testified and opined that because claimant's back pain became symptomatic after driving the

truck, it was medically probable that the truck's seat caused claimant's back injury. Although Dr. Goldman testified that it was only possible, but not medically probable, that the seat was the culprit, the ALJ was free to weigh the credibility of the physicians' testimony. Doing so, the ALJ exercised his discretion when he concluded that Dr. Goldman's opinion was less credible and persuasive than that of Dr. Kleiner. *See Rockwell Int'l*, 802 P.2d at 1183 (“[T]he weight to be accorded to [expert] testimony is a matter exclusively within the discretion of the [ALJ] as fact-finder.”).

Because the weight and credibility given expert witnesses is within the ALJ's sound discretion, such findings “may not be disturbed absent a showing that the ALJ's credibility determination is ‘overwhelmingly rebutted by hard, certain evidence’ to the contrary.” *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 224 (Colo. App. 2008) (quoting *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000)). Consequently, we may not disturb the ALJ's finding that Dr. Kleiner's testimony and opinions were more credible and persuasive than Dr. Goldman's.

Because substantial evidence supports the ALJ's factual

findings and conclusions, we cannot set aside the ALJ's decision. See § 8-43-308, C.R.S. 2013; *Wal-Mart Stores, Inc.*, 989 P.2d at 252 (where substantial evidence supported ALJ's determination that claimant's neck problems were work-related, decision would not be disturbed). Accordingly, we conclude that the Panel committed no error when it affirmed the ALJ's order awarding claimant medical and TTD benefits. See § 8-43-301(8), C.R.S. 2013.

The order is affirmed.

JUDGE CASEBOLT and JUDGE RICHMAN concur.

Colorado Supreme Court -- June 2, 2014
2014 CO 42. No. 13SA33. *In the Matter of Olsen.*

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2014 CO 42

Supreme Court Case No. 13SA33
Original Proceeding in Discipline
Appeal from the Hearing Board, 12PDJ013

In the Matter of John R. Olsen.

Order Affirmed in Part and Vacated in Part
en banc
June 2, 2014

Attorneys for Complainant:

Office of the Attorney Regulation Counsel
James C. Coyle, Regulation Counsel
Charles E. Mortimer, Jr., Deputy Regulation Counsel
Denver, Colorado

Attorney for Respondent:

John R. Olsen, Pro Se
Niwot, Colorado

JUSTICE HOBBS delivered the Opinion of the Court.

¶1 In this attorney discipline proceeding, we conclude that the Hearing Board's order suspending attorney John R. Olsen for six months with the requirement of reinstatement is unreasonable. The Board found that Olsen had engaged in negligent conduct, not knowing falsehood. Our review of the ABA standards and our prior decisions leads us to conclude that the appropriate sanction against Olsen is public censure rather than suspension. We affirm the Hearing Board's conclusions that Olsen violated Rules of Professional Conduct 3.1 and 8.4(d), but we reverse its imposition of a six-month suspension with the requirement of reinstatement and instead order that Olsen be, and hereby is, publicly censured for his misconduct.

I.

¶2 Olsen was admitted to practice law in Colorado in 1979. The events leading to this disciplinary proceeding stemmed from an unemployment lawsuit Olsen filed on behalf of his client Melissa Mellott in the United States District Court for the District of Colorado in October 2009.¹ Mellott retained Olsen in January 2009 through a pro bono program to represent her in an unemployment claim following her termination from MSN Communications, Inc. ("MSN"). Before agreeing to represent Mellott, Olsen interviewed her and found her to be a highly credentialed engineer. Mellott explained that her husband was an airman stationed at the Air Force Academy in Colorado Springs and that they both had top-secret military clearances due to the nature of their work. Olsen, himself a military veteran, believed her to be credible. Mellott's initial claim for unemployment was successful and she began collecting benefits.

¶3 Olsen then filed a complaint in the district court, seeking back pay, equal pay, front pay, and benefits for Mellott. From the outset of the underlying litigation, MSN maintained that Mellott's claims were frivolous. It claimed that Mellott had been employed for substantial compensation since her termination from MSN; that Mellott was fraudulently using another woman's social security number to hide her substantial income while collecting unemployment; that Mellott fabricated documents purporting to authorize her use of a second social security number; and that she lied to the district court by asserting she moved to Germany in the summer of 2010.

A. Mellott's Claim for Lost Wages

¶4 In January and February 2010, MSN discovered that Mellott had been employed since her termination from MSN, and provided Olsen copies of payroll records it had subpoenaed from Blackstone Technology Group ("Blackstone") and Qwest Communications ("Qwest"). Mellott continued to deny that she had been employed "in

any capacity.” In her April 16, 2010, deposition, Mellott was presented with a W-2 form that contradicted that claim. She asserted that the W-2 was incorrect and denied receiving over \$100,000 from Qwest in documented direct-deposited funds. Mellott also denied receiving \$51,000 documented by Blackstone. Olsen did not seek to depose Blackstone or Qwest to verify Mellott’s version of events. He did claim that he contacted Blackstone’s human resources department in an attempt to verify the payroll records and was instructed to obtain a release from Mellott. He did not obtain the release. Olsen also contacted Qwest and was told that Mellott was being internally investigated and her wages had been frozen as a result. He took no further steps to verify the Qwest documents.

¶5 With its motion to dismiss, filed on June 10, 2010, MSN again provided Olsen with the Qwest and Blackstone records and attached an email exchange between Mellott and a third employer in which she asked it to match Qwest’s employment package. Despite being presented with this credible evidence that his client had been untruthful about not working, Olsen’s response to MSN’s motion to dismiss simply reasserted Mellott’s declarations that she had not been regularly employed since March 16, 2010, that she had not received most of the direct-deposited funds from Qwest or Blackstone, and that the companies issued “misleading financial, payroll and paystub documents.” Olsen did not supplement Mellott’s discovery responses or deposition in light of her shifting narrative of events.

B. Mellott’s Social Security Number

¶6 MSN also discovered evidence that Mellott was using another woman’s social security number (“SSN”) and presented it to Olsen in the early stages of litigation. When questioned during discovery about her use of two SSNs, Mellott first claimed that she had been given a “temporary verification number” which was “linked” to her actual SSN. She submitted a document purportedly assigning her a “temperary” number (the word “temporary” was misspelled three times in the document), and Olsen never questioned its authenticity. During her deposition in April 2010, Mellott advanced a second theory to justify her use of the second SSN. When asked if she was familiar with Sandra Prince, a Florida resident whose SSN was identical to the number Mellott had submitted to Blackstone and Qwest, she claimed Blackstone had somehow erred in entering her information when preparing its I-9 form, mistakenly generating Prince’s records. Olsen later testified that he believed Mellott was merely “confused,” rather than dishonest, during her deposition.

¶7 In its June 10, 2010, motion to dismiss, MSN claimed Mellott had committed social security fraud. Olsen responded on August 2, 2010, and claimed MSN’s motion lacked basis in fact and was frivolous, and he attacked MSN’s counsel’s motives. He submitted a notarized declaration by Mellott and documents ostensibly authorizing her to use the other SSN. Olsen also attached his own declaration describing his personal knowledge of military security clearances (which Mellott claimed both she and her husband had) and advanced Mellott’s improbable theory for why she had used two SSNs. On August 12, 2010, MSN requested that Mellott authorize the Social Security Administration to release her records. Olsen opposed the request because, by that point, the district court had stayed discovery in the case in connection with MSN’s June 10, 2010, motion to dismiss.

¶8 Olsen later claimed that he had visited the Social Security Administration Office in Boulder on two occasions to try to confirm Mellott’s SSN, but he was again unable to obtain information without a release from Mellott. He did not obtain the release. Olsen also claimed to have made efforts to investigate Sandra Prince’s SSN, but stated that she refused to cooperate. During December 2010 hearings before Colorado Federal District Court Judge Philip Brimmer, a Social Security Administration supervisor testified that the SSN in question was not associated with Mellott, that the document Mellott submitted listing her “temperary” verification number was not a form the agency uses, and that it never issues temporary numbers. Rather than question his client’s inconsistent versions of events, Olsen instead claimed that the supervisor was “ignorant” and suggested she lied on the stand. Olsen did not withdraw his assertion that Mellott was legally entitled to use the SSN in question.

C. Claim that Mellott Relocated to Germany

¶9 Mellott’s case began to unravel in earnest in summer 2010. In a July 29, 2010, motion for a forthwith hearing, Olsen notified the district court that Mellott had moved to Germany because she had been assigned to “another sensitive role in the military.” On August 8, 2010, MSN filed a motion for attorney’s fees and costs, asserting that Mellott was not in Germany. Olsen requested additional time to respond to MSN’s motion, claiming it was difficult for Mellott to gather her “documents” and she did not have “scanning or FAXing ability from Germany (at her home).” Olsen’s September 1, 2010, response attached Mellott’s declaration that she had moved, a copy of her heavily redacted bank records allegedly listing transactions she made in Germany in July 2010, and Olsen’s own declaration that his client had moved. Olsen declared under oath that the bank records were valid and that he called his client on a German telephone number using German operator assistance.

¶10 That same day, Olsen contacted Mellott’s husband’s boss, Major Williams, to confirm the Mellotts’ relocation to Germany and Williams responded that Mr. Mellott had not been relocated. Olsen decided to disregard Major Williams’ statement based on the fact that the Major had previously denied Mellott had ever been employed by the Air Force, and Mellott had told Olsen otherwise.² Olsen also claimed to have spoken to a “receptionist” for Mr. Mellott’s unit, who told him Mr. Mellott “was somewhere on the East Coast”—a statement that Olsen inexplicably decided meant Mr. Mellott had been reassigned to another country.

¶11 Magistrate Judge Michael J. Watanabe set a hearing for October 27, 2010, and ordered Mellott to bring the passport she allegedly used while in Germany. Olsen ~~412~~ filed a motion to continue the hearing and submitted another

notarized declaration from Mellott attesting to her relocation, but the motion was denied. On October 26, 2010, Olsen moved to dismiss the case, asserting that Mellott could not afford to fly to Denver from Europe and was seeking employment overseas. At the October 27th hearing, an MSN employee testified that he had seen Mellott working at the offices of Dish Network on October 25, 2010, and had taken a photo with his cell phone of her working there. Olsen did not cross-examine the employee. Mellott's husband testified that he had seen her that very morning, that she was currently employed, and that she decided to work rather than attend the hearing. Mr. Mellott further testified that he had not been reassigned and neither he nor his children had been in Europe during the previous three months. Olsen later claimed that, while he was "stunned" by Mr. Mellott's testimony, he ultimately believed that Mr. Mellott was lying to somehow protect his wife and children, or alternatively, that he refused to acknowledge that he had been in Europe because of his top-secret operations.

¶12 The court granted Olsen's motion to dismiss on October 29, 2010, and granted MSN leave to file an updated motion for attorney's fees and costs. Two days later, Olsen requested permission to retract certain assertions that both he and Mellott had made regarding her move to Germany, which he finally concluded were false. On November 5, 2010, MSN filed a motion to compel the disclosure of attorney-client communications pursuant to the crime/fraud exception to attorney-client privilege on the grounds that Mellott and Olsen had conspired to commit social security fraud.

¶13 On November 23, 2010, MSN filed a second motion for attorney's fees and costs. On December 8, 2010, Magistrate Judge Watanabe issued an order directing Mellott to surrender her passport and concluding that statements made by Olsen and Mellott about her move to Germany were indeed false. Judge Brimmer held a hearing on December 21, 2010, on MSN's second motion for attorney's fees and costs and the crime/fraud motion, and on September 30, 2011, Judge Brimmer issued an order granting MSN's second motion for attorney's fees and denying the crime/fraud motion.

¶14 Judge Brimmer determined that Mellott lied under oath and in response to discovery requests by (i) stating that she was not working since being terminated from MSN, when in fact she had secured several lucrative jobs; (ii) lying about her use of two SSNs; and (iii) giving "preposterous testimony" about relocating to Germany and using a British-issued passport. Judge Brimmer also determined that Olsen should have been skeptical of his client's increasingly implausible contentions and that he had no basis to continue pursuing her original claims after MSN presented credible evidence that she was lying. Judge Brimmer concluded that Olsen's conduct "exceeded mere objective unreasonableness" and sanctioned Mellott and Olsen each \$25,000 pursuant to 28 U.S.C. § 1927 (2012). The sanction was also based on Judge Brimmer's finding that Olsen unreasonably multiplied the proceedings and reaffirmed false statements made by Mellott.

D. Disciplinary Proceeding

¶15 The Office of Attorney Regulation filed a complaint against Olsen in February 2012, alleging he violated several Colorado Rules of Professional Conduct in connection with his representation of Mellott. Prior to his disciplinary hearing, Olsen filed multiple motions to disqualify Presiding Disciplinary Judge Lucero, all of which were denied as meritless.³ After the disciplinary hearing, Olsen filed two additional motions for a mistrial, both of which were largely unsupported and were denied. The Hearing Board issued its Opinion and Decision Imposing Sanctions on December 17, 2012, concluding that the appropriate sanction for Olsen's misconduct was a six-month suspension with the requirement of reinstatement. The Hearing Board granted Olsen's motion for a stay of the suspension pending this appeal with the condition that he undergo practice monitoring and choose an appropriate practice monitor in consultation with Attorney Regulation. Olsen defied the latter condition by proposing three unsuitable practice monitors—his wife, his son, and a former employee—before Judge Lucero finally ordered him to select one from a list of neutral attorneys. Olsen's practice monitor has since submitted periodic reports attesting to his compliance with their Practice Monitoring Plan.

II.

¶16 We affirm the Hearing Board's conclusions that Olsen violated Rules of Professional Conduct 3.1 and 8.4(d), but we reverse its imposition of a six-month suspension with the requirement of reinstatement and instead order that Olsen be, and hereby is, publicly censured for his misconduct. We begin with an analysis of Olsen's violations of Rules 3.1 and 8.4(d) and then evaluate the proper sanction in light of the ABA Standards, our prior disciplinary decisions, and the specific facts of this case.

A. Standard of Review

¶17 This Court has exclusive jurisdiction over lawyers and possesses the plenary authority to regulate and supervise the practice of law in Colorado. *See* C.R.C.P. 251.1(d); *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002) (citing *People v. Varallo*, 913 P.2d 1, 3 (Colo. 1996)). We will affirm a sanction imposed by the Hearing Board unless we determine that the form of discipline bears no relation to the conduct, is manifestly excessive or insufficient in relation to the needs of the public, or is otherwise unreasonable. C.R.C.P. 251.27(b); *In re Roose*, 69 P.3d 43, 46 (Colo. 2003). We are bound by the Hearing Board's findings of fact, including its credibility determinations, unless they are not supported by substantial evidence in the record. *In re Rosen*, 198 P.3d 116, 119 (Colo. 2008); *In re Haines*, 177 P.3d 1239, 1244 (Colo. 2008). We review its decisions to characterize particular facts as aggravating or mitigating and its ultimate sanction de novo. *See* C.R.C.P. 251.27(b); *see also In re Hickox*, 57 P.3d 403, 404 (Colo. 2002).

¶18 We have consistently recognized the ABA Standards for Imposing Lawyer Sanctions (1986 & Supp. 1992) as the guiding authority in Colorado for selecting an appropriate sanction for an attorney in a disciplinary proceeding. See In re Attorney D., 57 P.3d 395, 399 (Colo. 2002). The purpose of the Standards is to foster consistency and fairness in the imposition of sanctions. See ABA Standards, Preface. The Standards lay out a range of suggested sanctions for each type of misconduct and require disciplinary bodies to consider the duty that was violated, the attorney's mental state, and the actual or potential injury caused by the attorney's misconduct. ABA Standards 3.0; Roose, 69 P.3d at 47. The Standards also require consideration of aggravating or mitigating factors that may enhance or reduce the presumptive sanction for an offense. Id. In evaluating the reasonableness of a sanction, we also consider our prior disciplinary decisions, though we have cautioned that a meaningful comparison between cases is challenging and each case must be decided according to its unique facts. In re Attorney F., 285 P.3d 322, 327 (Colo. 2012).

B. Hearing Board Findings on Rule Violations

¶19 After receiving briefing, conducting a formal hearing, and taking testimony from several witnesses, the Board concluded that Olsen violated two rules of Professional Conduct. It concluded that he violated Rule 3.1 by advancing three frivolous arguments on behalf of his client in the underlying federal litigation: (i) Mellott's claim for lost wages; (ii) Mellott's theories for why she used multiple SSNs; and (iii) that Mellott had moved to Europe and was unavailable to appear in person for several hearings before the federal magistrate and district court judges. The Board also concluded that Olsen violated Rule 8.4(d) by engaging in protracted and unnecessary litigation that wasted considerable judicial resources and prejudiced the administration of justice. We agree with the Board's conclusions that Olsen violated Rules 3.1 and 8.4(d).

¶20 Rule 3.1 states, in pertinent part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." We interpret Rule 3.1 broadly to include all proceedings in which factual and legal contentions are made, including post-trial and disciplinary proceedings. An objective standard is used to determine whether an attorney's claim is frivolous. See Colo. RPC Preamble cmt. 20 ("[The] Rules . . . establish standards of conduct by lawyers . . . a lawyer's violation of a Rule may be evidence of [a] breach of the applicable standard of conduct."). While an attorney is permitted to rely on factual accounts given by a client, it may not be objectively reasonable to continue to rely exclusively on a client's statement of facts when the attorney is presented with credible contradictory evidence. See Colo. RPC 3.1 cmt. 2 ("What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases . . . and determine that they can make good faith arguments in support of their clients' positions.").

¶21 The Board found that Olsen advanced his client's frivolous arguments first in the underlying federal lawsuit, and again in the post-trial proceedings concerning attorney fees and other sanctions. The Board reasoned that "it should have been obvious to [Olsen] that [his client's] shifting narratives were completely contradicted by credible evidence" and also that there was a "dearth of credible evidence indicating that [Olsen] conducted a reasonable investigation of his client's implausible factual assertions."

¶22 We agree that Olsen had an ongoing professional duty to independently assess the factual and legal bases for Mellott's claims. At the same time, we recognize that an attorney's role is to advocate for the client. The dissenting Hearing Board member correctly observes that an attorney has a duty of loyalty to the client, along with a duty of candor to the court, and attorneys should generally resolve doubts about the factual underpinnings of a claim in favor of their clients.

¶23 Nevertheless, Rule 8.4(d) states, in pertinent part: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." The record before us contains ample evidence that Olsen's conduct prejudiced the administration of justice in the underlying federal lawsuit. His unprofessional demeanor in dealing with opposing counsel, Judge Brimmer, and Magistrate Judge Watanabe exceeded the bounds of acceptable litigation strategy and evidenced a disregard for his professional responsibility to the tribunals. As a result of Olsen's pursuit of his client's frivolous arguments, Judge Brimmer and Magistrate Judge Watanabe were each required to expend significant judicial resources scheduling, preparing for, and continuing hearings, and ruling on Olsen's repetitive and often unsupported motions. For these reasons, there is adequate evidence in the record to uphold the Board's conclusion that Olsen violated Rule 8.4(d).

¶24 We conclude it to be significant, however, that the Board disagreed with the People's contention that Olsen violated Rule 3.3(a)(3)⁴ by knowingly offering false evidence in the underlying litigation and failing to take reasonable remedial measures in the district court.⁵ The Board properly interpreted Rule 3.3(a)(3) as requiring an attorney's actual knowledge that evidence is false before the duty to take remedial measures is triggered. See Colo. RPC 3.3 cmt. 8. Because the Board could not find that Olsen actually knew his client was lying, only that he "should have known . . . that his client's statements and documents were false," it concluded that he did not have the requisite mental state—knowledge—for a Rule 3.3(a)(3) violation. Likewise, the Board found that the People had failed to offer sufficient evidence that Olsen violated Rule 8.4(c).⁶ The prohibition against offering false evidence makes clear that a lawyer's "reasonable belief" the evidence is false does not necessarily preclude its presentation to the trier of fact. Colo. RPC 3.3 cmt. 8. Again, the Board found Olsen's mental state to be negligent but not knowing.

1. Duty, Mental State, and Injury Caused

¶25 Having found violations of Rules 3.1 and 8.4(d), the Board properly proceeded to apply the ABA Standards to Olsen's misconduct to arrive at a presumptive sanction. See ABA Standard 3.0; In re Attorney F., 285 P.3d 322, 326 (Colo. 2012) (prescribing a "flexible" two-step inquiry into the duty owed, the attorney's mental state, and the injury caused, followed by consideration of aggravating and mitigating factors). The Board concluded that Olsen violated a duty to the legal system by "persistently advancing three frivolous claims without basis in fact and by failing to adequately investigate his client's factual assertions." As discussed above, it concluded that his mental state was negligent, but not knowing, in that he "failed to heed a substantial risk that his advancement of [his client's] claims would cause harm to opposing counsel and the legal system."⁷ Last, the Board concluded that Olsen caused injury to the legal system and opposing counsel by wasting judicial resources and "prolonging the underlying litigation unnecessarily." There is sufficient evidence in the record to support the Board's conclusions on Olsen's duty, mental state, and the causation of injury.

2. ABA Aggravating and Mitigating Factors

¶26 Turning to the sanction for Olsen's misconduct, Standards 6.1 and 6.2 identify public censure as the presumptive sanction against a lawyer who is either negligent in determining whether statements or documents are false, or negligently brings a frivolous claim and causes injury to a party and interference with a legal proceeding. This presumptive sanction may be increased or decreased in light of aggravating and mitigating factors, as well as in light of our decisions in past disciplinary cases. In re Attorney F., 285 P.3d at 326.⁸ We review the Board's analysis of aggravating and mitigating factors de novo and will generally uphold its sanction unless we determine it to be unreasonable. See C.R.C.P. 251.27(b); see also Hickox, 57 P.3d at 404.

¶27 The Board considered five aggravating factors, one mitigating factor, and one additional factor to which it gave no weight. The aggravating factors the Board considered were:

- 9.22(c): Pattern of Misconduct—The Board applied "substantial weight" to the fact that Olsen had engaged in similar misconduct in a separate client matter around the same time, for which he was privately censured;
- 9.22(d): Multiple Offenses—The Board found that Olsen committed three separate violations of Rule 3.1 and one violation of Rule 8.4(d);
- 9.22(f): Deceptive Practices During the Disciplinary Process—The Board applied "substantial weight" to its finding that Olsen deceptively cross-examined a witness at the disciplinary hearing and frequently misrepresented evidence in his briefs, motions, and testimony;
- 9.22(g): Refusal to Acknowledge Wrongful Nature of Conduct— The Board applied "substantial weight" to the fact that Olsen has repeatedly "refused to acknowledge the obvious or take any responsibility for his actions," has "completely discounted any facts at odds with [his client's] version of events," and "failed to acknowledge his role in advancing frivolous claims"; and
- 9.22(i): Substantial Experience in the Practice of Law—The Board noted that Olsen has been a practicing attorney licensed in the State of Colorado since 1979 and has substantial litigation experience.

The single mitigating factor the Board considered was 9.32(k): Imposition of Other Penalties, in light of the \$25,000 sanction Olsen had paid to the federal district court as of the date of the Board's decision. The People initially conceded one additional mitigating factor, 9.32(e): Full and Free Disclosure to Panel or Cooperative Attitude During Proceedings, but the Board later gave no weight to this factor because of its belief that Olsen engaged in deceptive conduct at the disciplinary hearing. After weighing these factors and considering our prior disciplinary decisions, the Board determined that Olsen's presumptive sanction of public censure should be increased to a six-month suspension with the requirement of reinstatement.

¶28 We conclude that increasing Olsen's sanction from public censure to a six-month suspension with the requirement of reinstatement is unreasonable. The Board found that Olsen had engaged in negligent conduct, not knowing falsehood. Our review of the ABA standards and our prior decisions leads us to conclude that the appropriate sanction against Olsen is public censure rather than suspension.

¶29 While an attorney's mental state is not dispositive of the appropriateness of any particular sanction, our prior decisions have generally imposed harsher sanctions for knowing or intentional ethical violations than for negligence. See People v. Cain, 957 P.2d 346, 347 (Colo. 1998) ("The lawyer's mental state at the time of the misconduct is [a] critical difference between suspension and reprimand."); compare People v. Haase, 781 P.2d 80 (Colo. 1989) (imposing a six-month suspension for an attorney's obstruction of the discovery process, including intentional collusion with clients and expert witness to conceal discoverable facts unfavorable to their case) with People v. Thomas, 925 P.2d 1081 (Colo. 1996) (imposing public censure for an attorney's filing of frivolous motions, failure to cooperate with the disciplinary investigation, and making false statements concerning the qualifications and integrity of a judge). We determine it to be significant that the Board was unable to find that Olsen knowingly violated any rules, but that he was merely negligent in his failure to adequately investigate the factual underpinnings of his client's claims.

¶30 Olsen goes further and argues that his due process rights were violated because only two of the three Board members found him to be negligent, and thus he should not be subject to any sanction in this case. He claims that the imposition of a disciplinary sanction is akin to imposition of a criminal penalty and imposing a sanction against him required a unanimous vote. An attorney discipline case is not a criminal case and a lawyer's procedural due

process rights do not mirror those of a criminal defendant. People v. Smith, 937 P.2d 724, 727 (Colo. 1997); accord Varallo, 913 P.2d at 3 (“A lawyer in a disciplinary proceeding is entitled to procedural due process, although there is no requirement that the lawyer be afforded the same constitutional safeguards as in a criminal trial.”) (citations omitted). The Rules of Civil Procedure expressly provide for a valid sanction imposed by only two Board members. C.R.C.P. 251.19(a) (“Within 56 days (8 weeks) after the hearing, the Hearing Board shall prepare an opinion setting forth its findings of fact and its decision . . . [t]he opinion shall be signed by each concurring member of the Hearing Board. Two members are required to make a decision.”). Therefore, we are not required to overturn Olsen’s sanction due to the mere existence of the dissent in this case and, as stated above, there is adequate evidence in the record to support Olsen’s Rule 3.1 and 8.4(d) violations. Instead, where we disagree with the Board concerns the weight it gave to certain aggravating factors, which it ultimately used to increase his sanction from public censure to suspension.

¶31 First, we conclude that the Board applied too much weight to the aggravating factor that Olsen committed four distinct ethical violations. While Olsen did advance three distinct and frivolous arguments in the underlying litigation, and thus his actions constituted at least one violation of Rule 3.1, the record shows that the basis for all three of the frivolous claims was a pattern of lies and deception that originated with Olsen’s client, not Olsen himself. As the dissenting Hearing Board member pointed out, “the facts showing that [Olsen’s client] was lying did not reveal themselves in a continuous manner,” which complicates identifying the exact point at which Olsen should have recognized each claim was frivolous. A claim may appear to be meritorious at the outset of a case, only to be revealed as factually unsupported later on. We determine that Olsen’s Rule 3.1 violation is more appropriately characterized as a single violation arising from the ongoing pattern of untruths of his client, rather than three distinct violations.

¶32 Second, we disagree with the Board’s attribution of “substantial weight” to the aggravating factor of Olsen’s pattern of misconduct. Olsen was privately censured for similar misconduct around the same time he was representing Mellott. At his disciplinary hearing, Olsen moved for a mistrial when Attorney Regulation Counsel sought to offer into evidence a sealed envelope containing the record of his private censure. It was offered for the Board to consider as an aggravating factor only if it found Olsen had violated the Rules of Professional Conduct in the present case. Olsen claims this was an “improper procedure” that was “extremely prejudicial” to him. Though Judge Lucero properly denied Olsen’s motions for a mistrial because conditional admission of such evidence is consistent with the ABA Standards, see People v. Sather, 936 P.2d 576, 579 (Colo. 1997), we are not convinced that a single instance of prior discipline, without more, deserves greater than average weight.

¶33 We also decline to apply such “substantial weight” to what the Board viewed as Olsen’s deceptive practices during the disciplinary process. The primary basis⁹ for the Board’s application of substantial weight to this factor was its conclusion that Olsen engaged in deceptive cross-examination of a People’s witness about the location of the Boulder-area Social Security Administration (“SSA”) office. The Board concluded that Olsen’s cross-examination “strongly implied” that there are two SSA locations in Boulder and that he had visited a different location from the witness—presumably to undermine the witness’s credibility and to bolster his own credibility about the diligence of his independent investigation of his client’s claims. The Board took judicial notice of the existence of a single Boulder SSA office pursuant to C.R.E. 201 and Olsen claimed that this violated his due process rights because he did not have an opportunity to respond. While we disagree with Olsen’s argument that his due process rights were violated, we do recognize his right to confront and aggressively cross-examine the witnesses against him in a disciplinary proceeding. We resolve the issue of Olsen’s perceived deceptive cross-examination of witnesses in the disciplinary hearing in favor of Olsen.

¶34 In sum, our review of the Board’s application of ABA aggravating factors to Olsen’s case has led us to conclude that several of these factors—his multiple offenses, his pattern of misconduct, and his perceived deceptive practices during the disciplinary process—were given undue weight. The Board’s decision to increase his presumptive sanction of public censure to a six-month suspension was based, in large part, on these aggravating factors.

¶35 The primary purpose of lawyer regulation proceedings is to protect the public, not to punish the offending lawyer. Cardwell, 50 P.3d at 904 (“[W]e have made it clear that the primary purpose of attorney discipline is to protect the public, not to punish the offending lawyer.”). On balance, we conclude that the more reasonable sanction against Olsen is the presumptive sanction for negligent violations of Rules 3.1 and 8.4(d)—public censure—rather than suspension.

¶36 We observe that Judge Lucero granted a stay of Olsen’s suspension pending this appeal, concluding that the public would be adequately protected by Olsen undergoing practice monitoring until we issued our decision.¹⁰ See C.R.C.P. 251.27(h) (favoring the grant of a stay pending appeal unless the public will not be adequately protected). Olsen’s practice monitor has observed no further violations of the Rules of Professional Conduct during the pendency of this appeal. If Olsen again engages in conduct that violates the Rules, a more severe sanction than public censure would be available in a future disciplinary proceeding.

III.

¶37 We affirm the Hearing Board’s conclusions that Olsen violated Rules of Professional Conduct 3.1 and 8.4(d), but we reverse its imposition of a six-month suspension with the requirement of reinstatement. We hereby censure John R. Olsen for his misconduct.

¹ A complete summary of the facts of this case could fill volumes. Indeed, the Hearing Board's thorough opinion dedicates nearly twenty pages to summarizing the record of the federal litigation and Olsen's disciplinary proceeding. We highlight in this opinion only the facts most relevant to our decision on the appropriate sanction for Olsen.

² On September 20, 2010, Major Williams submitted a revised affidavit confirming that Mellott had indeed been employed as a "recreational specialist" with the Air Force for a brief period in 1999. This description differed from Mellot's and Olsen's assertions that she was required to have "top-secret" clearance for her job.

³ Olsen attempts to revive this recusal argument on appeal, claiming that the fact that Judge Lucero and Judge Brimmer were formerly employed as Assistant U.S. Attorneys together renders Judge Lucero biased in the present case. Olsen provides no legal authority to support this assertion and we are not convinced by his arguments.

⁴ Colo. RPC 3.3(a)(3) states, in pertinent part: "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." (emphasis added).

⁵ We note that the People did not cross-appeal on the Rule 3.3(a)(3) and 8.4(c) violations. We include this discussion for the purpose of comparing the requisite mental state for a violation of each of the Rules Olsen was alleged to have violated.

⁶ Colo. RPC 8.4(c) states, in pertinent part: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

⁷ Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards § 3 Definitions. Knowledge is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Id.

⁸ We have cautioned that this framework is not designed to propose a specific sanction for each of the unique fact patterns in cases of attorney misconduct, and that sanctions imposed must reflect the circumstances of each individual case. See id. (citing Rosen, 198 P.3d at 121).

⁹ While Olsen's deceptive cross-examination of the People's witness about the Boulder SSA office was the primary basis for its application of substantial weight to this factor, we acknowledge that the Board cited other incidents—his cross-examination of opposing counsel from the federal litigation and his misrepresentation of evidence pertaining to his client's SSN—as additional evidence of Olsen's deceptive conduct. While the record generally supports these findings, we still conclude that the Board erred in applying "substantial" weight to this aggravating factor.

¹⁰ The Board issued its opinion on the merits on December 17, 2012, holding in part that Olsen's deceptive conduct during the disciplinary proceedings was an aggravating factor supporting a six-month suspension. This perceived "deceptive conduct," as discussed above, included Olsen's cross-examination of a People's witness about the location of the Boulder-area SSA office. On February 14, 2013, Judge Lucero granted Olsen's motion for a stay of his six-month suspension pending this appeal. On July 17, 2013, the People filed a motion to lift the stay and immediately activate Olsen's suspension on the grounds that Olsen again deceptively asserted the existence of two SSA offices in his opening brief to this Court. Olsen argues that Judge Lucero somehow "reversed himself" when he denied the Peoples' motion to lift the stay. In denying the motion, Judge Lucero did nothing to affect the merits of the Board's decision. We are unpersuaded by Olsen's argument that Judge Lucero reversed himself, and we reaffirm Judge Lucero's authority to enter such orders pursuant to C.R.C.P. 251.19(c).

These opinions are not final. They may be modified, changed or withdrawn in accordance with Rules 40 and 49 of the Colorado Appellate Rules. Changes to or modifications of these opinions resulting from any action taken by the Court of Appeals or the Supreme Court are not incorporated here.

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May 6, 2014

Elisabeth A. Shumaker
Clerk of Court

VON J. PHATHONG; JENNIFER D.
PHATHONG,

Plaintiffs - Appellees,

v.

TESCO CORPORATION (US),

Defendant - Appellant.

No. 12-1455
(D.C. No. 1:10-CV-00780-WJM-MJW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **LUCERO, MURPHY, and BACHARACH**, Circuit Judges.

I. INTRODUCTION

Von J. Phathong was seriously injured while working on a drilling rig in Garfield County, Colorado. Phathong sued Tesco Corporation (“Tesco”), the operator of the drilling rig, alleging a Colorado state-law claim for negligence.¹

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹Phathong’s wife, Jennifer Phathong, brought a claim for loss of consortium in the same complaint. In Colorado, “[l]oss of consortium is a derivative claim. Derivative claims are unique in that they depend entirely upon the right of the

(continued...)

Prior to trial, Tesco sought summary judgment on the ground it was immune from common-law negligence liability because, inter alia, it was Phathong's statutory employer under the provisions of Colorado's Workers' Compensation Act. *See* Colo. Rev. Stat. § 8-41-401. The district court denied Tesco's motion, concluding the existence of disputed issues of material fact precluded summary judgment. The matter proceeded to trial. After the parties rested their cases, but before the matter was submitted to the jury, the district court, on its own motion, granted judgment as a matter of law to Phathong on the question of immunity. In so doing, it concluded "the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer" under § 8-41-401. The district court thereafter submitted Phathong's negligence claim to the jury; the jury found in Phathong's favor and granted him a substantial award of damages.² Tesco appeals, raising multiple challenges to both the district court's legal rulings and the jury's award of damages. This court concludes the record conclusively demonstrates Tesco was Phathong's statutory employer and, therefore, immune

¹(...continued)

injured person to recover." *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1164 (Colo. 2000) (citation omitted). "The effect of being a derivative claim is that loss of consortium claims are subject to the same defenses available to the underlying personal injury claim." *Id.* at 1164 n.6. Accordingly, the analysis set out in this opinion as to Phathong's negligence claim applies equally to Jennifer Phathong's claim for loss of consortium.

²The jury likewise found in favor of Jennifer Phathong on her loss-of-consortium claim and awarded her \$75,000 in damages.

from Phathong's negligence claims. This ruling obviates the need to address any of the other issues raised by Tesco on appeal. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **remands** this case to the district court to vacate its judgment in favor of the Phathongs and, instead, enter judgment in favor of Tesco.

II. BACKGROUND

A. Factual Background

Phathong began working for Tesco as a "floor hand" on a particular drilling rig, the DTC2 rig, in October of 2005. At 3:30 a.m. on the morning of December 13, 2005,³ Phathong was seriously injured while working on DTC2. For purposes of resolving this appeal, it is unnecessary to set out the facts surrounding Phathong's injury. Instead, it is sufficient to note the jury found Tesco's negligence in the operation of DTC2 was ninety-percent responsible for Phathong's injuries and awarded him a substantial amount of damages.

Tesco develops, manufactures, and services oil and gas rigs. As part of its normal business practices, Tesco would, at the time of the events at issue in this case, sign drilling contracts with owners of natural gas wells to provide drilling services, including the provision of drilling rigs and the personnel necessary to operate those rigs (the "casing drilling services business"). In April 2003, Tesco

³As will quickly become apparent, the date and time of this accident plays a critical part in this appeal.

entered into a Master Service Agreement with EnCana Oil & Gas (USA), Inc. (“EnCana”). This Master Service Agreement governed all subsequent contracts between Tesco and EnCana. Thereafter, in June 2005, Tesco and EnCana entered into a drilling contract (the “EnCana Drilling Contract”) covering Tesco’s natural gas casing drilling services operations on behalf of EnCana in Garfield County, Colorado. The EnCana Drilling Contract obligated Tesco, as the driller, to furnish all equipment, labor, and services necessary to dig wells to the depth of no less than 9500 feet, and no more than 10,000 feet. In particular, it mandated that Tesco use DTC2, a drilling rig leased by Tesco from Drillers Technology Corporation, for all work covered by the contract. The EnCana Drilling Contract also made Tesco responsible for making sure work on the rig was performed safely and obligated Tesco to carry adequate workers’ compensation insurance.

During the summer of 2005 (i.e., before Phathong was hired by Tesco and before the accident giving rise to Phathong’s injuries), Tesco entered into negotiations to sell the casing drilling services portion of its business to Turnkey E&P Corporation (“Turnkey”). At approximately 7:30 a.m. on the morning of December 13, 2005, Tesco and Turnkey closed on their Revised and Restated Acquisition Agreement (the “Acquisition Agreement”) and related Rig Personnel Supply Agreement (the “Rig Personnel Agreement”). Pursuant to the terms of the Acquisition Agreement, the deal became effective at 12:01 a.m. on the closing date (i.e., 12:01 a.m. on December 13, 2005, which is approximately three and

one-half hours before the accident giving rise to Phathong's injuries).⁴ Turnkey acquired only the casing drilling services division of Tesco and, after the sale, Tesco remained in business. Specifically, Turnkey acquired four Tesco-owned drilling rigs and the drilling contracts associated with those rigs. Turnkey also acquired all employees who worked in Tesco's casing drilling services division, including Phathong and the other DTC2 crew members.⁵ Importantly, however, Turnkey did not acquire the Master Service Agreement or EnCana Drilling Contract. Nor did Turnkey acquire Tesco's lease of DTC2 or of the other two rigs Tesco leased from Drillers Technology Corporation. Thus, as of 12:01 a.m. on December 13, 2005, Tesco remained obligated to perform under its remaining

⁴This provision of the Acquisition Agreement underpins Phathong's arguments regarding the unavailability of immunity to Tesco under Colorado's Workers' Compensation Act. That is, if the agreement had become effective upon closing, rather than at 12:01 a.m. on the day of closing, there would be no doubt but that Tesco was Phathong's actual employer at the time of the accident and, thus, entitled to immunity under the provisions of Colorado's Workers' Compensation Act. Because Tesco does not raise the argument on appeal, and because the record makes clear Tesco was Phathong's statutory employer, this court need not address whether the arbitrary time frame for assigning corporate liabilities in the contract between Tesco and Turnkey served to strip Tesco of its status as an actual employer under Colorado law. *See infra* n.5.

⁵The Acquisition Agreement provided that Tesco would be responsible for all "liability, costs[,] and expenses" for employment claims, including workers' compensation claims, "any employment-related tort claim," or "other claims or charges of or by" a former Tesco employee that accrued prior to the effective time of the agreement. Likewise, the agreement provided Turnkey would be responsible for the same accruing after the effective time.

contracts with, inter alia, EnCana and its drilling rig leases with Drillers Technology Corporation.

To fulfil its contractual obligations to EnCana and others, Tesco entered into the Rig Personnel Agreement with Turnkey. The Rig Personnel Agreement first recited that Tesco (1) remained contractually obligated to perform under its agreements with EnCana and others, (2) continued to hold leases on drilling rigs owned by Drillers Technology Corporation, but (3) lacked the manpower to manage the rigs because of the sale of its casing drilling services business to Turnkey. In light of these facts, the parties agreed that “while [Tesco] provides services to its third party customers, [Turnkey] shall provide personnel services with respect to the” leased rigs. Tesco paid Turnkey every two weeks pursuant to the following formula: “[Turnkey] will be compensated for the Services at the rate of one hundred and fifteen percent (115%) of the total of the actual and reasonably documented costs to [Turnkey] of salary and employment benefits and related [workers’] compensation paid to (or on behalf of) those individual employees of [Turnkey] who provide Services to [Tesco] under this Agreement”⁶ The Rig Personnel Agreement imposed upon Tesco the

⁶This billing arrangement stands in stark contrast to the billing arrangement Turnkey and Tesco reached as to drilling contracts assigned to Turnkey under the Acquisition Agreement. As to the assigned contracts, the Acquisition Agreement obligated Tesco to use its best efforts to secure consent from all its customers to the assignments. Until such consent was secured, Tesco was obligated to

(continued...)

responsibility for designating to Turnkey the drilling locations for the rigs, the drilling schedule, and providing a safe workplace environment for the performance of the services under the agreement. Turnkey was responsible for ensuring its personnel acted in a “commercially reasonable, industry standard manner and endeavor in good faith to perform its responsibilities . . . with operational expertise” in accordance with Tesco’s direction, unless Turnkey “reasonably believes that such directions will cause the well to be drilled in an imprudent or unsafe manner, in which case [Turnkey] shall have the right to refuse to conduct the requested operation.” Finally, the Rig Personnel Agreement defined the relationship of the parties as “independent contractor[s],” with neither party “deemed for any purpose to be, the agent, servant[,] or representative” of the other party.

B. Procedural Background

The Phathongs filed suit against Tesco in the United States District Court for the District of Colorado claiming, inter alia, that Tesco’s negligence in operating the DTC2 drilling rig led to their injuries. Tesco eventually filed a motion for summary judgment, asserting the Phathongs’ common-law damages claims were barred by, inter alia, the immunity afforded to statutory employers by

⁶(...continued)
continue invoicing customers for all services performed by Turnkey and to remit any payments it received to Turnkey. Ultimately, however, Tesco was not liable to Turnkey for any amounts a customer refused to pay on an invoice.

the Colorado Workers' Compensation Act. *See* Colo. Rev. Stat. § 8-41-401. The district court denied Tesco's motion and the case proceeded to trial. Prior to submission of the case to the jury, the district court sua sponte granted judgment as a matter of law to Phathong on the question of Tesco's entitlement to immunity as a statutory employer. In so doing, it concluded "the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer" under § 8-41-401. In that regard, the district court reasoned as follows:

The relationship [between Tesco] and Turnkey pursuant to that sale was not one of a general contractor and subcontractor . . . as envisioned by the Colorado Supreme Court in [*Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988)]. This was a sale of drilling operations, such that EnCana remained a general contractor, and Turnkey took over the subcontractor duties of running the drilling operations.

In these circumstances, [Tesco] is not the "statutory employer" entitled to immunity under the Colorado Workers' Compensation Act.

III. ANALYSIS

A. Legal Background

"The primary purpose of [Colorado's] workers' compensation act is to provide a remedy for job-related injuries, without regard to fault. The statutory scheme grants an injured employee compensation from the employer without regard to negligence and, in return, the responsible employer is granted immunity from common-law negligence liability." *Finlay*, 764 P.2d at 63 (citations

omitted). “Although a given company might not be [an injured party’s] employer as understood in the ordinary nomenclature of the common law, it nevertheless might be a statutory employer for workers’ compensation coverage and immunity purposes.” *Id.* at 64. The term “statutory employer” is defined in Colorado’s Workers’ Compensation Act as follows:

Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees’ dependents

Colo. Rev. Stat. § 8-41-401(1)(a)(I). Section 8-41-401(1)’s “purpose is to prevent employers from avoiding responsibility under the workers’ compensation act by contracting out their regular work to uninsured independent contractors.” *Finlay*, 764 P.2d at 64.⁷ Thus, § 8-41-401(1) “makes general contractors ultimately responsible for injuries to employees of subcontractors.” *Id.* Along with this burden comes a corresponding benefit. Under the Colorado scheme, “[s]tatutory immunity goes hand in hand with statutory liability.” *Buzard v. Super Walls*,

⁷In *Finlay*, the Colorado Supreme Court was considering a predecessor version of the “statutory employer” provisions of the Workers’ Compensation Act, specifically Colo. Rev. Stat. § 8-48-101(1) (1986). *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 64 (Colo. 1988). For all purposes relevant to this appeal, the current version of the Workers’ Compensation Act is identical to the version at issue in *Finlay*.

Inc., 681 P.2d 520, 523 (Colo. 1984). To qualify for the immunity afforded a statutory employer, § 8-41-401(1) imposes an obligation on general contractors to carry workers' compensation insurance. *Id.* at 522.

Section 8-41-401(1) does not permit injured employees to obtain a double recovery. *Finlay*, 764 P.2d at 64. Instead, under Colorado's Workers' Compensation Act, "if a subcontractor has obtained insurance[,] its employee cannot reach upstream to the general contractor to establish tort liability; the general contractor is immune from suit as any insured employer would be." *Id.* (quotations and alterations omitted). This aspect of Colorado law "encourages those contracting out work to require that contractors and subcontractors obtain workers' compensation insurance."⁸ *Buzard*, 681 P.2d at 523.

⁸It is undisputed Tesco and Turnkey both carried workers compensation policies at the time of Phathong's injuries. Phathong nevertheless argues Tesco is not entitled to the immunity ordinarily afforded a statutory employer under Colorado law because it "divested itself of any liability for workers' compensation claims" in the Acquisition Agreement. This assertion is not persuasive. As the cases cited above make clear, Tesco had a statutory obligation to provide workers' compensation insurance under Colorado's Workers' Compensation Act. Tesco was unable, as a matter of law, to contract away its workers' compensation liability. *See Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998) (en banc) (holding that parties may not privately contract to abrogate statutory requirements or contravene public policy of Colorado). Contrary to Phathong's suggestion, Tesco's obligation to provide workers' compensation insurance was not "divested by contract" simply because Tesco elected to allocate ultimate payment responsibility between itself and Turnkey for any future claims for workers' compensation benefits.

Whether a corporation like Tesco is a statutory employer under the terms of § 8-41-401 is dependent upon the nature of the “work contracted out.” *Finlay*, 764 P.2d at 64. Colorado employs the “regular business test” to determine whether the party contracting out work is a statutory employee; the test is satisfied “where the disputed services are such a regular part of the statutory employer’s business that absent the contractor’s services, they would of necessity be provided by the employer’s own employees.” *Id.* at 66. The Colorado Supreme Court has described its “regular business test” as intentionally broad and has justified an inclusive test as necessary “to accommodate more fully the purposes of the workers’ compensation act.” *Id.*⁹ In applying the regular

⁹In this regard, the *Finlay* court noted as follows:

From [more recent Colorado] cases there emerges a broader standard that takes into account the constructive employer’s total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. This broader standard ensures that an important purpose of section [8-41-101(1)]—that of making general contractors ultimately responsible for injuries to employees of subcontractors—will be fulfilled. That purpose, as well as the more general purpose of the workers’ compensation act to compensate injured employees for job-related injuries regardless of fault, would be frustrated were we to revert to the narrow standard applied in [an earlier Colorado case], and focus exclusively on whether the subcontracted activity *directly* relates to the alleged employer’s primary business. Such a narrow interpretation of the “regular business” test could potentially bar the recovery of an injured worker who is unable to show negligence and whose primary employer is uninsured and financially irresponsible. This result would clearly

(continued...)

business test, courts should consider “the constructive employer’s total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer.” *Id.* The importance of the contracted service to the employer’s total business operation is demonstrated where, absent the contractor’s services, the employer would have to provide its own employees rather than forgo having the work performed. *Id.* at 67. In other words, where the work is so essential to the day-to-day business operations of the employer that it cannot continue to function without the task being performed, its importance to the total business operation is demonstrated.

B. Standard of Review

This court reviews de novo the district court’s sua sponte grant of judgment as a matter of law in favor of Phathong on the question of Tesco’s status as a statutory employer. *Myklatun v. Flotek Indus., Inc.*, 734 F.3d 1230, 1233-34 (10th Cir. 2013); *cf. Humphrey v. Whole Foods Mkt. Rocky Mountain/S.W., L.P.*, 250 P.3d 706, 708 (Colo. App. 2010) (holding that when the facts supporting an entity’s status as a statutory employer are undisputed, the trial court’s determination of that status from the undisputed facts is a question of law).

⁹(...continued)

contravene the long-recognized rule that the workers’ compensation act is to be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families.

Finlay, 764 P.2d at 66-67 (quotations and alteration omitted).

Under this standard, the question is whether “a reasonable jury would . . . have a legally sufficient evidentiary basis to find for” Tesco on the question of its status as a statutory employer. Fed. R. Civ. P. 50 (a)(1). The resolution of this case turns heavily on questions of contract interpretation, which are also questions of law subject to de novo review. *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008).

C. Analysis

The district court concluded that after the closing of the Acquisition Agreement, the relationship between Tesco and Turnkey was not one of a general contractor and subcontractor as envisioned in *Finlay*. Instead, according to the district court, Tesco completely exited the casing drilling services business, EnCana remained the general contractor, and Turnkey took over the subcontractor duties of running the drilling operations. The uncontested facts in the record do not bear out the district court’s conclusions. Tesco remained an active participant in the casing drilling services business after the closing of the Acquisition Agreement and, absent the labor provided by Turnkey, would have had to train or hire its own workers to conduct that business. *See Finlay*, 764 P.2d at 67. Thus, because the work performed by Turnkey for Tesco satisfies Colorado’s regular business test, the district court erred in ruling Tesco was not Phathong’s statutory employer.

At the moment of the closing of the Acquisition Agreement, Tesco continued to be engaged in the casing drilling services business. Taken together, the Acquisition Agreement and the Rig Personnel Agreement demonstrate Tesco remained obligated to perform its duties to EnCana under the terms of the Master Service Agreement and the EnCana Drilling Contract. There is no evidence in the record indicating Turnkey succeeded in any way to Tesco's relationship with EnCana.¹⁰ Likewise, the Acquisition Agreement and the Rig Personnel

¹⁰In contrast, the Acquisition Agreement makes quite clear that Turnkey did succeed to Tesco's contractual relationships with those entities holding drilling contracts associated with the drilling rigs transferred by Tesco to Turnkey. *See supra* n.6 (noting Acquisition Agreement obligated Tesco to operate like a pass-through entity for the benefit of Turnkey for those drilling contracts associated with the rigs Turnkey acquired). All this demonstrates, however, is that after the parties closed on the Acquisition Agreement, Tesco's footprint in the casing drilling services business was smaller than it was before the closing. To the extent Phathong argues the lack of an intent on the part of Tesco to continue operations in this sector of its business indefinitely prevents it from being a statutory employer, we note the argument is wrong as both a matter of law and fact. Phathong has not cited, and this court has not found, any indication in Colorado law that the definition of statutory employer set out in the Colorado Code is limited to employers that continue to operate indefinitely under their current business models. Furthermore, such a counterintuitive assertion is at odds with *Finlay's* statement that the regular business test should focus broadly on a potential statutory employer's regular business operations, not on some narrow notion of its core or primary business. Even if the law were as Phathong imagines it, the record does not demonstrate Tesco intended to exit the casing drilling services business at the scheduled expiration of those drilling contracts associated with the Drillers Technology Corporation rigs. The Rig Personnel Agreement specifically provides as follows:

The term of this Agreement shall be coterminous with the longest term of the Equipment Leases with [Drillers Technology
(continued...)]

Agreement make clear it was Tesco, not Turnkey, that was obligated to continue making lease payments to Drillers Technology Corporation on the three drilling rigs not transferred to Turnkey under the agreements. Tesco maintained the same role with regard to its business operations on DTC2 as it had prior to the effective date of the Acquisition Agreement: it was still responsible for safety on the rig, providing the labor and equipment necessary to operate the rig, and designating the drilling locations and schedule. The only salient difference flowing from the closing of the Acquisition Agreement was that Tesco no longer had sufficient staff to manage the operation of DTC2 and contracted with Turnkey, who became the crew's direct employer and Tesco's subcontractor, to provide those services. *See Finlay*, 764 P.2d at 67-68 (holding a janitor for a cleaning service was a statutory employee of a computer company because absent the provision of cleaning services by the janitorial company, the computer company would have had to hire new employees or trained its existing employees to do the job).

¹⁰(...continued)

Corporation]. If [Tesco] wishes to renew or extend the terms of one or more such Equipment Leases, it shall provide [Turnkey] with not less than 45 days prior written notice thereof and [Turnkey] shall advise [Tesco] in writing within 15 days of its receipt of such notice, whether it has elected to (i) terminate this Agreement at the end of the last initial term of the Lease Agreements, or (ii) extend the term of this Agreement, subject to the same terms and conditions, to coincide with the extended term or terms of the Lease Agreements. Such determination shall be made by [Turnkey] in its sole discretion and, if it elects not to extend the term of this Agreement, it shall have no further obligations to Tesco hereunder at the end of such term.

The nature of the billing process between Tesco and Turnkey also belies the district court's suggestion Turnkey simply took Tesco's place in the employment chain between EnCana and Phathong. Tesco paid Turnkey pursuant to a contractual rate that was not tied in any regard to the rate EnCana paid Tesco under the EnCana Drilling Contract. Likewise, under the Rig Personnel Agreement, Tesco retained the responsibility for designating to Turnkey the drilling locations for the rigs, setting the drilling schedule, and providing a safe workplace environment for the performance of the services under the agreement. *See id.* at 67 n.4 (recognizing this type of control by a statutory employer over the work to be performed is indicative of, but not a necessary predicate to a statutory employment relationship). Finally, the Rig Personnel Agreement defined the relationship of the parties as "independent contractor[s]," with neither party "deemed for any purpose to be, the agent, servant[,] or representative" of the other party. There is absolutely no indication in the record that Tesco and Turnkey acted in derogation of this contractual provision.

IV. CONCLUSION

The record in this case conclusively demonstrates the work contracted out by Tesco to Turnkey was an important, routine, and regular part of Tesco's casing drilling services business. That being the case, the district court erred in sua sponte granting judgment in Phathong's favor on the immunity question and in denying Tesco's post-trial motion pursuant to Fed. R. Civ. P. 50. Thus, we

remand to the district court to **vacate** the jury's verdict in favor of the Phathongs and to, instead, **enter** judgment in favor of Tesco.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge