

# **BROWN BAG SEMINAR**

**Thursday, July 18, 2013**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation

**Free**

This outline covers ICAP and appellate decisions issued from

May 11, 2013 through July 12, 2013

## **Contents**

### **Industrial Claim Appeals Office decisions**

Blocker v. Express Personnel	2
Campos v. J.C. Penney Co.	7
Cobo v. Weatherford International, Inc.	13
Daniels v. US Airways Group, Inc.	20
Davies v. Kindred Healthcare	26
Kokins v. City of Westminster	32
McGuire v. Family Dollar Stores, Inc.	37
Ortega v. JBS USA	44
Salisbury v. Prowers County School District	53
Schoof v. Sun Drilling Products	60
Zanotelli v. Evraz, Inc.	66
Zaragosa v. Midlands Village Management	74

### **Court of Appeals decision**

Town of Castle Rock v. Industrial Claim Appeals Office	79
--	----

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-622-069-04

IN THE MATTER OF THE CLAIM OF

RANDY BLOCKER,

Claimant,

v.

FINAL ORDER

EXPRESS PERSONNEL,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated January 9, 2013, that ordered an award of permanent total disability (PTD) benefits to the claimant. We affirm.

The respondents appeal the determination of the ALJ that the claimant was unable to earn wages and was entitled to PTD benefits. Specifically, the respondents assert that because the claimant performed a job driving a forklift for a year at a point subsequent to his injury, this should be evidence the claimant could earn wages. The respondents argue the finding by the ALJ that this forklift job was sheltered employment was error.

The claimant worked for the respondents as a truck driver. He was injured on July 20, 2004, when the truck he was driving jackknifed. This led to injuries to his low back, cervical spine and to a loss of hearing. The claimant was eventually placed at maximum medical improvement (MMI) by Dr. Richman on June 3, 2011. Dr. Richman assigned a 47% whole person rating for permanent impairment based on injuries to the back, neck and hearing loss. Dr. Richman suggested work restrictions consisting of maximum lifting of 25 pounds and standing in one position for no longer than 30 minutes. A Division Independent Medical Examination performed by Dr. Sandell determined a 51% impairment rating but agreed with Dr. Richman as to the date of MMI and work restrictions. A functional capacity exam completed at Hands On Therapy in January, 2012, concluded the claimant could only lift a maximum of 10 pounds and should avoid prolonged walking and standing. Dr. Howe testified the claimant's hearing loss was such that he was very limited in perceiving or understanding verbal conversation. Vocational testimony from Tim Shanahan stated the claimant had available to him several jobs in the

local labor market which were in the light category of work. A vocational opinion from Katie Montoya stated that the claimant was unable to maintain any type of employment with his injuries and restrictions.

The claimant testified at the October 25, 2012, hearing that in 2010, a friend of his hired him to drive a forklift in a warehouse. The job required the claimant to use the forklift to move cargo from one truck to another. He stated he was the only person working during his shift at night. He was able to leave the job when he felt sore or ill. After a year, the job ended and the claimant was laid off. The claimant stated he does not believe he could sit any longer for the length of his shift while holding that job. The claimant has not worked since that job concluded.

The ALJ determined the claimant was unable to earn any wages. He relied on the claimant's testimony and on the testimony of Ms. Montoya that the forklift job does not exist in any similar form in the local labor market. The ALJ reasoned the forklift job was sheltered employment. As such, it was not seen as evidence the claimant could sustain wage earning employment. In reaching this conclusion, the ALJ noted the claimant was able to come and go from the job as he needed, to work at his own pace, and because no other employees were present at night, this mitigated the safety issue presented by the claimant's inability to hear. The job ended when the employer was no longer able to keep the job available. The ALJ found that neither of the vocational experts testifying could verify that any similar type of job was available in the local labor market.

The respondents argue the ALJ was in error to characterize the forklift job as sheltered and, therefore, inconsequential to the question of the claimant's ability to earn wages. They point out the job sounds similar to any standard fork lift driving position. The claimant only ceased performing the job when he was laid off. He did not leave the job due to his physical injuries.

A claimant is permanently and totally disabled if he is "unable to earn any wages in the same or other employment." Section 8-40-201(16.5), C.R.S. The determination of whether the claimant is incapable of earning wages in the same or other employment may be based upon the ALJ's consideration of a number of "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education and the availability of work the claimant can perform. The claimant bears the burden of proof to establish permanent total disability. Section 8-40-201(16.5)(a), C.R.S.

Additionally, a worker's ability to secure sheltered, or occasional employment under rare or unusual circumstances, does not preclude a determination of permanent total disability. *New Jersey Zinc Co. v. Industrial Commission*, 165 Colo. 482, 440 P.2d

284 (1968). If the evidence shows that the claimant is not physically able to sustain post injury employment, or that such employment is “unlikely to become available to a claimant again in view of the particular circumstances, the ALJ need not find that the claimant is capable of earning wages.” *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P. 3d 866, 868 ( Colo. App. 2001). Thus, in *Joslins*, an award of PTD benefits was upheld despite the fact the claimant was working at the time of the hearing, six years after the injury. The evidence in that case showed the claimant was “protected” by a supervisor and received assistance from students when performing her job as a food service worker. A vocational expert testified the claimant's job did not constitute employment because of the limited hours and because the job was not generally available to the public. The *Joslins* court found the evidence supported the ALJ's implicit determination that the job did not constitute “bona fide” employment. *See also Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Epp v. Penske Distribution Systems*, W.C. No. 3-999-840 (Feb. 12, 2002).

These issues are factual in nature and we are bound by the ALJ's findings of fact that are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we must defer to the ALJ's credibility determinations, his resolution of conflicts in the evidence, and the plausible inferences the ALJ drew from the record. *Cordova v. Industrial Claims Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Here, the respondents' argument notwithstanding, we conclude that the ALJ properly applied the “any wages” test mandated by § 8-40-201(16.5)(a), C.R.S. and properly applied the doctrine of “sheltered employment” to the claimant's forklift job. Findings of Fact at ¶19. The claimant testified he obtained the job through his driver's contacts with a friend. The friend offered him the job that was not advertised and for which he was not required to apply. It was arranged for the claimant to perform the job at night. This allowed the claimant to maintain a slower pace since no one was waiting on him to get his portion of the freight moved via the forklift. He could leave at any time in his shift should his back pain become disabling. Critically, since no other employees were present, the claimant's inability to hear the shouts of other employees did not present a safety barrier to his work. Tr. (Sept. 26, 2012) at 32-34; 45-47. Ms. Montoya testified the claimant could not perform the forklift job in a “general employment setting.” He could only maintain the job in the particular setting he had, and she could not find that type of setting presently was available or even existed. The testimony of Mr. Shanahan corresponded to that of Ms. Montoya. He could not find a reproduction of the forklift job in the local labor market. Thus, the ALJ's findings support his conclusion that the claimant's warehouse forklift job did not constitute employment but, instead, amounted to sheltered employment. Consequently, we will not disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

The ALJ has taken into account the various “human factors” involved, including the claimant’s age, education, work history, and general physical condition. The crux of the inquiry is whether employment exists which is reasonably available to the claimant given his particular circumstances. *Weld county School District, RE-12 v. Bymer*, 955 P.2d 550, 558 (Colo. 1998). Because the issue is factual, we must uphold the ALJ’s order if supported by substantial evidence. The ALJ specifically cited the reports and testimony of Dr. Howe, Dr. Sandell and Ms. Montoya. The record contains substantial evidence supporting the ALJ’s conclusion the claimant is unable to earn wages in the same or other employment.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued January 9, 2013 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

\_\_\_\_\_ 7/1/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

RANDY BLOCKER, 605 EAST 11TH STREET, PUEBLO, CO, 81001 (Claimant)  
EXPRESS PERSONNEL, Attn: RENEE RODRIGUEZ, 830 NORTH MAIN ST #140,  
PUEBLO, CO, 81003 (Employer)  
AMERICAN HOME ASSURANCE, Attn: PAM DESANTIS, C/O: SEDGWICK CMS, P O  
BOX 14493, LEXINGTON, KY, 50412-4493 (Insurer)  
SCHIFF & SCHIFF, P.C., Attn: HERBERT S. SCHIFF, ESQ., 332 BROADWAY AVENUE,  
PUEBLO, CO, 81004 (For Claimant)  
TREECE ALFREY MUSAT P.C., Attn: JAMES B. FAIRBANKS, 999 18TH ST STE 1600,  
DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-869-186

IN THE MATTER OF THE CLAIM OF

JANET CAMPOS,

Claimant,

v.

ORDER OF REMAND

J.C. PENNEY COMPANY,

Employer,

and

NATIONAL UNION FIRE,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge (ALJ) Walsh dated February 12, 2013, that granted the claimant's motion to strike the respondents' application for hearing and ordered them to file an admission of liability consistent with the findings of the Division Independent Medical Examination (DIME) physician's report. We set aside the ALJ's order and remand for further findings.

The ALJ made the following factual findings. The claimant sustained an admitted industrial injury on October 14, 2011. The claimant was placed at maximum medical improvement (MMI) in February of 2012 and the respondents filed a final admission of liability (FAL) in March of 2012. The claimant objected and requested a DIME, which was performed by Dr. Castrejon. In a report dated August 4, 2012, the DIME physician determined that the claimant was not at MMI.

The Division of Workers' Compensation (DOWC) sent a Notice Report "Not at MMI" dated August 14, 2012, notifying the parties that nothing further remained to be done by the DIME physician and that the parties should proceed as they deem appropriate. The Notice also provided: "If you have not received a copy of the physician's report, please contact us to obtain one." Counsel for the claimant received this Notice on August 16, 2012. Counsel for the respondents concedes that the respondents received this notice on August 20, 2012. Although advised that the DIME report had been issued and that they could receive a copy from the DOWC, the respondents failed to request a copy of the report. The respondents eventually received

the report on September 12, 2012, when the claimant's counsel faxed them a copy. On October 11, 2012, the respondents filed an application for hearing to challenge the DIME physician's opinion that the claimant was not at MMI. The claimant filed a "Motion for an Order Striking Respondents' Application and Directing Respondents to file an Admission of Liability Consistent with the Determinations of the DIME physician."

The ALJ ruled on the motion at the hearing and determined that the respondents failed to file an application for hearing within 30 days of the date the DIME report was finalized by the DOWC. The ALJ found that the 30 day time limit began to run on August 14, 2012, when the DOWC mailed out Notice Report. The ALJ went on to conclude that the respondents received the DOWC Notice Report no later than August 20, 2012, and, assuming arguendo, that the 30 day time limit began on August 20, 2012, the respondents still failed to timely file an application for hearing. Consequently, the ALJ dismissed the application for hearing and ordered the respondents to file an admission of liability consistent with the findings of the DIME physician. The respondents now appeal. The respondents conceded in earlier pleadings that temporary disability benefits were terminated by the March 2012, FAL because the claimant had been placed at MMI and if they were unable to contest the DIME physician's denial of MMI, the respondents would be required to restart the payment of temporary benefits. The order, therefore, is reviewable. §8-43-301(2), C.R.S.

On appeal the respondents contend that the 30 day time limit did not begin to run until the respondents received the DIME report on September 12, 2012, and, therefore, the October 11, 2012, application for hearing was timely. Because the ALJ's findings of fact are insufficient to permit appellate review, we remand the matter for further findings.

In 1998 the General Assembly created §8-42-107.2(4), C.R.S., which provides in pertinent part:

*Within thirty days after the date of the mailing of the [DIME]'s report, the insurer or self-insured employer shall either file its admission of liability pursuant to §8-43-203 or request a hearing before the division contesting one or more of the [DIME]'s findings or determinations contained in such report. (Emphasis added).*

Colo. Sess. Laws 1998, Ch. 313 at 1428-29. Thus, contrary to the respondents' contention, §8-42-107.2 (4), C.R.S., clearly states that the 30 day time limit to either file and admission or application for hearing to contest a DIME report begins to run as of the date of "mailing of the [DIME]'s report." The Colorado Court of Appeals recognized that this provision is "part of an overall statutory scheme designed to ensure the prompt payment of benefits without the necessity of litigation in cases that do not present a legitimate controversy." If the parties fail to request a hearing to contest the DIME

physician's findings, those findings become binding on the parties and the ALJ and the ALJ lacks jurisdiction to resolve a dispute as to those findings. *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005).

At the same time, the legislature amended §8-43-203(2)(b)(II), C.R.S., to require respondents filing a final admission of liability to advise the claimant that the case would automatically close as to admitted issues unless the claimant contested the admission within 30 days and requested a hearing on disputed issues. Colo. Sess. Laws 1998 Ch. 313 at 1431. In 2001 the General Assembly further amended §8-43-203, C.R.S., to state that the request for hearing on disputed issues need not be filed until after completion of the DIME and giving the respondents 30 days after the date of mailing of the report from the Division's independent medical examiner to file a revised final admission or to file an application for hearing. Colo. Sess. Laws 2001, Ch. 23 at 49.

As the panel previously recognized in *Hernandez v. Kaiser Hill Company*, W.C. No. 4-604-199, (August 3, 2012), although the relevant statutes clearly require the respondents to request a hearing within 30 days after the date of mailing of the DIME's report, the phrase "after the date of the mailing" of the DIME's report is ambiguous because the statutes do not articulate who bears the obligations to mail the report or what constitutes a sufficient DIME report to trigger a responsive action by an insurer or an employer. Thus, in *Hernandez* the panel applied the Director's June 13, 2001, Interpretive Bulletin (<http://www.colorado.gov/cs/Satellite/CDLE-workComp/CDLE/1248095316199> - choose Interpretive Bulletin Number 1) to conclude that the 30 day time limit for challenging a DIME report is triggered when the DOWC mails a Notice of Completion to the parties. We decline to depart from the holding in *Hernandez* and, therefore, agree with the ALJ that, under normal circumstances, the 30 day time limit for challenging the DIME report begins to run on the date the DOWC Notice of Completion is mailed to the parties.

In this case, however, unlike the *Hernandez* case, the ALJ found that the respondents did not have the DIME report at the time the DOWC Completion Notice was sent out. In our view, the statute contemplates that the parties have actual notice of the DIME report. Although there is nothing in the statute or the rules that expressly provides that the parties must have actual notice of the DIME report in order to trigger the 30 day time limit, the courts have held that due process of law requires that all parties receive notice of administrative proceedings and determinations which could result in the deprivation of a significant property interest. *See Colorado State Board of Medical Examiners v. Palmer*, 157 Colo. 40, 400 P.2d 914 (1965). Furthermore, the court has held that due process of law requires that a workers' compensation claimant receive timely notice of critical determinations affecting their substantial rights. *See Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996); *Hall v. Home Furniture CO.*, 724 P.2d 94 (Colo. App.

1986) (due process requires that a claimant receive actual notice of a final admission of liability).

Our courts, however, have also held that a party may waive or be estopped from asserting the right to actual notice. For instance, avoiding service of certified mail or providing an incorrect address might foreclose the right to actual notice. *Klingbeil v. State Department of Revenue*, 668 P.2d 930 (Colo. 1993); *Ault v. Department of Revenue*, 697 P.2d 24 (Colo. 1985). The panel also followed this reasoning in *Maryott v. J & H Properties*, W.C. No. 4-157-363 (April 28, 1997), to conclude that the claimant waived right to actual notice of a rescheduled medical appointment by failing to notify the parties and the Division of his correct address. Thus, the pertinent issue in the present case is whether the failure to receive the DIME report was due to circumstances within the respondents' control resulting in waiver of the right to actual notice. See *Utah Motel Associates v. Denver County Board of Commissioners*, 844 P.2d 1290 (Colo. App. 1992); *Ward v. Douglas County Board of Commissioners*, 886 P.2d 310 (Colo. App. 1994).

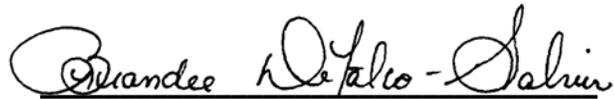
Waiver is the intentional relinquishment of a known right. Waiver may be express, as when a party states its intent to abandon an existing right, or implied, as when a party engages in conduct which manifests the intent to relinquish the right or acts inconsistently with its assertion. *Burlington Northern R. Co. v. Stone Container Corp.*, 934 P.2d 902 (Colo. App. 1997). To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Burman v. Richmond Homes, Ltd.*, 821 P.2d 913 (Colo. App. 1991).

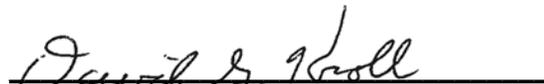
The existence of a waiver is generally a factual matter for the ALJ to determine, and we must uphold the order if supported by substantial evidence in the record. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); §8-43-301(8), C.R.S. We do, however, have the authority to set aside an order where the findings of fact are insufficient to permit appellate review. §8-43-301(8) C.R.S.; See *Boice v. Industrial Claim Appeals Office*, 800 P.2d 1155 (Colo. App. 1993).

Here, the ALJ found that the DOWC Notice provided that "if you have not received a copy of the physician's report, please contact us to obtain one." In our view this finding could permit the factual determination that the respondents waived actual notice of the DIME report by failing to request the report from the DOWC but does not necessarily compel it. Rather, this is a factual matter that the ALJ must resolve. Accordingly we must remand for entry of a further order containing factual findings sufficient to permit appellate review of the issue of the respondents' waiver of the actual notice of the DIME report. Nothing in this order should be construed as dictating the outcome of the factual questions that we have no authority to decide.

**IT IS THEREFORE ORDERED** that the ALJ's order issued February 12, 2013, is set aside and remanded for further findings consistent with the views expressed herein.

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

\_\_\_\_\_ 6/18/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JANET CAMPOS, 4734 TRAILMARK LOOP, COLORADO SPRINGS, CO, 80916  
(Claimant)

J.C. PENNEY COMPANY, 3650 NEWCENTER PP, COLORADO SPRINGS, CO, 80922  
(Employer)

NATIONAL UNION FIRE, Attn: RICHARD DAVIS, C/O: SEDGWICK CMS, P O BOX  
14520, LEXINGTON, KY, 40512 (Insurer)

CLAWSON & CLAWSON, L.L.P., Attn: MICHAEL CLAWSON, ESQ., 115 EAST VERMIJO,  
SUITE 101, COLORADO SPRINGS, CO, 80903 (For Claimant)

HALL & EVANS, L.L.C., Attn: MEGAN E. COULTER, ESQ., 1125 17TH STREET, SUITE  
600, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-861-933-03

IN THE MATTER OF THE CLAIMS OF

LAURA COBO AND MANUEL LUCIANO COBO,  
Surviving dependents of deceased,

Claimants

v.

WEATHERFORD INTERNATIONAL, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE,

Insurer,  
Respondents.

ORDER OF REMAND

The claimants seek review of an order of Administrative Law Judge Mottram (ALJ) dated February 27, 2013, that denied both of the surviving dependents' requests for two separate and distinct lump sum payments of \$60,000 arising out of the death of the decedent, and instead awarded one lump sum of \$60,000 to be apportioned equally between them. We reverse and remand the matter for calculation of the lump sum payable up to \$60,000 for each claimant.

The following facts are undisputed. On July 27, 2011, the decedent, Manuel Cobo, died in the course and scope of his employment with the respondent employer. At the time of his death, the decedent was married to the claimant, Laura Cobo. The claimant, Manuel Cobo, was a dependent child of the decedent at the time of his death, and also is the minor son of the claimant, Laura Cobo. The date of birth of the minor claimant, Manuel Cobo, is January 21, 2010.

As a result of the decedent's death, each claimant receives \$1,257 per month in Social Security death benefits for a total award of \$2,514 per month.

Pursuant to §§8-41-501 and 8-41-503, C.R.S., the respondents admitted to the compensability of the claimants' claims. At the time of his death, the decedent was a maximum wage earner. The payable death benefits per week is \$828.03. When applying §8-42-114, C.R.S., the reduction in benefit amount is \$290.08 per week. With the reduction in benefit amount of \$290.08 per week for Social Security death benefits, the

total payable death benefits per week amounts to \$537.95. The parties agreed that the benefit payout of \$537.95 per week shall be apportioned 50% to the claimant, Laura Cobo, and 50% to the minor claimant, Manuel Luciano Cobo. The parties also agreed that settlement of either claim would not impact the payout made to the remaining dependent. Thus, each claimant is entitled to \$268.97 per week until entitlement ceases pursuant to §8-42-120, C.R.S. or is otherwise affected by settlement, court order, death of co-dependent, or lump sum.

On June 13, 2012, the surviving spouse claimant filed a request for a \$60,000 lump sum payment. On June 13, 2012, the minor claimant, through his guardian *ad litem*, also filed a lump sum payment request.

On June 27, 2012, the respondent insurer filed a lump sum calculation sheet and proof of payment as to the lump sum request made by the surviving spouse claimant.

An application for hearing was filed regarding the calculation of the lump sum per §8-43-406(2), C.R.S. The parties subsequently filed a stipulation of facts and an agreement to proceed by position statements. In the claimants' position statements, they both argued that each was entitled to a lump sum of \$60,000. Conversely, the respondents argued that the claimants were entitled to just one lump sum of \$60,000.

The ALJ later approved the parties' stipulation of facts. The ALJ also issued his order determining that the claimants were limited to one lump sum payment of \$60,000 to be apportioned equally between them. The ALJ found that while both claimants have independent claims for death benefits arising out of the decedent's industrial accident, he disagreed that each claim was subject to a lump sum award of \$60,000. The ALJ found that if each claimant is entitled to a full lump sum award of \$60,000, then this could lead to an "absurd result" in a case involving multiple dependents. Using a hypothetical scenario, the ALJ found that five dependents with a maximum average weekly wage would result in a lump sum payment of \$300,000. The ALJ found that it was not the intent of §8-43-306, C.R.S. to provide for such a large amount of benefits to be paid in a lump sum. Findings of Fact at 3-4 ¶16. The ALJ also concluded that based on the language used in §8-43-406, C.R.S. which identifies "the claimant," this appears to imply that for purposes of a lump sum payment, there would be a single "claimant" following an injury. Conclusions of Law at 5 ¶7.

The claimants each have appealed. The claimants argue that the ALJ has disregarded the plain language of §8-43-406, C.R.S. by failing to award each dependent claimant a lump sum award of \$60,000. The claimants assert that the plain language of §8-43-406, C.R.S. allows a claimant to elect to take all or any part of the compensation

awarded in a lump sum by sending written notice to the insurer. The claimants contend that §8-40-201(3.6), C.R.S. defines “claimant” as a person who has or asserts a right to receive workers’ compensation benefits, and that WCRP 1-1(B) defines “claimant” to include “dependent(s) of a deceased employee claiming entitlement to benefits under the Act.” Further, the claimants contend that WCRP 5-10(B)(1)(c) provides that the total of all lump sums may not exceed \$60,000 per claim. According to the claimants, neither §8-43-306, C.R.S. nor WCRP 5-10 sets forth any language indicating that claims for death benefits are to be treated differently than other claims when dealing with lump sum requests. Thus, the claimants argue that since each has an independent claim for death benefits as compensation, and each is a claimant, then they each are entitled to receive compensation in a lump sum payment of \$60,000 under §8-43-406, C.R.S. We agree that the ALJ erred in determining that the claimants were entitled to only one lump sum award of \$60,000.

Initially, we note that on its face the ALJ's order does not appear to grant or deny a benefit or penalty. We have no authority to review an order that does not satisfy the finality criteria of § 8-43-301(2), C.R.S., which provides that any dissatisfied party may seek review of an order “that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty. . . .” *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003). In *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393 (Colo. 2010), the Colorado Supreme Court determined that the lump sum provision of the Act merely is procedural in nature. *See also May D & F v. Industrial Claim Appeals Office*, Colo. App. No. 11CA2460 (Jan. 17, 2013)(NSOP)(Panel properly concluded that Director’s order awarding claimant an additional lump sum did not substantively affect her entitlement to benefits and was not a final order within meaning of §8-43-301(2), C.R.S.). Procedural orders generally are not final and appealable. *See Reed v. Industrial Claim Appeals Office*, 13 P.3d 810 (Colo. App. 2000).

Nevertheless, in *Warren v. Southern Colorado Excavators*, 862 P.2d 966 (Colo. App. 1993), the Colorado Court of Appeals determined that the prior versions of the lump sum statute, which expressly exempted lump sum payment orders from review, did not preclude appellate review if: (1) the Director acted in excess of the authority granted his or her office; or (2) the claimant was otherwise prevented from seeking judicial assistance if the Director failed to act. Under the particular circumstances presented in this action, we conclude that we may review the ALJ's order. The claimants essentially have argued on review, and we agree, that the ALJ has exceeded his authority under §8-43-306, C.R.S. by disregarding the plain language of the Act, and by denying each dependent claimant a lump sum amount which is afforded by the Act.

Section 8-43-406, C.R.S. provides as follows regarding compensation in a lump sum amount:

- (1) At any time after six months have elapsed from the date of injury, *the claimant may elect to take all or any part of the compensation awarded in a lump sum* by sending written notice of the election and the amount of benefits requested to the carrier or the noninsured or self-insured employer. The carrier or self-insured employer shall file the calculation of the lump sum due and notice that the lump sum has been paid to the claimant within ten days after the election. . . The director shall make the method of calculation of lump sums available to all parties at all times, including posting the information on the division's web site. . .
- (2) *The aggregate of all lump sums granted to a claimant who has been awarded compensation shall not exceed sixty thousand dollars.* (emphasis added)

Further, the term “claimant” is defined in §8-40-201(3.6), C.R.S. as follows:

- (3.6) ‘Claimant’ means a person who either:
- (a) Receives benefits under articles 40 to 47 of this title; or
  - (b) Has or asserts, in any administrative or judicial forum or in any communication with the director, the division, or an employer, insurer, or self-insured employer, a right to receive such benefits.

In interpreting statutes, we must give effect to the intent of the General Assembly, and if the statutory language is clear and unambiguous, we must give the words their ordinary meaning and apply the statute as written. *See Cochran v. West Glenwood Springs Sanitation Dist*, 223 P.3d 123, 125-26 (Colo. App. 2009). In doing so, we must read and consider the statute as a whole and interpret it in a manner to give consistent, harmonious, and sensible effect to all of its parts. *Lujan v. Life Care Centers*, 222 P.3d 970, 973 (Colo. App. 2009). We should not interpret the statute so as to render any part of it either meaningless or absurd. *Id.* Additionally, nonexistent provisions should not be read into the workers' compensation act. *Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985).

In *Specialty Restaurants*, the Colorado Supreme Court determined that a claimant’s election of a lump sum payment functions merely as an advance of an award of benefits to which the claimant already is entitled. Consequently, the Court held that a lump sum payment does not create, eliminate, or modify the parties’ existing rights or liabilities which are determined as of the date of injury but, rather, vest only upon the

entry of an award of benefits. The Court held that a claimant's election of a lump sum payment merely alters the method of distribution of an existing award.

In our view, the plain and ordinary meaning of §8-43-406, C.R.S. allows for each dependent claimant to elect to take all or any part of his or her compensation in a lump sum of up to \$60,000. Both the surviving spouse and the minor son have a claim for, and are entitled to, death benefits as dependents of the deceased and as compensation under §8-42-114, C.R.S. Further, both the surviving spouse and the minor child of the decedent satisfy the definition of "claimant" under §8-40-201(3.6), C.R.S. That is, each one receives benefits under the Act. As stated above, §8-43-406, C.R.S. provides that "[t]he aggregate of all lump sums granted to a claimant who has been awarded compensation shall not exceed sixty thousand dollars." (emphasis added) Consequently, we conclude that each dependent claimant in this action is entitled to recover a lump sum of up to \$60,000, as set forth in §8-43-406, C.R.S. Thus, we reverse the ALJ's order that limited both dependent claimants to one lump sum amount of \$60,000 apportioned equally between them, and remand for the ALJ to calculate the lump sum available to each dependent claimant up to \$60,000. When awarding each claimant a lump sum, the ALJ should also specify the method by which the lump sum may serve to reduce future periodic benefits. Section 8-43-406, C.R.S.

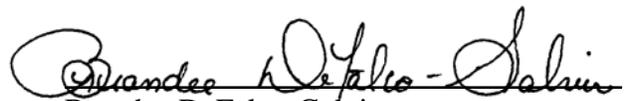
We also respectfully disagree with the ALJ's statement regarding an alleged "absurd result" occurring if each dependent claimant in his hypothetical scenario was entitled to a full lump sum award of \$60,000. *See Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998)(because best indicator of legislative intent is language of the statute, court must afford words their plain and ordinary meanings, provided no absurdity results; to extent there is ambiguity in a statute, court may consider other sources of legislative intent, including consequences of various constructions). As noted by the Court in *Specialty Restaurants*, a claimant's election to receive a lump sum payment does not create, eliminate, or modify vested rights or liabilities. According to the Court, at the time a claimant elects to take a lump sum payment, "the parties 'possess a continuing status'" by virtue of their existing award of benefits, which in this case is an award of death benefits. *See Specialty Restaurants Corp. v. Nelson*, 231 P.3d at 400. Rather, the election to take a lump sum payment merely alters the method of distributing the existing award by requiring advance payment of part or all of the compensation that is due. We further note that to the extent that an employer or insurer objects to a claimant obtaining a lump sum amount based upon the particular circumstances of a case, then WCRP 5-10(B) provides an avenue for relief. That Rule allows the insurer to object to the payment of the lump sum. In such a circumstance, the insurer shall submit the lump sum calculations to the claimant, the claimant's attorney, and the Division providing the reason for the objection, and the Director shall make a determination on the lump sum

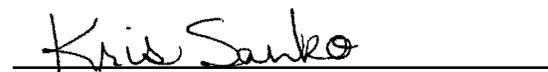
request. Further, because §8-43-406(1), C.R.S. requires calculation of the “amounts to be paid based on the present worth of partial payments,” it would be unlikely that five minor dependents would qualify for a lump sum payment of \$300,000. That figure likely would outstrip the “present worth of partial payments” and would be prohibited by the statute.

We further conclude that our determination allowing each claimant to elect to take all or any part of his or her compensation in a lump sum of up to \$60,000 does not contravene the language or conditions of WCRP 1-1(B) or WCRP 5-10(B)(2)(c). WCRP 1-1(B) provides that the term “[c]laimant” means an employee or dependent(s) of a deceased employee claiming entitlement to benefits under the Act.” Both the surviving spouse and the minor child are dependents of the deceased employee and both are entitled to receive death benefits under the Act. Section 8-42-114, C.R.S. Further, WCRP 5-10(B)(2)(c) provides that “[t]he total of all lump sums may not exceed \$60,000 per claim.” As noted by the ALJ in his order, both the surviving spouse and the minor child have independent claims for death benefits for the death of the decedent. Findings of Fact at 3-4 ¶16. *See Spoo v. Spoo*, 141 Colo. 268, 358 P.2d 870 (1971)(recognizing divergent claims of dependent children and dependent widow). Moreover, the longstanding “rule of independence” provides that the dependents’ claims are separate and distinct from, rather than derivative of, the worker’s claim, as argued by the respondents. *See Corbin v. Industrial Commission*, 724 P.2d 677 (Colo. App. 1986); *see also Metro Glass & Glazing, Inc. v. Orona*, 868 P.2d 1178 (Colo. App. 1994); *State Compensation Insurance Fund v. Industrial Commission*, 724 P.2d 679 (Colo. App. 1986).

**IT IS THEREFORE ORDERED** that the ALJ’s order dated February 27, 2013, is reversed and the matter is remanded to the ALJ for calculation of the total amount of lump sum payable up to \$60,000 for each claimant.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

IN THE MATTER OF THE CLAIM OF  
LAURA COBO AND MANUEL LUCIANO COBO  
W. C. No. 4-861-933-03  
Page 7

CERTIFICATE OF MAILING

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

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

LAURA COBO AND MANUEL LUCIANO COBO, P O BOX 4731, GRAND JUNCTION,  
CO, 81502 (Claimant)  
WEATHERFORD INTERNATIONAL, INC., 515 POST OAK BLVD. #600, HOUSTON, TX,  
77056 (Employer)  
NEW HAMPSHIRE INSURANCE, Attn: JENNIFER HELD, C/O: CHARTIS CLAIMS, P O  
BOX 25971, SHAWNEE MISSION, KS, 66225 (Insurer)  
WITHERS SEIDMAN RICE & MUELLER, PC, Attn: CHRISTOPHER SEIDMAN, ESQ., P O  
BOX 3207, GRAND JUNCTION, CO, 81502 (For Claimant)  
TREECE ALFREY MUSAT P.C., Attn: CHRISTOPHER P. AHMANN, ESQ., 999 18TH  
STREET, SUITE 1600, DENVER, CO, 80202 (For Respondents)  
WITHERS SEIDMAN RICE & MUELLER, PC, Attn: DAVID B. MUELLER, ESQ., P O BOX  
3207, GRAND JUNCTION, CO, 81502 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-695-093-07

IN THE MATTER OF THE CLAIM OF

DEBRA DANIELS,

Claimant,

v.

FINAL ORDER

US AIRWAYS GROUP, INC.,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of a supplemental order of Administrative Law Judge Stuber (ALJ) dated March 11, 2013, that determined Nurse Practitioner (NP) Lafayette was not an authorized provider and denied payment of his bills. We affirm the ALJ's order.

A hearing was held on the issue of medical bills, specifically payment of bills from NP Lafayette since December 8, 2010. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an industrial injury on June 1, 2006, to her low back. The respondent employer referred the claimant to Broadmoor Medical Clinic. At the clinic the claimant initially saw NP Lafayette who diagnosed a lumbar strain with radiculopathy and prescribed medications and physical therapy. Thereafter, NP Lafayette and Dr. Ogrodnick essentially alternated examinations and care for the claimant at the clinic. Dr. Ogrodnick referred the claimant to Dr. Sung in September of 2007, who eventually performed back surgery.

NP Lafayette last examined the claimant at the clinic on November 29, 2006, when he left his employment there and entered into a collaborative agreement with Dr. Richman at Rehabilitation Associates.

On May 23, 2007, Dr. Ogrodnick last examined the claimant due to the respondent insurer's contest of the workers' compensation claim. Dr. Ogrodnick wrote in June of 2007 that the claimant needed continuing treatment for her pain. Dr. Sung continued to

provide treatment for the claimant. The claimant obtained care through her health insurer due to the workers' compensation insurer's denial of the claim.

On March 15, 2007, NP Lafayette examined the claimant for the first time at Rehabilitation Associates upon referral from the claimant's personal physician, Dr. Alexander. NP Lafayette continued to provide treatment for the claimant through December of 2009, when NP Lafayette left Rehabilitation Associates. In the meantime, Dr. Sung performed a second lumbar fusion surgery on the claimant.

On January 5, 2010, NP Lafayette opened his own practice, Pain Care Center, LLC, pursuant to a change in the applicable state law governing nursing. On January 14, 2010, NP Lafayette examined the claimant at Pain Care Center, LLC and continued to treat the claimant on a regular basis.

A hearing was held before ALJ Krumreich on the issue of medical treatment. In an order dated March 29, 2010, ALJ Krumreich determined that the treatment by Broadmoor Medical Clinic, Dr. Ogradnick, Dr. Sung and Dr. Griffis as well as Dr. Ford after November 2007 was authorized. The order held that the treatment by Dr. Richman and NP Lafayette after March 15, 2007, was not authorized and not the liability of the respondent insurer.

On August 3, 2010, Dr. Ogradnick re-examined the claimant for the first time since 2007 and noted that there was "some concern about AIG authorizing continued treatment with Mr. Lafayette, but apparently this has been resolved." The claimant subsequently attempted to return to Dr. Ogradnick for chronic pain but Dr. Ogradnick refused to provide such ongoing treatment for the claimant and refused to refer the claimant to NP Lafayette for pain management.

On December 8, 2010, NP Lafayette and Dr. Stephen Ford attested that NP Lafayette had developed an "articulated plan for safe prescribing that documents how the advanced practice nurse intend to maintain ongoing collaboration with physicians and other health care professionals." The ALJ noted that the record evidence contained the attestation page, but omitted the actual articulated plan. The ALJ determined that this "plan" does not constitute a referral from Dr. Ford to NP Lafayette and Dr. Ford does not "supervise" NP Lafayette.

The claimant was awarded permanent total disability benefits in February of 2012.

NP Lafayette has continued to examine the claimant on a regular basis to monitor her medications and condition. He has prescribed ongoing pain medications and performed trigger point injections. The parties stipulated that all of the treatment by NP

Lafayette since December 8, 2010, was reasonably necessary to cure or relieve the effects of the claimant's work injury.

Based on these findings the ALJ concluded that NP Lafayette was not an authorized treating provider. The ALJ found that the claimant failed to prove by a preponderance of the evidence that all authorized treating physicians refused to treat her and, therefore, the claimant was not implicitly authorized to choose a new provider. The ALJ further found that the claimant was not referred to NP Lafayette by any authorized treating provider. The ALJ also rejected the claimant's argument that NP Lafayette was a "corporate medical provider" as referenced by §8-43-404(5)(a)(I)(A), C.R.S.

On appeal the claimant argues that the ALJ erred in his determination that NP Lafayette did not become authorized due to Dr. Ogrodnick's refusal to treat her. The claimant renews her argument that NP Lafayette is a "corporate medical provider" for purposes of §8-43-404(5)(a)(I)(A), C.R.S. because he was the first provider to treat her at the Broadmoor Medical Clinic. The claimant further contends that because §8-43-404(5)(a)(IV), C.R.S. allows a claimant to stay with an authorized treating physician if they move from the designated facility or corporate medical provider, she should be allowed to continue to treat with NP Lafayette. We are not persuaded the ALJ erred.

The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a), C.R.S., the respondent is afforded the right in the first instance to select a physician to attend the claimant. However, this statute implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Therefore, if the physician selected by the respondent refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *Id.*

Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ which must be upheld if supported by substantial evidence in the record. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Popke v. Industrial Claim Appeals Office*, *supra*. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Here, although the ALJ found that Dr. Ogrodnick refused to provide chronic pain management requested by the claimant, the ALJ also found, with record support, that the claimant failed to prove by a preponderance of the evidence that all authorized treating physicians have refused to treat her. As found by ALJ Krumreich in March of 2010, Broadmoor Medical Clinic, Dr. Sung, Dr. Griffis and Dr. Ford were authorized to treat the claimant in addition to Dr. Ogrodnick. Dr. Ford has administered epidural steroid injections in 2011 and 2012 and Dr. Sung has re-examined the claimant during this period. The fact that Dr. Ogrodnick may have refused to provide chronic pain management for the claimant does not mean that the right of selection passed to the claimant in view of the fact that there were other authorized providers willing to treat her. *See Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

The claimant further relies on §8-43-404(5)(a)(I)(A), C.R.S. and §8-43-404(5)(a)(IV), C.R.S., as support for her contention that NP Lafayette is authorized. These sections were added by HB 07-1176, Session Laws 2007 Ch. 204 §1. The effective date of these changes was January 1, 2008. Assuming, without deciding, that these statutory amendments are applicable to the claimant's 2006 injury, we nonetheless perceive no error by the ALJ.

Section 8-43-404(5)(a)(I)(A), C.R.S., defines "corporate medical provider" to mean a "medical organization in business as a sole proprietorship, professional corporation, or partnership." As we understand the claimant's argument, she appears to argue that NP Lafayette was a "corporate medical provider," and therefore, claimant could continue to treat with NP Lafayette. We agree with the ALJ's determination that NP Lafayette was not a "corporate medical provider" for purposes of this statute. Rather, NP Lafayette was employed by the Broadmoor Medical Clinic when the claimant was initially referred for treatment and could only perform delegated medical functions under the supervision of his employing physician, Dr. Ogrodnick. When NP Lafayette left the employ of Broadmoor Medical Clinic, he could no longer provide authorized treatment for the claimant absent a new referral or authorization, which did not exist here.

We also disagree with the claimant's assertion that §8-43-404(5)(a)(IV), C.R.S. is relevant here. This section provides that "if the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician." Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The plain language of the statute only allows the claimant to continue to treat with a "physician" who has moved from one corporate provider to another. Although NP Lafayette may be considered to be a "provider," pursuant to WCRP 16, NP Lafayette is not a "physician" as recognized by the claimant.

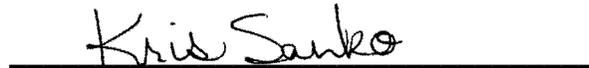
We disagree that the statute contemplates that a claimant may continue treatment with other providers that have moved from the original designated facility or corporate medical provider. The claimant's reliance, therefore, on §8-43-404(5)(a)(IV), C.R.S. is misplaced.

The ALJ's order reflects the proper application of law and is supported by substantial evidence in the record and we perceive no basis to disturb the order on review. §8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's supplemental order dated March 11, 2013 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

\_\_\_\_\_ 6/5/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

DEBRA DANIELS, 2526 ROUNDTOP DRIVE, COLORADO SPRINGS, CO, 80918  
(Claimant)

US AIRWAYS GROUP, INC., Attn: JENNIFER RUCINSKI, 4000 EAST SKY HARBOR  
BLVD., PHOENIX, AZ, 85034 (Employer)

AMERICAN HOME ASSURANCE, Attn: JENNIFER HELD, C/O: CHARTIS, P O BOX  
25971, SHAWNEE MISSION, KS, 66225 (Insurer)

STEVEN U. MULLENS, P.C., Attn: PATTIE J. RAGLAND, ESQ., P O BOX 2940,  
COLORADO SPRINGS, CO, 80901-2940 (For Claimant)

TREECE, ALFREY, MUSAT & BOSWORTH, P.C., Attn: KATHLEEN J. MOWRY, ESQ.,  
999 18TH STREET, SUITE 1600, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-727-298-03

IN THE MATTER OF THE CLAIM OF

KIM R. DAVIES,

Claimant,

v.

ORDER OF REMAND

KINDRED HEALTHCARE,

Employer,

and

AMERICAN INSURANCE GROUP  
PLAN,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated December 10, 2012, that determined her claim was closed by operation of law and denied the request to reopen based on mistake. We reverse the ALJ's determination that the claim is closed and remand for further proceedings.

A hearing was held on the issue of whether the claimant's claim was closed for her failure to timely file an objection and, alternatively, the claimant's request to reopen the claim based on mistake. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on January 2, 2007. At the time of the injury the claimant's address was 9831 S. Clariton Place, Littleton, CO 80216. (Clariton Address). This was also the address on file with Division of Workers' Compensation (Division) at this time.

The claimant testified in November of 2009, she submitted a change of address to the respondents and the Division but there were no records to reflect that the respondents or the Division received notice of a change of address. The ALJ did not find the claimant's testimony credible on this point.

In January of 2010, the claimant e-mailed the claims adjuster for her case and submitted a mileage reimbursement request. The claimant requested that the payment be sent to her "new address" at "7569 W. Frost Pl., Littleton, CO 80128." (Frost address).

The claimant also sent a mileage reimbursement request by facsimile in January of 2010, that stated, "please send payment to: 7569 W. Frost Dr., Littleton, CO 80128."

The respondents filed a Final Admission of Liability (FAL) on February 24, 2010. The FAL was sent to the claimant's prior, Clariton address. On February 26, 2010, the respondents filed an amended FAL to correct the claimant's average weekly wage (AWW). The ALJ, however, mistakenly found that this amended FAL was filed to include a three percent mental impairment rating from Dr. Moe. Respondents' Brief in Opposition at 3. The amended FAL was also mailed to the Clariton address. The claimant testified that she did not receive the February 24, 2010 or the February 26, 2010, FALs. It appears that the ALJ did not find the claimant's testimony credible as to the February 24, 2010 admission because he credited the claims adjuster's testimony that the claimant called on February 26, 2010, to discuss a problem with her AWW.

On March 5, 2010, the Division issued a letter to the respondents stating that it had received the February 26, 2010, amended FAL, and there was an overpayment of permanent partial disability benefits. The Division informed the respondents that they could amend the admission pursuant to WCRP 5-9. The ALJ found that on March 16, 2010, the respondents filed an amended FAL pursuant to the Division's letter. The amended FAL was again addressed to the Clariton address. The ALJ found that neither the claimant nor the Division received the March 16, 2010, amended FAL.

On May 19, 2011, the claimant filed a petition to reopen her claim asserting that her case should be reopened based on mistake or fraud because she did not receive the February 26, 2010, or the March 16, 2010, amended FALs. The claimant subsequently filed an application for hearing alleging that the claim was not closed because she had not received the amended FALs and alternatively, on the issue of petition to reopen.

The claimant's address was officially changed with the Division on March 8, 2012, after a prehearing conference.

Based on these findings the ALJ determined that the claim closed by operation of law because the claimant failed to timely object to the February 26, 2010, and March 16, 2010, FALs. The ALJ determined that although the claimant had provided notice of a change of address to the respondents in January of 2010, by facsimile and email, the claimant's correspondence did not indicate that the claimant was making a "permanent" address change. The ALJ further found that the claimant failed to notify the Division of the address change until March 8, 2012. The ALJ, therefore, concluded that it was proper for the respondents to mail the FAL to the Clariton address on file with the Division, rather than the Frost address and the claim closed by operation of law due to the claimant's failure to timely object.

The ALJ further found that the claimant failed to establish by a preponderance of the evidence that she is entitled to reopen her claim based on mistake. The ALJ concluded that the claimant was responsible for keeping the Division apprised of her current address and because she failed to notify the Division of her address change prior to the respondents' filing of the FALs, there was no "mistake" to warrant reopening the claim.

On appeal the claimant argues that the ALJ erred in his determination that the January 2010, correspondence did not provide the respondents with proper notification for her change of address. We agree that the ALJ erred in his determination and, therefore, reverse the ALJ's order.

The respondents initially request that we strike exhibits attached to the claimant's brief in support of petition to review. As the claimant points out, the majority of the exhibits were admitted at hearing. Tr. at 8. We do not, however, consider the exhibits which were not part of the record before the ALJ, as our review is restricted to the record before the ALJ, and the exhibits and factual assertions made on appeal by the claimant may not substitute for evidence which is not in the record. See *City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995)(appellate review limited to the record before the ALJ); *Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988)(appellate review limited to the record before the ALJ).

Section 8-43-203(2)(b)(II), C.R.S., provides that a claimant's failure to object to a final admission of liability and request a hearing on any disputed issues that are ripe for hearing within 30 days will result in automatic closure of the claim concerning all admitted liability. The automatic closure of issues raised in an uncontested FAL is "part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

The claimant, however, is entitled to actual notice of the FAL before the failure to object triggers a closure. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). Although there is nothing in the statutes or the rules that expressly provides that an FAL must be served by mail to the claimant's home address, the courts have held that such a requirement is implicit because it effectuates the legislative purpose of insuring the quick and efficient delivery of benefits and is reasonably designed to provide the claimant notice of the FAL and provide an opportunity to object. *Id.* If, however, non-receipt of

the FAL is attributable to the claimant's own conduct, the panel has previously held that a claimant may waive or be estopped from asserting, the right to actual notice. For instance, if the claimant avoids service or fails to provide the correct address. See *Maryott v. J & H Properties*, W.C. No. 4-157-363 (April 28, 1997).

Here, the ALJ found that the claimant's claim closed by operation of law due to the claimant's failure to timely contest the February 26, 2010, FAL and the March 16, 2010, FAL. The ALJ also found that the claimant did not receive the March 16, 2010, FAL. As we understand the order, the ALJ implicitly determined that the claimant waived her right to actual notice of the FAL because the claimant failed to notify the Division of her change of address. Under the circumstances of this case we disagree with the ALJ's conclusion that the claimant waived her right to actual notice of the FAL.

It appears that the respondents have taken conflicting positions on whether the March 16, 2010, FAL was actually filed. At hearing, the respondents stated that the March 16, 2010, FAL was never sent and they were relying on the February 26, 2010, FAL to support the argument that the claim was closed by operation of law. Tr. at 11-12 and 14. In the position statement and the brief in opposition the respondents suggest that the March 16, 2010, FAL was actually filed. The respondents also state that benefits were paid pursuant to the March 16, 2010, FAL, regardless of whether it was actually filed. Respondents' Brief in Opposition at 3 and 10. In any event, both the February 26, 2010, FAL and the March 16, 2010, FAL were sent to the Clariton address rather than the Frost address and our analysis applies to either FAL.

The general rule is that a claimant is responsible for keeping the Division, opposing parties and counsel advised of her current address and failure to do so may result in the non-receipt being attributed to the claimant's own conduct. See *Ward v. Douglas County Board of Commissioners*, 886 P.2d 310 (Colo. App. 1994); *Devore v. Industrial Commission*, 129 Colo. 10, 266 P.2d 774 (1954). Here, the claimant provided the respondents with her new home address in January of 2010. The respondents mailed the claimant's mileage reimbursement checks and continued to mail her permanent partial disability checks to this new address from January 13, 2010, through April 20, 2010. Claimant's Exhibits at 12 (L1-L5). A computer record indicates that the respondents changed the claimant's address in their system from the Clariton address to the Frost address on April 8, 2010. Claimant Exhibit at 13 (M1). The respondents did not use the address provided by the claimant to mail the FALs even though the respondents do not dispute being provided with this address in January of 2010. The fact that the claimant failed to provide the Division notice of her new home address does not alter the fact that the respondents had notice of the correct home address and the respondents were responsible for sending out the FAL. Had the claimant failed to receive a document from the Division, the non-receipt would arguably have been attributable to the claimant's

failure to provide the Division with the correct address. Compare *Hroncheck v. Constellation Concepts*, W.C. No. 4-496-790 and 4-380-625 (March 4, 2003)(claimant's failure to receive Order to Show Cause from the Division due to his failure to provide the Division with his correct address).

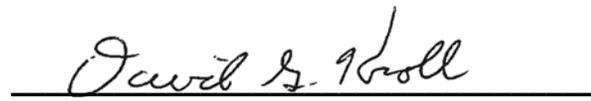
In this case we cannot say that the non-receipt of the FAL from the respondents was attributable to the claimant. Rather, the claimant provided the respondents with her new address in January of 2010 by email and facsimile. The evidence does not indicate that the claimant intended to waive her right to actual notice of the FAL. See *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988)(waiver is the intentional relinquishment of a known right). Thus, the ALJ's findings do not support his conclusion in this regard and we reverse the ALJ's order. Because the claimant did not receive the FAL in the case, her duty to object was not triggered and the claim did not close by operation of law. *Bowlen v. Munford*, supra.

In view of our disposition of the first issue, we do not reach the claimant's remaining arguments on appeal.

IT IS THEREFORE ORDERED that the ALJ's order dated December 10, 2012, is reversed and the matter is remanded for further proceedings concerning the claimant's entitlement to workers' compensation benefits.

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

\_\_\_\_\_ 6/3/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

KIM R. DAVIES, 7569 W FROST DRIVE, LITTLETON, CO, 80128 (Claimant)  
AMERICAN INSURANCE GROUP PLAN, Attn: MELISSA CARTER, C/O:  
SEDGWICK CMS, P O BOX 14493, LEXINGTON, KY, 40512 (Insurer)  
THOMAS POLLART & MILLER, LLC, Attn: ILENE H. FELDMEIERS, ESQ., 5600 S  
QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For  
Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-629-985-01

IN THE MATTER OF THE CLAIM OF

KAREN E KOKINS,

Claimant,

v.

FINAL ORDER

CITY OF WESTMINSTER,

Employer,

and

SELF INSURED,

Insurer,  
Respondent.

The *pro se* claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated January 8, 2013, that granted the respondent's motion for summary judgment denying and dismissing the claimant's claims for benefits other than admitted medical benefits. We affirm the ALJ's order.

The following are undisputed facts. The claimant sustained an admitted injury on July 6, 2004. The respondent filed a final admission of liability (FAL) on July 26, 2006, admitting for ongoing maintenance medical benefits. According to the FAL the last indemnity benefit became due and payable to the claimant on June 16, 2006. To date, the respondent has continued to pay medical benefits for the claimant. The claimant did not object to the FAL or otherwise take any action on the claim until July 17, 2012, when she filed a petition to reopen indicating that there had been a change in her medical condition. The claimant filed an application for hearing on September 5, 2012, endorsing the issues of compensability, medical benefits, reasonably necessary, average weekly wage, petition to reopen claim, disfigurement, permanent partial disability benefits and penalties.

The respondent filed a motion for summary judgment requesting that the ALJ enter an order striking the claimant's application for hearing based on the fact that the statute of limitations in §8-43-303, C.R.S. had run, the claimant did not request specific medical benefits and failed to plead her penalty claim with specificity. The claimant responded to the motion for summary judgment asserting that the case should be

reopened based on allegations that her former attorney conspired with the respondent to deny her workers' compensation benefits by pursuing a third party negligence action and that her former attorney advised her not to object to the FAL and never told her that she had only six years from the date of injury to reopen her claim. The claimant stated that she was seeking to reopen her claim to determine maximum medical improvement, benefits, average weekly wage, permanent partial disability and worsening of her medical condition.

The ALJ determined that there was no issue as to any material fact and granted the respondent's motion on the basis that the claimant's application for hearing on all issues, with the exception of medical benefits, was barred by the statute of limitations in §8-43-303, C.R.S. The ALJ denied and dismissed all claims, other than admitted medical benefits.

On appeal the claimant raises the same arguments she made to the ALJ in her response to the motion for summary judgment, setting forth numerous factual assertions concerning her allegations for fraud and ineffective counsel. The claimant, however, does not dispute the material facts listed above underlying the ALJ's finding that the claim is closed and barred by the statute of limitations, with the exception of medical benefits. As such, we are not persuaded to interfere with the ALJ's order granting the request for summary judgment.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where 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); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

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). However, once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to

summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

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). Pursuant to §8-43-301(8), C.R.S., however, 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.

Here, the question on review is whether applicable law supports the ALJ's grant of summary judgment on the grounds that the statute of limitations in §8-43-303, C.R.S. has run. The applicable statute of limitations in §8-43-303(1), C.R.S., provides that an ALJ may reopen a claim "at any time within six years of the date of injury." Subsection 8-43-303(2)(a), C.R.S. allows an ALJ to reopen a claim for indemnity benefits within two years after the date the last temporary or permanent disability benefits became due and payable. Subsection 8-43-303(2)(b), C.R.S. allows an ALJ to reopen a claim within two years of the date the last medical benefit has become due or payable. Here, the claimant does not dispute that it has been more than six years since the date of injury and more than two years since the payment of indemnity benefits. Therefore, the ALJ properly determined that the statute of limitations had run for the claimant's claims of indemnity benefits.

The claimant's general allegations of fraud against the respondent and her former attorney come from the fact that her former attorney represented the claimant and the respondent in the third party negligence action. This is not an uncommon occurrence in a subrogation matter and we agree with the ALJ that by itself does not give rise to fraud or collusion. See §8-41-203, C.R.S. Nor does the claimant's assertion that she received inadequate legal representation afford grounds for relief from the statute of limitations. See *Hereford v. Mr. Steak*, W.C. No. 3-589-581 (October 3, 1996). The determination to pursue a third party negligence claim and the advisement of the claimant's legal rights to reopen her claim were matters between the attorney and the claimant and we are without authority to address that issue. See *McGinley v. Mariner Post Acute Network*, W.C. No. 4-535-097 (April 7, 2003).

The claimant also requests that the order be clarified as to her medical benefits. The respondent admitted for ongoing maintenance medical benefits in the 2006 FAL. As the ALJ recognized in his order, the respondent continues to provide medical benefits to date. Should the claimant have a basis to reopen the issue of medical benefits for more than maintenance care, §8-43-303(2)(b), C.R.S. allows an ALJ to review and reopen as to

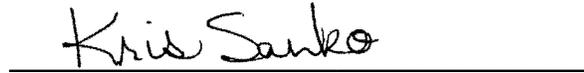
medical benefits, anytime within two years after the date the last medical benefits become due and payable.

We are not persuaded by the claimant's remaining arguments and conclude that the law supports the ALJ's order granting the motion for summary judgment.

**IT IS THEREFORE ORDERED** that the ALJ's order dated January 8, 2013, 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

6/10/2013 by RP.

KAREN E KOKINS, 1451 E 141ST AVE, BRIGHTON, CO, 80602 (Claimant)  
CITY OF WESTMINSTER, Attn: RISK MGMT, 4800 W 92ND AVE, WESTMINSTER, CO,  
80031 (Employer)  
PAUL T. KRUEGER ESQ., C/O: RITSEMA & LYON, 999 - 18TH ST SUITE 3100, DENVER,  
CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-738-209-04

IN THE MATTER OF THE CLAIM OF

JACK MCGUIRE,

Claimant,

v.

FINAL ORDER

FAMILY DOLLAR STORES, INC.,

Employer,

and

ACE AMERICAN INSURANCE  
COMPANY,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 12, 2013, that ordered the cessation of the respondents' obligation to provide certain medical treatment. We affirm.

The claimant submits this appeal of the ALJ's order which determined continued medical treatment of the claimant's August 13, 2007, work injury was not reasonable or necessary treatment.

A hearing was conducted in this case before the ALJ on September 28, 2012. After the receipt of a post hearing deposition and position statements, the ALJ submitted specific findings of fact, conclusions of law and order. The ALJ summarized the evidence as showing the claimant began receiving treatment for pain complaints as early as 2004. He initiated treatment in Florida with Dr. Davis, Dr. Henn and Dr. Weiner. His complaints involved his cervical spine and left arm pain. His reports of pain in the period between 2004 and 2006 were considerable. He explained to Dr. Henn his pain was "unbearable" and that it interfered with his activities and his sleep. He informed Dr. Weiner his pain was "driving him crazy" and he rated pain levels as high as a 10 on a 10 point scale. The claimant last treated with Dr. Weiner before he moved to Colorado on February 14, 2006. On that date his complaints were of neck pain and right shoulder pain. This was described as shooting, stabbing, burning and continuous. Dr. Weiner had prescribed for the claimant Oxycontin, Lipoderm cream, Gabapentin, Ketoprofen, Lidocaine, Ketamine, Amitriptyline and Baclofen.

The claimant relocated to Colorado and began working for the employer as a store manager. In June, 2007, the claimant began treating with Dr. Cambe at the Mapleton Pain Management Center. The claimant described pain occurring in his neck, upper back and down his right shoulder and arm. As of July 17, 2007, the claimant received continued prescriptions for Oxycontin and Percocet. On August 13, 2007, the claimant was injured when he fell while reaching for boxes on a ladder at work. He received a diagnosis of a right shoulder rotator cuff strain and a cervical strain. He underwent surgery for a rotator cuff repair in October, 2007. The claimant continued to complain of pain in his shoulder. He began treating with Dr. Reinhard. Dr. Reinhard diagnosed the claimant as suffering from Complex Regional Pain Syndrome (CRPS). The claimant was evaluated by Dr. Steig in June, 2008. Dr. Steig was skeptical of a new diagnosis of CRPS through a migration to the claimant's legs. He did not believe opioid analgesics were helpful to the claimant. Dr. Reinhard placed the claimant at MMI on June 11, 2009, and a Division Independent Medical Exam was performed by Dr. Hattem. Dr. Hattem provided an impairment rating for CRPS located in both the claimant's upper and lower extremities. Dr. Hattem however, recommended the claimant be tapered off narcotic analgesics. The respondents filed a Final Admission basing an award of permanent partial disability benefits upon Dr. Hattem's 45% impairment rating.

In 2010, the claimant underwent additional medical evaluations. Ron Carbaugh, PsyD., wrote in a report that the claimant reported to him that he received no benefit from any of his medical therapies. He was of the opinion the claimant was psychologically focused on his physical symptoms and impairment and that additional psychological care would be of little benefit. Dr. Weingarten conducted a psychiatric review of the claimant's condition. Dr. Weingarten identified several pieces of evidence to support a finding of malingering. These included incentives on the part of the claimant which were financial and directed at obtaining medication. Dr. Pitzer evaluated the claimant and found that no treatment, including his pain medication, had produced any improvement in the claimant's ability to function. Dr. Pitzer believed the claimant's pain complaints were largely preexisting to the claimant's work injury.

The claimant received two additional medical evaluations in 2011. Dr. Pemmaraju reviewed the claimant's medications. He compared the claimant's situation and his prescriptions to the recommendations in the Director's Medical Treatment Guidelines (Guidelines) regarding CRPS. The doctor pointed out that the Guidelines require narcotic medication to be justified by corresponding increases in the claimant's ability to function. In the event the claimant was not achieving increased function, the claimant should be tapered off the pain medication. Dr. Pemmaraju concluded most of the prescriptions the claimant received were ineffective in obtaining increased function and should be discontinued. Dr. Cebrian conducted a records review and an in person examination of the claimant. Dr. Cebrian came to the conclusion the claimant did not

have a correct diagnosis of CRPS. He also relied on the Guidelines' emphasis on the need for functional improvement to qualify the claimant as an appropriate patient for his pain medications. He noted the lack of improvement in the claimant's function. Based on his exam and observations, he recommended the claimant be weaned off his current pain medication. He also concluded the claimant's symptoms for which he was receiving the medications were not caused by the work injury but were preexisting to his work injury.

The ALJ attributed greater weight to the opinions of Doctors Hattem, Pitzer, Carbaugh, Weingarten, Pemmaraju and Cebrian. The ALJ relied on the opinions by these reviewers to conclude the claimant's treatments and medications are not reasonable or necessary given that there is inconsiderable evidence they are leading to an increase in the claimant's ability to function in an elevated capacity. Because that is the basis for their prescription pursuant to the Guidelines, and medical practice, their continued prescription could not be justified by the ALJ. The ALJ also made the determination the symptoms for which the medications were prescribed were preexisting and the medications were not related to treatment of the work injury. The ALJ granted the respondents' request to cease medical maintenance benefits, save for the possible cost of weaning the claimant off his current medications.

On appeal, the claimant argues the ALJ did not have jurisdiction to entertain the respondents' issue of medical benefits. The claimant asserts the Division IME physician, Dr. Hattem, provided an impairment rating for the condition of CRPS. The claimant declaims then, that the ALJ denied the request for continued medical treatment based upon a reversal of Dr. Hattem's findings which had become binding in the case. The claimant further argues that the ALJ's determinations are not supported by substantial evidence in the record.

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

To the extent the claimant argues the ALJ did not have subject matter jurisdiction to review the request of the respondents to cease medical treatment, his argument does not appear to apply to the determinations actually made by the ALJ. The claimant points

to the findings of Dr. Hattem, as the DIME physician, that CRPS of the upper and lower extremities was a part of the claimant's work injury and justified an impairment rating. The claimant contends the ALJ set aside these determinations by Dr. Hattem and ruled the claimant did not suffer from CRPS. He concludes that because the respondents did not dispute the DIME findings through a timely request for a hearing, and, in fact, filed a Final Admission adopting the DIME physician's rating, those findings are binding in this claim and are not subject to dispute or review by an ALJ.

The claimant misreads the decision of the ALJ. The ALJ did not make a finding that the claimant was without symptoms of CRPS due to his work injury. The ALJ determined the claimant was receiving treatment that was not reasonably necessary to relieve the effects of his injury. Whereas the ALJ did acknowledge that Dr. Cebrian came to the conclusion the claimant was not inflicted with a CRPS condition, the ALJ also noted that Dr. Cebrian held the opinion "that no amount of medical evaluation, diagnosis, therapy, medications and interventions would improve claimant's condition but would instead reinforce claimant's pain behaviors." Dr. Cebrian was not alone in this conclusion. Indeed, Dr. Hattem in his DIME report, recommended the claimant be weaned off narcotic analgesics. The actual summary finding made by the ALJ was:

Accordingly, claimant does not require any ongoing medical maintenance treatment that will be reasonably necessary to relieve the effect of his August 13, 2007 industrial injury or prevent further deterioration of his condition. Conclusions of Law at 10 ¶6.

The claimant's argument notwithstanding, there was no finding that the claimant did not maintain a diagnosis of CRSP, or that the medical treatment was not 'related'. Rather, the ALJ found that the continued treatment was not reasonable or necessary. *Id.* The respondents are only responsible for medical treatment that is reasonably necessary to cure or relieve the effects of the industrial injury. This also applies to a request for medical treatment after the date of MMI. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The ALJ then, had subject matter jurisdiction to resolve the issue of medical care in this claim. The question of whether the requested treatment is reasonable and necessary is one of fact for the ALJ.

The claimant next argues that the record does not support the ALJ's findings of fact. The respondents are only responsible for medical treatment that is reasonably necessary to cure or relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; see also *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). The question of whether the requested treatment is reasonable and necessary is one of fact for the ALJ. See *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App.

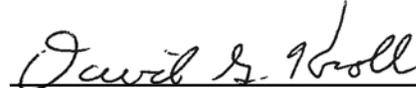
1997). Because these questions are factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City of Durango v. Dunagan, supra*. Substantial evidence is that quantum of proof which would support a reasonable belief in the existence of a fact without regard to contradictory evidence and conflicting inferences. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 2003). Where expert medical opinion is presented, it is solely for the ALJ as fact finder to weigh the evidence and resolve any conflicts. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

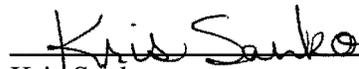
Additionally, it is well settled that respondents retain the right to contest or dispute liability for medical benefits or medical treatment on grounds that such benefits or treatment are unnecessary, unauthorized, or unrelated to the industrial injury. *Grover v. Industrial Commission, supra*; *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003) (employer retains right to contest compensability, reasonableness, or necessity of medical benefits); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Here, our review of the ALJ's order demonstrates that he properly took into account the evidence in the case. Both parties presented medical opinions with sharply differing conclusions as to the reasonableness and relatedness of the claimant's treatment. The ALJ, however, could reasonably rely on the opinions of Doctors Hattem, Pitzer, Carbaugh, Weingarten, Pemmaraju and Cebrian. Several of these doctors noted the claimant was being treated with the same medications as had been prescribed to him prior to the date of his work injury. Drs. Hattem, Steig, Pitzer, Carbaugh Weingarten, Pemmaraju and Cebrian documented that the claimant's medications were not providing the improvement in function for which they were prescribed. Dr. Hattem, Dr. Weingarten, Dr. Steig, Dr. Pemmaraju and Dr. Cebrian specifically recommended the claimant be weaned off his use of narcotic medications. While Dr. Reinhardt, Dr. Weiner and Dr. Cambe expressed opposing opinions, it is the prerogative and task of the ALJ to weigh and accept the most persuasive of the medical evidence. *Rockwell International v. Turnbull*, 802 P.d. 1182 (Colo. App. 1990)(where conflicting expert opinion is presented, it is for ALJ as fact finder to resolve conflict). The ALJ has done so in this case. His determinations are supported by substantial evidence as represented by the testimony and reports of Doctors Hattem, Pitzer, Carbaugh, Weingarten, Pemmaraju and Cebrian. Section 8-43-301(8), C.R.S. We do not see adequate cause to set aside the order of the ALJ.

**IT IS THEREFORE ORDERED** that the ALJ's order issued March 12, 2013, 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

\_\_\_\_\_ 7/10/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JACK MCGUIRE, 149 ORANGE HARBOR DRIVE, FT. MYERS, FL, 33905 (Claimant)  
FAMILY DOLLAR STORES, INC., P O BOX 1017, CHARLOTTE, NC, 28201 (Employer)  
ACE AMERICAN INSURANCE COMPANY, Attn: TAMMY JORDAN, C/O: SEDGWICK  
CMS - DENVER, P O BOX 14493, LEXINGTON, KY, 40512-4493 (Insurer)  
THE LAW OFFICES OF BARBARA J. FURUTANI, P.C., Attn: BARBARA J. FURUTANI,  
ESQ., 1732 RACE STREET, DENVER, CO, 80206 (For Claimant)  
CLIFTON & BOVARNICK, P.C., Attn: HOLLY M. BARRETT, ESQ., 789 SHERMAN  
STREET, SUITE 500, DENVER, CO, 80203 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-804-825

IN THE MATTER OF THE CLAIM OF

JOSE ORTEGA,

Claimant,

v.

FINAL ORDER

JBS USA, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE  
COMPANY,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Cain (ALJ) dated January 11, 2013, that ordered permanent partial disability benefits. We affirm.

The claimant injured his right knee at work on September 14, 2009. At that time he worked in the employer's meat packing plant. He was stepping across a ribbing stand when he slipped on some water and twisted his right knee. The claimant treated with Dr. Brignoni and then was evaluated by Dr. Laura Caton on October 5, 2009. The ALJ noted that Dr. Caton reviewed an MRI of the claimant's right knee which showed the claimant suffered from severe degenerative arthritis. The MRI also revealed the absence of a lateral meniscus. Dr. Caton's history included a report of a previous work injury to the claimant's knee five years previously and an earlier arthroscopy to that same right knee. Dr. Caton advised the claimant to seek treatment in regard to a total knee replacement in the future. However, the doctor stated that treatment was not due to this September 14, 2009, work injury. She determined the claimant was at MMI for the "medial collateral ligament sprain" he sustained at work. Dr. Caton concluded there was no permanent impairment attributable to the 2009 work injury.

The respondents filed a notice of contest on October 9, 2009. On January 11, 2010, the claimant underwent a total right knee arthroplasty by Dr. Hajek. Due to complications, the claimant had additional knee surgeries on January 25, 2011, and March 17, 2011.

The claimant requested a hearing in regard to the issues of compensability and medical benefits up to the date of October 5, 2009, the day Dr. Caton determined the claimant was at MMI. The ALJ noted the claimant planned to pursue a Division IME review regarding MMI and additional medical treatment if the hearing determined the claim was compensable. A hearing was conducted by ALJ Henk on July 13, 2010. ALJ Henk ruled the claim was compensable. She also awarded medical benefits through October 5, 2009. In her summary order, ALJ Henk resolved that the evidence showed the claimant's injury "consists of a medial collateral ligament sprain/strain." She also reasoned the claimant "has not proven by a preponderance of the evidence that his September 14, 2009 accident aggravated his preexisting degenerative arthritis." Neither party requested specific findings.

The respondents filed a Final Admission of Liability on September 30, 2010, which limited compensability to a right knee "sprain/strain" pursuant to ALJ Henk's order. The claimant requested a DIME review. The respondents moved for a prehearing order limiting the DIME to consideration only of the injury described by ALJ Henk as being work related. In a January 10, 2011, Order, PALJ DeMarino agreed and directed the DIME to consider MMI and permanent impairment for only the "claimant's right medial collateral ligament sprain/strain".

The DIME proceeding was completed by Dr. Lindberg on December 6, 2011. Because the PALJ order was not a medical record, Dr. Lindberg did not have it available when he wrote his report. The DIME report noted the claimant's arthritis condition and his prior and recent surgeries. Dr. Lindberg found the claimant's impairment of his right knee to be 32% of the lower extremity and his date of MMI was the date of the report, December 6, 2011. His analysis included an apportionment relegating only 30% of this rating to the claimant's September, 2009, work injury. In a post report deposition, Dr. Lindberg was shown the PALJ order. The doctor stated that if limited to a review of a 'sprain/strain' of the right knee, he was of the opinion the claimant was at MMI on October 5, 2011, and there was no permanent impairment involved.

The respondents submitted an application for a hearing to challenge the findings of the DIME physician. At the hearing before ALJ Cain on October 26, 2012, the parties stipulated that in the event the ALJ determined the order of the PALJ applied and the injury was limited to ALJ Henk's finding of a right knee sprain/strain, then the MMI date was October 5, 2009, and the claimant received no permanent partial disability benefits. If the DIME was not limited by the PALJ order, then the claimant was entitled to PPD benefits based upon a 32% extremity rating.

ALJ Cain concluded the PALJ order should be set aside. The PALJ order was predicated on the application of issue preclusion. ALJ Cain reviewed the prerequisites

for issue preclusion listed in *Sunny Acres Villa v. Cooper*, 25 P.3d 44 (Colo. 2001). These included the requirements that (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. ALJ Cain reasoned that three of these criteria did not apply in this case. The issue decided by ALJ Henk was said to not be identical to the issue before the PALJ and ALJ Cain. This was because ALJ Cain viewed as dicta ALJ Henk's finding that the nature of the claimant's work injury did not include an aggravation of the claimant's previous arthritic condition. Once ALJ Henk found the claim was compensable and awarded medical benefits to October 5, 2009, she had ruled for the claimant on all of his issues for hearing. Because the claimant had received no treatment for the arthritis condition prior to October 5, it was of little consequence that ALJ Henk went further and specified that arthritis was not involved. Similarly, ALJ Cain found there was no final order on the merits when ALJ Henk entered her summary order. That order was not subject to appeal by the claimant and therefore not final. Because the claimant was provided all the relief he requested through the summary order, he did not have standing to appeal. The summary order then, was not final to the extent it could be applied against the claimant. Finally, ALJ Cain reasoned the claimant did not have a full and fair opportunity to litigate the issue of strain versus aggravation in the prior proceeding. This also was due to the fact the claimant received no treatment for his arthritis between the date of injury and the October 5 date of MMI. Since he could only litigate treatment received prior to MMI, without first having a DIME review of the MMI date, the claimant was unable to litigate the inclusion of arthritis aggravation among his work injuries. ALJ Cain set aside the PALJ order and awarded PPD benefits based upon the 32% lower extremity rating.

The respondents take exception with ALJ Cain's determination, focusing primarily on ALJ Cain's ruling there was no identity of issues between those decided by ALJ Henk and the issues addressed by the PALJ and ALJ Cain.

The respondents argue that if the respondents had determined to appeal ALJ Henk's order, her determination to accept one alternative version of the injury and reject the other would have been significant. It is not clear however, why that would be the case. If the respondents had pursued an appeal, while the claimant could not (because he had won his requested relief), the respondents would need only to make the argument on appeal that the claimant did not sustain a sprain/strain at work. The issue of the aggravation of arthritis would not be presented since it had been dismissed by the order being appealed. As a result, ALJ Cain's characterization of ALJ Henk's order as not

final regarding aggravation of the arthritis, or not essential in regard to that determination, is valid.

The respondents contend the case law supports the application of issue preclusion as a limitation on the review conducted by a Division Independent Medical Examiner. They assert then, that ALJ Cain was in error when he set aside the PALJ's order restraining the DIME. Concomitantly, they claim ALJ Cain also was in error when he awarded PPD benefits based partially on an aggravation of the claimant's arthritis. The difficulty with the respondents' position lies in the extent it would allow for the prelitigation of the MMI and impairment rating issues prior to the application of the DIME process. Those issues would be determined at a hearing by a preponderance of the evidence standard. The statute however, provides that a DIME determination of those issues is to be reviewed at a hearing by a clear and convincing standard. The tactic of litigating those issues, by either party, as a means of obtaining advantage in the DIME process is inconsistent with the aim of the statute. The effect would be to actually increase litigation rather than avoiding it.

In *Holnam v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2007), the Court discussed the tactical issue involved. The claimant there had injured his shoulder at work. A DIME review found the claimant's cervical spine was not involved in the injury. The claimant then filed another claim asserting his cervical spine sustained a new injury incurred at work after the date of MMI determined by the DIME. The Court held that 'claim' preclusion barred the consideration of the subsequent cervical claim. The claimant had argued the differing standards of proof prevented the application of claim preclusion. The claimant was required in the older claim to overcome the DIME's opinion regarding the cervical spine by clear and convincing evidence, while he could establish the compensability of the cervical spine in the newer claim by only a preponderance of the evidence. The Court pointed out that difference was not significant in considering claim preclusion, but it was applicable in regard to 'issue' preclusion:

It is true that claimant had to overcome the DIME by clear and convincing evidence in the first proceeding, but needed only to prove his occupational disease claim by a preponderance of the evidence in the second proceeding. However, although issue preclusion (collateral estoppel) may be affected by the difference in the burden of proof, *see* Restatement, *supra*, § 28(4), that principle does not translate to the realm of claim preclusion. *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 594 (3d Cir.1989) (claim

preclusion applicable even when there are differing standards of proof in the two proceedings). (*Holnam*, 159 P.3d 795, 799).

In this case, the respondents seek to apply the earlier order of ALJ Henk as ‘issue’ preclusion in the DIME process. The differing standards of proof then, are significant.

The Court in *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002), recognized that the issue of compensability presented issues of overlapping determinations. The Court in *Cordova* specifically set forth that the decisions of a DIME physician are only to be given presumptive effect when provided by the statute. Therefore, the determination as to whether or not there exists a compensable injury was based upon the preponderance of evidence standard, *see Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). However, the “IME physician’s opinion concerning cause of [a] particular component of claimant’s overall impairment must be overcome by clear and convincing evidence.” *See, Qual-Med v. Industrial Claims Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

The respondents rely on decisions in *Lockhart v. Tetra Technologies*, W.C. No. 4-725-760 (May 21, 2009), and *Younger v. Merritt Equipment Co. v. Fireman’s Fund Ins. Co.*, W.C. No. 4-326-355 (December 30, 2009). Those decisions do not directly support the respondents’ position that issues decided by a preponderance of the evidence preclude a later contrary conclusion by a DIME physician. In *Lockhart*, an ALJ ruled in a compensability hearing that the work injury was limited to a temporary aggravation of a preexisting rotator cuff condition. The same ALJ presided in a subsequent hearing involving a DIME determination the claimant was not at MMI due to treatment necessitated by the underlying rotator cuff malady. The ALJ set aside the DIME’s determination. The ALJ did observe that the DIME’s opinion was inconsistent with the ALJ’s previous compensability determination. However, the ALJ specifically ruled that he found the DIME’s MMI opinion “had been overcome by clear and convincing evidence.” The ALJ then, did not actually reject the DIME determination based on issue preclusion. In *Younger*, the opinion did find that an earlier decision regarding compensability had a preclusive effect on a later ALJ’s review of a DIME’s conclusion. However, the respondents in *Younger* did not argue the differing standards of proof involved. Accordingly, the opinion did not address that issue.

At the same time that *Lockhart* and *Younger* were decided, the Court of Appeals issued a decision in *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). In *Eller*, the claimant’s treating physician had treated the claimant for her asserted work injury, placed the claimant at MMI and provided an impairment rating. In the following hearing regarding compensability, the ALJ found the claim to be not

compensable. The claimant argued the treating doctor's determination of compensability inherent in his MMI and impairment rating determinations was binding because the respondents had not challenged them with a DIME review. The Court did not agree based on the same analysis set forth in *Cordova, supra*:

Here, the issue before the ALJ was whether claimant had sustained a compensable injury in the first instance. Employer did not challenge either the MMI determination or the impairment rating. Although an inquiry into the relatedness of a particular component of a claimant's overall impairment will carry presumptive effect when determined by a DIME, *see Qual– Med, Inc. v. Indus. Claim Appeals Office*, 961 P. 2d 590, 592 ( Colo. App. 1998), the issue of causation in this case concerned only the threshold showing necessary to prove compensability.

The Panel did then address directly the varying standard of proof and its effect on issue preclusion in *Braun v. Vista Mesa*, W.C. No. 4-637-254 (April 15, 2010). The claimant in *Braun* had obtained a decision from an ALJ in 2008 that she had sustained a work related thoracic outlet syndrome injury for which she required Botox injections. The claimant later underwent a DIME which concluded the claimant did not have TOS and did not require additional Botox injections. In a hearing featuring the issue of a challenge to the DIME determinations, a second ALJ upheld the DIME's findings. The claimant appealed urging that the ALJ's order be set aside based upon issue preclusion due to the first ALJ's order. The Panel noted the evidentiary standards involved in the two ALJ decisions were indeed distinct such that issue preclusion did not apply:

We view the decision in *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006) as instructive on the effect of different burdens of proof on issue preclusion. The *Holnam* court rejected the claimant's argument that because there were differences in the degree of proof in the two proceedings preclusive principles should not apply. In the first proceeding in *Holnam* the claimant was required to overcome the DIME opinion on causation by clear and convincing evidence, while in the second she was only required to establish the

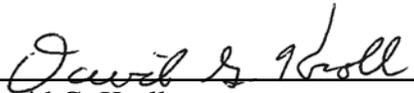
existence of an occupational disease by a preponderance of the evidence. The court conceded that the differences in the respective burdens might be significant if issue preclusion were applicable, but that those differences were not significant where claim preclusion applied. *Holnam, Inc.* 159 P.3d at 799.

Here, there were different burdens of proof in the hearing before ALJ Martinez (preponderance) and before ALJ Mottram (clear and convincing). As we understand *Holnam* these differences in the burden of proof may prevent the application of issue preclusion as argued by the claimant here. Therefore, we are not persuaded that ALJ Mottram erred in refusing to apply the doctrine of issue preclusion and disregard the DIME physician's opinion on MMI and the resulting denial of TTD benefits beyond those at the date of MMI as found by the DIME physician.

Insofar as the present case is concerned, the determination in *Braun* denies the effect of issue preclusion in regard to both the PALJ order and the order of ALJ Cain. ALJ Henk reviewed the compensability of the various injuries for which the claimant complains based upon a preponderance of the evidence. The DIME, however, is charged by the statute with making a determination as to which body parts and conditions have been permanently affected by the work injury. Those determinations are reviewed by the ALJ using a clear and convincing evidence standard. The issue then, determined by ALJ Henk is not identical to the later issue decided by ALJ Cain. Issue preclusion does not constrain either the DIME physician or the decision of ALJ Cain. ALJ Cain acted within his discretion in reviewing and accepting the DIME finding and the stipulation of the parties as to the applicable impairment rating.

**IT IS THEREFORE ORDERED** that the ALJ's order issued January 11, 2013, 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

\_\_\_\_\_ 6/27/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JOSE ORTEGA, 200 N 35TH AVE LOT 220, GREELEY, CO, 80634-1152 (Claimant)  
JBS USA, LLC, P O BOX 1450, GREELEY, CO, 80632 (Employer)  
ZURICH AMERICAN INSURANCE COMPANY, Attn: MICHAEL FARNHAM, C/O:  
SEDGWICK CMS, P O BOX 14493, LEXINGTON, KY, 40512-4493 (Insurer)  
KAPLAN MORRELL, LLC, Attn: BRITTON J. MORRELL, ESQ., 1305 EIGHTH STREET,  
GREELEY, CO, 80631 (For Claimant)  
CLIFTON & BOVARNICK, P.C., Attn: DIANE K. MURLEY, EAQ., 789 SHERMAN  
STREET, SUITE 500, DENVER, CO, 80203 (For Respondents)  
JOSE ORTEGA, 200 N. 35TH AVENUE, LOT 220, GREELEY, CO, 80631 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-702-144

IN THE MATTER OF THE CLAIM OF

DWANA SALISBURY,

Claimant,

v.

PROWERS COUNTY SCHOOL DISTRICT RE2,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated February 20, 2013, that denied and dismissed their request to terminate all treatment by Dr. Richman and Dr. Hopkins for the claimant's depression, anxiety, and headaches. We affirm.

The claimant suffered an admitted work injury on September 27, 2006. The claimant was sitting in a chair which broke and the claimant fell. The claimant struck her head on a table and then again on the floor. The claimant briefly lost consciousness as a result. The claimant was examined on September 27, 2006. A computed tomography (CT) scan of the brain was normal.

The claimant has a history of suffering from depression, anxiety, headaches, and head injuries over the course of several years. She sustained head injuries in various different incidents occurring in 1983, 1987, 1989, 1991, and 2003. The claimant lost consciousness in a number of these incidents.

The claimant subsequently received medical treatment after her fall. The claimant's authorized treating physician diagnosed headaches, severe anxiety, and depression, which he opined was aggravated by the industrial injury. The claimant received various medical treatments including psychology consultations, physical medicine, and blocks and injections.

On May 29, 2009, Dr. Richman determined that the claimant was at maximum medical improvement (MMI). Dr. Richman provided an impairment rating and recommended post-MMI medical treatment. He specifically opined that for maintenance

care, the claimant be allowed to continue with Celexa at nighttime, but that her medical provider may want to wean off the Celexa to see if she remains emotionally stable without the need for antidepressant management. He also recommended that the claimant continue on Kepra, but based on the significant response she had from prior injections, the Kepra probably could be decreased and/or eliminated. He recommended slow titration off of Kepra. He added that if the frequency of the claimant's headaches increased, then Kepra should be reinstated. Additionally, Dr. Richman recommended up to two or three greater occipital nerve blocks per year if the claimant had exacerbations of this particular portion of her headache. Dr. Richman also recommended that the claimant be allowed to see her medical provider four to six times per year as necessary for medication management.

On June 8, 2009, the respondents filed a final admission of liability (FAL) for permanent disability benefits and a MMI date of May 29, 2009. The FAL also provided an award of general post-MMI medical benefits.

Subsequently, on June 23, 2009, Dr. Richman issued an addendum report, which noted that the claimant might also need C2 or C3 blocks if the occipital nerve blocks did not continue to provide symptom relief.

On July 29, 2009, the respondents filed an amended FAL, admitting for post-MMI reasonable and necessary medical benefits. The general remarks section specifically stated in pertinent part as follows:

Please see the attached Addendum to the Impairment Rating from Dr. David Richman dated 6/23/09. This post MMI treatment is also admitted too as per his report. We continue to pay out the PPD award that we previously admitted to.

\* \* \* \*

We admit for reasonable and necessary and related medical treatment and/or medications after MMI.

Dr. Richman continued to provide post-MMI medical care for the claimant's industrial injury, including prescription medications, greater occipital nerve blocks, and reexamination. Dr. Richman referred the claimant to Dr. Hopkins for psychological evaluation.

Dr. Basse eventually performed an independent medical examination for the respondents. Dr. Basse concluded that none of the claimant's current symptoms were related to the work injury, unless the preceding medical records showed minimal symptoms before the industrial injury.

Dr. Richman disagreed with Dr. Basse's conclusions regarding the relatedness of the claimant's conditions. Dr. Richman noted that the claimant's pain, particularly her headaches, was directly related to the work injury.

On August 8, 2012, the respondents applied for hearing on the issue of medical benefits. Dr. Basse testified by deposition that the claimant did not need additional treatment for her industrial injury and that she seemed to be at baseline.

After hearing, the ALJ entered his order stating that the sole issue determined was the respondents' request to terminate all treatment by Dr. Richman and Dr. Hopkins for the claimant's depression, anxiety, and headaches. The ALJ ultimately denied and dismissed the respondents' request to terminate all treatment by Dr. Richman and Dr. Hopkins. The ALJ found that the respondents had failed to prove by a preponderance of the evidence that the claimant had returned to her pre-injury baseline such that the treatment by Dr. Richman and Dr. Hopkins was no longer reasonably necessary to cure or relieve the effects of the admitted work injury. The ALJ found the opinions of Dr. Richman more credible than those of Dr. Basse. The ALJ found that Dr. Basse admitted she did not know the claimant's baseline condition and could not cite any evidence about the frequency or severity of the claimant's headaches prior to her industrial injury. Further, the ALJ found that the medical literature also did not support the conclusion that the claimant would necessarily return to baseline.

The ALJ also ruled that while the respondents argued that they were not seeking to withdraw their admission for all post-MMI benefits, and that they only were disputing the specific treatment by Dr. Richman and Dr. Hopkins, they, in effect, were seeking to terminate all post-MMI treatment because they contended the claimant was at her baseline condition before the admitted work injury. The ALJ ruled that the respondents did not challenge a particular medication or therapy technique. Rather, he determined that the respondents disputed that any of the claimant's conditions were now related to her industrial injury. The ALJ also ruled that the respondents went beyond a general admission for reasonably necessary medical benefits by specifically admitting for the referenced benefits in their amended FAL. Consequently, the ALJ concluded that the respondents must bear the burden to prove that the claimant is back at her pre-injury baseline condition so that she no longer needs any treatment from Dr. Richman or Dr. Hopkins for depression, anxiety, and headaches.

On review, the respondents argue that the ALJ misapplied the burden of proof. They contend that the ALJ erred in determining that under the 2009 amendment to §8-43-201(1), C.R.S., the respondents bore the burden of proving that "specific" post-MMI medical treatment provided by Dr. Richman and Dr. Hopkins was no longer reasonably necessary to cure or relieve the effects of the admitted industrial injury. The respondents contend that the claimant has the burden of proof to establish that such post-MMI treatment is reasonable, necessary, and related to the work injury. We disagree.

Section 8-43-201(1), C.R.S. provides as follows:

(1) The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

(2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

Where the respondents file a final admission admitting for post-MMI medical treatment pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), this does not preclude them from later contesting their liability for a particular treatment. Rather, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *See Grover v. Industrial Commission*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Where, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.; *see also Barker v. Poudre School District*, W.C. No. 4-750-735 (March 7, 2012).

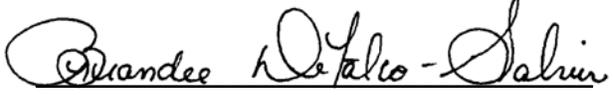
Here, during the hearing the respondents argued, and in their brief in support the respondents continue to argue, that they were not seeking to withdraw or modify their admission for post-MMI medical benefits. The respondents instead assert that they were disputing current specific treatment, which they argue is the reasonableness, necessity, and relatedness prospectively of office visits with Dr. Richman for headaches and psychological difficulties, injections performed by Dr. Richman, psychological counseling performed by Dr. Hopkins, and medications prescribed to treat the claimant's headaches, depression, and anxiety. Tr. at 3-5, 7-8, 9-10. According to the respondents, therefore, the burden did not shift from the claimant to them to prove the reasonableness, necessity, and relatedness going forward of such "specific treatment."

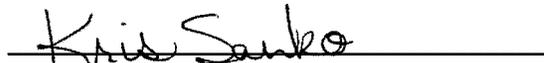
The respondents' argument notwithstanding, they were not challenging a particular medical treatment. Rather, they were arguing, and continue to argue, that all of the claimant's current conditions are not related to her industrial injury. As such, they were challenging all treatment that Dr. Richman recommended for maintenance medical benefits. At the hearing, for instance, the respondents tendered and relied upon the report and deposition of Dr. Basse, who opined that none of the claimant's current symptoms are related to the work injury, that the claimant does not need additional treatment for her industrial injury, and that the claimant seems to be at baseline. Ex. O, Depo. of Dr. Basse at 71-72, 73-77; Ex. G at 36. Essentially, therefore, the respondents were seeking an order that no further maintenance medical treatment is reasonable, necessary, and related for the claimant's headaches, depression, and anxiety. We agree with the ALJ that the respondents were, in effect, seeking to terminate all post-MMI treatment for the claimant's depression, headaches, and anxiety on the basis that she had returned to her pre-injury baseline condition. Because the respondents previously had filed an amended FAL admitting for maintenance medical treatment and/or medications, the ALJ properly placed the burden on the respondents to show why they no longer were responsible for maintenance medical benefits in general. Ex. B at 5-13. Consequently, we conclude that the respondents were seeking to modify an issue that previously was determined by their amended FAL and they, therefore, had the burden of proof to establish such modification. Section 8-43-201, C.R.S. (party seeking to modify an issue determined by a final admission shall bear the burden of proof for any such modification); *see also Barker v. Poudre School District, supra*.

To the extent the respondents argue that the ALJ erred in determining that their amended FAL resulted in the burden of proof switching from the claimant to them, we are not persuaded that reversible error occurred. While the respondents amended FAL did, in fact, admit for the specific post-MMI treatment of the C2 or C3 blocks as recommended by Dr. Richman, the ALJ's determination that the respondents bore the burden of proof was not based solely on this factor. Ex. B at 7. Rather, the ALJ also relied upon the order in *Barker*, and determined that the respondents essentially were seeking to terminate all post-MMI treatment because they contended that the claimant returned to her pre-injury baseline condition. Conclusions of Law at 6-7 ¶3. We agree with the ALJ's determination in this regard, as explained above. Therefore, we are not persuaded to disturb the ALJ's order on this ground.

**IT IS THEREFORE ORDERED** that the ALJ's order dated February 20, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

DWANA SALISBURY

W. C. No. 4-702-144

Page 8

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 6/5/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

DWANA SALISBURY, 6525 ROAD FF, LAMAR, CO, 81052 (Claimant)

PROWERS COUNTY SCHOOL DISTRICT RE2, Attn: CAROLYN YOKUM, P O BOX 608,  
HOLLY, CO, 81047 (Employer)

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY  
BLVD., DENVER, CO, 80230 (Insurer)

MICHAEL W. SECKAR, P.C., Attn: LAWRENCE SAUNDERS, ESQ., 402 WEST 12TH  
STREET, PUEBLO, CO, 81003 (For Claimant)

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

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-870-644-01

IN THE MATTER OF THE CLAIM OF

TERRY SCHOOF,

Claimant,

v.

FINAL ORDER

SUN DRILLING PRODUCTS,

Employer,

and

SEABRIGHT INSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated November 16, 2012, that denied the compensability of the claim and a request for medical benefits. We affirm.

The claimant raises on appeal the issue as to whether the evidence established the claimant was injured at work due to striking his head on a scaffold, in contrast to the ALJ's finding that his injuries were the result of an unexplained fall.

A hearing was conducted on October 16, 2012, in Grand Junction. The ALJ found the claimant was working for the employer as a warehouse manager on October 25, 2011. On that date he was discovered sitting on the concrete floor near a scaffolding mounted on a hydraulic lift. The claimant complained of head pain and had blood running from his nose. There were no other signs of blood on the floor or scaffolding or any other items of debris possibly related to a fall. The claimant was transported to the emergency room by ambulance. He was diagnosed with a right temporal skull fracture accompanied by subdural blood and hemorrhage.

The ALJ summarized the evidence pertinent to the cause of the claimant's injury. At the time the claimant was found and taken to the hospital, the claimant stated he did not have a memory of events surrounding the time of his injury. He did however, maintain that he did not fall off of anything. The claimant also stated to the ER physicians that he did not fall. In the ER it was noted the claimant did not have recollection of recent events and could not explain the cause of his headache. Diagnostic tests, including a CT scan of the skull, revealed a skull fracture and internal

hemorrhaging. The claimant treated with Dr. Hunninghake and Dr. Stagg through November and December, 2011.

The claimant could not recall for either doctor the events of his injury on October 25. At the hearing on October 16, 2012, the claimant testified he regained his memory of those events. He stated he tripped over a hose which ran to an acetylene torch located on the floor of the warehouse. He then fell and struck his head on the scaffolding.

The ALJ discounted this testimony of the claimant. He pointed to medical records after the date of injury. These documented continued memory problems, particularly surrounding the time of injury. There was no medical record stating the claimant could recall these events within a month of the fall. The records from the fire department, responding to the call for an ambulance, did not find him located in proximity to the acetylene torch or its hoses. Neither the fire department nor coworkers found any debris surrounding the claimant suggesting he could have tripped over anything. Instead, the claimant was found near the scaffolding. The claimant however, testified he had not been on the scaffolding prior to his fall. The ALJ did accept this portion of the claimant's testimony as being most probably accurate.

The ALJ reasoned the evidence did not show the claimant tripped over the torch hoses. The evidence, in addition, did not establish the claimant fell off the scaffold. The respondents had submitted medical records showing the claimant had recently been diagnosed with diabetes and his blood sugar measurements indicated they were very high and not controlled. The ALJ did not accept the respondents' theory the claimant fell due to a hypoglycemic episode. In the face of this accumulation of inadequate evidence, the ALJ determined the claimant's injury was "unexplained". He could only conclude the claimant fell and hit his head on the concrete floor. Noting the nearly identical fact situation in *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968), the ALJ adopted the reasoning of that opinion. The ALJ ruled that to the extent the claimant had failed to carry his burden of proof showing that an injury at work occurred within the scope of employment, that injury was not compensable. An "unexplained" fall did not meet that burden. The claim for benefits was therefore denied.

Pursuant to §8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury . . . arising out of and in the course of the employee's employment." See also §8-41-301(1)( b), C.R.S. As pertinent here, the question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to

those functions to be considered part of the employment contract.” *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)). Accordingly, we must uphold the ALJ’s determination of this issue if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; see *Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). This standard of review requires us to defer to the ALJ’s credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The claimant argues on appeal some paradoxes in the evidentiary findings of the ALJ. It is pointed out that the ALJ rejected the testimony of the claimant stating he hit his head on the scaffolding. The ALJ reasoned that the claimant had told the fire department and ER physicians he had no memory of how he had injured himself. The ALJ found it unlikely the claimant would recover his memory of these events one month later and yet never reveal this fact to treating doctors. However, the claimant questions then, the ALJ’s reliance on the testimony of the claimant which asserted the claimant was not on the scaffold when he fell. The claimant then reasons the fact that medical records subsequent to the date of his fall did not refer to the recovery of his memory of the fall did not mean that recovery did not occur. The claimant also argues it is physically impossible for the claimant to have fallen and hit his head on the floor without also injuring any other part of his body.

We cannot say it was unreasonable for the ALJ to decline to credit the claimant’s testimony stating he tripped on the torch hose and hit his head on the scaffolding. He states to the providers in the medical records the opposite, saying he did not remember. He gave the same version to the fire department ambulance attendants. It is within the province of the ALJ to weigh the evidence and draw conclusions on that basis. The ALJ placed greater weight on the claimant’s statements near the time the events occurred than he did on those made two years later at the hearing. There is no substantial basis to reject the ALJ’s reading of this evidence.

Similarly, we cannot say the ALJ’s reliance on other portions of the claimant’s testimony reflects an inconsistency in the ALJ’s approach. The claimant misinterprets the ALJ’s finding the claimant did not fall from the scaffold and hit his head. Because the claimant’s fall was not witnessed, there is no evidence in the record the claimant fell from the scaffold. Since the claimant testified he did not fall from the scaffold, the ALJ was led to ‘accept’ this testimony since there was no evidence otherwise to contradict it. The ALJ encountered no evidence from any source that placed the claimant on the

scaffold at the time of his fall. There is a basis then, for the ALJ to reject a portion of the claimant's testimony while not rejecting all of it. See *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968) (to the extent testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony).

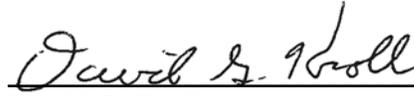
The claimant states it is not logical to find the claimant could have fallen onto a concrete floor and to have hit his head without sustaining any physical contact with other parts of his body. This argument is not persuasive for two reasons. The fact that there were no bruises or lacerations on other parts of the claimant's body does not mean there was no physical contact with other body parts. It could simply be that whatever contact occurred was not violent enough to have caused those types of injuries. Secondly, there does not appear to be any physical reason why an individual falling backwards or forwards with their head tilted in the direction of the fall would not have hit their head first.

Finally, the claimant argues the ALJ was mistaken to conclude this case was similar to that of *Finn v. Industrial Commission, supra*, and to apply the same result here. *Finn* featured a claimant found lying on the floor with various injuries including a skull fracture. There were no witnesses to his accident and the claimant had no recollection of the accident. The Supreme Court held the burden of proof was on the claimant "who must show a direct causal relationship between his employment and his injury." It was not sufficient to simply show an injury occurred while the claimant was at work. Without more, the claimant failed to carry his burden of proof. The ALJ found the evidence in *Finn* to be substantially similar to the evidence here. The ALJ then, also concluded the claimant had not sustained his burden of proof.

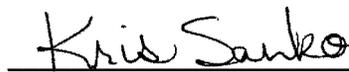
The claimant asserts the record in this case is distinct from that in *Finn* because the claimant testified he tripped and fell while leaving work for his lunch break. However, the ALJ did not find credible the claimant's testimony in that regard. There was then, no evidence upon which the ALJ could rely to find a "direct causal relationship between his employment and his injury." The record established the claimant was found lying on the floor with a skull fracture. There were no witnesses to the accident and the claimant was found to have no recollection of the accident. These were also the salient facts in *Finn*. The ALJ's application of *Finn* to this case is a fair reading of the case law. There was no error in doing so. The ALJ's conclusion the claimant had not carried his burden of proof was justified by the record and case authority.

**IT IS THEREFORE ORDERED** that the ALJ's order issued November 16, 2012, that denied the compensability of the claim and the request for medical benefits is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

A handwritten signature in cursive script that reads "David G. Kroll". The signature is written in black ink and is positioned above a horizontal line.

David G. Kroll

A handwritten signature in cursive script that reads "Kris Sanko". The signature is written in black ink and is positioned above a horizontal line.

Kris Sanko

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 5/23/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

SUN DRILLING PRODUCTS, Attn: TINA VARHAAGEN, 503 MAIN STREET, BELLE CHASSE, LA, 70037 (Employer)

SEABRIGHT INSURANCE, Attn: PENNY VERGES, 2702 NORTH 44TH STREET, BOX B-105, PHOENIX, AZ, 85008 (Insurer)

GREG R. REMMENGA, P.C., Attn: GREG R. REMMENGA, ESQ., 2478 PATTERSON RD., UNIT 22, GRAND JUNCTION, CO, 81505 (For Claimant)

TREECE ALFREY MUSAT P.C., Attn: JAMES B. FAIRBANKS, ESQ., 999 18TH STREET, SUITE 1600, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-860-562-04

IN THE MATTER OF THE CLAIM OF

LANDEE ZANOTELLI,

Claimant,

v.

**FINAL ORDER**

EVRAZ, INC. DBA ROCKY MOUNTAIN STEEL,

Employer,

and

SELF INSURED,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Stuber (ALJ) dated December 31, 2012, that denied and dismissed her claim for workers' compensation benefits resulting from a co-employee's sexual harassment of her. We affirm.

On May 2, 2007, the claimant began working for the respondent employer as a production laborer. She was promoted to a quality assurance worker, and then became an administrative assistant in the human resources department. In December 2008, the claimant was promoted to senior administrative assistant in the business office. She assisted the executive secretary and performed various specific duties, including reviewing expense reports from the sales employees.

Mr. King was the sales director. While he had no direct supervisory relationship over the claimant, the claimant nevertheless reviewed his expense reports and also prepared sales brochures for him. The claimant did not know Mr. King outside of work and did not socialize with him.

In late 2010, Mr. King began acting inappropriately toward the claimant. He repeatedly winked and stuck out his tongue at the claimant. He also commented to the claimant that she was "hot" and he "wanted her."

In late 2010, Mr. King offered to show the claimant photographs of his children on his company-issued cell phone. Mr. King displayed photographs of his children followed by one photograph of his erect penis. Mr. King commented to the claimant that his penis

looked “different in person” and wanted to know if she wanted to see his penis outside of work sometime. The claimant informed Mr. King that she was not interested.

At that time, the claimant did not make any report to her employer about Mr. King’s sexual harassment. The claimant did inform the executive secretary, however, about Mr. King’s actions. The executive secretary was not a manager.

In the last week of May and first week of June 2011, Mr. King informed the claimant that every afternoon he got “horny” and masturbated in his office. The claimant told Mr. King that he should go home to his wife.

On Friday, June 3, 2011, Mr. King asked the claimant if she would like to see photographs of his new boat that he had stored on his iPad. Another employee was in the claimant’s office at the time. Mr. King left and the claimant asked the other employee to remain in her office because she was afraid that Mr. King was going to try to show her a photograph of his penis again. Mr. King returned and showed the claimant the photographs of his boat and one photograph of his erect penis. The claimant told Mr. King to get out of her office and that she did not want to see things like that.

Over the following weekend, the claimant informed her supervisor about what Mr. King had done. The supervisor immediately contacted the Human Resources (HR) Director. On June 6, 2011, the HR Director interviewed the claimant and Mr. King. Mr. King was placed on administrative leave pending the investigation. On June 10, 2011, the employer terminated Mr. King’s employment.

On June 10, 2011, the claimant sought treatment from Ms. Lopez, a licensed clinical social worker through an employee assistance program. The claimant provided a history consistent with the alleged events.

The claimant subsequently applied for a hearing on the issues of compensability, medical benefits, and temporary total disability benefits. The claimant alleged a clam of mental impairment.

After hearing, the ALJ entered his order denying and dismissing the claimant’s claim for benefits. Relying upon the holding in *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001), the ALJ found the claimant failed to prove by a preponderance of the evidence that she suffered an injury arising out of and in the course of her employment. The ALJ found that Mr. King’s entire course of conduct, which included verbal and nonverbal statements, could be a psychologically traumatic event that generally is outside of a worker’s usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. The ALJ nevertheless found that the evidence demonstrated Mr. King’s sexual harassment was personally directed at the claimant. The ALJ therefore concluded that the sexual harassment was inherently

private and the evidence did not provide any additional nexus between the conditions of employment and the claimant's psychological injury from the harassment.

### I.

On review, the claimant argues that the ALJ incorrectly assigned her the burden of proving that Mr. King's sexual harassment was not of a personal nature. The claimant contends that since the respondent was in a much better position to discover and present evidence on the alleged personal nature of the sexual harassment, the burden should have been the respondent's. The claimant further contends that the ALJ's findings are not supported by the record and are insufficient to show that the sexual harassment was personal in nature. The claimant argues that the ALJ's sparse factual findings that the work only brought the claimant and Mr. King together and that the terms and conditions of work did not contribute anything more to the abuse, is contrary to the actual evidence in the record. In support, the claimant argues there is no evidence that Mr. King abused the claimant outside of work or even tried to. The claimant also asserts that because Mr. King possessed a superior position, this contributed to the abuse since this gave Mr. King greater access to the claimant than he would have had if he did not have such a position. The claimant contends that the ALJ impermissibly discounted this evidence. We perceive no error.

In *Horodyskyj*, the Colorado Supreme Court addressed whether sexual harassment of an employee is compensable under Colorado's Workers' Compensation Act (Act). The Court held that in the usual case, injuries resulting from workplace sexual harassment do not arise out of an employee's employment for purposes of the Act. The Court held that nothing in the express language of the Act addresses sexual harassment, and that while the Act is designed to provide exclusive remedies for employees suffering work-related injuries, it was not intended to cover injuries resulting from the usual case of workplace sexual harassment. The Court then applied the three-part test for purposes of determining whether willful assaults by co-employees arise out of employment under the Act: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. The first and third categories arise out of employment for purposes of the Act. The second category of injuries, inherently private assaults, does not arise out of employment and, therefore, is not covered under the Act.

The *Horodyskyj* Court held that since the sexual harassment of the claimant was inherently private, the claimant's injuries, therefore, were not compensable under the Act. The Court reasoned in pertinent part as follows:

The second category of assaults, those that are inherently private, are those in which "the animosity or dispute that culminates in an assault is imported

into the employment” from claimant's or tortfeasor's domestic or private life, and “is not exacerbated by the employment.” *Id.*, § 8.02[1] [a], at 8-42. These torts have their origin in the private affairs of the claimant or the tortfeasor and are unrelated to their respective work-related functions. *Popovich*, 811 P.2d at 383. Cases falling under the rubric of category two typically center on disputes over love interests or spouses; they generally involve parties who know one another in private life or, having met on the job, elect to enter into a private relationship just as they might have had they met elsewhere, and subsequently develop a private quarrel. 1 Larson, *supra*, § 8.02[1][a], at 8-48 to 49. Under these circumstances, there is an insufficient nexus between the assault and the employment conditions or functions for the injury to arise out of employment.

The *Horodyskyj* Court held that the co-employee’s harassing acts did not have an inherent connection to the employment because the acts did not originate in Horodyskyj’s employment functions, the harassing conduct was specifically targeted at the employee, and the sexually harassing conduct originated in personal matters unrelated to the parties’ work functions. The Court therefore concluded there was an insufficient nexus between the conditions of employment and the injury to support a finding that the harassing conduct arose out of the employment. Thus, the employee’s sexual harassment and related tort claims were not barred by the exclusive remedy provisions of the Act. *But see Popovich v. Irlando*, 811 P.2d 379 (Colo.1991); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo.1988)(because district court determined material facts were not in dispute and because employee agreed there was no personal or private motivation for co-employee's attack, Court concluded assault was neutral and compensable under Act); *Public Service of Colorado v. Industrial Claim Appeals Office*, 68 P.3d 583 (Colo. App. 2003)(claim was not premised on sexual harassment, but arose out of work-related retaliation claimant experienced following his testimony in lawsuit of a co-worker).

Initially, to the extent the claimant contends the ALJ erred in assigning her the burden of proof, we are not persuaded. It is well settled that to receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that she has sustained an injury arising out of and in the course of her employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo.App.2000)(“Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded.”); *see also* §8-41-301(2)(a), C.R.S. Whether the respondent or the claimant is in a better position to discover and present evidence on the alleged personal nature of the sexual assaults is not a factor to be considered when determining the party that possesses the burden of proof under the Act. Section 8-41-301(1)(c), C.R.S.; *see also* §8-41-301(2)(a), C.R.S.

Next, not only are the ALJ's findings supported by the record, but these findings also are sufficient to demonstrate that Mr. King's sexual harassment of the claimant was of a personal nature and not inherently connected to the employment or attributable to neutral sources that were not personal to the claimant or Mr. King. In his order, the ALJ found that the claimant did not know Mr. King outside of work and did not socialize with him. Findings of Fact at 2 ¶2. During the hearing, the claimant testified that she never had contact with Mr. King until she started working in the executive office for her employer, she never socialized with Mr. King outside of work, and she never had any contact with Mr. King out of work. Tr. at 11-12. Merely because Mr. King did not abuse the claimant outside of work or even try to, does not compel a conclusion that the sexual harassment arose out of the employment relationship. As held in *Horodysky*, private assaults include those in which the assailant and victim did not know each other prior to, or associate outside of, the employment where the victim was specifically chosen or targeted. *Id.* at 477. Instead, the ALJ found that Mr. King targeted the claimant and his sexual harassment was personally directed at her. The ALJ found that Mr. King acted inappropriately toward the claimant by making verbal and nonverbal statements to her. Findings of Fact at 2-3, 6 ¶¶6, 7, 13, 33. The claimant testified that Mr. King commented to her that she was "hot," that he "wanted her," he showed her quite private pictures, and he stuck out his tongue at her and wiggled it on a weekly basis. Tr. at 11-15. The ALJ further found that the conditions of the claimant's employment required very little interaction between the claimant and Mr. King. Other than the claimant reviewing Mr. King's expense reports, the ALJ found that the only demonstrated workplace connection was that Mr. King worked in the same building as the claimant. Findings of Fact at 6 ¶33. During the hearing, the claimant testified that the nature of her contact with Mr. King was when she had to review his and his employees' expense reports and when she had to make brochures for Mr. King. Tr. at 12.

Additionally, merely because Mr. King possessed a superior position at the respondent employer and that likely gave Mr. King greater access to the claimant, this also does not mandate the result that the sexual harassment arose out of the conditions of employment. The *Horodyskyj* Court recognized that the plaintiff in that case was employed as an apprentice electrician for the employer, Argus Electric Service, Inc. (Argus), and that the sexual harasser was the only co-employee of the plaintiff and also was the president and sole owner of Argus. While recognizing this work relationship, the Court nevertheless held that sexual harassment ordinarily does not fall into either category of assaults that are compensable under the Act. The Court explained that acts of harassment are highly personal and except in the most unusual cases, will fall into the category of inherently private assaults. As noted above, the Court reasoned that inherently private assaults are imported into the employment from the perpetrator's domestic or private life. *Id.* at 477-478. Moreover, the Court held that the fact that two employees meet through their employment is not enough to cause the offensive on-the-

job conduct as arising out of the employment. *Id.* at 476-477. Here, the ALJ did, in fact, find that Mr. King was the sales director for the respondent employer, and he also found that Mr. King had no supervisory relationship with the claimant. Findings of Fact at 2 ¶2. Based on the holding in *Horodyskyj*, however, this work-relationship does not mandate the conclusion that the claimant's claim is compensable. *Id.*

We therefore agree with the ALJ's conclusion that based on the totality of this evidence, there is not a sufficient nexus between the conditions and obligations of employment and the claimant's injury to support a finding that the injury arose out of her employment. Consequently, we will not disturb the ALJ's order on these grounds. Section 8-43-301(8), C.R.S.

## II.

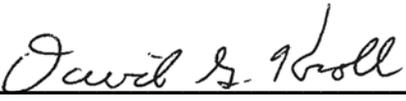
The claimant further argues that the ALJ misapplied the holding in *Horodyskyj*. The claimant reasons that the decision in *Horodyskyj* was based on the pleadings rather than on factual findings, and that the *Horodyskyj* Court assumed that the plaintiff had a Title VII claim whereas such a claim does not necessarily exist in this action. We are not persuaded the ALJ erred in applying the holding in *Horodyskyj*.

The claimant's argument notwithstanding, the fact that the decision in *Horodyskyj* was based on the pleadings rather than on factual findings does not persuade us that the sexual harassment in this action is compensable under the Act. The claimant here still was under the obligation to prove that her injury arose out of her employment, which the ALJ found she did not satisfy. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office, supra*. Further, we recognize the claimant's argument that she may be unable to pursue a Title VII claim for Mr. King's sexual harassment of her. This, however, is not a factor that we may consider when determining whether the claimant has demonstrated her injury arose out of her employment. Section 8-41-301(1)(c), C.R.S.; *see also* §8-41-301(2)(a), C.R.S. We agree with the ALJ that the entire course of conduct the claimant was subjected to by Mr. King certainly was traumatic and would, no doubt, cause distress. Nevertheless, we are bound by the statutory scheme presented in the Act and by the Court's holding in *Horodyskyj*, which compel us to conclude that the claimant's claim for workers' compensation benefits is not compensable.

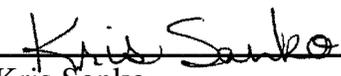
Since we conclude that the holding in *Horodyskyj* is controlling, we are not persuaded by the claimant's remaining contentions that there is any basis for disturbing the ALJ's order or that the holding in *In re Question Submitted by U.S. Court of Appeals, supra*, renders the claimant's claim compensable.

**IT IS THEREFORE ORDERED** that the ALJ's order dated December 31, 2012, 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

\_\_\_\_\_ 6/19/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

LANDEE ZANOTELLI, 710 S TEJON AVENUE, PUEBLO WEST, CO, 81007 (Claimant)  
EVRAZ, INC. DBA ROCKY MOUNTAIN STEEL, Attn: AMY GRZESK, 1612 E ABRIENDO  
AVENUE, PUEBLO, CO, 81004-3406 (Employer)  
MICHAEL W. SECKAR, P.C., Attn: LAWRENCE SAUNDERS, ESQ., 402 WEST 12TH  
STREET, PUEBLO, CO, 81003 (For Claimant)  
LEE & KINDER, LLC, Attn: SHEILA TOBORG, ESQ./JOSEPH W. GREN, ESQ., 3801 E.  
FLORIDA AVE, SUITE 210, DENVER, CO, 80210 (For Respondents)  
SEDGWICK CMS, Attn: SUSAN M. FILIPIAK, PO BOX 14493, LEXINGTON, KY, 40512-  
4493 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-863-381-02

IN THE MATTER OF THE CLAIM OF

JESUS ZARAGOZA (Deceased)  
MARIELA RUIZ BARRIGA,

Claimant,

v.

FINAL ORDER

MIDLANDS VILLAGE  
MANAGEMENT, LLC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant and respondent employer seek review of an order of Administrative Law Judge Mottram (ALJ) dated December 31, 2012, that denied and dismissed the claimant's application for benefits. We affirm.

The ALJ dismissed the claimant's request for death benefits on the basis that Colorado had no jurisdiction over the claim and the extra territorial provisions of § 8-41-204 C.R.S. did not apply. The claimant's husband, Jesus Zaragoza, was killed while working at a construction site in North Dakota on July 28, 2011. The ALJ determined Zaragoza was hired by the employer in North Dakota on July 11, 2011. It was also found by the ALJ that Zaragoza lived in Ohio prior to being hired by the employer. Zaragoza's only job for the employer was at the North Dakota job site. Zaragoza had travelled from Ohio to North Dakota to work. He did change planes in Denver on his way to North Dakota.

The ALJ summarized the evidence in his findings of fact. The employer maintains its headquarters in Montrose, Colorado. All of its employees live and work in Colorado. The employer purchased several acres near Williston, North Dakota, to develop and sell to other builders as home sites. During the spring and summer months the employer would send a crew of its Colorado employees to work on this North Dakota project. In July, one of the Colorado employees quit. Zaragoza's father in law, David Ruiz, worked for the employer and was at the North Dakota job. Ruiz testified that he called the employer's supervisor, Heriberto Gallegos, in Colorado and was authorized to offer the

job vacancy to Zaragoza who was at his home in Ohio. Zaragoza then flew to North Dakota, with a stop over at Denver International Airport, and began working on July 9. Gallegos testified the phone conversation with Ruiz occurred after Zaragoza was already in North Dakota. Gallegos then arrived in North Dakota from Montrose on July 11. At that time Gallegos had Zaragoza sign some necessary paperwork, a W-4 and an I-9 form, which he then faxed back to Montrose. The claimant continued to work in North Dakota until July 28 when he was killed in a construction accident. The employer maintained workers' compensation insurance coverage with the respondent carrier, Pinnacol. The employer believed this coverage would extend to its employees while working in North Dakota. Pinnacol however, denied coverage for the death benefits' claim of Zaragoza's widow and minor child. Pinnacol took the position Zaragoza had never formed any connection with Colorado. Pinnacol pointed to § 8-41-204 as the only basis upon which coverage for an out of state injury could be obtained. It was asserted the claimant must have been in Colorado at some point in his history of employment with the employer to allow the application of § 8-41-204. Because the claimant never worked in Colorado, Pinnacol concluded there was no jurisdiction for a Colorado claim.

Section 8-41-204 allows that benefits as provided by the Colorado workers' compensation law may be awarded in the case of an accident occurring outside the state where either the injured employee was hired in Colorado or was regularly employed in Colorado. In addition, the out of state injury must have occurred within six months of the point the employee left Colorado. This last provision means the employee must have been physically present in Colorado after hire, *Hathaway Lighting, Inc. v. Industrial Claim Appeals Office*, 143 P.3d 1187 (Colo. App. 2006), and that presence must be the result of some employment related duty or incidental to employment. *Baldwin v. Air Wisconsin Airlines*, W.C. No. 4-761-745 (January 13, 2012).

The claimant sets forth as her position that her father, Ruiz, was Zaragoza's agent, and a contract of hire was formed when Ruiz phoned Gallegos while Gallegos was still in Colorado and Ruiz was given permission to hire Zaragoza. Ruiz then phoned Zaragoza to tell him to come to North Dakota. Pursuant to this argument, the contract was formed in Colorado, due to Gallegos' physical location, and Zaragoza's arrival in Denver on July 7 to switch planes was a physical presence in Colorado connected to his hiring to work first in North Dakota, and then later in Colorado. Therefore, it is argued a contract of hire was made in Colorado and Zaragoza was injured within six months after he left the state.

The employer argues that Ruiz was a conduit or intermediary between the employer in Colorado and Zaragoza in Ohio. Under this theory, Zaragoza made an application for employment when he spoke with Ruiz, who then passed this application along to Gallegos in Colorado who accepted it. In addition, the contract of hire

contemplated that Zaragoza would work in Colorado after a temporary assignment to North Dakota. As a result, Zaragoza arrived in Denver to work but had to immediately leave the state to help in North Dakota. The employer's analysis then, is that Zaragoza was hired in Colorado to work in Colorado and then left the state within six months of his injury.

The ALJ did not agree. It was concluded in the ALJ's findings that the contract of hire was not formed until Gallegos personally met Zaragoza in North Dakota on July 11, 2011. The completion of the paper work on that date was the last act required to form a contract of hire. The contract of hire then, was made in North Dakota. It was found that the discussion of future work in Colorado was speculative. Before the work in North Dakota concluded, either the employer or Zaragoza could have terminated the employment agreement. The ALJ resolved Zaragoza was neither hired in Colorado nor regularly employed in Colorado. There was no jurisdiction for Colorado law to apply to the claim for death benefits.

Whether an employee was "hired ... in this state" is a contract question generally governed by the same rules as other contracts. *See Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1984). The place of contracting is generally determined by the parties' intention, and is usually the place where the offer is accepted, or the last act necessary to the meeting of the minds or to complete the contract is performed. *Id.*; *Denver Truck Exchange v. Perryman*, *supra*.

The question of whether the claimant has proven the existence of a contract for hire is one of fact for determination by the ALJ. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1967). Similarly, the nature of the last act necessary to complete the contract and its location are generally factual questions for the ALJ's resolution. Because these questions are factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. §8-43-301(8), C.R.S. The substantial evidence standard 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. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The record contains substantial evidence supporting the findings of the ALJ. Gallegos testified he had no recollection of speaking to Ruiz in regard to hiring Zaragoza until after Zaragoza had arrived in North Dakota. He also stated that he, Gallegos, hired Zaragoza after he met him personally on July 11, when they were both in North Dakota.

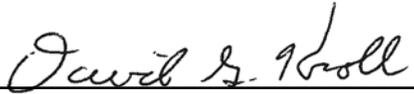
The testimony by Ruiz to the effect that he was authorized to inform Zaragoza he would have a job with the employer if Zaragoza “could get to North Dakota” is not inconsistent with the ALJ’s finding. This condition may be construed as a condition precedent to any contract of hire. As such, the contract would be implemented once the claimant was in North Dakota at the employer’s job site. The employee’s arrival being the last act necessary to complete the contract, the contract would have been made in North Dakota. The ALJ found Ruiz was not authorized by Gallegos to conclude a contract of hire with Zaragoza. In addition, Gallegos had the authority to hire and fire. The act of sending the W-4 form and the I-9 form to the office in Montrose was not a restriction or condition on Gallegos’ authority to make a hiring decision.

The ALJ also commented that the evidence surrounding any conversation between Gallegos and Ruiz prior to Zaragoza’s arrival in North Dakota was not sufficient to establish an authorization for Ruiz to extend an employment offer. The claimant did not produce evidence to establish an agency relationship between Ruiz and Zaragoza. The ALJ did not find the record established a contract of hire between the employer and Zaragoza was formed in a conversation between Gallegos and Ruiz. In regard to the employer’s argument that a phone call from Ruiz in North Dakota, to Zaragoza in Ohio, could create a contract of hire, that contract would necessarily have been concluded in either North Dakota or Ohio, but not in Colorado.

The ALJ’s findings, supported by substantial evidence in the record, demonstrate there was no contract of hire in Colorado, no employment in Colorado and no physical presence of Zaragoza in Colorado within six months of his injury. We cannot say the ALJ was required to find § 8-41-204 applied in this case.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued December 31, 2012, denying the claim for death benefits, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G.Kroll

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

MARIELA RUIZ BARRIGA

W. C. No. 4-863-381-02

Page 6

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 6/12/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

MIDLANDS VILLAGE MANAGEMENT, LLC., Attn: MATT MILES, C/O: LEADERSHIP CIRCLE, LLC, P O BOX 239, MONTROSE, CO, 81402 (Employer)

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY BLVD., DENVER, CO, 80230 (Insurer)

THE FRICKEY LAW FIRM, Attn: JANET L. FRICKEY, ESQ., 940 WADSWORTH BLVD., 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)

RITSEMA & LYON, P.C., Attn: PAUL T. KRUEGER, ESQ., 999 18TH STREET, SUITE 3100, DENVER, CO, 80202 (For Respondents)

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, Attn: KRISTIN A. CARUSO, ESQ./KRISTI L. BLUMHARDT, ESQ., 5600 S. QUEBEC STREET, SUITE 100C, ENGLEWOOD, CO, 80111 (Other Party)

Court of Appeals No. 12CA2190  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-868-029

---

Town of Castle Rock and CIRSA,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Mike Zukowski,

Respondents.

---

ORDER SET ASIDE AND CASE  
REMANDED WITH DIRECTIONS

Division V  
Opinion by JUDGE GRAHAM  
Furman and Miller, JJ., concur

Announced July 3, 2013

---

Ritsema & Lyon, P.C., Paul Krueger, Alana S. McKenna, Denver, Colorado, for  
Petitioners

No Appearance for Respondent Industrial Claims Appeals Office

Law Office of O'Toole and Sbarbaro, P.C., Neil D. O'Toole, Denver, Colorado, for  
Respondent Mike Zukowski

¶ 1 This workers' compensation action raises a question of statutory interpretation: What evidence overcomes the statutory presumption of compensability articulated in section 8-41-209, C.R.S. 2012? The statute provides that certain cancers contracted by firefighters with five or more years on the job shall be compensable under the Workers' Compensation Act (Act), sections 8-40-101 to -47-209, C.R.S. 2012. However, an employer may overcome the presumption "by a preponderance of the medical evidence that [the cancer] did not occur on the job." § 8-41-209(2)(b), C.R.S. 2012. The Industrial Claim Appeals Office (Panel) affirmed the ruling of the administrative law judge (ALJ) that a specific non-work-related cause of the cancer had to be established in order to overcome the presumption. We conclude, to the contrary, that the presumption can be overcome by establishing that the risk of cancer from other sources outweighs the risk created by firefighting. We therefore set aside the Panel's decision and remand this matter for consideration under the statute as interpreted here.

## I. Background

¶ 2 The facts of this case are undisputed. Claimant, Mike Zukowski, has worked as a firefighter, engineer, and paramedic for employer, the Town of Castle Rock (the Town), since November 2000. He grew up in Albuquerque, New Mexico, where he was involved in cub scouts, boy scouts, soccer, gymnastics, track and field, and orchestra. He served as a firefighter in that city before moving to Colorado. During his off hours, claimant also worked in construction, framing, and building decks, and sometimes working outside.

¶ 3 In 2011, claimant was diagnosed with malignant melanoma on his right outer calf. Claimant underwent three excision surgeries to remove the growth. He was subsequently released to work full duty and appears to be cancer free.

¶ 4 Claimant sought both medical benefits and temporary total disability (TTD) benefits under section 8-41-209. Under the statute,

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system

and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter . . . .

§ 8-41-209(1), (2)(a), C.R.S. 2012. The parties stipulated that section 8-41-209's presumption of compensability applied. The only issue presented at hearing, then, was whether the Town had overcome the presumption.

¶ 5 The Town retained a physician with expertise in occupational and environmental medicine, Dr. William Milliken, M.D., who reviewed claimant's medical records and his history of risk exposures. Dr. Milliken opined that although firefighters have an increased risk of developing melanoma as compared to the general population, claimant's various other exposures and risk factors – primarily sun exposure and the presence of moles on his skin –

placed him at far greater risk of developing melanoma.

¶ 6 The ALJ ruled, however, that Dr. Milliken’s testimony was insufficient to overcome the presumption of compensability. The legislature specified that an employer may overcome the presumption by showing “by a preponderance of the medical evidence that such condition or impairment did not occur on the job.” § 8-41-209(2)(b). The ALJ interpreted this statutory provision to mean that an employer must show that “a claimant’s cancer comes from a specific cause not occurring on the job.” Consequently, the ALJ concluded that the Town’s introduction of “risk factors outside of firefighting exposure is insufficient to sustain [employer’s] burden of proof.”

¶ 7 On review, the Panel affirmed the ALJ’s decision. The Panel reasoned that whether the Town had shown “that firefighting is not a causative factor in . . . claimant’s skin cancer is one of fact for determination by the ALJ.” Because the Panel concluded that sufficient evidence supported the ALJ’s determination, it declined to set aside the ALJ’s order. This appeal followed.

## II. Analysis

¶ 8 The Town, along with its insurer, CIRSA (collectively, Town), contends that the ALJ misinterpreted section 8-41-209(2)(b) when he determined that the evidence it offered was insufficient to overcome the presumption of compensability created by section 8-41-209(1). It argues that, contrary to the ALJ’s interpretation, section 8-41-209(2)(b) “does not require an employer to prove the exact cause of [a] claimant’s cancer” in order to overcome the statutory presumption of compensability. Moreover, it contends, in cases such as this, in which the precise cause of a claimant’s cancer cannot be determined, mandating that an employer can only overcome the burden by establishing that the “specific cause” did not occur on the job effectively raises an employer’s burden “to a heightened burden of proof that is . . . akin to a strict liability standard.” The Town asserts that the ALJ should have considered the evidence of risk factors it introduced. It maintains that by finding its evidence insufficient, the ALJ failed to carry out the legislature’s intent to leave open an avenue to overcome the statutory presumption. We agree.

A. Rules of Statutory Interpretation

¶ 9 As with all statutory construction, when we interpret a provision of the Act, if its language is clear “we interpret the statute according to its plain and ordinary meaning.” *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). In addition, “when examining a statute’s plain language, we give effect to every word and render none superfluous, because “[w]e do not presume that the legislature used language “idly and with no intent that meaning should be given to its language.”” *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (citation omitted) (quoting *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003)).

¶ 10 While we are not bound by the Panel’s interpretation or its earlier decisions, *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006), and review statutory construction de novo, *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff’d*, 145 P.3d 661 (Colo. 2006), we give deference to the Panel’s reasonable interpretations of the statute it administers. *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006); *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App.

2005), *aff'd*, 134 P.3d 407 (Colo. 2006).

¶ 11 In general, “an administrative agency’s interpretation of its own regulations is . . . entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with such regulations.” *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002). The Panel’s interpretation will, however, be set aside “if it is inconsistent with the clear language of the statute or with the legislative intent.” *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998).

#### B. Section 8-41-209’s Rebuttable Presumption

¶ 12 As we have discussed, section 8-41-209 creates a rebuttable presumption of compensability for certain cancers contracted by firefighters who have “completed five or more years of employment as a firefighter,” but had no “substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter.” The express statutory language provides that an otherwise compensable cancer “[s]hall not be deemed to result from the firefighter’s employment if the firefighter’s employer or insurer shows by a preponderance of the medical evidence that such

condition or impairment did not occur on the job.” § 8-41-209(2)(b).

¶ 13 One division of this court has already examined the burden placed on employers to overcome the presumption. In *City of Littleton v. Industrial Claim Appeals Office*, 2012 COA 187, a division of this court held that the statute required employers to “affirmatively prove, by a preponderance of the evidence, that the firefighter’s cancer did not result from, arise out of, or arise in the course of the firefighter’s employment.” *Id.* at ¶ 34. Thus, under the majority’s view in *City of Littleton*, an employer could overcome the presumption by showing “that [the] claimant’s occupational exposures (1) could not have caused [the type of cancer the firefighter contracted] (disproving general causation), or (2) did not cause claimant’s particular [cancer] (disproving specific causation).” *Id.* at ¶ 82.

¶ 14 In *City of Littleton*, a firefighter was diagnosed with brain cancer. The City of Littleton introduced evidence showing that while some chemicals had been “weakly associated” with brain cancer, few had “been identified as an exposure in firefighters.” *Id.* at ¶ 62. The City also challenged the causal link between

firefighting and brain cancer. *Id.* at ¶ 67. The majority held that because the City “produced no evidence about [the firefighter’s] specific occupational exposures,” it had failed to overcome the statutory presumption of compensability. *Id.* at ¶¶ 93-94.

### C. The Town’s Evidence Offered to Rebut the Presumption

¶ 15 Here, in contrast, the Town introduced evidence of claimant’s specific exposures and risks for developing melanoma. Dr. Milliken, the Town’s retained medical expert, testified that claimant’s increased risk for developing melanoma as a result of firefighting was about “1.32” which translates to “around a [thirty] percent increase, or [twenty-eight] percent, [but he did not] remember the exact math.” Conversely, claimant’s increased risk of melanoma due to ultraviolet (UV) exposure, based upon his admitted sun exposure, “was at least twice normal.” In addition, Dr. Milliken testified that moles on claimant’s skin, four or five of which he thought could be “atypical nevi,” also greatly increased claimant’s risk of melanoma. According to Dr. Milliken, these atypical nevi suggested an increased risk of melanoma in claimant “6-10 times normal.” Dr. Milliken summarized his findings as follows:

In summation, in this case, in all medical probability, it appears that melanoma arose from a precursor mole on the right calf, and that the non-occupational risk factors of sun exposure and nevus count were in all probability related to an increased risk for melanoma at up to 6-10 or more times normal.

[I]f one assumes that skin contact with [polyaromatic hydrocarbons] secondary to firefighting exposure did occur on a frequent basis, the likelihood that sun exposure and skin type [were] the cause of melanoma is about 600-1000% as compared to a “normal” person, whereas the possibility secondary to firefighting is perhaps 24% (the meta risk of 1.32 suggests that if 132 cases of melanoma were to have occurred in firefighters, 32 of them would be attributed to firefighting exposure;  $32/132 = 24\%$ ).

¶ 16 Dr. Milliken’s opinions were echoed by claimant’s retained expert in occupational and environmental medicine, Dr. Annyce Mayer, M.D. Although she opined that it could not be proven that claimant’s melanoma “did not occur on the job,” emphasized the distinction between risk and causation, and maintained that “relative risk does not establish causation,” she agreed with Dr. Milliken on several points. In particular, she acknowledged that

- (1) ninety percent of DNA changes are caused by UV radiation;

- (2) claimant's childhood sun exposure was a risk factor for developing melanoma;
- (3) claimant's atypical nevi were also a risk factor for developing melanoma;
- (4) three atypical nevi correlated with a "relative risk of 3.03" while five atypical nevi raise an individual's risk to "6.36";
- (5) firefighters have a "summary risk estimate of 1.32" for developing melanoma; and
- (6) there was "no way to know" what claimant's "causative exposure" was.

Dr. Mayer's testimony thus reflected and supported the view that firefighting was a lesser melanoma risk to claimant than his other known exposures and risks. Indeed, the risk statistics she provided corroborated Dr. Milliken's statistics showing that firefighting was the least of claimant's risk exposures for melanoma.

#### D. Interpretation of Section 8-41-209(2)(b)

¶ 17 In affirming the ALJ, the Panel held that it could not set aside the ALJ's decision because the ALJ "plausibly interpreted" the

medical evidence of the experts and did not misapply the law. It noted that while the ALJ found Dr. Milliken “unpersuasive,” it was persuaded by Dr. Mayer that statistical risk factors were not necessarily demonstrative that the cancer “did not occur on the job.”

¶ 18 While we disagree with the Panel on this point – the ALJ never found Dr. Milliken “unpersuasive” or less than credible, but actually noted that both physicians were “well qualified” and “agree[d] on several key points” – we note that the ALJ’s credibility determinations need not be given deference if the ALJ misapplied the statute. The question here is not which expert was more credible and persuasive, but whether the type of information provided, namely, risk factors rather than definitive causal links, was sufficient to overcome the presumption of compensability. We conclude that evidence of risk factors can be sufficient and that the Panel and the ALJ consequently misinterpreted section 8-41-209(2)(b).

¶ 19 As the majority observed in *City of Littleton*, because “employers may be unable to locate the kind of evidence that would

disprove specific causation,” “evidence [of alternative causation] may be sufficient to disprove specific causation.” *City of Littleton*, ¶ 38. Contrary to the Panel’s interpretation of the statute, *City of Littleton* did not require an employer to unequivocally establish that the cause of the firefighter’s cancer arose outside work. Rather, “evidence of alternative causation” may satisfy an employer’s burden of establishing by a preponderance of the evidence that the cancer “did not occur on the job.” *Id.*; see § 8-41-209(2)(b).

Following this reasoning, we conclude that an employer can overcome the presumption of compensability created by section 8-41-209(2)(b) with evidence that a claimant’s injury more likely than not arose from a source outside the workplace.

¶ 20 Requiring an employer to establish that a cancer was specifically caused by a source outside the workplace, as the ALJ did here, creates a nearly insurmountable barrier over which most employers will not be able to climb, because the precise cause of most cancers cannot be determined. To hold otherwise, as claimant advocates, would essentially create a strict liability statute mandating that every firefighter who develops one of the prescribed

cancers is entitled to workers' compensation coverage. In our view, such an outcome would vitiate the legislature's intent to provide employers with an avenue to overcome the presumption by a preponderance of the evidence. See § 8-41-209(2)(b); *Support, Inc.*, 968 P.2d at 175 (Panel's statutory interpretation will be set aside if inconsistent with the legislative intent).

¶ 21 The statute states that an employer may overcome the presumption by establishing "by a preponderance of the medical evidence" that the cancer "did not occur on the job." § 8-41-209(2)(b).

When applying the preponderance of the evidence standard, a fact finder must decide whether the existence of a contested fact is more probable than its nonexistence. If a party has the burden of proof by a preponderance of the evidence, and the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof.

*Schocke v. State*, 719 P.2d 361, 363 (Colo. App. 1986) (citation omitted). Thus, by specifying that the presumption can be overcome by a preponderance of the evidence, the legislature made clear that the statute was *not* imposing strict liability on employers,

but that the presumption could instead be overcome by demonstrating that another source was more likely or more probably the cause of a firefighter's cancer. *See id.*

¶ 22 Courts in other jurisdictions that have enacted analogous provisions have similarly held that evidence showing an alternative probable cause of the illness can overcome the presumption of compensability. In those jurisdictions, the test examines probability, not definitive causation, to determine whether the presumption has been rebutted. Notably, the Supreme Court of North Dakota has held that a presumption of compensability for “any health impairment caused by lung or respiratory disease” suffered by a full-time law enforcement officer may be rebutted by proof “that, more likely, [the work] was not a significant contributing factor to the injury or disease.” *Elter v. North Dakota Workers Comp. Bureau*, 599 N.W.2d 315, 319-20 (N.D. 1999) (quoting *McDaniel v. North Dakota Workers Comp. Bureau*, 567 N.W.2d 833, 837(N.D. 1997)) (applying former codification of N.D. Cent. Code § 65-01-15.1) (presumption rebutted where evidence showed police officer's lung cancer was more likely caused by

smoking than exposure to other work-related carcinogens such as asbestos and radon, even though deceased officer had stopped smoking fifteen years before lung cancer developed); *see also* *Burrows v. North Dakota Workers' Comp. Bureau*, 510 N.W.2d 617, 619 (N.D. 1994) (presumption that officer's small cell lung cancer was caused by his occupation was rebutted by medical evidence opining that claimant's smoking increased his likelihood of developing lung cancer fifty-fold).

¶ 23 The Missouri Court of Appeals likewise concluded that an employer's evidence of alternative, probable causes of a firefighter's illness sufficiently rebutted the presumption of compensability. *See Byous v. Missouri Local Gov't Emps. Ret. Sys. Bd. of Trs.*, 157 S.W.3d 740, 749 (Mo. Ct. App. 2005) (to overcome presumption that heart disease was suffered in the line of duty by firefighter, employer must show "that non-work-related causes more probably caused the heart disease than work-related causes").

¶ 24 We find the views of these jurisdictions compelling and persuasive. We therefore hold that an employer may overcome the statutory presumption of compensability with specific risk evidence

demonstrating that a particular firefighter's cancer was probably caused by a source outside work.

¶ 25 Because the ALJ held the Town to a standard higher than required under the statute, we must remand to the Panel to remand to the ALJ to review the evidence under the standard described above. On remand, the ALJ shall review the evidence presented to determine whether the Town overcame the presumption by showing, by a preponderance of the medical evidence, that it was more likely than not that claimant's cancer "did not occur on the job." § 8-41-209(2)(b).

¶ 26 The order is set aside and the case remanded for further proceedings consistent with this opinion.

JUDGE FURMAN and JUDGE MILLER concur.