COLORADO
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July Case Law Update

Presented by Judge John Sandberg and Judge David Gallivan

This update covers ICAO and COA decisions issued between June 9, 2017 to July 6, 2017

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COLORADO COURT OF APPEALS **2017COA90**

Court of Appeals No. 16CA0448
Arapahoe County District Court No. 13CV30674
Honorable Kurt A. Horton, Judge

Shawn Sovde, a minor, by and through his mother and next friend, Katrina Kinney,

Plaintiff-Appellant,

v.

Kevin Scott, D.O.; and Andrew Sarka, M.D.,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE BERNARD
Dailey and Fox, JJ., concur

Announced June 29, 2017

Andrew T. Brake, P.C., Andrew T. Brake, Englewood, Colorado, for Plaintiff-Appellant

Hershey Decker, PLLC, C. Todd Drake, Lone Tree, Colorado, for Defendants-Appellees

¶ 1 Colorado's Rules of Civil Procedure require parties to lawsuits to endorse expert witnesses and to inform each other of the substance of the expert witnesses' testimony. But what happens if one party withdraws an endorsed "may call" expert witness shortly before trial or during trial, and the opposing party then announces that it wants to call the withdrawn witness to testify? We conclude that, to answer this question, a trial court should, in the exercise of its discretion, balance factors such as (1) whether the expert's testimony would be cumulative; (2) whether excluding the expert's testimony would result in unfair prejudice to the nonendorsing party; and (3) whether the nonendorsing party did not endorse its own expert on the subject, because the absence of such an endorsement would suggest an attempt to "piggyback" on the endorsing party's preparation.

¶ 2 This question arose in the context of a medical malpractice case. Plaintiff, a child, Shawn Sovde, by and through his mother, Katrina Kinney, sued defendants, Dr. Andrew Sarka and Dr. Kevin Scott. The jury found in defendants' favor. Plaintiff appeals. We affirm.

I. Background

¶ 3 The child was born on June 25, 2006. Shortly after his birth, his mother noticed a "scrape" or a "lesion" on "the top of his head" and marks by his ears. She noticed "more lesions" on him the next day.

¶ 4 Dr. Sarka examined the child on the day after he was born, and Dr. Scott examined him the day after that. Dr. Scott told the mother that the lesions were "baby acne" and "cradle cap." He repeated these observations when he examined the child three days later. Neither doctor took any action or ordered additional testing concerning the lesions during the week after the child was born.

¶ 5 The child's behavior changed on July 4, or nine days after his birth. The mother later testified that he "was not eating as well" as he had earlier, and that he was "[m]uch sleepier." The lesions on his head were "getting bigger," and they were spreading.

¶ 6 The next day, based on a pediatrician's advice, the mother and the child's father, Raymond Sovde, rushed the child to the hospital. Once there, doctors determined that the child had been infected with the herpes simplex virus, which had manifested itself in two

ways: skin, eyes, and mucous membrane (SEM) disease, and central nervous system (CNS) disease.

¶ 7 The doctors at the hospital immediately began to treat the child with antibiotics, which they repeated over time. But the CNS disease had done serious damage, eventually inducing seizures and causing a sensory processing disorder. And some of the medicine that the doctors prescribed for the child caused other medical problems, such as pancreatitis.

¶ 8 The child's lawsuit claimed that

- defendants had negligently misdiagnosed the child's lesions as something benign instead of manifestations of the herpes simplex virus, even though, plaintiff alleged, the child had herpes-caused lesions on his head on the day that he was born; and
- if defendants had timely and properly diagnosed the lesions as products of less harmful SEM disease, they could have treated the child with antibiotics, which could have prevented the onset of the more harmful CNS disease.

¶ 9 Defendants countered that

- the child had developed the two forms of herpes-related disease simultaneously on July 4 or 5, and that the lesions that the mother had seen on him on the day of his birth had not been herpes-related; so
- they were not negligent because they could not have diagnosed any herpes-related disease before July 4 or 5.

¶ 10 The case proceeded to trial. The jury found that defendants had not been negligent.

¶ 11 Plaintiff raises two contentions on appeal.

¶ 12 First, he asserts that the trial court erred when it denied related requests concerning two of defendants' previously endorsed expert witnesses whom defendants had withdrawn. Plaintiff wanted to call them to testify, or to use their depositions to cross-examine defendants' other experts.

¶ 13 Second, he contends that the trial court erred when it excluded certain testimony because it was hearsay.

II. Withdrawn Expert Witnesses

A. Additional Background

¶ 14 Defendants endorsed several expert witnesses more than three months before trial. One of them, Dr. Thomas Reiley, was a

neurologist. Another, Dr. Richard Molteni, was a pediatrician and a neonatologist. The endorsement described them as "Specially Retained Expert Witnesses Who May be Called to Testify During the Hearing in this Matter."

¶ 15 Plaintiff did not endorse Dr. Reiley or Dr. Molteni. But he reserved the right "to call any witnesses listed by . . . [d]efendants and any rebuttal or impeachment witnesses as may be deemed necessary, at the conclusion of [d]efendants' case."

¶ 16 About six weeks before trial, defendants designated the two expert witnesses as "may call" witnesses on their witness list. (C.R.C.P. 16(f)(3)(VI)(A) distinguishes between "may call" and "will call" witnesses. "If a party lists a witness as a 'will call' witness, that party 'must ensure' that the witness will be available to testify at trial if called by any party without the necessity of another party serving a subpoena on the witness." 6 David R. DeMuro, *Colorado Practice Series: Civil Trial Practice* § 9.4, Westlaw (database updated Aug. 2016). As we explain in more detail below, there is no such requirement for "may call" witnesses.)

¶ 17 Eleven days before trial, defendants filed a motion stating that they would not call Dr. Reiley at trial. They asked the trial court to

exclude all of his "[d]eposition testimony, handwritten notes, and literature" from the trial.

¶ 18 The next day, plaintiff updated his witness list to include Dr. Reiley, and he served him with a subpoena.

¶ 19 After a hearing, the trial court ruled that plaintiff could not call Dr. Reiley as his witness and that plaintiff could not refer to his deposition or expert report. The court observed that defendants had listed him as a "may call" witness and that they were "entitled to withdraw [him] as an expert witness. They have done so somewhat belatedly but have done so."

¶ 20 The court did not anticipate that plaintiff would be prejudiced if he could not call Dr. Reiley to the stand. "Among other things, [he has his] own expert in pediatric neurology endorsed to testify in this case as well as a number of other witnesses."

¶ 21 Near the end of defendants' case-in-chief, they said that they would not call Dr. Molteni to testify. Plaintiff asked the court to allow him to call Dr. Molteni as his own rebuttal witness or to allow him to read Dr. Molteni's deposition to the jury. Plaintiff claimed that his opinions "very much rebut[ted]" other defense expert opinions.

¶ 22 Citing its previous ruling about Dr. Reiley, the court denied plaintiff's request. Although it acknowledged that it was "somewhat sensitive to the fact that [defendants were] doing this late," the court explained that plaintiff should have endorsed Dr. Molteni as his own witness if he had planned to rely on his opinions in rebuttal.

¶ 23 The court did, however, allow plaintiff to use Dr. Reiley's and Dr. Molteni's opinions in hypothetical questions for cross-examining some of defendants' other expert witnesses. But the court, citing "strong public policy reasons," added that plaintiff could not name these experts or suggest that the hypotheticals had come from the opinions of defendants' formerly endorsed expert witnesses.

B. Standard of Review

¶ 24 Trial courts have broad discretion to admit or to exclude expert testimony, *Estate of Ford v. Eicher*, 220 P.3d 939, 942 (Colo. App. 2008), *aff'd*, 250 P.3d 262 (Colo. 2011), and to permit "late identified witnesses to testify," *Dare v. Sobule*, 648 P.2d 169, 171 (Colo. App. 1982), *rev'd on other grounds*, 674 P.2d 960 (Colo. 1984). A trial court abuses its discretion if its ruling is manifestly

arbitrary, unreasonable, or unfair, or if it applies an incorrect legal standard. *Estate of Ford*, 220 P.3d at 942.

C. Applicable Rules

¶ 25 Colorado's civil rules require each party to disclose to the opposing party the identity and expertise of any person who may present evidence at trial. C.R.C.P. 26(a)(2)(A); *see also* C.R.C.P. 26(a)(2)(B) (requiring parties to disclose retained experts via a written and signed report).

¶ 26 A different rule requires each party to file a "proposed trial management order" at least twenty-eight days before trial, identifying the witnesses whom it "will call" and the witnesses whom it "may call." C.R.C.P. 16(f)(3)(VI)(A).

> When a party lists a witness as a "will call" witness, the party does not have to call the witness to testify, but must ensure that the witness will be available to testify at trial if called by any party without the necessity for any other party to subpoena the witness for the trial.

Id. The rule does not contain similar requirements for "may call" witnesses. *See id.*

¶ 27 This lack of a parallel requirement has meaning because we cannot "add words" to a court rule. *See Boulder Cty. Bd. of*

Comm'rs v. HealthSouth Corp., 246 P.3d 948, 951 (Colo. 2011)("We do not add words to a statute."); *see also Leaffer v. Zarlengo*, 44 P.3d 1072, 1078 (Colo. 2002)(noting that standard principles of statutory construction apply to the interpretation of court rules). Applying de novo review, *see Gleason v. Judicial Watch, Inc.*, 2012 COA 76, ¶ 14 (interpreting court rules is a question of law that appellate courts review de novo), we conclude that the presence of the requirement for "will call" witnesses in C.R.C.P. 16(f)(3)(VI)(A), and the absence of the requirement for "may call" witnesses in that rule, indicates that the supreme court, in promulgating the rule, made a deliberate choice, *see BSLNI, Inc. v. Russ T. Diamonds, Inc.*, 2012 COA 214, ¶ 9 (using standard statutory construction principles in evaluating the Colorado Rules of Civil Procedure); *cf. People v. Seacrist*, 874 P.2d 438, 440 (Colo. App. 1993)(Appellate courts apply "the presumption that the General Assembly was aware that qualifying language could be added to limit application of the statute . . . and that it would have done so if such had been its intent."). We conclude that the deliberate choice of the supreme court was to eschew placing a responsibility on parties to make

their "may call" witnesses available at trial if they decide that they do not want to call those witnesses to testify.

¶ 28 C.R.C.P. 16 also requires parties to, at least twenty-eight days before trial, identify the depositions of any witness that they may use at trial. C.R.C.P. 16(f)(3)(VI)(D) ("If the preserved testimony of any witness is to be presented the proponent of the testimony shall provide the other parties with its designations of such testimony at least 28 days before the trial date.").

D. Application

¶ 29 Plaintiff's contention is multifaceted. First, he appears to assert that the trial court should not have allowed defendants to withdraw Dr. Reiley and Dr. Molteni past the trial management deadline. Second, he submits the court should have permitted him to call the doctors to testify after defendants had withdrawn them or permitted him to use their depositions to cross-examine other expert witnesses. We disagree with both facets of this contention.

1. The Trial Court Properly Permitted Defendants to Withdraw Dr. Reiley and Dr. Molteni as Witnesses

¶ 30 To begin, defendants designated both Dr. Reiley and Dr. Molteni as "may call" experts at least twenty-eight days before trial

to comport with C.R.C.P. 16(f)(3)(VI)(A). Defendants also complied with C.R.C.P. 26 because they disclosed the two doctors as experts that they "may" call. *See* C.R.C.P. 26(a)(2)(A).

¶ 31 We are not aware of any Colorado rule or holding — and plaintiff does not cite any — that requires a party to call each witness on its witness list. Some cases have expressly rejected such a rule. *See Warren v. People*, 121 Colo. 118, 123, 213 P.2d 381, 384 (1949)("[T]he district attorney is under no obligation to call all witnesses whose names are endorsed on the information."); *see also United States v. Bond*, 552 F.3d 1092, 1097 (9th Cir. 2009)("[I]t is elementary that litigants are not *required* to call every witness identified on their witness lists. The witness list simply provides notice to the court and to opposing counsel of the witnesses who *may* be presented at trial.").

¶ 32 In the absence of any authority holding otherwise, we conclude that the trial court did not abuse its discretion when it permitted defendants to withdraw Dr. Reiley and Dr. Molteni. We also conclude, for the reasons that we explained above, that defendants did not have an obligation to make them available at

trial to testify because defendants had designated them as "may call" witnesses, not "will call" witnesses.

2. The Trial Court Did Not Abuse Its Discretion When It Denied Plaintiff's Request to Call Dr. Reiley and Dr. Molteni to Testify or to Use Their Depositions

¶ 33 Plaintiff did not comply with C.R.C.P. 26 because he did not timely endorse Dr. Reiley or Dr. Molteni. He also did not inform the court and defendants that he would use their depositions at trial under C.R.C.P. 16(f)(3)(VI)(D).

¶ 34 In exercising its broad discretion to reject plaintiff's request "to endorse witnesses after the date permitted by rule," *Brown v. Hollywood Bar & Cafe*, 942 P.2d 1363, 1365 (Colo. App. 1997), the trial court pointed out that plaintiff had not informed the court he would rely on the expert opinions of Dr. Reiley and Dr. Molteni. The court also observed that plaintiff had endorsed several of his own experts with similar expertise. *See, e.g.*, *People v. Carmichael*, 179 P.3d 47, 55 (Colo. App. 2007)("Because Carmichael's late endorsement violated the discovery rules, and he failed to articulate a reason why it was so late, we perceive no abuse of discretion by the court in imposing a sanction and disallowing the testimony of the defense witness."), *rev'd on other grounds*, 206 P.3d 800 (Colo.

2009); *Brown*, 942 P.2d at 1365)(concluding that the trial court did not abuse its discretion when it barred witnesses from testifying who had not been timely endorsed).

¶ 35 Notwithstanding plaintiff's untimely endorsements of the doctors and requests to use their depositions, he asserts that, "once a party endorses an expert, the expert has been deposed, and the parties are engaged in final trial preparation," "it is too late to prohibit an opposing party from calling the expert." Even if we assume that plaintiff's untimely endorsements were insufficient to support the trial court's decision to bar Dr. Reiley and Dr. Molteni from testifying, we still conclude that the trial court did not abuse its discretion.

¶ 36 C.R.C.P. 26 and its federal counterpart are silent about whether a party may call an opposing party's expert witness once the opposing party has withdrawn the expert. *See Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408, 409 (D. Minn. 1999); *McClendon v. Collins*, 372 P.3d 492, 494 (Nev. 2016)("[T]he rules of civil procedure are silent as to whether an opposing party may depose or call as a witness an expert who had been designated as

one who will testify at trial but was then later de-designated."). Colorado appellate courts have not addressed this question.

¶ 37 Courts outside of Colorado have used a "discretionary" or "balancing" approach to determine whether one party may call the opposing party's withdrawn expert. *See House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 242-47 (N.D. Iowa 1996)(describing the discretionary or balancing approach and applying it in that case); *see also Peterson v. Willie*, 81 F.3d 1033, 1037-38, 1038 n.4 (11th Cir. 1996)(explaining that once an expert is withdrawn by one party, the court has discretion to permit the opposing party to call the expert); *McClendon*, 372 P.3d at 494 (noting that the discretionary standard is the "proper standard" to determine whether a "de-designated" expert may testify for the opposing party)(citation omitted).

¶ 38 A court applying this balancing test weighs factors such as whether the expert's testimony would be cumulative, thus limiting the testimony's probative value; whether excluding the expert's testimony would result in unfair prejudice; and whether the opposing party failed to endorse its own expert, thereby

demonstrating an attempt to "piggyback" on the other party's preparation. *McClendon*, 372 P.3d at 495.

¶ 39 Courts adopting the balancing test also recognize that the party that *originally* endorsed the expert witness can suffer prejudice if the opposing party calls the withdrawn expert to testify. For example, "[j]urors unfamiliar with the role of counsel in adversary proceedings might well assume that [a party's] counsel had suppressed evidence which he had an obligation to offer [when the party withdrew an expert witness.] Such a reaction could destroy counsel's credibility in the eyes of the jury." *Peterson*, 81 F.3d at 1037 (quoting *Granger v. Wisner*, 656 P.2d 1238, 1242 (Ariz. 1982)). Another court described this sort of prejudice as "explosive." *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995)(consulting expert witness context; the expert at issue was not designated by the hiring party to testify); *see also* Damian D. Capozzola, *Expert Witnesses in Civil Trials* § 8:27, Westlaw (database updated Sept. 2016)("[T]here should be a presumption against a party being able to call at trial an expert originally retained by the other party, a presumption that can only be overcome by a showing of exceptional circumstances, or by

prophylactic measures taken by the [c]ourt to ensure that the other party is not unduly prejudiced. Indeed, a number of courts have held that a party may not use the deposition of an opponent's withdrawn expert.").

¶ 40 Our review of the record indicates to us that the trial court applied the balancing test described in cases such as *House* and *Peterson*. Indeed, in its order denying plaintiff's motion for a new trial, the court cited those two cases.

¶ 41 As well, during the trial, the court explained that

- "there has been no reliance by [plaintiff] on the endorsement of Dr. Reiley. There's no specific cross endorsement for Dr. Reiley or otherwise an indication sufficient to the [c]ourt that [plaintiff was] relying upon Dr. Reiley being present";
- "there should be no prejudice to [plaintiff if the court does not allow him to call Dr. Reiley to testify]. Among other things, [he has his] own expert in pediatric neurology endorsed to testify in this case as well as a number of other witnesses"; and
- Dr. Reiley's testimony would be "duplicative."

¶ 42 The court relied on the same reasoning to deny plaintiff's request to call Dr. Molteni to testify or to use his deposition. And the court reiterated these same reasons when it denied plaintiff's motion for a new trial.

¶ 43 The record does not include trial transcripts of the testimony of the expert witnesses whom plaintiff called to testify at trial. So we must presume that the missing transcripts supported the trial court's decision. *See In re Marriage of Cardona*, 321 P.3d 518, 526 (Colo. App. 2010), *aff'd on other grounds*, 2014 CO 3.

¶ 44 Plaintiff next asserts that Dr. Reiley and Dr. Molteni held opinions that were inconsistent with the opinion of a third expert witness whom defendants called to testify at trial. (This witness, Dr. Michael Radetsky, was a pediatrician who had expertise in pediatric infectious diseases.) The trial court's order barring Dr. Reiley and Dr. Molteni from testifying was, plaintiff continues, therefore unjust.

¶ 45 The record contains Dr. Reiley's and Dr. Molteni's depositions and reports and the testimony of Dr. Radetsky. Contrary to plaintiff's assertion, our review of the record shows only small differences among these various sources of expert opinion. For

example, Dr. Reiley offered the opinion that babies who contract SEM disease will eventually develop CNS disease in about seventy percent of cases; Dr. Radetsky did not "know the derivation" of this statistic. Dr. Reiley thought that the incubation period for the herpes simplex virus was two to twelve days after birth; Dr. Radetsky said the timeframe could vary if babies were inoculated against the virus at birth.

¶ 46 Pointing out these differences would not have furthered plaintiff's case very much. For example, Dr. Reiley's opinion about the timeframe when herpes-related lesions could appear — two to twelve days after birth — was *consistent* with defendants' position at trial that the child's herpes-related lesions appeared nine or ten days after he was born.

¶ 47 True enough, Dr. Molteni thought that herpes-related lesions would "crust over" in five to seven days, while Dr. Radetsky said that the crusting process moved more quickly. Medical charts in the record show that, when the child was admitted to the hospital on July 5, he had crusted lesions on his nose, his neck, and his chest. So Dr. Molteni's opinion that lesions take several days to

crust would have supported plaintiff's theory that the child had SEM disease *before* July 4 or 5.

¶ 48 But plaintiff had also endorsed a second neurologist, Dr. Dinesh Talwar, who expressed substantially the same opinion as Dr. Molteni. (Recall that the record does not contain any of the testimony of plaintiff's experts. But it includes Dr. Talwar's expert disclosure.) Dr. Talwar indicated that "[s]kin lesions of herpes develop and evolve over a period of time." The child's lesions "likely developed over a period of 5 to 10 days, and it would be highly unlikely that they developed over only 2 days." So the record shows that Dr. Talwar could have made the same point as Dr. Molteni.

¶ 49 Given all of this, we conclude that the record supports the trial court's implicit decision that Dr. Reiley's and Dr. Molteni's testimony and the depositions would have been cumulative or would have had little probative value. *See House*, 168 F.R.D. at 246; *McClendon*, 372 P.3d at 495 ("In applying [the *House*] balancing test, courts have considered such factors as whether the testimony would be duplicative or cumulative of other witnesses' testimony, thus limiting the probative value of that testimony."); *cf. Rubel*, 160 F.R.D. at 460-61 ("[I]t appears to us that the substance

of Dr. Hembree's proposed testimony, even giving the plaintiff the benefit of the doubt, would overlap very substantially [with] the testimony of plaintiff's other witnesses. In consequence, the evidence in question appears to be cumulative save, of course, for the fact that Dr. Hembree was retained in the first instance by Lilly.")(footnote omitted).

¶ 50 We further conclude that plaintiff was not unfairly prejudiced by the trial court's decision to exclude this testimony. He did not endorse Dr. Reiley and Dr. Molteni in a timely fashion, even though he had deposed them and he had learned of the substance of their expert opinions well in advance of trial. We therefore reject plaintiff's assertions that he had reasonably relied on the prospect that defendants would call Dr. Reiley and Dr. Molteni to testify — even though they were designated as "may call witnesses" — and that these witnesses' expert opinions were critical to his case. *Cf. Rubel*, 160 F.R.D. at 462 ("Nor can plaintiff fairly be heard to argue that she relied upon the ability to obtain the evidence from Dr. Hembree. She did not list Dr. Hembree as a trial witness in the pretrial order."). And the prospect that plaintiff was prejudiced is further undercut by the trial court's decision to allow him to cross-

examine Dr. Radetsky about Dr. Reiley's and Dr. Molteni's opinions in the form of hypotheticals.

¶ 51 In summary, we conclude that the trial court properly applied the balancing approach described in *House*, *Peterson*, and *McClendon*. We further conclude that the court did not abuse its discretion when it denied plaintiff's requests to call Dr. Reiley and Dr. Molteni at trial or to use their depositions. We last conclude, for these same reasons, that the court properly rejected plaintiff's motion for a new trial. *See, e.g.*, *Acierno v. Garyfallou*, 2016 COA 91, ¶ 40 (concluding that the trial court did not abuse its discretion in denying a motion for a mistrial, and for the same reasons, it did not abuse its discretion in denying a request for a new trial on the same grounds).

III. Hearsay Testimony

A. Additional Background

¶ 52 Concerned about the child's changing behavior on July 4, the father telephoned a friend who was a licensed medical assistant in a pediatrician's office.

¶ 53 At trial, plaintiff sought to offer the medical assistant's testimony repeating what the child's father had said during the

telephone call. He argued that this testimony was admissible under CRE 803(4) because the father's statements were made for purposes of medical diagnosis or treatment. As plaintiff's counsel explained,

> [the medical assistant] was – if you will, an extension of [the pediatrician's] office. The call was made to make an appointment to see a physician. And if I – my recollection is correct – I believe it is – it was also to get her advice as to what they should do from a medical standpoint for [the child], knowing she's in the medical field.

¶ 54 The medical assistant said during an offer of proof that she knew that the child's father had called her for "[m]edical help."

> A. [The father] had told me that . . . they were having to wake [the child] up to feed him, that he was having a difficult time feeding. He had the blisters on his head, that [he] and [the child's mother] didn't believe the doctor was correct in his assessment, and they wanted a second opinion. And they were really worried about him.
>
> And I told him that, you know, to continue to wake up [the child] in the middle of the night. And I would give him a call first thing in the morning after I talked to [the pediatrician for whom she worked], and I would get an appointment to come in and see us.
>
> Q. So did you, in fact, give them medical advice yourself in terms of what to do and when to come in?
>
> A. Correct.

> Q. And did you then understand this was, in effect, their reaching out to you as someone in the medical community that they knew who might try to help them because what they were being told by their doctor simply wasn't satisfying?
>
> A. Correct.

¶ 55 Plaintiff also wanted to introduce the medical assistant's statements to the pediatrician for whom she worked, repeating what the child's father had said during the telephone call. And he wanted to present this same testimony through the child's mother, who had been in the room when the father had called the medical assistant.

¶ 56 The trial court excluded this testimony during the trial, ruling that it was inadmissible hearsay. The court stood by this decision in its order denying plaintiff's motion for a new trial.

B. Standard of Review

¶ 57 We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *See Mullins v. Med. Lien Mgmt., Inc.*, 2013 COA 134, ¶ 35. A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or if the court

misapplies the law. *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008).

¶ 58 But, even if the trial court abused its discretion when it excluded the evidence in this case, we will only reverse the judgment if we can say "with fair assurance" that the error "substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, ¶ 29 (citations omitted); *see In re Estate of Fritzler*, 2017 COA 4, ¶ 7 (noting that an appellate court will not reverse a judgment if the trial court's decision to exclude the evidence was harmless).

C. Law

¶ 59 Hearsay "is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). As a general rule, hearsay is not admissible. But there are exceptions in rules and statutes. *See* CRE 802.

¶ 60 Statements made for the purpose of medical diagnosis or treatment are exempted from the rule prohibiting hearsay. *See* CRE 803(4). For this type of evidence to be admissible, it must (1) be

made for purposes of medical diagnosis or treatment; (2) describe medical history, symptoms, or the inception or cause of symptoms; and (3) be reasonably pertinent to diagnosis or treatment. *Kelly v. Haralampopoulos*, 2014 CO 46, ¶ 20. But statements ascribing fault are generally not admissible under CRE 803(4), unless the statements of fault are "necessary for diagnosis and treatment." *People v. Allee*, 77 P.3d 831, 834 (Colo. App. 2003).

D. Application

¶ 61 The father's statements to the medical assistant fall into two broad categories: (1) statements describing the child's symptoms; and (2) statements expressing dissatisfaction with the care that defendants had given him.

¶ 62 The latter category of statements clearly does not fall under CRE 803(4). These statements ascribed fault to defendants, and they were not necessary to assist in the diagnosis and treatment of the child's condition. *See id.*

¶ 63 But we conclude that the former set of statements fell within the ambit of CRE 803(4) because the father provided them to the medical assistant to obtain a diagnosis of and treatment for the child's condition; they described his symptoms and his medical

history; and they were obviously pertinent to the diagnosis and treatment of his condition. *See Kelly*, ¶ 20.

¶ 64 Even so, we cannot say with fair assurance that excluding this testimony substantially influenced the basic fairness of the trial, *see Estate of Fritzler*, ¶ 7; *Core-Mark Midcontinent, Inc.*, ¶ 29, because other witnesses testified about the child's symptoms and conditions on July 4.

- The child's mother testified that, on that day, he did not eat "as well" and that he was "much sleepier," even "lethargic." The mother and the father had to wake him to feed him through the "afternoon, evening, and . . . night." "He was not eating much, and he was not waking up on his own to eat."
- The mother said that the lesions on the child's head "were certainly getting bigger" on July 4, and that other lesions were spreading to his nose and chest.
- A defense expert repeated the mother's observations that the child had been lethargic and that he had not eaten normally on July 4.

¶ 65 "If evidence that is excluded was also presented through other testimony or admitted evidence, any error in excluding the cumulative evidence is harmless and does not constitute reversible error." *Fritzler*, ¶ 12. Because the substance of the statements that the father made to the medical assistant was admitted through other witnesses, we conclude that plaintiff was not harmed by the trial court's decision to exclude the medical assistant's testimony.

¶ 66 In reaching this conclusion, we note that defendants did not contest the testimony about the child's July 4 symptoms. Their position was, instead, that the child had developed the herpes-related lesions on July 4 or 5 *after* they had examined him.

¶ 67 Since this error was harmless, then, by a parity of reasoning, any error that the trial court may have made in preventing the medical assistant from testifying about her statements to the pediatrician repeating what the father had said during the telephone call or in preventing the mother from testifying about the father's statements was also harmless.

¶ 68 And, based on these conclusions, we further conclude that the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial on these grounds. *See Acierno*, ¶ 40.

¶ 69 The judgment is affirmed.

JUDGE DAILEY and JUDGE FOX concur.

COLORADO COURT OF APPEALS **2017COA67**

Court of Appeals No. 16CA0822
City and County of Denver District Court No. 15CV33216
Honorable Morris B. Hoffman, Judge

American Family Mutual Insurance Company,

Plaintiff-Appellee,

v.

Omar Ashour,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by CHIEF JUDGE LOEB
Kapelke* and Vogt*, JJ., concur

Announced May 18, 2017

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 In this insurance coverage action for declaratory judgment, defendant, Omar Ashour, appeals the district court's denial of his motion for summary judgment and its entry of summary judgment in favor of plaintiff, American Family Mutual Insurance Company (AFI). Ashour contends that the district court erred by ruling, as a matter of law, that his claim for underinsured motorist (UIM) coverage under his automobile insurance policy with AFI was precluded because he was not legally entitled to sue his employer or co-employee in tort for his injuries based on their immunity under the Workers' Compensation Act of Colorado (the Act). We agree with Ashour, reverse the judgment of the district court in favor of AFI, and remand with directions for entry of summary judgment in favor of Ashour.

I. Background and Procedural History

¶ 2 Ashour is an employee and co-owner of Nubilt Restoration & Construction (Nubilt). While employed with Nubilt, Ashour was severely injured when he was pinned by a thirty-foot truck to a nearby tractor-trailer. The accident was caused by the negligence of his co-employee, Rebecca Peake, who failed to set the airbrake on

the truck that rolled backward and pinned Ashour to the other vehicle.[1]

¶ 3 After the accident, Ashour submitted a claim to Nubilt's workers' compensation carrier and subsequently received benefits. He also submitted a claim to Nubilt's corporate liability insurance provider and received a settlement for that claim based on a policy rider that allowed for coverage of workplace injuries. Ashour then made a claim under his personal automobile insurance policy with AFI for UIM benefits to recover the remainder of his alleged damages.

¶ 4 After receiving Ashour's claim, AFI filed this action in district court seeking a declaratory judgment as to whether Ashour was owed UIM coverage when the plain language in the policy limited UIM benefits to those situations in which the insured was "legally entitled to recover" from the owner or operator of an uninsured or underinsured motor vehicle. AFI alleged that the Act provided Ashour with his exclusive remedy for damages and that, because the Act immunized Nubilt and Peake from tort suits brought by

[1] Peake was cited by the Colorado State Patrol for careless driving resulting in bodily injury.

Ashour for work-related injuries, Ashour was not "legally entitled to recover" under the AFI UIM policy.

¶ 5 In his answer, Ashour alleged that the phrase "legally entitled to recover" had been interpreted by Colorado courts to mean that an insured must only establish fault of the party causing the injury (the tortfeasor) and the extent of the insured's damages, and that, accordingly, he was not required to show that he could proceed with a lawsuit against the tortfeasor(s). Ashour asserted as an affirmative defense that AFI was, therefore, estopped from denying coverage on the basis of the policy's "legally entitled to recover" language.

¶ 6 Subsequently, Ashour filed a motion for summary judgment, relying on *Borjas v. State Farm Mutual Automobile Insurance Co.*, 33 P.3d 1265 (Colo. App. 2001), in which a division of this court defined the phrase "legally entitled to recover" and ultimately concluded that an insured was "legally entitled to recover" even when the tortfeasor was immune from suit under the Colorado Governmental Immunity Act (CGIA). In its response to Ashour's motion for summary judgment, AFI distinguished *Borjas* and instead relied on *Continental Divide Insurance Co. v. Dickinson*, 179

P.3d 202 (Colo. App. 2007), in which another division of this court concluded that an independent contractor subject to a limited recovery provision in the Act was not entitled to claim benefits under his employer's UIM policy.

¶ 7 The district court agreed with AFI's interpretation of Colorado law and, in a written order, concluded that *Dickinson* was dispositive of Ashour's claim if Peake had acted within the scope and course of her employment. At the conclusion of its order, the district court denied Ashour's motion for summary judgment and allowed the case to proceed for a determination of whether Peake had been acting within the course and scope of her employment at the time of the accident.

¶ 8 Several weeks later, AFI filed its own motion for summary judgment asserting that, as a matter of law, Peake had been acting within the course and scope of her employment. After full briefing by both parties, the court entered a second written order, reaffirming its prior order on the coverage issue and concluding on undisputed facts that Peake was acting within the course and scope of her employment at the time of Ashour's accident. Accordingly, the court granted AFI's motion for summary judgment and declared

that AFI was not obligated under Ashour's policy to pay Ashour UIM benefits.

¶ 9 Ashour now appeals. Specifically, he challenges the district court's conclusion that he was not entitled to UIM benefits under his own insurance policy with AFI based on the immunity provided to Peake and Nubilt under the Act. He does not appeal the court's ruling that Peake was acting within the course and scope of her employment.

II. Standard of Review

¶ 10 We review the grant of a summary judgment motion de novo. *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002). In reviewing a motion for summary judgment, the nonmoving party is afforded all favorable inferences that may be drawn from the allegedly undisputed facts. *City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, ¶ 8 (citing *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999)).

¶ 11 For our review, we apply the same standard as the district court. *Id.* at ¶ 9. "Thus, our task on review is to determine whether . . . the district court correctly applied the law" when it ruled that Ashour was barred from receiving UIM benefits from AFI because he

was not legally entitled to recover against his employer or co-employee under the Act. *Id.* In doing so, we review the district court's legal conclusions de novo. *Id.*

III. Applicable Law

¶ 12 This case involves the application and interaction of two bodies of Colorado law: workers' compensation and uninsured or underinsured motorist (UM/UIM) coverage.

A. Workers' Compensation Law

¶ 13 The purposes of the Act are to protect employees who suffer injuries arising from their employment and to give injured workers a reliable source of compensation for their injuries. *Engelbrecht v. Hartford Accident & Indem. Co.*, 680 P.2d 231, 233 (Colo. 1984). Employers subject to the Act, including Nubilt, are required to secure insurance to cover their employees' claims for work-related injury. § 8-44-101(1), C.R.S. 2016.

¶ 14 An employer who has complied with the Act

> shall not be subject to the provisions of section 8-41-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death of or personal injury to any employee . . . ; and all causes of action, actions at law, suits in

> equity, proceedings, and statutory and common law rights and remedies for and on account of such . . . personal injury to any such employee and accruing to any person are abolished except as provided in said articles.

§ 8-41-102, C.R.S. 2016. There is no dispute that Nubilt was in compliance with the Act at the time of Ashour's accident and that Ashour has received workers' compensation benefits as a result of the accident.

¶ 15 Similarly, when an employer complies with the Act, such compliance is construed as

> a surrender by the employer, such employer's insurance carrier, and the employee of their rights to any method, form, or amount of compensation or determination thereof or to any cause of action, action at law, suit in equity, or statutory or common-law right, remedy, or proceeding for or on account of such personal injuries . . . of such employee other than as provided in said articles, and shall be an acceptance of all the provisions of said articles, and shall bind the employee personally.

§ 8-41-104, C.R.S. 2016. Thus, Nubilt and its workers' compensation insurance carrier are immune from suit by Ashour for his injuries sustained in the course and scope of his employment.

¶ 16 By extension, co-employees are also immune from suit for injuries to a fellow employee arising out of the scope of employment. *Kandt v. Evans*, 645 P.2d 1300, 1304-05 (Colo. 1982). Thus, here, Peake is also immune from suit.

¶ 17 The immunity from suit provided by the Act is often referred to as the exclusivity provisions because the Act has been interpreted to provide the *exclusive* remedy to a covered employee for injuries sustained while the employee is performing services arising in the course of his or her employment. *Horodyskyj v. Karanian*, 32 P.3d 470, 474 (Colo. 2001) ("The exclusive-remedy provisions of the Act bar civil actions in tort against an employer for injuries that are compensable under the Act." (citing §§ 8-41-102, -104)). However, this exclusive remedy is limited to suits by an injured employee against his or her employer or co-employee; an injured employee may receive workers' compensation benefits *and* bring suit against a third-party tortfeasor. *See* § 8-41-203(1)(a), C.R.S. 2016; *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 38, 510 P.2d 891, 893 (1973) (The "Act is not to shield third-party tort-feasors [sic] from liability for damages resulting from their negligence."); *see also Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 100 (Colo. 1995).

¶ 18 Thus, the Act's exclusivity provisions can be summarized this way: the workers' compensation system is an agreement by employers to provide benefits to employees, regardless of fault, and in exchange for assuming that burden, the employer is immunized from tort claims for injuries to its employees. § 8-40-102(1), C.R.S. 2016 ("[T]he workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike."); *People v. Oliver*, 2016 COA 180M, ¶ 22.

B. UM/UIM Law

¶ 19 Colorado law requires that all automobile insurance policies insuring against loss resulting from bodily injury or death must provide UM/UIM coverage. § 10-4-609(1)(a), C.R.S. 2016. The statute sets out specific requirements for UM/UIM insurance policies, and if a policy violates those mandatory coverage requirements, courts will read those requirements into the policy. *McMichael*, 906 P.2d at 101.

¶ 20 Specifically, UIM coverage is intended to cover the difference, if any, between the amount of the limits of a tortfeasor's legal liability coverage and the amount of the damages sustained by the injured

party, up to the policy limits. § 10-4-609(1)(c). A division of this court has interpreted this subsection to mean that an insurer's obligation to pay UIM benefits is "triggered by exhaustion of the tortfeasor's 'limits of . . . legal liability coverage,' not necessarily any payment from or judgment against the tortfeasor." *Jordan v. Safeco Ins. Co. of Am., Inc.*, 2013 COA 47, ¶ 29 (alteration in original) (citation omitted).

¶ 21 As relevant here, Colorado law limits UM/UIM coverage to "protection of persons insured thereunder who are *legally entitled to recover* damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom." § 10-4-609(1)(a) (emphasis added). The statute also provides for payment of benefits when the party at fault is underinsured:

> Uninsured motorist coverage shall include coverage for damage for bodily injury or death that an insured is *legally entitled to collect* from the owner or driver of an *underinsured* motor vehicle. An underinsured motor vehicle is a land motor vehicle, the ownership, maintenance, or use of which is insured or bonded for bodily injury or death at the time of the accident.

§ 10-4-609(4) (emphasis added).[2] AFI's policy tracks the "legally entitled to recover" language of the statute and explicitly provides coverage for underinsured vehicles: "We will pay compensatory damages for bodily injury which an insured person is *legally entitled to recover* from the owner or operator of an uninsured motor vehicle or an *underinsured* motor vehicle." (Emphasis added.)

¶ 22 At issue in this case is the phrase "legally entitled to recover." Colorado courts have considered the meaning of "legally entitled" language in the past, albeit not under the precise circumstances at issue in this case. For example, in *Newton v. Nationwide Mutual Fire Insurance Co.*, in the context of deciding whether the insurer was entitled to reduce the UIM benefits paid to the insured by the amount of personal injury protection benefits paid out under the same policy, the supreme court stated that "[u]ninsured motorist recovery is available only to persons 'legally entitled to recover

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[2] While the statutory language in subsections (1)(a) and (4) varies slightly, we conclude there is no legally significant difference between the phrase "legally entitled to recover" and "legally entitled to collect." *See Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265, 1267 (Colo. App. 2001) (analyzing a policy with language "legally entitled to collect" against a statutory provision with the phrase "legally entitled to recover" without distinguishing between those phrases); *see also State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318, 324 n.12 (Ky. 2010).

damages from owners or operators of uninsured motor vehicles.'" 197 Colo. 462, 465, 594 P.2d 1042, 1043 (1979) (citation omitted). "Thus a claimant may not obtain payment under uninsured motorist coverage *without first establishing that the uninsured motorist's fault, normally negligence, caused the collision*." *Id.* (emphasis added). This fault-based concept was again articulated in *DeHerrera v. Sentry Insurance Co.*, 30 P.3d 167, 173-74 (Colo. 2001), in which the supreme court, in analyzing section 10-4-609(1)(a), interpreted subsection (1)(a) to mean that "an insured is entitled to recover UM/UIM benefits when a person who is at fault in an accident does not have any liability insurance" or is underinsured.

C. Interaction Between the Act and UIM Coverage

¶ 23 The "legally entitled to recover" requirement is central to this case because of the immunity provided to employers and co-employees under the exclusivity provisions of the Act. The precise question before us is whether Ashour is "legally entitled to recover" under the meaning of the UM/UIM statute when he cannot sue Nubilt or Peake, the tortfeasors, due to their immunity under the Act.

¶ 24 Colorado courts have considered the interaction between the Act and the UM/UIM statute in very few instances. In a basic sense, courts have noted that claims for UM/UIM benefits and claims for workers' compensation benefits are independent of one another. *Benson v. Colo. Comp. Ins. Auth.*, 870 P.2d 624, 626 (Colo. App. 1994) ("We conclude that the trial court is the proper forum for resolution of plaintiff's claim for uninsured motorist benefits and that this claim is independent of any workers' compensation claim.").

¶ 25 In *McMichael*, where an employee was injured on the job by a third-party tortfeasor who was underinsured, the Colorado Supreme Court held that the injured employee was entitled to benefits under both workers' compensation and his employer's UIM policy because "[t]he [UIM] benefits do not constitute workers' compensation benefits and do not result because of a suit brought by McMichael against [his employer]." *McMichael*, 906 P.2d at 100. That case, however, did not involve a claim for UIM benefits under the injured worker's personal UIM policy.

¶ 26 Colorado courts have also tended to be protective of the benefits provided by UM/UIM coverage. For example, an insurance

policy provision for the reduction of UIM benefits by the amount paid by workers' compensation is void. *Nationwide Mut. Ins. Co. v. Hillyer*, 32 Colo. App. 163, 165, 509 P.2d 810, 811 (1973). Colorado law also does not allow UIM benefits to be offset by any other coverage, including workers' compensation benefits. § 10-4-609(1)(c); *see also Adamscheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 583-84 (10th Cir. 2016) (citing *Hillyer*, 32 Colo. App. at 165, 509 P.2d at 811) (compiling Colorado cases allowing recovery in addition to workers' compensation benefits without offset).

D. *Borjas*: UM/UIM Coverage and Sovereign Immunity

¶ 27 We now turn to an analysis of *Borjas*, the case relied on by Ashour and distinguished by AFI and the district court.

¶ 28 In *Borjas*, a division of this court concluded that a tortfeasor's immunity under the CGIA did not bar an injured party from recovering UM/UIM benefits from her own insurer because the phrase "legally entitled to recover damages," as used in section 10-4-609, simply "means that the insured must be able to establish that the fault of the uninsured motorist gave rise to damages and the extent of those damages." *Borjas*, 33 P.3d at 1269. The

immunity of the uninsured tortfeasor under the CGIA was, thus, irrelevant for purposes of UM/UIM coverage.

¶ 29 Borjas was injured in a car accident when her personal vehicle was hit by a police car driven by an Alamosa police officer responding to an emergency. *Id.* at 1266.[3]

¶ 30 To recover damages, Borjas first attempted to sue the officer and the City of Alamosa, but her case was dismissed because the officer and the City were both immune from suit under the CGIA. *Id.* at 1266-67. Borjas then made a claim under her own insurance policy for UM benefits. *Id.* at 1267. State Farm denied the claim, and Borjas sued to enforce payment of benefits under her insurance policy. *Id.* The insurance policy, similar to the one here, restricted UM/UIM benefits to situations in which the insured was "legally entitled to collect" from the driver of an uninsured vehicle. *Id.* The district court dismissed the action because the officer and the City were immune under the CGIA, "and therefore [Borjas] was not legally entitled to collect damages from them." *Id.*

¶ 31 On appeal, a division of this court defined the issue as: "whether § 10-4-609 requires coverage when an injured motorist

[3] Workers' compensation was not at issue in that case.

cannot collect damages from a negligent motorist because the tortfeasor is immune from liability pursuant to the CGIA . . . ." *Id.* at 1268.

¶ 32 The division determined that the insurance company's interpretation of the policy to deny coverage when the tortfeasor was immune from suit under the CGIA violated public policy. *Id.* at 1267, 1268. Citing the policies underlying the UM/UIM statute, the division concluded that "[i]t is entirely consistent with this public policy to construe § 10-4-609 to require that UM insurance coverage apply even though the tortfeasor is immune from liability under the CGIA." *Id.* at 1268. The court reasoned that, *from the perspective of the injured party*, the lack of legal responsibility had the same effect as being injured by an uninsured driver. *Id.*

¶ 33 The division in *Borjas* acknowledged a split in cases from other jurisdictions that had addressed the issue of UM/UIM coverage where the tortfeasor was protected from liability by some form of governmental immunity. Nevertheless, the division supported its outcome as follows:

> The courts that have held that UM coverage was mandated where the tortfeasor is protected by some form of governmental

> immunity have all found that interpretation consistent with the purposes of their UM statutes, i.e., to provide that motorists may purchase insurance to protect themselves from negligent motorists who cannot or will not pay for the damages they have caused. The UM statutes discussed in these cases all have language similar to § 10-4-609. Thus, we find the holdings in these cases consistent with the purpose of § 10-4-609 described above.
>
> The contrary line of cases all give a strict interpretation to the statutory language "legally entitled to recover" that we find inconsistent with the public policy expressed in § 10-4-609.

Id. at 1269.

¶ 34 The division also found further support for providing coverage in a prominent treatise on UM/UIM coverage, and it summarized the following three reasons why a

> tortfeasor's immunity should not preclude a UM claim: (1) while tort immunity protects the tortfeasor as intended, it should have no effect on an insurance company providing first party UM insurance coverage; (2) it is consistent with the strong public policy of providing insurance coverage to protect drivers when no compensation is available from the negligent tortfeasor; and (3) tort immunities are personal to the tortfeasor and therefore cannot be raised by an insurer.

Id. (citing 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.14, at 388-90 (2d ed. 2001)).

¶ 35 Importantly, the division also specifically noted that its conclusion did not contravene the public policy expressed in the CGIA because "[t]hose persons and entities who are immune from liability under the CGIA are unaffected by this holding." *Id.*

¶ 36 In succinct terms, the court held

> that the phrase "legally entitled to recover damages," as used in § 10-4-609, means that the insured must be able to establish that the fault of the uninsured motorist gave rise to damages and the extent of those damages. We further conclude that the public policy expressed in § 10-4-609 requires that UM insurance policies must provide coverage for the protection of a motorist injured by the negligence of a driver who is immune from liability under the CGIA.

Id. (citation omitted).

E. *Dickinson*: UM/UIM Coverage and Independent Contractors Under the Act

¶ 37 Next, we turn to an analysis of *Dickinson*, the case relied on by AFI and found to be controlling by the district court.

¶ 38 Several years after *Borjas*, a division of this court was presented with the novel issue of determining whether an

independent contractor subject to capped tort damages from his employer by section 8-41-401(3), C.R.S. 2016, of the Act could recover on his claim for additional benefits from his employer's UM/UIM policy. *Dickinson*, 179 P.3d at 203-04.

¶ 39 While on the job, Dickinson sustained injuries when he fell from a truck driven by his co-employee. *Id.* at 203. Dickinson was an independent contractor working for United Technical Services (UTS), and the co-employee/tortfeasor was an employee of UTS. *Id.*

¶ 40 An administrative law judge rejected Dickinson's workers' compensation claim against UTS because he was an independent contractor, not an employee of UTS, and, therefore, was not protected under the Act. *Id.* To recover damages for his injuries, Dickinson then sued UTS and his co-employee in tort. *Id.* The trial court ruled that Dickinson's recovery against his employer and co-employee was limited to $15,000 by section 8-41-401(3) of the Act because he elected in writing not to be covered by UTS's workers' compensation policy and did not purchase his own workers' compensation insurance. Dickinson settled the tort case for $15,000. *Id.* at 204.

¶ 41 To recover his damages in excess of $15,000, Dickinson then filed a claim under UTS's UM/UIM auto insurance policy, claiming that the $15,000 statutory limit to his tort recovery rendered UTS and its employee underinsured. *Id.*

¶ 42 UTS's auto insurer brought a declaratory action to determine whether Dickinson's claim was precluded because of the limitation in section 8-41-401(3). *Id.* On cross-motions for summary judgment, the district court ruled in favor of the insurer. *Id.*

¶ 43 On appeal to this court, the division's analysis focused on section 8-41-401(3) of the Act. As a matter of first impression, the division defined the issue as "whether the Act's $15,000 limitation on certain tort claims precludes recovery against a UM/UIM insurer of an employer for damages suffered in a work-related accident in which the tortfeasor is in the same employ as the claimant." *Id.*

¶ 44 As part of its analysis, the division broadly stated that "[t]he majority of jurisdictions that have addressed this issue hold that 'an insured is not "legally entitled to recover" under the uninsured motorist provisions of an insurance policy if the exclusivity provisions of the workers' compensation statute would bar an action against the tortfeasor.'" *Id.* (quoting *Matarese v. N.H. Mun.*

Ass'n Prop.-Liab. Ins. Tr., Inc., 791 A.2d 175, 180-81 (N.H. 2002)). The division agreed with this view and stated it was consistent with Colorado statutes. *Id.* at 205.

¶ 45 In considering the policy behind section 10-4-609, the division found that the statute recognizes that injured parties have the right to recover for losses caused by uninsured motorists in the same manner as if the motorist were insured. *Id.* "But because here the tortfeasor and UTS were insured, Dickinson's public policy argument for avoiding the $15,000 limitation would place him in a better position. . . . Hence, we discern no absurdity in giving effect to the limitation in § 8-41-401(3), notwithstanding § 10-4-609(1), when the tortfeasor enjoys this immunity." *Id.* at 206. Again, the division's analysis focused on the recovery limitation and limited immunity in section 8-41-401(3).

¶ 46 *Dickinson* also specifically distinguished *Borjas* in three ways. First, the division noted that some of the out-of-state cases cited in *Borjas* reached different outcomes when workers' compensation immunity was at issue rather than sovereign immunity. *Id.* at 206-07.

¶ 47 Second, the division explained that *Borjas* allowed recovery by an insured who had purchased the statutorily mandated UM/UIM coverage and would have otherwise remained uncompensated if CGIA immunity had defeated coverage of such benefits. The division contrasted that scenario with the plaintiff in *Dickinson*, who could have protected himself from the $15,000 cap but chose not do so. *Id.* at 207.

¶ 48 Third, the division in *Dickinson* determined that while the public policies of the CGIA and the UM/UIM statute at issue in *Borjas* were not at odds with each other, the policies behind section 8-41-401(3) and the exclusivity provisions of the Act *were* at odds with each other under the circumstances of the case. *Id.* at 208. To allow Dickinson to recover above the cap in section 8-41-401(3) through the employer's UM/UIM insurance would, in the division's view, "undercut" the policy of encouraging independent contractors to obtain workers' compensation coverage, while unjustly burdening an employer or co-employee with additional liability based on an independent contractor's choice to forego workers' compensation coverage. *Id.* at 207. The division thus reasoned that it would be unjust to allow Dickinson to recover money from his employer

above the $15,000 cap through the employer's insurance policy when that employer enjoyed immunity for any damages above $15,000 under section 8-41-401(3).

¶ 49 The division summarized its holding as follows:

> In sum, we hold that where an independent contractor fails to obtain his own workers' compensation insurance and does not dispute that he could have done so, § 8-41-401(3) precludes the independent contractor from recovering more than $15,000 in damages from the UM/UIM insurer of the employer of a tortfeasor who is in the same employ as the independent contractor.

Id. at 208. As pertinent here, the division expressly recognized the narrow application of its holding and specifically noted that it might not be applicable to a claim for benefits by an injured independent contractor against his or her own UIM insurer: "Nevertheless, we acknowledge that *the statutory policies which we have reconciled may interact differently if a claimant subject to § 8-41-401(3) sought UM/UIM benefits from the claimant's own insurance carrier*, and we express no opinion on such a scenario." *Id.* (emphasis added.)

IV. Discussion

¶ 50 Ashour contends that the district court erred as a matter of law by applying the very narrow and limited holding in Dickinson to

this case to preclude his claim for coverage of UM/UIM benefits from AFI. We agree and, for the reasons below, conclude that the district court misapplied the law in concluding that Dickinson should control the outcome of the case. Rather, we conclude that the holding and reasoning in Borjas are applicable here and should be extended to allow UM/UIM coverage to Ashour under his policy with AFI.

A. *Dickinson* is not Applicable to the Circumstances in this Case

¶ 51 Factually, *Dickinson* is not analogous to this case in several key respects.

- Dickinson was not an employee, but an independent contractor without benefits under the Act. *Dickinson*, 179 P.3d at 203.
- Dickinson sought recovery of UIM benefits from his employer's policy, not his own personal policy. *Id.* at 204.
- Dickinson made the choice not to be covered by his employer's workers' compensation policy and not to protect himself with his own workers' compensation insurance. *Id.* at 203-04

In contrast, Ashour was an employee who was injured on the job, was fully covered under the Act, and opted to receive the protection of UM/UIM benefits through his personal auto insurance policy.

¶ 52 In our view, the fact that Ashour sought recovery of benefits under his own insurance policy is critical for two reasons. First, Ashour did not seek to recover additional damages from the immune parties in this case — his employer and co-employee. And, second, *Dickinson* expressly acknowledged that the outcome may be different where the injured party (in that case an independent contractor) made a claim with his or her own insurer, and the division, accordingly, expressed no opinion on the applicability of its holding to the situation present in this case. *Id.* at 208.

¶ 53 Analytically, *Dickinson* is also distinguishable because it did not consider the meaning of "legally entitled to recover" under section 10-4-609. Instead, it considered only the recovery cap for independent contractors provided in section 8-41-401(3). *Id.* Indeed, the division limited its holding to the circumstances where an independent contractor had chosen not to be covered by the Act and was subject to the recovery cap in section 8-41-401(3). *Id.* Section 8-41-401(3) is not relevant here because Ashour is not an

independent contractor, but rather an employee of Nubilt. The issue and holding in *Dickinson* were limited by three factors that were present in that case: the applicability of section 8-41-401(3) to the injured party; the request by the injured party for coverage under an employer's UM/UIM insurer; and the presence of a co-employee tortfeasor. The only one of those factors present here is that Ashour was also injured by a co-employee. Thus, contrary to the district court's conclusion, much of *Dickinson*'s reasoning does not apply to the circumstances of this case.

¶ 54 *Dickinson* is also distinguishable from a policy standpoint. As noted by the division in *Dickinson*, the policy behind section 8-41-401(3) is to encourage independent contractors to choose workers' compensation coverage under their employer's policy or in a personal policy by capping tort recovery at $15,000. *Id.* at 207. That statutory cap and the policy underlying it are simply not relevant to Ashour's case. Moreover, the division in *Dickinson* emphasized that the employer and co-employee were subject to immunity from damages exceeding $15,000 and that it would have been unjust to subject them to additional liability (i.e., a payout by the employer's insurance company) based on Dickinson's election

not to obtain coverage. *Id.* That concern also has no bearing here because Ashour sought recovery of benefits from his own insurer, which would not subject his employer or co-employee to further liability.[4]

¶ 55 We therefore conclude that *Dickinson* is not applicable to Ashour's case. Hence, we also conclude that the district court misapplied the law when it found *Dickinson* controlling.

B. *Borjas* is Analogous to the Circumstances Here

¶ 56 In contrast to *Dickinson*, the reasoning and holding in *Borjas* have a broader application. We start, again, with a basic comparison between the facts in this case and those in *Borjas*.

- Both Ashour and Borjas sought to recover benefits under their personal UM/UIM insurance policies and thus chose to protect themselves from otherwise unrecoverable damages. *Borjas*, 33 P.3d at 1266.

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[4] Our analysis also leads us to reject AFI's assertions that the exclusivity provisions of the Act are broad enough to preclude any compensation to an injured employee from other sources in excess of those provided by the formulas under the Act. As discussed above, Colorado law allows injured employees to receive workers' compensation benefits and benefits or payouts from sources other than their employer or co-employee. *See Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 100 (Colo. 1995); *Benson v. Colo. Comp. Ins. Auth.*, 870 P.2d 624, 626 (Colo. App. 1994).

- The tortfeasor in each case was cloaked in immunity from tort, one under the CGIA and the other through the exclusivity provisions of the Act. *Id.* at 1267.
- Both cases required the court to interpret the phrase "legally entitled to recover" in section 10-4-609(1)(a). *Id.* at 1268.

¶ 57 From a policy standpoint, *Borjas* focused on the policies behind the UM/UIM statute and the immunity provided under the CGIA. While the CGIA is not at issue here, we discern that the reasoning in *Borjas* is nonetheless applicable because both the CGIA and the Act provide complete immunity from tort actions. Thus, AFI's argument that *Borjas* is distinguishable because it did not address the exclusivity provisions of the Act (i.e., employer and co-employee immunity) simply misses the mark.

¶ 58 AFI also attempts to distinguish *Borjas* because the immunity provided by the CGIA left the plaintiff in that case with *no* means of recovery (as if the tortfeasor were uninsured), whereas here, even though Nubilt and Peake were immune from suit, Ashour received benefits from Nubilt's workers' compensation insurer. We are not persuaded. This argument ignores the fact that the language of

AFI's UM/UIM policy, consistent with section 10-4-609, provides coverage where the tortfeasor is *underinsured*. The statute defines underinsured tortfeasors simply and broadly as those who are covered by insurance at the time of the accident. § 10-4-609(4). Thus, Nubilt and Peake are effectively underinsured in that Ashour received benefits up to Nubilt's workers' compensation insurance limits but still has additional damages from his workplace injury. It is the exhaustion of Nubilt's and Peake's limits of liability coverage (i.e., workers' compensation insurance) that triggers AFI's obligation to pay UM/UIM benefits. *Jordan*, ¶ 29. From the "perspective of the injured innocent" employee, "the lack of legal responsibility has the same effect" as that of an underinsured driver. *Borjas*, 33 P.3d at 1268.

C. Analysis and Application of *Borjas*

¶ 59 Although we conclude *Borjas* is guiding and instructive here, we recognize that it is not directly on point because it does not address workers' compensation or the issue of co-employee tortfeasors. Hence, the question to be resolved is whether the immunity provided to government employees by the CGIA is somehow distinguishable from the immunity provided to employers

and co-employees under the Act. We conclude there is no such meaningful distinction. We agree with *Borjas*'s broad interpretation of the phrase "legally entitled to recover," because it is consistent with the underlying policies of both the Act and the UM/UIM statute, and, thus, we conclude that immunity under the Act, like immunity under the CGIA, does not bar an injured employee's recovery of UM/UIM benefits from his or her personal insurer.

¶ 60 As a threshold matter, we consider AFI's basic argument that its UM/UIM policy language is unambiguous and consistent with the UM/UIM statute, and that a plain reading of that language results in an insured such as Ashour falling outside of the policy's UM/UIM coverage because he is not "legally entitled to recover" from Peake, the tortfeasor. AFI, however, concedes that no Colorado case law is directly on point under the circumstances of this case and, accordingly, relies on out-of-state case law that purportedly represents the "majority view." We acknowledge this argument but are unpersuaded.

¶ 61 We give the words of an insurance contract their plain meanings, avoiding strained and technical interpretations. *Progressive Specialty Ins. Co. v. Hartford Underwriters Ins. Co.*, 148

P.3d 470, 474 (Colo. App. 2006). However, in the context of UM/UIM coverage, if a UM/UIM policy violates the statutory coverage requirements, courts will read those requirements into the policy. *McMichael*, 906 P.2d at 101. Similarly, Colorado courts have required UM/UIM coverage in instances where the insurance carrier's interpretation of its UM/UIM policy denying coverage violated the public policy behind the UM/UIM statute. *Borjas*, 33 P.3d at 1267, 1268; *see also Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344 (Colo. 1998) (stating that courts have a "heightened responsibility" to scrutinize insurance policies that unduly compromise the insured's interests; any provision of an insurance policy that violates public policy is unenforceable).

¶ 62 As AFI points out, and as we discuss in more detail below, some out-of-state cases have concluded that the phrase "legally entitled to recover" is unambiguous and means more than simply showing that the uninsured/underinsured motorist was "at fault." However, we choose to adopt the *Borjas* interpretation of that phrase because it is consistent with the policies underlying the UM/UIM statute, the purpose of which is to compensate the injured party "for injuries received at the hands of one from whom damages

cannot be recovered." *Borjas*, 33 P.3d at 1267 (quoting *Farmers Ins. Exch. v. McDermott*, 34 Colo. App. 305, 308-09, 527 P.2d 918, 920 (1974)).

¶ 63 Specifically, the division in *Borjas* held that "legally entitled to recover" under section 10-4-609(1)(a) "means that the insured must be able to establish that the fault of the uninsured motorist gave rise to damages and the extent of those damages." *Id.* at 1269. The division did not limit its interpretation of that language or tie its interpretation to situations where the injured party has no other means of recovery.

¶ 64 It necessarily followed from *Borjas*'s fault-based approach that "the public policy expressed in § 10-4-609 requires that [UM/UIM] insurance policies must provide coverage for the protection of a motorist injured by the negligence of a driver who is immune from liability." *Id.* And, of course, the immunity at issue in that case was that provided under the CGIA.

¶ 65 Thus, we must consider whether the policy considerations articulated in *Borjas* are equally applicable where, as here, the plaintiff was injured by the negligence of parties who are immune under the Act. We conclude that the policies underlying the Act's

exclusivity provisions and the UM/UIM statute do not conflict and that, therefore, Ashour is entitled to make a claim for UM/UIM benefits against AFI, his personal auto insurer.

¶ 66 The essential purpose of the Act is to protect employees who sustain injuries arising out of their employment. *Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982). The Act is intended to provide a reliable and speedy source of compensation, and consequently, it does not require proof of fault before the worker can recover benefits. *Id.*

¶ 67 "In order to effectuate the Act's basic goals of speedy and reliable compensation of injured workers, the General Assembly has enacted a formula which calculates awards to an injured worker based on loss of earning power at the time of injury." *Id.* For example, the temporary benefits Ashour was awarded were calculated as sixty-six and two-thirds percent of his average weekly wage while he was working at Nubilt. § 8-42-105(1), C.R.S. 2016. There are also caps and limits on the amount of disability benefits provided each year. § 8-42-107.5, C.R.S. 2016. Thus, the district court accurately stated in its order that the "General Assembly has made the decision to exchange a comprehensive, prompt, fault-free

and largely determinate compensation system for the vagaries of the common law's fault-based tort system, at the price of sometimes *undercompensating* injured parties." (Emphasis added.)

¶ 68 The UM/UIM statutory scheme implicates other compelling policy considerations. The UM/UIM statute was enacted in 1965 to ensure adequate compensation to victims injured in vehicular accidents. *See* Ch. 91, sec. 2, § 72-12-19, 1965 Colo. Sess. Laws 333-34. Since then, Colorado courts have consistently concluded that the prime concern of the UM/UIM statute is the "need to compensate the innocent driver for injuries received at the hands of one from whom damages cannot be recovered." *Borjas*, 33 P.3d at 1267 (quoting *McDermott*, 34 Colo. App. at 308-09, 527 P.2d at 920). This "legislative purpose is satisfied when an insurance policy provides coverage for injury caused by an uninsured [or underinsured] motorist to the same extent as for injury caused by an insured motorist." *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998).

¶ 69 Concisely stated, "the public policy of Colorado requires that insurance coverage be available to protect motorists from losses caused by other negligent drivers who cannot or will not pay for the

damages they have caused." *Borjas*, 33 P.3d at 1268; *see also* Ch. 91, sec. 1, 1965 Colo. Sess. Laws 333.

¶ 70 The division in *Borjas* explained that the strict interpretation of "legally entitled to recover" advocated by the insurance company was not consistent with the public policy of section 10-4-609 as outlined above.[5] 33 P.3d at 1269. The division further reasoned that the policies behind section 10-4-609 did not adversely affect the immunity provided under the CGIA because "[t]hose persons and entities who are immune from liability under the CGIA are unaffected by this holding." *Id.*

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[5] We assume that the General Assembly is cognizant of the division's 2001 decision in *Borjas* and that the division's interpretation of section 10-4-609(1)(a), C.R.S. 2016, in that case was approved by the legislature because the statute has been amended twice since that decision and subsection (1)(a) has remained unchanged. Ch. 413, secs. 1, 2, § 10-4-609(1)(c), (2), (4), (5), 2007 Colo. Sess. Laws. 1921-22; Ch. 196, sec. 1, § 10-4-609(6), (7), 2010 Colo. Sess. Laws. 845-46; *People v. Sandoval*, 2016 COA 57, ¶ 36 ("The General Assembly is presumed cognizant of relevant judicial precedent when it enacts legislation in a particular area. And, when a statute is amended, the judicial construction previously placed upon that statute is deemed approved by the General Assembly to the extent the provision remains unchanged." (quoting *U.S. Fid. & Guar., Inc. v. Kourlis*, 868 P.2d 1158, 1162-63 (Colo. App. 1994))); *see also Jordan v. Safeco Ins. Co. of Am., Inc.*, 2013 COA 47, ¶ 28.

¶ 71 Similar to the analysis in *Borjas*, the policies behind the Act and behind the UIM statute are not in conflict. To preclude Ashour from claiming benefits from his own insurance carrier under his UM/UIM policy would effectively deny him the full protection for injuries caused by underinsured negligent drivers contrary to the intent of the General Assembly. Moreover, allowing him to claim benefits from his own insurance carrier would not in any way affect the immunity provided to his employer and co-employee by the Act. Unlike the plaintiff in *Dickinson*, Ashour did not seek to recover additional damages from his immune employer or co-employee; instead, he sought only to enforce the terms of his insurance policy and recover benefits from his own insurer.

¶ 72 In addition, the policies behind the Act are focused on the protection of the injured worker (here, Ashour), not the protection of a third-party auto insurance company. Similarly, the UM/UIM statute is focused on protecting injured motorists, not the insurance companies who are statutorily required to offer the coverage. In our view, AFI should not be allowed to deny coverage to Ashour when the purpose of the UM/UIM statutory mandate is to protect those with coverage from the financial burdens imposed by

tortfeasors who are unable to pay for the full scope of damages they cause.

¶ 73 In sum, we conclude that Ashour's claim for UIM benefits under his policy with AFI is not barred by the exclusivity provisions of the Act, or by the "legally entitled to recover" language of the policy.

D. Out-of-State Authority

¶ 74 Both parties discuss non-Colorado case law in their briefs on appeal, and, in addition, both *Borjas* and *Dickinson* cite foreign cases in support of their respective holdings. Indeed, AFI even urges us to adopt what it perceives to be the "majority rule" that workers' compensation exclusivity provisions are a bar to recovery of UM/UIM benefits where the tortfeasor is a co-employee.[6] Thus, we address some of the out-of-state cases pertinent to our analysis.

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[6] Based on our review of non-Colorado authority, we are skeptical that the "majority rule" is that articulated by AFI. In that regard, we note that while courts in various jurisdictions are split on this issue, the opinions and reasoning in most cases are very nuanced, such that we are unable to discern a clear majority; the facts and analyses vary so widely that they do not lend themselves to a straight comparison. Thus, we disagree with *Continental Divide Insurance Co. v. Dickinson*, 179 P.3d 202, 204 (Colo. App. 2007), to the extent it stands for the proposition that denying UM/UIM

¶ 75 Courts in a number of states have found no bar to recovery of UM/UIM benefits, and in so holding, they have used the same fault-based definition of the phrase "legally entitled to recover" articulated in *Borjas*. For example, as in the case here, in *Barfield v. Barfield*, 742 P.2d 1107, 1109 (Okla. 1987), an employee was injured by a co-employee during the course and in the scope of their employment and then applied for UM/UIM benefits from his personal auto insurer. The insurer argued that UM/UIM coverage was not available to the injured employee because the alleged tortfeasor was immune from tort liability under Oklahoma's workers' compensation statute, and the insured was, therefore, not "legally entitled to recover." *Id.* at 1111. The court in *Barfield* relied on existing Oklahoma precedent to determine that the phrase "legally entitled to recover" meant that the insured "must be able to establish *fault* on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages." *Id.* at 1112 (quoting *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 685 (Okla. 1983)). The *Barfield* court explicitly stated that the phrase did not

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coverage to employees covered by workers' compensation who are injured by a co-employee is the "majority" view.

mean "that an insured must be able to proceed against an uninsured/underinsured in *tort* in order to collect uninsured motorist benefits." *Id.* The Oklahoma Supreme Court subsequently extended its decision in *Barfield* by reaffirming the fault-based definition of "legally entitled to recover" and determining that there was no distinction between an employee who sought to recover from his own policy or his employer's UM/UIM policy. *Torres v. Kan. City Fire & Marine Ins. Co.*, 849 P.2d 407, 411 (Okla. 1993).

¶ 76 Similarly, in *Southern Farm Bureau Casualty Insurance Co. v. Pettie*, 924 S.W.2d 828, 831 (Ark. Ct. App. 1996) (citing *Hettel v. Rye*, 475 S.W.2d 536, 537-38 (Ark. 1972)), the court noted that the phrase "legally entitled to recover" only requires "a showing of fault on the part of the uninsured motorist." Accordingly, the court held that the exclusive remedy provision of the Arkansas workers' compensation statutes did not bar the injured worker from being "legally entitled to recover" UM/UIM benefits. *Id.* at 832; *see also Jenkins v. City of Elkins*, 738 S.E.2d 1, 12-14 (W. Va. 2012) (identifying *Borjas* as a leading case that illustrated the majority interpretation of the phrase "legally entitled to recover," and holding such phrase to mean that an insured is entitled to UM/UIM

coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages).

¶ 77 We are persuaded by these cases because they are consistent with the reasoning and holding in *Borjas* and with the public policies articulated in Colorado's UM/UIM statutory framework.

¶ 78 In contrast, those courts in other states that have found the workers' compensation exclusivity provisions to be a bar to UM/UIM coverage have relied on a much stricter definition of "legally entitled to recover." For example, in *Wachtler v. State Farm Mutual Automobile Insurance Co.*, 835 So. 2d 23, 26 (Miss. 2003), the Mississippi Supreme Court found that the Mississippi workers' compensation exclusivity provision barred an injured employee from recovering UM benefits under the employee's own insurance policy based on its determination in a prior case that the phrase "legally entitled to recover" meant "those instances where the insured would be entitled at the time of the injury *to recover through legal action*." *Id.* (emphasis added). The court distinguished *Barfield*, in part, on the grounds that its holding was contrary to already existing Mississippi precedent interpreting the phrase "legally entitled to recover." *Id.* at 27; *see also Allstate Ins. Co. v.*

Boynton, 486 So. 2d 552, 555-56 (Fla. 1986) (relying on a definition of "legally entitled to recover" requiring that the case against the tortfeasor be able to be "reduced to judgment"); *State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318, 322 (Ky. 2010) (distinguishing prior cases that determined that "legally entitled to recover" required proof of fault and damages and deciding that the phrase was not ambiguous under the circumstances of Slusher's case).

¶ 79 We are simply not persuaded by the analysis in cases such as *Wachtler*[7] because they are not consistent with the policies underlying Colorado's UM/UIM statute or the division's analysis in *Borjas*.

V. Conclusion

¶ 80 The district court's judgment is reversed. The case is remanded with directions to enter summary judgment in favor of Ashour, declaring, as a matter of law, that AFI must provide coverage of UM/UIM benefits to Ashour upon his proof that Peake

[7] Indeed, we are much more persuaded by the dissenting opinion in *Wachtler v. State Farm Mutual Automobile Insurance Co.*, 835 So. 2d 23, 28-29 (Miss. 2003) (Diaz, J., dissenting), based on its emphasis of the importance of the public policies and purposes of UM/UIM coverage.

was at fault for causing his injuries and of the extent of his damages in excess of the coverage offered him under the Act.

JUDGE KAPELKE and JUDGE VOGT concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-957-118-02

IN THE MATTER OF THE CLAIM OF:

ORLANDO A. TRUJILLO,

Claimant,

v.

FINAL ORDER

ELWOOD STAFFING,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurer,
Respondents.

The *pro se* claimant seeks review of an order of Administrative Law Judge Spencer (ALJ) dated January 11, 2017, that determined he did not overcome the opinion of the Division-sponsored independent medical examination (DIME) physician on maximum medical improvement (MMI). The claimant also seeks review of the ALJ's order awarding disfigurement benefits. We set aside the ALJ's order in part and affirm in part.

This matter went to hearing on whether the claimant overcame the DIME physician's determination that he reached MMI on October 2, 2015, and disfigurement benefits. After the hearing, the ALJ found that the claimant sustained an admitted injury to his right wrist on June 18, 2014. He underwent conservative treatment and was placed at MMI with no impairment by Dr. Merchant on July 24, 2014.

The respondents filed a Final Admission of Liability (FAL) based on Dr. Merchant's MMI report. The respondents' FAL stated that the claimant's claim was medical only, and was not a claim for lost time exceeding three working days. The claimant objected and requested a DIME.

Dr. Scheper was selected to perform the DIME. On December 18, 2014, Dr. Scheper evaluated the claimant and opined that he was not at MMI. Dr. Scheper recommended a MRI arthrogram of the claimant's wrist and continuation of occupational

therapy. Dr. Scheper noted that if the claimant failed to improve, a referral to an orthopedic wrist/hand specialist would be appropriate.

The respondents subsequently filed a General Admission of Liability, reopening the claim for further treatment. The claimant underwent the MRI arthrogram, which revealed a tear of his triangular fibrocartilage complex (TFCC). He was referred to Dr. Larsen.

Dr. Larsen agreed that the claimant had a TFCC injury. He also noted manifestations of ulnar neuropathy. Dr. Larsen recommended electrodiagnostic testing to evaluate potential neuropathy. He further opined that immobilization was unlikely to resolve the claimant's TFCC tear, and he discussed other options, including a steroid injection and arthroscopic debridement. He believed the claimant's TFCC tear was not particularly unstable or terribly symptomatic. Consequently, he was uncertain whether a repair would be necessary.

The claimant underwent the nerve conduction studies on June 3, 2015. The study revealed right median neuropathy at the wrist with focal demyelination and sensory conduction delay without motor involvement. The findings were consistent with mild right carpal tunnel. The findings related to the ulnar nerve were normal.

Dr. Larsen administered a steroid injection. However, the claimant reported that the injection did not provide him any benefit. Although the claimant was still having ulnar-sided wrist pain, Dr. Larsen stated that the claimant was working fairly well with it and coping. Dr. Larsen further noted that the claimant seemed to feel he could work through it as long as it did not worsen. While Dr. Larsen felt the claimant's symptoms were "definitely real," he also felt that they were not so severe that he required surgery. Dr. Larsen released the claimant from treatment with the caveat that he could return if his condition worsened.

The claimant's authorized treating physician, Dr. Olson, subsequently placed the claimant at MMI on October 2, 2015. Dr. Olson noted that Dr. Larsen did not recommend surgery because the claimant had no significant functional-locking or mechanical symptoms. He also noted that the claimant did not want to have surgery. Dr. Olson recommended maintenance care, including possible wrist surgery in the future.

On January 6, 2016, the claimant returned to Dr. Scheper for a follow-up DIME. Dr. Scheper agreed the claimant had reached MMI on October 2, 2015, with no impairment. He agreed that maintenance treatment was necessary and opined that

surgical treatment might be reasonable and necessary depending on the progression of the claimant's symptoms.

The respondents filed a FAL in February 2016 consistent with Dr. Scheper's findings. In their FAL, the respondents stated the claimant's claim was a medical only claim. The respondents admitted for reasonable and necessary medical benefits after MMI.

The claimant requested a hearing regarding the DIME physician's finding of MMI with no impairment, and the claimant also requested medical benefits and disfigurement benefits.

The claimant subsequently underwent an independent medical examination with Dr. Rook. The claimant reported ongoing pain in his right wrist, and that his wrist frequently locked and he had to self-mobilize to get it out of the locked position. Dr. Rook noted swelling in the right hand and wrist, reduced grip strength, and an audible popping within the right wrist. Dr. Rook opined that the claimant was not at MMI and would likely require surgery on the right wrist.

The claimant underwent a follow-up visit with Dr. Larsen on June 20, 2016. The claimant reported his symptoms had worsened and that he could not cope with his condition. Dr. Larsen opined that the claimant seemed to be worsening and referred him for repeat electrodiagnostic testing to evaluate neuropathic symptoms.

The EMG testing showed worsening of the right median nerve carpal tunnel syndrome. The ulnar nerve was normal.

In his report dated November 12, 2016, Dr. Larsen opined the claimant was likely to require surgery. But, he further stated that the specific surgery the claimant needed for his ulnar wrist was "a little bit in question." Dr. Larsen indicated that he needed to evaluate the claimant again to make a final determination regarding the specific surgical procedures recommended. Dr. Larsen also opined that the claimant was not at MMI, because surgery was being planned to try to improve his condition.

The ALJ ultimately determined that the claimant failed to overcome the DIME physician's opinion that he was at MMI as of October 2, 2015. The ALJ found that the DIME physician's determination of MMI was consistent with Dr. Larsen's contemporaneous reports and opinions. The ALJ further found that while Dr. Larsen now recommends surgery, that recommendation was based on a change of condition

since MMI. The ALJ concluded that a change of condition after MMI did not show the original MMI date was incorrect. The ALJ also found that as of the date of the hearing, Dr. Larsen had submitted no specific request for authorization of surgery. The ALJ therefore essentially determined that since the claimant was at MMI as of October 2, 2015, his claim was closed and he was entitled to an award of post-MMI medical benefits. He noted that his order regarding post-MMI medical benefits was consistent with the respondents' FAL. The ALJ also awarded the claimant $500 for disfigurement benefits.

The claimant has petitioned to review the ALJ's order. The claimant's petition to review contains only general allegations of error derived from §8-43-301(8), C.R.S., and the claimant has not filed a brief in support of the petition to review. Consequently, the effectiveness of our review is limited. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986).

Here, based on the Colorado Supreme Court's holding in *Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), we necessarily set aside the ALJ's order which upholds the DIME's finding that the claimant is at MMI and thereby closes the claimant's claim. In *Loofbourrow*, the Court held that a determination of MMI has no statutory significance with injuries that do not result in the loss of no more than three days or shifts of work time or permanent disability, as is the case in this action:

> 'Maximum medical improvement,' as a statutory term of art, therefore has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place. *See* § 8-42-107(8)(b)(I). While the concept is defined in terms of the ineffectiveness of further medical treatment and may therefore be useful in assessing the extent to which an employer is obligated to continue furnishing medical services to an injured employee, as a statutory term of art with consequences for contesting a final admission of liability, reopening a closed claim, or, as in this case, filing a new claim for an injury that has become compensable for the first time, it can logically have applicability only for injuries for which disability indemnity is payable. Whether or not an employer continues to furnish medical treatment for a worker whose injury can be accommodated without the loss of work time in excess of three days—and whether or not the division finds it useful for billing and recording purposes to 'close' cases based on a determination that no further treatment is likely to improve the employee's condition, without regard to whether the injury was ever compensable, *see, e.g.*, 7 Colo. Code Regs.

> 1101-3:16, Rule 16-7(E)—the statutory consequences of a finding of "maximum medical improvement" can apply only to injuries as to which disability indemnity is payable.

Id. at 331.

Consequently, the claimant's claim in this action is not closed. The respondents' FAL based on the DIME physician's finding of MMI, and which provided that no disability indemnity was payable, is premature, and does not preclude the claimant from requesting further medical benefits. The claimant is required to establish those medical benefits are reasonable, necessary, and related to the work injury. However, he need not prove his condition has changed or that there was a mistake which would justify a reopening pursuant to §8-43-303, C.R.S. Those issues are not closed and the claimant need not establish grounds for reopening. *Id.; see also Kazazian v. Vail Resorts*, W.C. No. 4-915-969-03 (April 24, 2017); *Thibault v. Ronnie's Automotive* Services, W.C. No. 4-970-099-01 (Aug. 2, 2016); *Barrera v. ABM Industries*, W.C. Nos. 4-849-952-01 & 4-865-048 (June 10, 20016).

Additionally, to the extent the claimant appeals the ALJ's disfigurement award, we are not persuaded there is any error. The ALJ found, with record support, the claimant had a permanent mild swelling about his right wrist and hand as a result of his compensable injury. Tr. at 41-43. Section 8-42-108(1), C.R.S. As such, we have no basis to disturb the ALJ's order in this regard.

IT IS THEREFORE ORDERED that the ALJ's order dated January 11, 2017, is set aside to the extent it upholds the respondents' DIME that the claimant is at MMI as of October 2, 2015, and thereby closes the claimant's claim;

IT IS FURTHER ORDERED that the ALJ's order regarding disfigurement benefits is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

6/22/17 by TT .

ORLANDO TRUJILLO, 33550 HWY. 96 EAST #25, PUEBLO, CO, 81001 (Claimant)
RITSEMA & LYON, P.C., Attn: KELLY F. KRUGEL, ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-922-618-04

IN THE MATTER OF THE CLAIM OF

BRIAN NANEZ,

Claimant,

v.

FINAL ORDER

MECHANICAL & PIPING INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated December 27, 2016, that denied the claimant's request to require the respondents to pay the charges incurred for a judicially appointed conservator and guardian and to increase his average weekly wage. We affirm the decision of the ALJ.

The claimant was injured on June 25, 2013, while working for the employer as a plumber. The claimant fell from the second floor onto a concrete floor below. He injured both shoulders and sustained a significant closed head injury. The claimant was placed at maximum medical improvement (MMI) on August 4, 2015. Both his treating physician, Dr. Macaulay, and the Division sponsored Independent Medical Examiner (DIME), Dr. Hattem, assigned the claimant permanent impairment ratings for his shoulders and a 40% rating for a traumatic brain injury. The respondents admitted liability for permanent total disability benefits.

Dr. Macaulay described the claimant's disability pertinent to his brain injury as featuring good long-term memory but impaired short-term memory. The disability is characterized as a difficulty with staying on task and becoming easily distracted. The claimant is said to travel to a store and forget why he is there. The claimant can become obsessed with an insignificant task or topic. In the past, he has neglected to take prescribed medication and has failed, at some points, to obtain a refill of a prescription.

The claimant is prohibited from driving. Dr. Macaulay noted the claimant has difficulty with managing his money or budgeting it over a several week period.

At the instance of the claimant's father and his doctors a petition was filed with the Arapahoe County District Court to appoint a conservator for the claimant pursuant to § 15-14-401 C.R.S. Marcie McMinimee, an attorney with the law firm serving as the Arapahoe County Public Administrator, was appointed by the Court to serve as the claimant's conservator in May, 2016. Several months later, Ms. McMinimee submitted a petition to the Court pursuant to § 15-14-204 to appoint a guardian for the claimant. On November 7, 2016, Karen Buchanan, a registered nurse, was designated to be the claimant's guardian. Ms. McMinimee charges $265 per hour for her services and Ms. Buchanan charges $125. The fees incurred are typically charged as expenses to the claimant's estate.

The claimant submitted an application for a hearing in June 2016, requesting that the respondents be ordered to pay the costs of the conservator and the guardian as a medical benefit. The claimant also sought to have the ALJ increase the claimant's average weekly wage (AWW) calculation to reflect the wages he would have earned if he had obtained a master plumber's license in the future. Following a hearing on October 13, 2016, the ALJ determined he did not have jurisdiction through the Workers' Compensation statute to order the respondents liable for the costs of a court appointed conservator or guardian. The ALJ also resolved that the services provided by the conservator and guardian did not qualify as medical benefits for which the respondents would be liable. He deemed they were more legal in nature. The ALJ noted the tasks of a guardian, which most closely resemble a medical function, could be provided by a nurse case manager. Finally, the ALJ denied the request to recompute the AWW. He concluded the information provided left the issue too speculative to justify an increase above the rate calculated through the claimant's earnings at the time of injury.

I.

The ALJ noted the only benefit requested by the claimant was to have the respondents pay for the conservator and guardian previously ordered by the District Court. The Workers' Compensation statute, § 8-42-101(1)(a) provides an employer is liable for the cost of "medical, surgical, dental, nursing and hospital treatment … as may reasonably be needed …to cure and relieve the employee of the effects of the injury." The claimant argues he is required to use a conservator and a guardian due to the effects of his injury. That injury is said to affect the claimant's ability to engage in activities of daily living. The appointments are to serve as a "peripheral brain" for the claimant. It is

asserted the claimant cannot otherwise participate in a treatment plan, take his medications, successfully report his symptoms to his doctors, direct his attorneys, budget his money or take care of his property. He argues these appointments are fiduciaries while a nurse case manager is not. The claimant contends the services provided are medical and assist in relieving him of the effects of his injury.

The Court of Appeals noted in *Bogue v. ADI Corp*., 931 P.2d 477 (Colo. App. 1996), that an expense allowing a claimant to be more independent, active and more productive in his lifestyle "are salutary goals, [but] they are beyond the intent of § 8-42-101(1)(a)." Similarly, tasks which resemble household chores that the claimant cannot perform due to his injuries have been determined to not fall into the category of compensable medical benefits. In *Kraemer & Sons v. Downey*, 852 P.2d 1286 (Colo. App. 1992), the Court approved some tasks performed by the claimant's wife as a medical benefit, but not all. "… the employer, by statute, has the affirmative duty of furnishing this kind of nursing services. … Of course, *compensation is not awarded to a spouse if the only services being rendered to the claimant are ordinary household service*s. 852 P.2d at 1288. (italics provided). The physician in *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995), recommended assistance for daily living chores when the claimant's low back injury limited her ability to clean her house. The Court determined house cleaning services in those circumstances would not qualify as a compensable medical expense:

> Further, because the housekeeping services do not enable her to obtain medical or nursing treatment and are not relatively minor compared to the very limited medical or nursing treatment needed by the claimant, those housekeeping services are not incident to medical or nursing treatment and, thus, are not compensable. 809 P.2d at 365.

In contrast to the need to characterize the services in question as 'medical', 'nursing' or enabling the access to medical care, the appointment of a conservator or a guardian by the District Court is to serve a largely different purpose. Pursuant to § 15-14-401(1)(b) the Court is to inquire whether the incapacitated person is "unable to manage property and business affairs …" and that "the individual has property that will be wasted or dissipated unless management is provided …". When approved, a conservator is directed by § 15-14-418 (3) to submit for approval by the court a "financial plan for protecting, managing, expending, and distributing the income and assets of the protected person's estate." While the conservator is to pay bills, she need not pay the claimant's medical bills because the respondents are currently handling those payments

themselves. As observed by the ALJ, these conservator functions are primarily financial and are not accurately described as medical or nursing services. Accordingly, they are not compensable expenses.

The duties ascribed to a Guardian also fail to fall easily into the category of medical benefits. Section 15-14-314 provides a guardian is to take care of the incapacitated person's personal effects and to bring protective proceedings to protect his property; spend the person's money for his support, care, education and welfare; and to notify the court of the person's improvement or death. Section 12-14-315 states the guardian is to apply for and to receive money from any insurance, contract or trust; on behalf of the person; to establish a place of dwelling for the person; take action through a proceeding to compel another to support the person, or to pay money for the benefits of the person; and to consent to care, treatment, or service for the person. Another section allows the guardian to initiate divorce proceedings. Concerning medical care, § 15-14-310(5) prohibits a guardian from being a "direct service provider". The guardian in this matter was not appointed until after the October 13, 2016, hearing. The details of her particular services are therefore hypothetical. The statute prohibits the guardian from providing a direct service as opposed to a legal service. These activities are largely outside of a reasonable definition of medical care. As such, they would not be compensable.

The ALJ surmised that while § 8-42-207(l) provides for an ALJ to appoint a guardian ad litem and assess their fees to a party in the case of a minor dependent's claim, the workers' compensation statute allows such authority in no other context. Indeed, a comparison of the workers' compensation statute with that for incapacitated persons reveals a lack of congruity. The appointments for the incapacitated person are directed solely by the District Court. Conservators and guardians are to report annually in writing to the court. They are to describe the status of their ward, itemize the contents of his estate and specify each expenditure made from the estate or on behalf of the ward. The compensation charged the estate by the guardian is subject to the approval of the District Court, § 8-14-316, as is that of the conservator § 15-14-418. It is to be a reasonable fee. However, controversies arising under the workers' compensation statute are delegated to the Director or to an ALJ, § 8-42-207(1).

The fees that may be charged by any medical provider are subject to the medical fee schedule developed by the Director, § 8-42-101(3)(a). It is unlawful for a medical provider to charge for any services in excess of the fee schedule (unless approved by the Director). The claimant is, in effect, asking the ALJ to delegate his statutory responsibility to determine the reasonableness of medical care to the District Court. The

claimant is also inviting a provider to commit an unlawful act by charging fees in excess of the medical fee schedule despite their approval by the District Court. That circumstance serves to make the Director the arbiter of reasonable fees for conservators and guardians through the medical fee schedule in contravention of the delegation of that authority to the District Court.

The Medical Treatment Guidelines, W.C. Rule of Procedure 17, Exhibit 10 (Traumatic Brain Injury), 7 Code Colo. Reg. 1101-3, do provide for a variety of medical services following MMI in the case of brain injury. Among these are attendant care, life skills training and individual support. It is suggested they be monitored by an experienced certified case manager. (Part M). The description of a case manager's duties do coincide in many respects with those of a court appointed guardian. This would particularly be the case in approving medical treatment for the claimant. Subject to a reconciliation between the medical fee schedule and the fee approved by the District Court, the claimant could seek approval for certain, specified, services of the guardian to be paid by the respondents or authorized by an ALJ, and thereby obtain reimbursement to the claimant's estate. However, in this matter the claimant is asking the ALJ to authorize any and all services performed by both a conservator and a guardian based solely upon appointment by a District Court. The ALJ was correct in concluding such a request was beyond his authority.

II.

The claimant's AWW of $555.19 was derived by the respondents from an examination of the weekly wages paid the claimant in the period prior to his June 2013, injury. The claimant was working as an assistant plumber. The claimant contends that he had plans to secure his plumbing license, become a journeyman plumber and then eventually pass the tests for a master plumber. He asserts that due to his injury he was unable to achieve these vocational goals. Citing *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001), as authority, the claimant argues his AWW should be increased to reflect the AWW he would have earned as a master plumber.

The claimant submitted the report and testimony of a vocational expert, Katie Montoya, to calculate the potential future earnings of the claimant. Ms. Montoya stated that a high of $34.23 per hour could be expected by a master plumber. Her opinion was that a reasonable expectation for the claimant was to eventually reach $24.43 per hour. That would lead to an AWW of $977.20. The claimant and his father also both testified to the claimant's plan to become certified as a master plumber. The claimant noted he began working for the employer because they would pay for him to attend a trade school

necessary to obtain his plumbing license. In the course of this testimony it was noted the claimant had served twenty years in jail following a murder conviction, was an alcoholic prior to his work injury and had a DUI conviction within the past several years. He had yet to actually enroll in the trade school.

The ALJ found the argument that the claimant was likely to earn considerably more in the future than he had at the time of his injury included too much speculation to allow the ALJ to raise the AWW. The ALJ observed that in *Pizza Hut*, the claimant was injured through his part time job delivering pizza. However, the claimant was studying to be a nurse. The claimant had actually finished his nursing degree when the court approved an increase in his AWW to reflect his earning potential as a full time nurse. That increase affected only his permanent partial impairment benefits since he had attained MMI. However, the ALJ pointed to the fact the claimant had not proceeded very far down the path to securing his master plumber's certification. The ALJ therefore found the claimant's argument premised more on conjecture than on probability

The claimant contends that the use of the claimant's earnings at the time of his injury results in an injustice and he is deprived of fair compensation. We are not persuaded to interfere with the ALJ's exercise of his discretion in determining the claimant's AWW.

Section 8-42-102(2)(d), C.R.S, sets forth the method for calculating the AWW. The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The ALJ is afforded discretionary authority in calculating the wage. We may not interfere with the ALJ's calculation of the AWW unless an abuse of discretion is shown. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). An ALJ only abuses his discretion where the order "exceeds the bounds of reason," such as where it is unsupported by the record or is contrary to law. *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985).

In *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777 (Colo. 2010), the court reaffirmed that under the Workers' Compensation Act, in determining an employee's AWW the ALJ may choose from two different methods set forth in section 8-42-102. The court noted the first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Section 8-42-102(2). The court then explained the second method for calculating an employee's AWW, referred to as the "discretionary exception," applies

when the default provision "will not fairly compute the [employee's AWW]." Section 8-42-102(3). In such a circumstance, the ALJ has discretion to "compute the [AWW] of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." *Id*.

Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993), specifically notes the discretionary exception allows the ALJ to compute the AWW in such a manner that would fairly determine the claimant's AWW. The ALJ here found that the claimant's AWW should be properly based upon his earnings at the time of his injury. We are not persuaded that the ALJ was compelled to base the claimant's AWW upon the claimant's possibly increased wages resulting from achieving a higher standing in the plumbing trade and higher hourly rates after the injury.

It is unlikely that use of the "default provision," created by the General Assembly under § 8-42-102(2) that provides for use of a claimant's wages at the time of injury in calculating AWW, can ever be said to be such an abuse of discretion that it exceeds the bounds of reason or is contrary to the law. In any event, here we perceive no reversible error in the exercise of the ALJ's discretion. The ALJ correctly cited the law and we read nothing in the order as suggested by the claimant that the ALJ mistakenly read *Pizza Hut* as eliminating his discretionary ability in determining AWW.

IT IS THEREFORE ORDERED that the ALJ's order issued December 27, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

6/16/17 by TT .

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
VOLANT LAW, LLC, Attn: J. BRYAN GWINN, ESQ, 333 WEST HAMPDEN AVE., SUITE 1000, ENGLEWOOD, CO, 80110 (For Claimant)
RUEGSEGGER SIMON SMITH & STERN, LLC, Attn: DAVID SMITH, ESQ, 1401 17TH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)
KAPLAN MORRELL, LLC, Attn: MICHAEL H. KAPLAN, ESQ, 6801 W. 20TH STREET, SUITE 201, GREELEY, CO, 80634 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 3-989-875-09

IN THE MATTER OF THE CLAIM OF:

ROSA SCHWARTZ,

Claimant,

v.

FINAL ORDER

DILLION COMPANIES d/b/a KING SOOPERS,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Edie (ALJ) dated February 7, 2017, that denied the respondent's liability to pay for household chores performed by the claimant's son. We affirm the decision of the ALJ.

The claimant was injured at work for the respondent on July 24, 1990. Between that date and 1993, the claimant underwent treatment, which included surgeries to her left shoulder, her cervical spine, her lumbar spine, and her left knee. In 2005 and 2010, she underwent, respectively, a total left knee replacement and a left shoulder replacement. In 1997, the claimant's physician, Dr. Hall, recommended the claimant be provided with eight hours per week of homecare services, which included grocery shopping, cooking and assistance entering and exiting the claimant's hot tub. In 1999, ALJ Stuber ordered the respondents to pay the claimant's granddaughter to provide the homecare services. The claimant later moved to Arizona. Her son, Jim Schwartz, provided the homecare services at that point.

Mr. Schwartz described his assistance to his mother as including the monthly cleaning of her 3000 square foot, three bedroom and three-bath house. He testified he also does grocery shopping, yard work, laundry and cooking for the claimant. Mr. Schwartz noted that he usually drives his mother to her doctor's appointments. The claimant testified she suffers increased pain when she is required to perform many of these activities herself. The claimant described how she did not require assistance with

personal hygiene or handling her medications. The claimant acknowledged she could drive and went to many of her doctor's appointments unaccompanied. She stated her yard does not feature any grass.

The respondents challenged their liability for the payment to Mr. Schwartz for his eight hours per week of activities on behalf of his mother. The respondents asserted chores he performed could not be characterized as a medical service required by the workers' compensation statute.

The ALJ made findings and observed the claimant had a recommendation from her current treating physician, Dr. Feldman, that she is in need of assistance in performing the household chores assigned to her son. The ALJ found the claimant had an appointment with Dr. Feldman once every three months. The ALJ surmised the claimant's physical condition was worsening although it was not clear to him whether this was a function of normal aging or an acceleration caused by work injuries. The ALJ also found the claimant can shower by herself, use the bathroom by herself, feed herself, manage her medications, can drive to doctor's appointments and can water the plants in her yard. The ALJ determined the Court of Appeals in *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995) described the standard to be applied when reviewing a request that non-professional household assistance be paid for by respondents. The *Tarshis* decision held that in order to render housekeeping services compensable, the services must enable the claimant to obtain medical care or be relatively minor in comparison to the medical care and treatment. The ALJ deduced that the activities performed by Mr. Schwartz were not nursing services but, rather, were household chores. The ALJ deemed the chores did not enable the claimant to receive medical care. While Mr. Schwartz had driven the claimant to medical appointments three times during the previous six months, the claimant acknowledged she could drive herself to the appointments. The ALJ also observed that the trips to the physician represented a small portion of the $6,240 Mr. Schwartz was paid annually by the respondent. The ALJ adjudged these chores could not then, be seen as incidental to the assistance in transporting the claimant to receive medical care. The ALJ resolved the services provided by Mr. Schwartz were not reasonable and necessary services sufficiently related to the claimant's medical care to render them compensable.

On appeal, the claimant contends that requiring the claimant to perform household chores herself will serve to increase her pain. She points out the prescriptions provided her over the past 20 years for assistance with these activities are premised on the relationship that performing those chores would lead to increases in her pain. The claimant notes then, that this assistance will serve to cure and relieve the effects of the

work injury. The claimant acknowledges the standard set forth in *Tarshis* that household chores are compensable only if incidental to obtaining medical or nursing treatment. In that regard, she points to an unpublished Court of Appeals decision, *Colorado Springs School Dist. #11 v. Industrial Claim Appeals Office*, 12CA2465 (Colo. App. October 3, 2013)(not selected for publication), as approving an order for assistance with household chores while applying that standard. The assistance supplied by Mr. Schwartz is argued to be incidental insofar as it represents only a small portion of the cost of all of the medical treatment provided the claimant. The claimant asserts the ALJ was in error in defining 'incidental' as the comparison of only the cost of driving the claimant to medical appointments versus the cost of the balance of the household tasks performed. Because the delegation of these chores to her son allows for the relief of the claimant's symptoms and the effects of her injuries, the claimant asserts the efforts of Mr. Schwartz should be found compensable.

The Workers' Compensation statute, § 8-42-101 (1) (a) provides an employer is liable for the cost of "medical, surgical, dental, nursing and hospital treatment … as may reasonably be needed … to cure and relieve the employee of the effects of the injury." This matter features the issue of whether or not services provided by a family member, or an individual without specific medical training, may be compensated pursuant to this section for assistance in regard to normal household duties. The reported cases dealing with the issue acknowledge household chores are not considered 'medical' treatment but may be compensated as such if they are 'incidental' to obtaining medical or nursing treatment.

Those reported cases, which include an award for in-home assistance feature claimants with severe disabilities and the need for considerable nursing types of care. In *Atencio v. Quality Care, Inc*., 791 P.2d 7, (Colo. App. 1990), the claimant injured both of her arms in a compensable claim. She was diagnosed with left carpal tunnel syndrome, a ganglion cyst, a brachial plexsis injury, reflex sympathetic dystrophy, wrist sprain, fracture of the radius, thoracic outlet syndrome, biceps tendonitis, temporomandibular joint dysfunction and severe tendon and nerve lacerations to four fingers on her right hand. The claimant was unable to manage almost any of the activities of daily living without assistance. The claimant required an attendant to assist with the claimant's bathing, dressing, home health care, cooking, housekeeping and sanitary functions. The Court reversed the Panel's denial of authorization for housekeeping and attendant care services, ruling those activities were incidental to obtaining medical treatment.

Similarly, in *Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992), the claimant was paralyzed below the chest and suffered cognitive deficits from an

industrial accident. During the afternoon and evenings, the claimant's wife assisted him with eating, bathing, preparing him for bed and showering. The claimant in *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995), underwent work related back surgery. His wife assisted him over a several month period with entry and exiting from bed, assistance in walking, exercising, and hygiene. Because these items were sufficiently akin to nursing services, they were ruled compensable.

In contrast, requests for in-home assistance were disfavored when physical disability was less severe and little nursing activity was required. In *Valdez v. Gas Stop*, 837 P.2d 544 (Colo. App. 1993), the claimant sustained a work injury that made it difficult to mop the floor, clean the bathtub or move furniture. However, the claimant was working. The claimant's physician recommended housekeeping assistance for two hours a day, three times per week. The Court denied the respondents' liability for the housekeeping costs. The decision distinguished *Atencio* on the basis that the claimant in that case was much more severely disabled. The Court noted that in *Valdez* it was necessary to demonstrate "that such services are incident to any medically necessary attendant care services and are central to the claimant's physical health or personal care." In *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995), the claimant suffered a back injury which limited her ability to cook, grocery shop or bathe. While her boyfriend assisted her with those activities, she requested the respondents pay for physician prescribed housecleaning services. The Court denied compensability for those services noting they were not related to performing or securing medical treatment. The decision concluded:

> … if housekeeping services do not enable a claimant to obtain medical or nursing treatment or are not relatively minor in comparison to medical care and treatment, then other divisions of this court have held that such services are not compensable. *Id.* at 364.

The result is that the Court of Appeals puts weight on the severity of the claimant's injury and the extent that injury limits the scope of the claimant's ability to undertake the activities of daily living. When those abilities are more substantially constrained, then housekeeping chores come to represent a less significant portion of the claimant's medically necessary assistance. It is then, more likely they will be characterized as only 'incidental' to medically necessary attendant care or nursing services.

This has been the pattern followed in our more recent decisions reviewed by the Court of Appeals pertinent to requests for the provision of housekeeping tasks. In *Cross v. Mircroglide*, W.C. No. 4-355-764 (September 2, 2003), *aff'd, Cross v. Industrial Claim Appeals Office*, (Colo. App. No. 03CA1807, October 7, 2004) (not selected for publication) the claimant underwent surgery on her cervical spine. For several months thereafter, the claimant's husband assisted by performing housekeeping chores including vacuuming, laundry, changing bedding, shopping, cooking, cleaning bathrooms, watering plants and semi-annually cleaning of windows and curtains. We noted a service would be 'medically necessary' if it relieved the injuries' effects and was directly associated with the claimant's physical needs, and that it would be 'incidental' to obtaining such treatment if it enabled the attainment of treatment or was a 'minor concomitant to medical treatment. The services requested in *Cross* were found by the ALJ to be neither and we affirmed that decision. In *Schramek v. Chico's FAS*, W.C. No. 4-601-867 (June 14, 2011), *aff'd Schramek, v. Industrial Claim Appeals Office*, (Colo. App. No. 11CA1385, April 12, 2012)(not selected for publication), the claimant's physician prescribed assistance for cleaning the bathroom and kitchen, vacuuming and mopping on the basis that performing those activities would exacerbate the claimant's injuries. The compensability of this request was denied by the ALJ for the reason the services were neither medical treatment nor incidental to the expense of providing medical, nursing or attendant care. Conversely, in *Hobirk v. Colorado Springs School Dist. #11*, W.C. No. 4-835-556-01 (November 15, 2012), *aff'd, Colorado Springs School Dist. #11 v. Industrial Claim Appeals Office*, 12CA2465 (Colo. App. October 3, 2013)(not selected for publication), the claimant experienced severe limitations in his ability to function. The claimant fell from a ladder and sustained spinal fractures at five levels of his thoracic spine. The claimant required the use of a wheel chair and assistance in dressing, bathing and cooking. The respondents disputed the compensability of assistance for grocery shopping and house cleaning. The ALJ found the assistance for dressing, bathing and cooking was associated with the claimant's physical needs and the additional tasks of grocery shopping and house cleaning were a minor portion of this group of attendant care services. The ALJ's decision rendering the services compensable was affirmed.

Applying these precedents in this matter, we conclude the ALJ has committed no error. As noted, the claimant testified she could dress, bathe and feed herself. She can, and does, drive to medical appointments. She could handle her medications. The ALJ credited the testimony of Mr. Schwartz as to the types of tasks he performed on behalf of the claimant. The ALJ concluded none of them represented nursing assistance. As such, the ALJ examined the activities to determine their incidental relation to medical or nursing services. This required him to find either that Mr. Schwartz' assistance was 'incidental' insofar as it allowed the claimant to access medical care, or that his help not

related to such access was only a small portion of his total assistance. The ALJ observed the claimant was paid $15 per hour for eight hours of work per week. This totaled $6,240 annually. The ALJ surmised that four trips to a doctor's appointment every year rendered the remainder of Mr. Schwartz's assistance much more than incidental to the access to medical or nursing care. Household chores, in fact, represented the lion's share of the services for which he was being paid. The measurement of 'incidental' might also be made through a comparison of the cost of household chores to the cost of all other medical treatment. However, at this juncture the claimant only sees her doctor every three months and takes pain medication. The ALJ could reasonably conclude the housekeeping chores make up a large, and not incidental, share of the treatment provided to the claimant.

The argument that the claimant's pain level would increase should she attempt to perform the household chores herself does not help the claimant. In *Tarshis v. Country Squire Kennels*, W.C. No. 3-967-901 (July 15, 1994), we held that housekeeping services which allowed the claimant to avoid activity that would aggravate her pain symptoms could be denominated 'medical' for that reason. However, the Court of Appeals in *Country Squire Kennels v. Tarshis*, *supra*, reversed that conclusion. This is because the statute limits the employer's liability to medical or nursing costs. As the Court noted in *Kraemer*, *Suetrack* and *Tarshis*, the performance of household chores does not qualify as medical treatment. It must be incident to medical treatment to be compensable.

Accordingly, we have no compelling reason to disturb the decision of the ALJ and affirm that order.

IT IS THEREFORE ORDERED that the ALJ's order issued February 7, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

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Denver, CO 80203

CERTIFICATE OF MAILING

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6/5/17 by TT .

TURNER, ROEPKE & MUELLER, LLC, Attn: ROBERT W. TURNER, ESQ, 1259 LAKE PLAZA DRIVE SUITE 260, COLORADO SPRINGS, CO, 80906 (For Claimant)
POLLART MILLER LLC, Attn: CHARLOTTE A. VEAUX, ESQ, 5700 SOUTH QUEBEC STREET, SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-965-485-03

IN THE MATTER OF THE CLAIM OF

CAROL KROMER,

Claimant,

v.

FINAL ORDER

STATE OF COLORADO,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Lamphere dated January 27, 2017, that awarded the claimant permanent partial disability benefits based on a 19 percent scheduled impairment rating. We affirm the ALJ's order.

This matter was previously before us. In an order dated May 4, 2017, we remanded the matter for reconstruction of the file. The file has since been recreated and is now before us on appeal.

The claimant sustained a work-related injury to her right knee on September 18, 2014. The claimant received conservative treatment, including a brace, over the counter medications for pain, and a series of steroid injections. The claimant was eventually placed at maximum medical improvement (MMI) on July 15, 2016, by Dr. Neubauer. Dr. Neubauer determined that the claimant sustained a 14 percent scheduled rating for loss of range of motion (ROM) in her right knee, a 10 percent scheduled rating for a torn meniscus, and a 10 percent scheduled rating for arthritis/chondromalacia, for a combined scheduled rating of 30 percent. Dr. Neubauer reduced the claimant's ROM impairment to zero by comparing the ROM of the uninjured contralateral extremity to that of the injured limb pursuant to the "Impairment Rating Tips" published by the Division of Worker's Compensation. Dr. Neubauer's final rating was a 19 percent scheduled rating.

The claimant underwent an independent medical examination (IME) with Dr. Ridings at the respondent's request. Dr. Ridings assessed five percent impairment for the torn meniscus but declined to include any impairment for the claimant's arthritis/chondromalacia. Dr. Ridings determined that the claimant had 18 percent impairment for loss of ROM. Dr. Ridings also applied the Division's "Impairment Rating Tips" to subtract out the contralateral ROM measurements. Dr. Ridings' final rating was an eight percent scheduled injury.

The claimant underwent an IME with Dr. Castrejon. Dr. Castrejon concluded that the claimant had a 16 percent scheduled rating for loss of ROM, which he also subtracted out the contralateral leg to yield five percent scheduled impairment for the right knee ROM loss. Dr. Castrejon also provided the claimant with a 10 percent rating for her meniscus tear and a 10 percent rating for arthritis. Dr. Castrejon's combined rating was a 23 percent scheduled rating.

The ALJ noted that all of the doctors utilized the contralateral measurements to reduce the claimant's ROM loss in the right knee. The ALJ was most persuaded by the rating of Dr. Neubauer who determined that because the active range of motion for flexion in the right knee was equal or better in the non-injured knee the claimant had no ROM loss. Thus, the ALJ concluded that the claimant failed to prove that Dr. Neubauer erred when he determined that the claimant had no impairment due to range of motion loss. The ALJ further recognized the discretionary nature of the 10 percent for arthritis and the meniscal tear to conclude that Dr. Neubauer's rating in this regard was more appropriate than Dr. Ridings. The ALJ, therefore, concluded that the claimant sustained a 19 percent scheduled impairment rating for her right knee.

On appeal the claimant contends that the ALJ erred in crediting Dr. Neubaeurer's opinion. The claimant argues that there is no basis in statute or rule to allow a reduction for ROM loss based on the ROM loss on the contralateral knee. We perceive no error and affirm the ALJ's order.

When a claimant seeks to challenge a scheduled impairment rating, the claimant must show by a preponderance of the evidence that the scheduled rating is incorrect. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998)(the Division Independent Medical Examination Procedures of § 8-42-107(8)(c), only apply to non-scheduled impairments). Whether a scheduled rating is incorrect is a question of fact for the ALJ. Thus, to the extent the ALJ's decision is supported by substantial evidence in the record, we may not substitute our judgment by reweighing the evidence in an attempt

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

As the claimant argues, the Division's "Impairment Rating Tips" do not carry the force of a statute or rule. The Colorado General Assembly, in the Workers' Compensation Act, has chosen to designate the AMA Guides as the basis for physical impairment ratings. Section 8-42-101(3)(a)(I), C.R.S; § 8-42-101(3.7), C.R.S. Under these statutes the Director is required to promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings. The panel's prior orders extend deference to the Workers' Compensation Division's interpretation of the AMA Guides as set forth in the "Impairment Rating Tips." These Tips were written at the direction of the statute, § 8-42-101(3.5)(a)(II), C.R.S. If the applicable language is clear, we apply its plain and ordinary meaning. *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220 at 223 (Colo. 2005). As the panel noted in *Davis v. Mohawk Industries*, W.C. No. 4-674-003 (July 21, 2011), the "Impairment Rating Tips" are not part of the AMA Guides, but may be relevant to the impairment rating. Therefore, a physician's application of those tips goes to the weight the ALJ gives to an impairment rating. *Silva v. Corporate Services Group Holdings*, W.C. No. 4-944-337 (Feb. 23, 2016); *Serena v. SSC Pueblo Belmont*, W.C. No. 4-922-394 (Dec. 1, 2015), *aff'd* 15CA2095 (Nov. 3, 2016)(NSOP); *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (Dec. 7, 2011), *aff'd* 11CA2561 (Oct. 18, 2012)(NSOP). We are not persuaded to depart from the reasoning in these prior orders.

The Division's "Impairment Rating Tips" provide, in pertinent part:

> When deemed appropriate, the physician may subtract the contralateral joint ROM impairment from the injured joint's ROM impairment. (An example would be a patient with limited knee flexion due to obesity.) However, this subtraction should not be done if the contralateral joint has a known previous injury.

Here, the ALJ found, with record support, that the claimant had no prior injury to the contralateral joint and that all of the physicians subtracted out the contralateral joint impairment. Relying on a portion of Dr. Ridings' opinion, the ALJ further found that any ROM deficit the claimant may have can be explained by the claimant's body habitus rather than the work-related injury. The ALJ weighed the medical evidence that applied the AMA Guides and the Director's "Impairment Rating Tips" to conclude that the claimant sustained a 19 percent scheduled impairment rating. The ALJ's order is amply

supported by the evidence and we have no basis to disturb the order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated January 27, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

7/6/17 by TT .

HASSLER LAW FIRM, LLC, Attn: STEPHEN JOHNSTON, ESQ, 616 WEST ABRIENDO AVE, PUEBLO, CO, 81004 (For Claimant)
ATTORNEY GENERAL, Attn: HOLLY BARRETT, ESQ, C/O: WORKERS' COMPENSATION UNIT, 1300 BROADWAY 10TH FLOOR, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-010-884-02

IN THE MATTER OF THE CLAIM OF:

PHILIP S. ASHTON,

Claimant,

v.

FINAL ORDER

CITY AND COUNTY OF DENVER,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated February 8, 2017, that denied and dismissed his request for mental impairment benefits, medical benefits, and temporary total disability benefits. We affirm.

The claimant works for the employer as a police officer. On March 24, 2016, the claimant was dispatched to a scene in which a 77 year old veteran was armed with a knife and behaving erratically. The individual was in a highly agitated state and repeatedly asked the claimant to shoot him. The individual pointed the knife at his own chest and also pointed the knife directly at the claimant. The claimant was in a doorway with only a narrow hallway behind him. The claimant eventually convinced the individual to drop the knife. The claimant then apprehended the individual and removed him from the scene. The incident lasted for approximately 30-45 minutes. The claimant stated that he suffered an "adrenaline dump" during the incident and that it took a while to get through his system.

About 30 minutes after the incident, the claimant began to experience lightheadedness, chest pains, and a headache. The claimant was transported by ambulance to the Swedish Medical Center Emergency Room for an evaluation. The records revealed the claimant was suffering from "chest pain due to anxiety/panic attack" because of "a stress response." The claimant's blood pressure reading after the incident

was 220/140. The claimant remained overnight at the hospital and was released to return to work without restrictions on March 27, 2016.

The respondent employer subsequently referred the claimant to Denver Health and Hospital Authority for an evaluation. On March 28, 2016, the claimant was examined by Dr. Szczukowski. Dr. Szczukowski diagnosed the claimant with an acute stress reaction, and directed the claimant to his personal medical provider and to remain off work until his blood pressure was under control.

On March 28, 2016, the claimant was examined by his personal medical provider, Dr. Sims. Dr. Sims noted that the claimant was following up from a hospital visit for chest pains and elevated blood pressure. After receiving blood pressure medications, the claimant's readings continued to fluctuate. The claimant reported that he also periodically suffered from headaches.

On April 1, 2016, the claimant returned to regular employment. Dr. Sims eventually determined that the claimant's blood pressure was under control. He specifically noted that the claimant suffered from hypertension that was well-controlled with medications.

Dr. Sims subsequently authored a letter regarding the March 24, 2016, incident. He noted that the claimant never required medications to treat high blood pressure prior to March 24, 2016. He explained that the claimant's blood pressure on March 24, 2016, was "very high" and could be considered "life threatening." His symptoms of dizziness, chest pains, headache, and blurred vision constituted signs of "hypertensive urgency." Dr. Sims explained that the claimant's elevated blood pressure was caused by the stressful situation that he encountered on March 24, 2016, while performing his duties as a police officer.

During the ensuing hearing, the claimant testified that he did not suffer any lasting effects from the March 24, 2016, incident. He further testified that he currently works full duty without restrictions. The claimant also acknowledged that no medical professional had diagnosed him with permanent disability as a result of the March 24, 2016, incident.

The ALJ ultimately determined the claimant failed to establish "he suffered a permanent mental impairment from an accidental injury arising out of an in the course and scope of his employment," as set forth in §8-41-301(2), C.R.S. He found that the claimant had not demonstrated he suffered from a "recognized, permanent disability."

The ALJ reasoned that the claimant testified he did not suffer any lasting effects from the incident and is currently working full duty without restrictions, and no medical professional had diagnosed him with a permanent disability as a result of the March 24, 2016, incident. The ALJ also found the claimant had not produced testimony of a licensed physician or psychologist opining that the incident constituted a "psychologically traumatic event." The ALJ further found that the claimant had not demonstrated that the March 24, 2016, incident "was generally outside a worker's usual experience that would evoke significant symptoms of distress in a similarly situated worker." The ALJ also found that the claimant's personnel file reflected he had received numerous awards, letters of commendation, and recognition in his job review for incidents involving responding to suicidal calls. The ALJ found the claimant recognized that police officers generally encounter situations where individuals present risks to themselves and others. The ALJ therefore denied and dismissed the claimant's request for benefits.

The claimant has petitioned to review the ALJ's order and has raised numerous allegations of error. The claimant initially contends the ALJ erred in requiring him to establish he had suffered a permanent disability before requiring the respondent to furnish benefits. The claimant further argues that §8-41-301(2), C.R.S. contains ambiguities since §8-41-301(2)(a), C.R.S. requires a showing of permanent disability but §8-41-301(2)(d), C.R.S. only requires a showing of temporary disability. Additionally, the claimant argues the ALJ erred in ruling that since he failed to suffer a permanent impairment, then his claim did not arise out of and in the course of his employment. The claimant contends that this is an incorrect application of the legal standards. Next, the claimant argues the ALJ applied an incorrect legal standard regarding the submission and interpretation of medical evidence. He explains that in paragraph 8 of his order, the ALJ essentially found that the claimant failed to produce testimony of a licensed physician since Dr. Sims did not testify at the hearing. The claimant also contends the ALJ applied an incorrect legal standard as to whether the incident was generally outside the claimant's usual experience. He explains that in his 25 years as a police officer, he never has been involved in such a situation and the incident was not common to all fields of employment. Last, the claimant argues that the requirements set forth in §8-41-301(2), C.R.S. violate his right to equal protection. We perceive no reversible error.

A claim for mental impairment is governed by §8-41-301(2), C.R.S., and provides in pertinent part as follows:

> (2)(a) A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of

> this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.
>
> * * *
>
> (c) The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment.
>
> (d) The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment.

First, we reject the claimant's argument that the ALJ erred in requiring him to establish he had suffered a permanent disability before ordering the respondent to furnish "rudimentary" benefits that he is entitled to recover. In *Kieckhafer v. Industrial Claim Appeals Office*, 284 P.3d 202, 206 (Colo. App. 2012), the Colorado Court of Appeals essentially rejected this contention. In that case, the Court held when an injury is the result of an emotional stimulus that results in mental impairment, a "heightened standard of proof" is required to prevent frivolous claims. The Court determined that as a threshold for compensability, a claimant must prove a recognized, permanent disability by evidence supported by a licensed physician or psychologist. The Court explained that the phrase "recognized, permanent disability" contained in §8-41-301(2)(a), C.R.S. seeks to limit recovery to those permanent mental impairments that have a disabling effect on the sufferer. *See also Davison v. Industrial Claim Appeals Office, 84 P.3d 1023* (Colo. 2004)(burden is heightened in mental impairment). Here, the ALJ concluded, with record support, that the claimant did not sustain a permanent mental impairment as a result of the March 24, 2016, incident. During the hearing, the claimant testified that the symptoms he experienced as a result of the March 24, 2016, incident have abated and that he has returned to working full duty with no restrictions. Tr. at 26, 28. Section 8-43-301(8), C.R.S. Additionally, the claimant's argument notwithstanding, even where a

claimant's mental impairment claim is not fraudulent or frivolous, this still does not negate the plain language of §8-41-301(2)(a), C.R.S., which requires proof of a recognized, permanent disability. Consequently, we have no basis to disturb the ALJ's order on these grounds.

Next, we also reject the claimant's argument that §8-41-301(2), C.R.S. contains ambiguities since §8-41-301(2)(a), C.R.S. requires a claimant to prove a permanent disability, but §8-41-301(2)(d), C.R.S. only requires proof that a claimant is temporarily disabled from his or her occupation. Again, the Court in *Kieckhafer* essentially rejected this argument, holding that there was "no incompatibility" between §8-41-301(2)(a) and (2)(d), C.R.S. The Court explained that subsection (2)(d) "merely provides that, in addition to satisfying the heightened burden for establishing compensability of a mental impairment claim under section (2)(a), a claimant also must show that the mental impairment itself is "sufficient [either] to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment." *Id*. at 207. The Court explained that nothing in the language of these two subsections negates the requirement in subsection (2)(a) that, as a threshold for compensability, a claimant must prove a recognized, permanent psychological disability by evidence supported by a licensed physician or psychologist. We similarly reject the claimant's argument that §8-41-301(2)(a), C.R.S. and §8-41-301(2)(c), C.R.S. are in conflict. These subsections are consistent. Subsection (2)(a) requires not only that the claimant experience a psychologically traumatic event that is not common to the claimant's work, but subsection (2)(c) heightens the standard by requiring the psychologically traumatic event not be common to all fields of employment. Thus, we may not disturb the ALJ's order on these grounds.

Next, the claimant argues the ALJ applied an incorrect legal standard when ruling that he failed to show his claim "arose out of and in the course of his employment" because he proved no permanent impairment. The claimant reasons that whether he was unable to demonstrate he suffered a permanent impairment has no bearing on whether his claim arose out of or in the course of his employment. Presumably, the claimant is referring to paragraph 7 of the ALJ's order, which provides in pertinent part as follows:

> As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental impairment from an accidental injury arising out of and in the course of his employment. . . . Order at 6-7 ¶7.

The claimant's argument notwithstanding, the ALJ was simply following the language of §8-41-301(2)(a), C.R.S. The ALJ merely ruled that the claimant's request for mental impairment benefits did not satisfy the requirements of §8-41-301(2)(a), C.R.S. since he did not prove a permanent disability as a result of the March 24, 2016, incident. Therefore, we may not disturb the ALJ's order on this ground.

Next, the claimant takes issue with paragraph 8 of the ALJ's order, which provides as follows:

> Moreover, Claimant has not produced 'testimony of a licensed physician or psychologist that the incident constituted a 'psychologically traumatic event.' Although Dr. Sims noted that Claimant's elevated blood pressure was caused by a 'stressful situation' on March 24, 2016, he did not testify at the hearing in this matter or detail that the incident was 'psychologically traumatic.'

The claimant appears to argue that the ALJ ruled that since Dr. Sims did not testify at the hearing, that this means the claimant failed to produce the testimony of a licensed physician. The claimant contends that he produced and admitted as an exhibit Dr. Sims' medical report.

The claimant has misconstrued the ALJ's order. We initially note that an ALJ is not held to a crystalline standard in articulating his findings of fact, and we may consider findings that are necessarily implied by the ALJ's order. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Regardless, the ALJ here was not ruling that since Dr. Sims did not testify, that this meant the claimant failed to produce testimony of a licensed physician or psychologist as required under §8-41-301(2)(a), C.R.S. *See State Dep't of Labor & Empl. v. Esser*, 30 P.3d 189 (Colo. 2001)(section 8-41-301(2)(a) requires mental impairment claim be supported by work product of licensed physician or psychologist which may include letters, reports, affidavits, depositions, documents, and/or oral testimony). What the ALJ instead was ruling is that the claimant failed to produce testimony of a licensed physician or psychologist showing that the incident on March 24, 2016, constituted a "psychologically traumatic event." It is true, as the claimant argues, that the physician or psychologist is not required to use the exact terms "psychologically traumatic event" when referring to the circumstances surrounding the incident at issue. *City of Loveland Police Dep't v. Industrial Claim Appeals Office*, 141 P.3d 943, 951 (Colo. App. 2006); *see also Davison v. Industrial Claim Appeals Office, supra* (expert medical or psychological opinion must prove claimant suffered psychologically traumatic event). Instead, the claimant must

present sufficient facts to show that a psychologically traumatic event or events existed. *Id.* Here, the ALJ did, in fact, consider Dr. Sims' medical reports. It is apparent, however, that the ALJ was not persuaded that the stressful incident the claimant encountered on April 24, 2016, was sufficient to constitute a "psychologically traumatic event" as set forth in §8-41-301(2)(a), C.R.S. The ALJ made a reasonable inference from the record in this regard and it is binding on us. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Consequently, we have no basis to disturb the ALJ's order on this ground.

We also reject the claimant's argument that the ALJ applied an incorrect legal standard on whether the incident was generally outside the claimant's usual experience. The claimant recites many of the facts and argues that in 25 years he never has been involved in such an incident and that the incident on March 24, 2016, was most certainly not common to all fields of employment. However, the ALJ found that disarming a suicidal party was not outside of the claimant's usual work experience. As detailed above, the ALJ found, with record support, that the claimant had received numerous awards, letters of commendation, and recognition in his job review for incidents involving responding to suicidal calls. Ex. I at 82-84, 98, 115. He further found that the claimant himself recognized that police officers generally encounter situations where individuals present risks to themselves and others. Tr. at 39. We may not substitute our judgment by reweighing the evidence to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990)(reviewing court is bound by resolution of conflicting evidence, regardless of the existence of evidence which may have supported a contrary result); *see also Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990)(ALJ, as fact-finder, is charged with resolving conflicts in expert testimony). Therefore, since the ALJ reasonably inferred from the evidence that the March 24, 2016, incident was not generally outside of a police officer's usual experience, we have no basis for disturbing the ALJ's order in this regard.

Last, the claimant argues that §8-41-301(2), C.R.S. violates his constitutional guarantees to equal protection. However, we lack authority to consider the claimant's constitutional challenge of the statute. *See Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993); *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Thus, the claimant has not presented grounds which afford us a basis to interfere with the ALJ's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated February 8, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

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Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

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THE LAW OFFICES OF CHARLES W. HEMPHILL, Attn: CHARLES W. HEMPHILL, ESQ, 8441 WEST BOWLES AVENUE SUITE 250, LITTLETON, CO, 80123 (For Claimant)
OFFICE OF THE DENVER CITY ATTORNEY, Attn: MICHELLE S. SISK, ESQ, C/O: EVIN BERG, ESQ, 201 WEST COLFAX AVE., DEPT. 1108, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-006-772-01

IN THE MATTER OF THE CLAIM OF

ARZELLE LEWIS,

Claimant,

v.

FINAL ORDER

WELLBRIDGE/STARMARK HOLDINGS,

Employer,

and

XL SPECIALTY INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated February 6, 2017, that ordered the claimant's injury compensable and found the respondents liable for the cost of the claimant's emergency room treatment, surgery on his left arm, physical therapy and medications. We affirm the order of the ALJ.

The claimant was a former college and professional basketball player. He was asked by the manager of the employer Denver Athletic Club's Monaco street facility to develop basketball clinics. The manager and the claimant agreed the claimant would advertise and conduct a series of free demonstration clinics in November and December 2014. Based on the interest generated by these demonstration clinics, the claimant would conduct clinics in 2015. The attendees would pay for participation in the 2015 clinics. The employer would keep 65% of the fees paid and the remaining 35% would be paid to the claimant as his commission. The claimant was leaving the demonstration clinic he had conducted on December 23, 2014, when he slipped on the ice, which had accumulated on the front steps of the employer's facility. The claimant fractured his left arm due to his fall.

The claimant contacted the employer the next day to report the injury. He was informed he was not an employee and the employer declined responsibility for his injury. The risk specialist for the employer, Lisa Dreiling, spoke to the claimant two days later.

Ms. Dreiling reported that the claimant stated he was not working when he fell on December 23. Ms. Dreiling also reviewed the employer's records that showed the employer had hired the claimant but the records did not indicate any wages paid, including on December 23. The respondents maintained their position that the claimant was not working when he broke his arm.

The claimant requested a hearing concerning the compensability of his injury and liability for his medical expenses. At the December 27, 2016, hearing, the claimant testified to his agreement to develop and conduct basketball clinics for the employer. He noted he participated in orientation activities, was issued a name badge by the employer, and was provided T-shirts bearing the employer's name and logo that he was directed to wear. The claimant explained that he conducted the demo clinics in November and December with a co-worker. By the conclusion of December, the claimant observed that he and the co-worker had recruited 20 to 30 youth to enroll in the clinics and he expected he would earn $600-700 per month beginning in January and $2,000 through the duration of the first set of clinics. Ms. Dreiling testified the claimant had been employed and was included in the employer's wage accounting system. Ms. Dreiling explained the claimant was to be paid on a commission basis but the employer's procedure required him to clock in and out using an electronic system. The claimant was to be paid $8 per hour before he earned any commissions. Ms. Dreiling concluded that because the claimant had stated to her he was not working when he fell, and the employer's electronic records did not reveal he had clocked in or out on December 23, the claimant was not injured in the course and scope of employment.

The ALJ noted the employer hired claimant and the claimant received an employee's handbook and attended orientation classes. The ALJ found the claimant was employed to conduct demonstration classes for no charge in November and December. The claimant was not paid immediately for his work with the demonstration but was to be paid through a commission on the paid business developed through the demonstrations. The ALJ determined the claimant conducted a demonstration clinic on December 23 and broke his arm when he fell while he was exiting the employer's building. The ALJ deemed this injury to have occurred within the course and scope of the employment and ordered the respondents to pay for the open reduction and internal fixation surgery performed by Dr. Morgan as well as the subsequently prescribed physical therapy and pain medications.

The respondents appeal contending that because the claimant was not paid for conducting the demonstration clinic on December 23, he was acting as a volunteer. It is argued injuries sustained by volunteers are not compensable. The respondents rely on

Hall v. State Compensation Insurance Fund, 387 P.2d 899 (Colo. 1963). In *Hall*, the claimant was a member of an organization, the Blue Ladies, providing assistance to a hospital and its patients and receiving in return only a complimentary lunch. Because the claimant did not become obligated through a contract of employment with the hospital, an injury she suffered while engaged in her volunteer activities was deemed not compensable.

The claimant responds by asserting the argument the claimant was a volunteer was not raised by the respondents before the ALJ. Because the findings of the ALJ, which are supported by the record, resolve that the claimant was not acting as a volunteer, we find it unnecessary to rule on the claimant's objection.

The testimony of both Ms. Dreiling and the claimant states the claimant entered into an employment contract with the employer. Ms. Dreiling stated the claimant was to be paid a minimum of $8.00 per hour plus commissions for running basketball clinics. The claimant explained that all trainers employed by the respondent were responsible for generating participation in their classes and lessons. To the extent they are successful their commissions are increased. The ALJ concluded therefore, that the claimant conducted the demonstration classes with the expectation he would receive compensation following their completion. He found the claimant was not acting as a volunteer. The testimony of the claimant and of Ms. Dreiling is substantial evidence that supports this finding.

In *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994) the Court determined a ski instructor, injured while providing services in exchange for a daily ski pass provided to his girlfriend, was functioning as an employee, and not as a volunteer. The employer argued the ski pass was only a gratuity given as a favor to the claimant. The court disagreed. It reasoned a "volunteer" was a person who "gives his services without any express or implied promise of remuneration." The court noted the record in the matter showed "the claimant obligated himself to perform ski patrol services for the respondent-employer and in return, the respondent-employer obligated itself to provide free daily ski passes to the claimant or his designee." The cost of the pass revealed its value to the claimant to be $4.50 per hour. The court reasoned: "Based on these facts, we conclude that Apostolou did not volunteer his services within the common meaning of that phrase …."

In this matter, the claimant agreed to conduct basketball clinics, in the form of both free demonstrations and paid participations, in exchange for a commission based on a percentage of the revenue realized. His service was based on an "express or implied

promise of remuneration." Both parties were obligated to either perform or pay for the performance. The record reveals substantial evidence in support of the ALJ's finding the claimant was "hired by Employer as a non-exempt staff member". His injury incurred while performing his obligations in that regard and it is compensable.

Because the existence of a contract for hire is generally a question of fact for the ALJ, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Tuttle v. ANR Freight System, Inc*., 797 P.2d 825 (Colo. App. 1990); *Cassidy v. Rocky Mountain Communications*, W. C. Nos. 4-597-715 and 4-597-716 (March 18, 2005); *Pfuhl v. Prime, Inc*., W.C. No. 4-215-435 (February 16, 1995). In applying this standard, we are obliged to view the evidence in the light most favorable to the prevailing party and defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences which he drew from the evidence. *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The testimony of the witnesses in the record constitutes substantial evidence to support the determination of a contract of employment. We find no cause to conclude the ALJ committed error in deciding the claimant sustained a compensable injury.

IT IS THEREFORE ORDERED that the ALJ's order issued February 6, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

6/12/17 by TT .

BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C., Attn: STEPHAN J. MARSH, ESQ, 40 INVERNESS DRIVE EAST, ENGLEWOOD, CO, 80112 (For Claimant)
POLLART MILLER LLC, Attn: ERIC J. POLLART, ESQ, C/O: AMANDA J. BRANSON, ESQ, 5700 S. QUEBEC STREET, SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

40 ACCEPTING CASE HANDLED BY ANOTHER LAWYER

Adopted February 3, 1968.
Addendum issued 1995.

Syllabus

A lawyer may properly accept employment to handle a matter which has been previously handled by another lawyer, provided that the first lawyer has been given notice by the client that his employment has been terminated.

Facts

Lawyer A has begun representing a client on a particular matter. Subsequently, the client contacts Lawyer B and says that he wants to terminate Lawyer A's employment and employ Lawyer B on this matter. Lawyer B asks whether he may accept the employment.

Opinion

The American Bar Association Committee on Professional Ethics has long held that the client has the right to be represented at all times by counsel of his own selection. Canon 7, ABA Opinions on Professional Ethics, Formal Opinion No. 10. A lawyer may properly accept employment to handle a matter which has been previously handled by another lawyer, provided that the superseding lawyer has assured himself that the first lawyer has been given notice by the client that his employment has been terminated. As ABA Formal Opinion No. 10 points out:

> The lawyer originally engaged has his remedy at law for any breach of contract that may occur through the client's termination of his employment but he cannot insist that his professional brethren refuse employment in the matter merely because he claims such a breach of contract. To hold otherwise would be to deny a litigant's right to be represented at all times by counsel of his own selection.

Moreover, a superseding lawyer is not responsible for the fees due the superseded one. ABA Formal Opinion 130; ABA Informal Opinion 243. Any question as to the amount of a lawyer's fee or method of its payment is a matter of contract, express or implied, to be construed as other contracts are construed. Any controversy concerning such a matter is a matter of law to be determined by the courts. See ABA Formal Opinion 63. However, the superseded lawyer is entitled to notice so as to enable him to protect his right or lien. ABA Formal Opinion 17.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are contained in Rule 1.16 (regarding declining or terminating representation).

82 ASSERTION OF ATTORNEY'S RETAINING LIEN ON CLIENT'S PAPERS

Adopted April 15, 1989.
Addendum issued 1995.

Introduction and Scope

Assertion of Attorney's Retaining Lien on Client's Papers

The Ethics Committee of the Colorado Bar Association has been requested to provide guidance to many Colorado attorneys regarding ethical considerations in asserting a retaining lien on clients' papers in their possession under C.R.S. § 12-5-120 (1973). This opinion discusses situations in which it may *not* be ethically permissible to assert such a lien.

Syllabus

A lawyer may ethically assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may *not* be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Code of Professional Responsibility; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

General Discussion

A. *C.R.S. § 12-5-120: The Retaining Lien on Client's Papers*

> C.R.S. § 12-5-120 (1973) states in pertinent part that:
>
> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment . . . from the time of giving notice of the lien to that party.[1] Attorneys are permitted to acquire interests in causes of action or the subject matters of litigation they are conducting for clients in order to protect their rights to collect fees by the assertion of legally permissible liens. DR 5-103(A)(l); EC 5-7.

B. *General Legal Limitations on the Assertion of Retaining Liens on Clients' Documents*

A lawyer's right to assert a retaining lien is not absolute. The right may be limited by legal and ethical considerations.[2] In Colorado, there is no common law attorney's lien, and no lien exists except under the statute. *Donaldson v. Gaudio*, 260 F.2d 333 (10th Cir. 1958). In order for an attorney to assert a retaining lien, the client must owe the attorney a general balance of compensation. *People v. Garnett*, 725 P.2d 1149, 1154 (Colo. 1986) (*en banc*); *People ex rel. Goldberg v. Gordon*, 199 Colo. 296, 609 P.2d 995, 997 (1980) (*en banc*). The retaining lien, as a passive possessory lien, may be lost if the lawyer voluntarily relinquishes possession of the items to which the lien has attached. *See, In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir.), *cert. denied*, 444 U.S. 1080 (1979); *Attorney Grievance Commission v. McIntire*, 286 Md. 87, 405 A.2d 273 (1979); 7 Am.Jur.2d Attorneys at Law §§ 315 and 322. Moreover, if a lawyer sues a client to recover fees and expenses, the lawyer forfeits the right to exclusive possession of the client's papers relevant to the fee dispute, and the lawyer can be required to produce

them for inspection pursuant to C.R.C.P. Rule 26(b)(1). *Jenkins v. District Court*, 676 P.2d 1201, 1204-05 (Colo. 1984). *See, Intaglio Service Corp. v. J.L. Williams & Co.*, 112 Ill. App.3d 824, 445 N.E.2d 1200, 1201-1204 (1st Dist. 1983); "Attorney's Retaining Lien as Affected by Action to Collect Legal Fees," 45 A.L.R. 4th 199; Klein and Todd, "The Treatment of Attorney's Liens in Colorado," 16 *The Colorado Lawyer* 623, 624 (April 1987).

Finally, an attorney who has asserted a lien may be compelled to produce documents to the client's adversary, since it would be inequitable to deny a litigant access to relevant and perhaps essential proof, merely because the opposing party had failed to pay attorney's fees. *Lucky-Goldstar International (America), Inc. v. International Mfg. Sales Co.*, 636 F.Supp. 1059, 1064-65 (N.D.Ill. 1986); *Tri-Ex Enterprises v. Marzon Guar. Trust Co.*, 583 F.Supp. 1116, 1118 (S.D.N.Y. 1984).

C. *Ethical Limitations on the Assertion of Retaining Liens*

In *Jenkins v. District Court*, 676 P.2d at 1204, the Colorado Supreme Court stated:

> There is little doubt that an attorney who withdraws from a case for justifiable reason, or is terminated by his client without cause, may recover compensation for his services. In such situations the attorney has the right to a retaining lien upon the books, papers, securities, and money of his client in his possession.

Nonetheless, the ethical propriety of asserting a retaining lien is not absolute under the Code of Professional Responsibility. An attorney must be guided by high ethical standards. *MacFarlane v. Harthun*, 195 Colo. 38, 581 P.2d 718 (Colo. 1978) (*en banc*). *See, Miller v. Paul*, 615 P.2d 615, 619 (Alaska 1980); *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 116-117 (La. 1979) (*on reh'g*). An attorney must also refrain from "conduct that is prejudicial to the administration of justice." DR l-102(A)(5).

Further, DR 7-101(A)(2) requires that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client, although a lawyer may withdraw as permitted under DR 2-110, DR 5-102, and 5-105. When a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," the lawyer may cease representing the client. DR 2-110(C)(1)(f). The lawyer must nonetheless take "reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled. . . ." DR 2-110(A)(2). Ethical Consideration 2-32 also states in part:

> A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

Various court decisions and bar association ethics opinions have stated that an attorney may not ethically assert a retaining lien in the circumstances described below:

1. There is no legal basis for the assertion of the lien. *See, Garnett*, 725 P.2d at 1154-55 (Colo. 1986) (*en banc*) (client did not yet owe any fees); *People v. Razatos*, 636 P.2d 666, 669-671 (Colo. 1981) (*en banc*) (attorney had "uncertain claim to the fee on which the purported lien was founded").

2. A lawyer has been suspended or disbarred. In this situation, the lawyer may not assert a retaining lien with respect to any matter. This result is because "[t]he foundation of our profession is based upon honor, trust and the highest standards of integrity . . ." *MacFarlane v. Harthun, supra*, 581 P.2d at 718-19.

3. A lawyer is guilty of misconduct in the particular matter. Even if the lawyer is not suspended or disbarred, the lawyer may not assert the lien in that matter, but may assert the lien in other matters in which there has been no misconduct. *MacFarlane v. Harthun, supra*, 581 P.2d at 718.

4. In a contingency fee case, prior to the completion of the case. *People v. Radinsky*, 182 Colo. 259, 512 P.2d 627 (1973) (*en banc*).

5. A client who can not pay the fees furnishes adequate security, or posts an adequate bond. *See, e.g., Jenkins v. District Court, supra*; *Morse v. Eighth Judicial Court*, 65 Nev. 275, 195 P.2d 199 (1949); *Steiner v. Stein*, 141 N.J. Eq. 478, 58 A.2d 102 (1948); District of Columbia Bar Association Opinion No. 191 (4/19/88) (a lawyer may not withhold a client's file during a fee dispute if the client has offered adequate security, such as a bond or a letter of credit).

6. The client's papers are essential to preserve an important personal liberty interest, or defense of a criminal charge. *See, e.g. Jenkins v. District Court, supra*, 676 P.2d at 1204, n. 3; *Jenkins v. Weinshienk*, 670 F.2d 915, 919-20 (10th Cir. 1982); *Hauptmann v. Fawcett*, 243 A.D. 613, 276 N.Y.S. 523, modified, 243 A.D. 616, 277 N.Y.S. 631 (App. Div. 1935); ABA Informal Opinion No. 1461.

7. The lawyer has withdrawn without just cause or reasonable notice. *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

8. The lawyer is validly discharged for professional misconduct, or conduct prohibited by the Code of Professional Responsibility. *See*, Note, "Attorney's Retaining Lien Over Former Client's Papers," 65 *Colum. L. Rev.* 296 (1965); *Miller v. Paul*, 615 P.2d at 620 (Alaska 1980).

9. "[W]hen the client is financially unable to post a bond or pay, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client." *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

ABA Informal Opinion No.1461 states:[3]

> . . . Financial inability of the client to pay the amount owing should also cause the lawyer to forego the lien because the failure to pay the fee is not deliberate and thus does not constitute fraud or gross imposition by the client. The lawyer should forgo the lien if he knew of the client's financial inability at the beginning or if he failed to assure agreement as to the amount or method of calculating the fee.

In sum, absent the exceptions stated above, a lawyer may ethically assert a retaining lien on a client's papers when the client is financially able to pay fees, but fails or refuses to do so.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(j) (providing the same exception to the prohibition against a lawyer acquiring a proprietary interest in a client's cause of action or subject matter of litigation that was provided in DR 5-103(A)(1)) and Rule 1.16(d) (requiring lawyers to take, upon termination of representation, {take} steps to the extent reasonably practicable to protect a client's interests such as surrendering papers and property to which the client is entitled).

NOTES

1. This opinion does not deal with retaining liens asserted on funds under C.R.S. § 12-5-120, or with charging liens asserted under C.R.S. § 12-5-119 (1973).

2. This opinion does not discuss the effect of bankruptcy on attorneys' liens. *See* Klein and Todd, "The Treatment of Attorney's Liens in Colorado," 16 *The Colorado Lawyer* 623, 624 (April 1987). *See also*, *In re Oiltech, Inc.*, 38 Bankr. 484 (Bankr. D. Nev. 1984); *In re Life Imaging Corp.*, 31 Bankr. 101 (Bankr. D. Colo.

1983); *In re Ranes*, 31 Bankr. 70 (Bankr. D. Colo. 1983). This opinion also does not discuss potential constitutional considerations which might affect the assertion of retaining liens. For instance, one commentator has opined that: "The retaining lien should not be an absolute right that can be asserted in an *ex parte* manner. Otherwise, an attorney asserting a questionable fee claim could deny a client his/her property without due process of law . . ." Dubin, "The Retaining Lien: An Ethical Trap for the Unwary Lawyer," 63 *Michigan Bar Journal* 257, 258 (March 1984).

3. Ethical Consideration 2-23 requires a lawyer to "be zealous in his efforts to avoid controversies over fees with clients," and not to "sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." The same standard should be applied in determining whether to exercise a retaining lien. American Bar Association Informal Opinion No. 1461 (11/11/80); Tennessee Ethics Opinion No. 86-F-106 (9/26/86) (a retaining lien should be asserted only when necessary to prevent fraud or gross imposition by the client); Pennsylvania Bar Association Ethics Opinion No. 81-7 (undated) (a lawyer should assert a lien on client property only as a matter of last resort when necessary to prevent fraud by the client, and when other reasonable methods have failed).

104 SURRENDER OF PAPERS TO THE CLIENT UPON TERMINATION OF THE REPRESENTATION

Adopted April 17, 1999.

Introduction and Scope

The Ethics Committee has received numerous inquiries concerning the responsibility of the lawyer to surrender papers and property to the client upon termination of the representation. These inquiries generally relate to the obligations of the lawyer to deliver the documents and involve discussion of which papers and property the client is entitled to receive. Such debates can be especially difficult when the client's newly-retained counsel seeks delivery of the file from the terminated lawyer, and the steps taken in the course of representation in the past are being challenged or questioned. The purpose of this opinion is to address the general obligations of lawyers to surrender the file upon demand after termination and to discuss what does, or does not, constitute the papers and property to which the client is entitled.

This opinion does not address those situations where a lawyer has not been fully paid and the lawyer is asserting a retaining lien on client papers. For a discussion of the lawyer's duties in these circumstances, see, CBA Ethics Committee Formal Opinion 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (April 15, 1989, addendum issued, 1995).[1] For purposes of this opinion, the Committee assumes the lawyer has not asserted a retaining lien upon the papers.

This opinion also does not address the specific obligations of the lawyer to retain and preserve files after closure of the representation.[2] See, "Coping with the Avalanche: A Survey on the Disposition of Client Files" by Doris Truhlar and Joseph de Raismes, *The Colorado Lawyer*, October 1987.[3] Finally, this opinion does not address whether and under what circumstances all or any part of a lawyer's file may be subject to disclosure or discovery in civil and criminal proceedings pursuant to applicable law and rules of court.

Syllabus

The primary ethical obligation of a lawyer upon termination of the representation is to take the steps necessary, to the extent reasonably practicable, to protect the client's interests. One of these steps involves the lawyer's duty to surrender papers and property to which the client is entitled. Lawyers consistently have been disciplined for blanket refusals to surrender the file to the client upon demand. Since the client may be uninformed about what is, or is not, contained in the file, the lawyer may inquire as to the needs of the client; however the lawyer should understand that it may be difficult for the client to define what is required. Interrelated with the obligation to protect the client's interests is the lawyer duty to define the client's needs liberally. In this context, the client's entitlement is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access to the documents related to the representation to enable continued protection of the client's interests.

There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld.

A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld, for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled.

Detailed definition of this second category is difficult. The distinction in this area is factually specific to each situation and must be determined by the lawyer, realizing that the lawyer has a duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information. Generally, such duty favors production.

In the event that personal attorney-work product is intertwined with information that should be surrendered, the lawyer should produce factual information in the form of a summary or with personal impressions redacted if necessary. Given the variety of factual circumstances that may arise and the fact that Colorado courts have not addressed this area, the Committee provides its own analysis together with a summary of authorities from other jurisdictions to assist the lawyer in analyzing the particular situation which the lawyer may face. In the event of a dispute regarding production of documents in the context of litigation, a review of the documents *in camera* may be necessary.

Under Colo. RPC 1.16(d), all papers and property to which the client is entitled must be surrendered upon demand within a reasonable time, regardless of duplication costs. In the event that the lawyer decides to retain a copy of these papers and property for the lawyer's own purposes, the duplication costs for these items are not properly billed to the client. However, in the event that the lawyer voluntarily produces personal attorney-work product, it is appropriate for the attorney to charge the duplication costs of these documents to the client.

It is undecided under Colorado law whether an agreement between the lawyer and the client regarding duplication costs is binding as a matter of contract. While the payment of such charges may be purely a contractual matter, the Committee believes that the terms of such an agreement must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct. However, retention of papers and property to which the client is entitled until such costs have been paid is subject to the same exceptions to the right of retention as under a properly asserted retaining lien. *See* CBA Ethics Committee Formal Opinion 82.

Discussion of the Lawyer's General Obligations

Colo. RPC 1.16(d) states:

> Upon termination of representation, *a lawyer shall take steps to the extent reasonably practicable to protect a client's interests*, *such as* giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled* and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. (Emphasis added.)

The Colorado Supreme Court consistently has recognized the client's right to the prompt delivery of papers and property to which the client is entitled upon termination of the representation, and the Court consistently has disciplined lawyers for failure to do so. *See People v. Rishel*, 956 P.2d 542 (Colo. 1998); *People v. Holmes*, 951 P.2d 477 (Colo. 1998); *People v. Davis*, 950 P.2d 596 (Colo. 1998); *People v. Kuntz*, 942 P.2d 1206 (Colo. 1997); *People v. McKee*, 942 P.2d 494 (Colo. 1997); *People v. Mannix*, 936 P.2d 1285 (Colo. 1997); *People v. Wallace*, 936 P.2d 1282 (Colo. 1997); *People v. Reynolds*, 933 P.2d 1295 (Colo. 1997); *People v. Ebbert*, 925 P.2d 274 (Colo. 1996); *People v. Damkar*, 908 P.2d 1113 (Colo. 1996); *People v. Kuntz*, 908 P.2d 1110 (Colo. 1996); *People v. Jamrozek*, 914 P.2d 350 (Colo. 1996); *People v. Sigley*, 917 P.2d 1253 (Colo. 1996); *People v. Crews*, 901 P.2d 472 (Colo. 1995); *People v. Tucker*, 904 P.2d 1321 (Colo. 1995); *People v. Retru*, 884 P.2d 721 (Colo. 1994); *People v. Johnson*, 881 P.2d 1205 (Colo. 1994); *People v. Felker*, 770 P.2d 402 (Colo. 1989). In each of these cases, the lawyer was disciplined for refusing or failing to deliver, after client request, papers to which the client was entitled. The emphasis has been on recognizing the lawyer's duty to protect the client's interests rather than in defining in detail what constitutes the "papers and property to which the client is entitled" under Rule 1.16(d).

Since Rule 1.16(d) does not define what constitutes the "papers and property to which the client is entitled," such definition must be derived from the purpose of the rule, which is furtherance of the lawyer's principal ethical duty reasonably to protect the client's interests: "[u]pon termination of the repre-

sentation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest . . ." In this context, it is the Committee's opinion that the papers and property to which the client is entitled are not necessarily defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access to the files related to the representation as a means to enable continuing protection of the client's interests.

Therefore, upon termination of the attorney-client relationship, except where there is a validly asserted retaining lien, the client should be provided those documents and other property provided by the client and such originals and copies of other documents possessed by the lawyer relating to the representation that the client reasonably needs to protect the client's interests. This duty is subject to consideration of the narrow qualifications outlined below.

This position is consistent with the majority of cases and ethics opinions that conclude that upon termination of the attorney-client relationship, the client has the right to full access to the file on the represented matter, subject to a few qualifications discussed below. For a discussion of situations where these concerns have been addressed, *see In the Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997), citing *Resolution Trust Corp. v. H. P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989); State Bar of Georgia, Formal Advisory Op. No. 87-5; Massachusetts Rules of Court, Rule 3.07, DR 2-110[A][4] (West, 1997); Ohio Supreme Ct. Bd. Of Comm'rs On Grievances and Discipline, Op. No. 92-8; *Maleski v. Corporate Life Ins. Co.*, 163 Pa. 36, 641 A.2d 1 (Pa. Commw. 1994); State Bd. of California Standing Committee On Professional Responsibility and Conduct, Formal Op. No. 1992-127; Connecticut Bar Ass'n Committee On Professional Ethics, Op. No. 94-1; State Bar of Michigan Commission on Professional and Judicial Ethics, Syllabus CI-926 (1983); Oregon State Bar Ass'n, Op. No. 1991-125. The lawyer must deliver originals and copies of other documents that the lawyer has which relate to the representation and which the client reasonably needs. *See* Restatement (Third) of the Law Governing Lawyers, American Law Institute, § 58(3), comment d (1998).

The Committee notes that Rule 1.16(d) requires the lawyer, to the extent reasonably practicable to protect the client's interest, to "surrender" all papers and property to which the client is entitled. The use of this term is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand. While it is appropriate for a lawyer to request a reasonable period to produce the file, a lawyer may not ignore or refuse a client's request for such papers and property.

An ambiguous request should be met with some inquiry by the lawyer. *See Dubose v. Shelnutt*, 566 So.2d 921 (Fla. App. 5 Dist. 1990)(client request for "depositions of following witnesses" placed a duty on the lawyer to call the client and find out exactly what the client needed.) *See also Matter of Struthers*, 877 P.2d 789 (Ariz. 1994); *Finch v. State Bar of California*, 170 Cal. Rptr. 629, 621 P.2d 253 (Cal. 1981); *People v. Damkar*, 908 P.2d 1113 (Colo. 1995); *Matter of Kelly*, 655 N.E.2d 1220 (Ind. 1995); *Comm. on Prof. Ethics & Conduct v. Leed*, 477 N.W.2d 390 (Iowa 1991); *Matter of England*, 894 P.2d 177 (Kan. 1995); *Kentucky Bar Ass'n v. Delahanty*, 878 S.W.2d 795 (Ky. 1994); *In re Turissini*, 655 So.2d 327 (La. 1995), *In re Disciplinary Action Against Cowan*, 540 N.W.2d 825 (Minn. 1995); *Matter of DePietropolo*, 603 A.2d 951 (N.J. 1992); *Cleveland Bar Ass'n v. Bancsi*, 651 N.E.2d 949 (Ohio 1995); *Matter of Meeder*, 463 S.E.2d 312 (S.C. 1995); *In re McCarty*, 665 A.2d 885 (Vt. 1995); *State Bar Committee on Legal Ethics v. Karl*, 449 S.E.2d 277 (W. Va. 1994); *but see Matter of Curtis*, 908 P.2d 472 (Ariz. 1995) (lawyer did not violate prompt return provision where the client had retained originals and had given the lawyer copies).

Numerous questions may arise concerning the costs of duplication of the papers and property at the time of delivery. Generally, consistent with recognition that the file must be surrendered to the client, absent agreement to the contrary, it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy.[4] The fact that copies of documents may have been provided to the client previously does not eliminate the responsibility of the lawyer to provide the client with the file. If the lawyer wishes to keep copies of the documents to which the client is entitled, the lawyer can do so at the lawyer's own expense.

Unless there is a valid agreement to the contrary, refusal to provide the papers and property contained in the file until the client pays duplication costs restricts the client's right to the file and is improper. *See McKim v. State*, 528 N.E.2d 484 (Ind. App., 1 Dist. 1988) (attorney could not refuse to relinquish documents contingent upon client payment of copying costs); *In re Admonition Issued in Panel File No. 94-24*, 533 N.W.2d 852 (Minn. 1995); *In re X.Y.*, 529 N.W.2d 688 (Minn. 1995); Alaska Ethics Opinion 95-6 (1995); Kansas Ethics Opinion 92-05 (1992); Michigan Ethics Opinion RI-203 (1994). Note, however, that this responsibility would not necessarily apply to those categories of documents to which the client is not entitled as further discussed in this opinion in the event that the lawyer voluntarily decides to make these documents available to the client.

The Committee is aware that many fee agreements seek specifically to establish the obligations of the lawyer and client for payment of duplication costs. While the payment of such charges may be purely a contractual matter, *see,e.g.*, ABA Informal Op. 1376 (Feb. 18, 1977), the Committee believes that such terms must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct. Retention of documents contingent upon payment of duplication costs is subject to the same exceptions that apply to a properly asserted retaining lien as discussed more completely by the Committee in CBA Ethics Committee Formal Opinion 82. *See Kallsen v. Big Horn Harvestore Systems, Inc.*, 761 P.2d 292 (Colo. App. 1988).

Documents to Which the Client is Not Entitled

Documents Protected from Disclosure Based Upon Third Party Interests

The client is not entitled to the production of documents obtained from or prepared for a third party, most commonly another client, that are used by the lawyer as guides or models in the current representation. The lawyer is not required to disclose documents that may violate the duty of confidentiality and nondisclosure owed to some third party, or otherwise imposed by law.[5] In the event that a pleading from a file related to the representation of a third party was used as a draft for the requesting client, it properly may be withheld. However, the pleading that was drafted for the requesting client from that model is not within this exception. Drafts of pleadings, if maintained in the file and not destroyed in the normal course of the representation, should be produced.

Personal Attorney-Work Product

Authorities differ as to the responsibility of the lawyer to produce personal attorney-work product that is contained in the file.[6] These discussions focus on varying definitions of what constitutes personal attorney-work product and the lawyer's responsibilities related to various portions of documents identified as personal attorney-work product.

Virtually all authority that has discussed this category recognizes that personal attorney-work product does not include documents belonging to the client or documents which are the "end product" of the attorney's services. These documents must be produced to the client. End product items include pleadings filed in the action, correspondence with the client, opposing counsel and witnesses, and final versions of contracts, wills, corporate records and similar records prepared for the client's actual use. *See*, *e.g.*, Illinois State Bar Ass'n, Op. No. 94-13.

While there is some authority to the contrary,[7] the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view.[8]

Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter.

It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specif-

ic facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected to the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer.

Some authority has applied definitions in this area that do not mirror the opinion of the Committee stated in this opinion. Various definitions of "work product" and accompanying discussions can be found in: *In the Matter of Sage Realty Corp.*, *supra*, ("documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purposes of giving internal direction to facilitate performance of the legal services entailed in that representation"); ABA Informal Opinion 1376 (Feb. 18, 1977) ("lawyer need not deliver [to client] his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem"); Arizona Ethics Opinion No. 81-32 (papers and documents belonging to client do not include "attorney's own notes and memos to himself; nor his myriad scratchings on note sheets; nor records of passing thoughts dictated to a machine or a secretary and placed in the file; nor ideas, plans or outlines as to the course the attorney's representation is to take"); Delaware Ethics Opinion 1997-5 (Nov. 5, 1997) ("lawyer's working notes, impressions and draft documents"); Illinois Ethics Opinion No. 94-13 (Jan. 1995) ("lawyer's notes, drafts, internal memoranda, legal research and factual research materials, including investigative reports, prepared by or for the lawyer for use of the lawyer in the representation"); Kansas Ethics Opinion 92-05 (July 30, 1992) (includes attorney's "recorded mental impressions, research notes, legal theories, and unfiled pleadings included in the client's file"); ABA/BNA Lawyer's Manual on Professional Conduct 31:1206 (examples of lawyer's work product include "recorded mental impressions, research notes, legal theories, and unfiled draft documents").

The lawyer should err on the side of production. If documentation is retained and production requests persist, disputes concerning access to documents which the lawyer perceives to be personal attorney-work product may need to be resolved by a court after judicial inspection of the documents *in camera*. *See, e.g.*, *People v. Salazar*, 835 P.2d 592 (Colo. App. 1992).

NOTES

1. CBA Formal Ethics Opinion 82 recognizes that a lawyer ethically may assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may not be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Colorado Rules of Professional Conduct; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

2. The Committee notes that the duty to surrender papers to the client to the extent reasonably practicable to protect the client's interests is not identical to the obligations of the lawyer to preserve the file. While certain documents might be withheld since they are contained in one of the exceptions addressed in this opinion, the fact that the lawyer has retained these documents does not diminish the obligation to preserve the file as that obligation is defined by agreement or by law. Discussion of this obligation is beyond the scope of this opinion.

3. Consistent with the suggestions raised by the authors of the cited article, the Committee encourages lawyers to address matters concerning file disposition in the initial retention letter or fee agreement, or in writing upon completion of representation in the matter.

4. The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. *See, e.g.,* C.R.C.P.,

Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation).

5. In certain areas of practice, lawyers are subject to court orders that prohibit the disclosure of certain documents or certain information to the client. This opinion does not address documents covered by such court orders.

6. The authorities that discuss this issue unfortunately use the term "work product." The Committee emphasizes that this term may be misleading in that it could be confused with "work product" which is protected against discovery because it relates to mental impressions, conclusions, opinions, or legal theories of an attorney concerning a matter in litigation. For purposes of this opinion, "personal attorney-work product" relates to that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting attorney impressions, that is not needed to protect the client's interests and, therefore, need not be produced pursuant to RPC 1.16(d).

7. *See Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, mod. 128 F.R.D. 182 (S.D. Miss. 1989); *Corrigan v. Armstrong, et. al.*, 824 S.W.2d 92 (Mo. App. 1992); Alabama State Bar, Formal Ethics Opinion RO-86-02; Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 92-1; Illinois State Bar Ass'n, Opinion No 94-13; North Carolina State Bar Ethics Committee, RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Opinion No. 92-88 (1993). The Committee disagrees with these authorities to the extent they state that the client is required to establish some specific need for the documents since it may be especially difficult for the client to establish that need when the client is unaware of what the file contains.

8. Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.