COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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March Case Law Update

Presented by Judge Laura Broniak and Judge John Steninger

This update covers ICAO and COA decisions issued between February 13, 2018 to March 9, 2018

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The Case Law Update is offered as an educational and informational program. The discussions and commentary should not considered a policy statement by the Division of Workers' Compensation or an indication of how the presenters would rule on any future pending cases.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-016-677-01

IN THE MATTER OF THE CLAIM OF:

FRANCIS GALAGAR,

Claimant,

v.

FINAL ORDER

E2 OPTICS, LLC,

Employer,

and

TRAVELERS,

Insurer,
Respondents.

The claimant seeks review of the corrected order of Administrative Law Judge Turnbow (ALJ) dated October 19, 2017, that granted the respondents' motion for summary judgment and dismissed the claim for benefits pursuant to the statute of limitations in § 8-43-103(2) C.R.S.. We reverse the order of the ALJ.

We note initially that we reject the respondents' contention we do not have jurisdiction to review the claimant's petition to review based on the respondents' allegation that the petition failed to set forth in detail the particular errors. Although §8-43-301(2), C.R.S. provides that a petition to review "shall set forth in detail the particular errors and objections of the petitioner," the requirement for a "detailed" petition to review is not jurisdictional and we may elect to review an otherwise timely petition to review. *Oxford Chemicals, Inc. v Richardson*, 782 P.2d 843 (Colo. App. 1989).

The respondents filed a Motion for Summary Judgment on October 12, 2017. The motion asserted the claimant filed a Worker's Claim for Compensation on April 29, 2016. The attached claim for compensation filled out by the claimant stated he injured his neck and cervical spine while lifting furniture for the employer in August 2015. The respondents filed a Notice of Contest form on October 28, 2016. The Summary Judgment motion asserted the two year statute of limitations specified in § 8-43-103(2) had expired and the claim for benefits should be dismissed. The motion also observed

that the claimant's application for a hearing dated August 23, 2017, was filed subsequent to the two-year anniversary of his injury.

The ALJ issued a Corrected Order Granting Summary Judgment on October 19. The order described how the claimant had submitted an application for a hearing on August 23, 2017, requesting medical benefits and temporary total benefits commencing the date of his injury on August 15, 2015. Among the order's findings of fact was the determination the claimant had filed his Worker's Claim for Compensation on April 29, 2016. The ALJ then ruled the two year statute of limitations described in § 8-43-103(2) had run. The ALJ concluded:

> As stated above, section 8-43-103(2) provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years after the injury. …
>
> Thus the statute ran on August 15, 2017, two years after his injury. Claimant's Application was not filed until August 23, 2017, two years after his injury. Claimant's Application was not filed until August 23, 2017, after the statute had run. … The Application for hearing was filed after the expiration of the statute of limitations. …
>
> Claimant's Response to Respondents' Motion for Summary Judgment misapprehends the basis for Respondents' Motion. The Response focuses on how clear it is that Claimant was injured on August 15, 2015, and fails to address the statute of limitations issue.

The claimant did assert in his response to the Summary Judgment Motion: "The respondents acknowledge that a claim for compensation was filed timely." The claimant then seeks to anticipate several other arguments the respondents might possibly be advancing as a basis for the motion.

We find the claimant's confusion understandable. The respondents contend in their Motion for Summary Judgment the claimant filed a claim for compensation within two years of the date of his work injury. The respondents then inconsistently state that because the claim was not filed within two years of the injury, the claim is barred by a statute of limitations, which requires it be filed within that two-year period. In his response, the claimant appears to be under the impression he is missing something. If so,

we find ourselves in the same predicament. Section 8-43-103(2) provides that in the case of an injury for which compensation is being claimed, the injured employee must file notice of such a claim with the Division within two years to avoid a bar to the claim's adjudication. The section's preceding paragraph (1) provides that any notice required to be filed by the injured employee "shall be in writing and upon forms prescribed by the division for that purpose and served upon the division … .' The Division's Workers' Compensation Rules of Procedure, 7 CCR 1101-3, Rule 5-1(D) and (E), refers to this notice and requires the claimant to file a Worker's Claim for Compensation form to achieve compliance with this statutory direction. Accordingly, when the respondents' Motion for Summary Judgment recites that the claimant filed his Worker's Claim for Compensation on April 29, 2016, in relation to an injury occurring in August, 2015, the Motion has rendered inapplicable the limitations period set forth in § 8-43-103(2). The required notice of the claim for benefits was thereby admitted to have been timely filed in compliance with that section's instruction. The findings by the ALJ which correspond to these admissions by the respondents similarly preclude a dismissal of the claim premised on the two year limitation period in § 8-43-103(2).

The Motion for Summary Judgment appears to reveal some confusion between the significance of a Worker's Claim for Compensation and an Application for a Hearing. While § 8-43-103(2) does provide a two year period in which to file the former, that section is not germane to any restriction upon an Application for a Hearing.

As a result, we find the ALJ has committed error in approving the Motion for Summary Judgment. The order doing so is reversed.

IT IS THEREFORE ORDERED that the ALJ's corrected order of October 19, 2017, is reversed and set aside.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

3/6/18 by TT .

BACHUS & SCHANKER LLC, Attn: JAMES W OLSEN ESQ, 1899 WYNKOOP STREET STE 700, DENVER, CO, 80202 (For Claimant)
RAY LEGO & ASSOCIATES, Attn: GREGORY W PLANK ESQ, 6060 S WILLOW DR STE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-895-940-03

IN THE MATTER OF THE CLAIM OF:

JOSEPH YEUTTER,

Claimant,

v.

FINAL ORDER

CBW AUTOMATION, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of the corrected order of Administrative Law Judge Cannici (ALJ) dated August 28, 2017, that denied the claimant's request for permanent total disability benefits and maintenance medical benefits. We affirm the order.

The claimant worked for the employer as a controls engineer performing tasks related to robotic programming when he was injured on August 24, 2012, while adjusting the sensors on a robotic machine. The claimant was struck in the face by a carbon fiber pole attached to the machine and knocked to the ground. He sustained injuries which included a skull fracture, inner ear nerve damage, a broken arm, broken bones in his orbital skull sockets, and a tear to the rotator cuff in his shoulder. The claimant returned to work after two weeks. He later left the employer and took a job as a mechanical engineer at BW Container Systems.

In November 2013, the claimant complained to his treating occupational doctors, Dr. O'Toole and Dr. Curiel, that he was experiencing symptoms of extreme fatigue and sleep disturbance. The claimant was evaluated by a psychiatrist, Dr. Newline, and a sleep study was completed. The sleep study showed findings consistent with narcolepsy. Narcolepsy is a condition featuring the inability to regulate sleep causing him to fall into sleep, including a deep sleep, with little warning. Dr. Newline prescribed Adderall to assist the claimant to stay awake. The claimant testified he began taking increasingly

large doses of Adderall to allow him to maintain employment. In September 2014, the claimant was advised by a pulmonary and sleep specialist, Dr. Neagle, that the levels of Adderall being consumed by the claimant posed an imminent risk of a heart attack. The claimant reduced his level of medication. However, he found he was no longer able to perform his job. He stated he was unable to remain awake and his level of cognitive function declined. The claimant stopped working in February 2015.

The claimant testified he sleeps 18 to 20 hours per day. He finds noise and activity bothersome. He states he never feels rested and his inability to concentrate leads him to be in danger of accidents. He believes he cannot watch his children alone. The claimant describes how short periods of activity leave him significantly fatigued. Dr. O'Toole determined the claimant had reached maximum medical improvement (MMI) on August 26, 2015. In addition to his other injuries, Dr. O'Toole diagnosed the claimant with several injuries including traumatic brain injury, which he stated induced the condition of narcolepsy. The doctor assigned the claimant a 45 percent whole person rating for a nervous system injury to the brain. He combined this with a 19 percent rating for vision injury and a 25 percent rating from Dr. Newlin for mental health impairment. The combined whole person impairment was 67 percent. Dr. O'Toole determined the claimant should remain off work and recommended periodic maintenance follow up evaluations and prescriptions for Wellbutrin, Adderall, Colmipramine, Zolfran, and Ambien.

The respondents requested a Division independent medical examination (DIME) which was conducted by Dr. Hattem. The DIME physician agreed with the date of MMI and deferred to the opinions of the treating doctors to determine that the claimant's injuries included a post-traumatic induced diagnosis of narcolepsy. The DIME physician determined the claimant sustained a 39 percent whole person impairment rating giving 19 percent for disturbance of visual acuity and 25 percent for the brain injury. The respondents filed a final admission of liability on March 2, 2016, consistent with the DIME physician rating and denied liability for ongoing medical benefits.

The claimant requested a hearing on the issues of permanent total disability and maintenance medical benefits. The insurance carrier for the long-term disability program of BW Container Systems obtained reports from Dr. Rosenfield, Dr. Sekirk, and Dr. Ogundipe that concluded the claimant was not so disabled from his injuries that he could not work. The respondents obtained evaluations from Dr. D'Angelo, Dr. Grinman, Dr. Kenneally, Psy.D., and Dr. Kleinman, all of whom concluded the claimant's condition should not preclude the claimant from engaging in occupational activity.

Dr. Kenneally performed a neuropsychological evaluation of the claimant which concluded that the claimant had no residual cognitive impairment from the head injury and in her opinion the claimant's described limitations in performance did not correspond to objective information. Dr. Kenneally also stated that it was not possible to say that the brain trauma from the injury caused the narcolepsy. Dr. Grinman, a neurologist specializing in sleep medicine, wrote a report stating the claimant's record does not support a condition featuring full functional impairment.

Dr. Kleinman reviewed the report of Dr. Kenneally, a report prepared by a firefighter who had recently been called to the claimant's house and interviewed four former co-workers of the claimant. Dr. Kleinman observed these sources indicated the claimant was engaged in more daily activity than he acknowledged. He determined the claimant's sleep disorder had not been the cause of the claimant's absence from work. Instead, Dr. Kleinman deduced the claimant left his employment due to a lack of professional skill.

Dr. D'Angelo testified she has worked on the Level II Division of Workers' Compensation certification class and investigated and researched the possible link between narcolepsy and head trauma. Dr. D'Angelo described how there is little research correlating the two. Dr. D'Angelo also pointed out the latency period in the claimant's case of more than a year between the date of his injury and the narcolepsy symptoms to conclude that it was improbable that the claimant's brain trauma could have caused his reported symptoms.

The claimant submitted the testimony of occupational expert Katie Montoya and the respondents countered with that of vocational expert Roger Ryan. Ms. Montoya described the claimant as slow to respond to her interview questions and his drowsiness, more than specific assigned restrictions, would make it unlikely he could maintain employment. She expressed concern the claimant would miss work and have difficulty arriving on time for a job. Ms. Montoya did not believe the claimant was able to earn wages. Mr. Ryan relied upon information that displayed the claimant's ability to successfully work in his engineering field for more than a year following his injury. During this period, the claimant was shown to be a productive and reliable employee. Mr. Ryan pointed to several jobs Dr. O'Toole had approved for the claimant, as well as other jobs such as customer services, telephone solicitor, dispatching, drafting and tutoring by phone, that were appropriate for the claimant. Mr. Ryan concluded the claimant was employable and able to earn wages.

The ALJ determined that the medical evidence was too speculative to allow a causal connection to be established between the claimant's traumatic brain injury and the narcolepsy. The ALJ, however, found that even assuming the claimant's employability was limited by his narcolepsy, the claimant still retained the ability to earn wages. The ALJ credited the opinions and testimony of Mr. Ryan over that of Ms. Montoya to find that the claimant has developed a number of transferrable job skills thorough his education and experience that render him a suitable candidate for a number of employment opportunities. The ALJ also found it significant that the claimant returned to work after the injury working 9-10 hours in a highly competitive environment.

The ALJ also determined that the claimant failed to prove his entitlement to reasonable necessary and related medical maintenance benefits. Relying on Dr. D'Angelo's opinion that the claimant's need for narcolepsy medication is not related to the work injury, the ALJ denied and dismissed the claimant's request for ongoing medical treatment after MMI.

On appeal, the claimant contends the ALJ's order is not supported by substantial evidence and that the evidence undermines the ALJ's determination that the claimant's brain injury did not lead to his narcolepsy symptoms. The claimant also asserts that the DIME physician's findings are binding on the parties and the ALJ because the respondents failed to dispute those findings. We are not persuaded the ALJ committed reversible error and affirm the order.

I.

Section 8-40-201(16.5) (a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant has the burden of proof to establish permanent total disability. In determining whether the claimant has satisfied that burden of proof, the ALJ may consider a number of "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education, and the availability of work the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The overall objective of this standard is to determine whether, in view of all these factors, employment is reasonably available to the claimant under his particular circumstances, which includes the claimant's complaints of fatigue, pain, drowsiness, and cognitive deterioration.

Because the issue of permanent total disability is generally factual, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This standard of review requires that we consider the evidence in the light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 91 P.3d 1117 (Colo. App. 2003).

On conflicting vocational evidence, the ALJ found the claimant failed to prove he is unable to earn wages in the same or other employment. The ALJ's order clearly articulates the basis of the order and is sufficient to permit appellate review. *See Boice v. Industrial Claim Appeals Office*, 800 P.2d 1339 (Colo. App. 1990).

Crediting Mr. Ryan's opinion, the ALJ found that the claimant is capable of employment despite his work injuries. The ALJ observed Mr. Ryan's belief the claimant was able to sustain work within a number of capacities and has not been assigned specific work restrictions. Based on the claimant's numerous skills from his enlistment as a Marine, college education, and several years of work as a mechanical engineer the ALJ determined there were a variety of jobs identified by Mr. Ryan that were available to the claimant. These positions included mechanical drafter, information clerk, hardware salesperson, cashier II, telephone solicitor, tutor, appointment clerk, motor vehicle dispatcher, collection clerk, unarmed security guard, production assembler, parking lot attendant, check cashier, ticket taker, restaurant host, sales clerk, janitor, dining room attendant, tool crib attendant, shipping and receiving clerk, and outside deliverer. The ALJ, in addition, referenced the medical opinion of Dr. Grinman to verify the claimant's narcolepsy did not cause complete functional impairment. Dr. Grinman found the condition would only exclude the claimant from operating commercial motor vehicles. Although the evidence was subject to conflicting inferences, the ALJ found that employment exists that is reasonably available to the claimant under his particular circumstances. Thus, it was plausible for the ALJ to conclude that the claimant could reasonably sustain employment and earn wages.

To the extent the ALJ did not make specific findings of fact concerning evidence supporting the claimant's contention that he is unable to work due to an absence of accommodation for his pain, complaints of fatigue and absence of energy, that does not establish grounds for appellate relief. The ALJ is not required to expressly cite evidence

he rejected as unpersuasive. *Jefferson County Public School v. Dragoo*, 765 P.2d 636 (Colo. App. 1988). Evidence not specifically credited is implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ's findings reflect that he resolved the pertinent conflicts based upon his credibility determinations. *See Ralston v. Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991)(ALJ not required to resolve all conflicts in the evidence but only pertinent conflicts). While we may not have reached the same determination of the ALJ on this issue, we are precluded from reweighing the evidence on appeal. *Rockwell v. International Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Neither may we substitute our judgment for that of the ALJ concerning the credibility of the expert witnesses. Therefore, we may not interfere with the ALJ's determination that Mr. Ryan's testimony was more credible than the testimony of the claimant's vocational expert. The claimant's further arguments on this issue do not alter our conclusions.

II.

We also reject the claimant's contention that the ALJ erred in denying the claimant's request for maintenance medical benefits. Whether the claimant sustained his burden to prove entitlement to maintenance medical benefits is a question of fact. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. § 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in the light most favorable to the prevailing party, and to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The Colorado Court of Appeals has noted that in this context the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d at 415.

Here, the ALJ relied on the opinions of Dr. D'Angelo and Dr. Kenneally to find that the claimant's need for medication to treat his narcolepsy is not causally related to the work injury. These opinions provide substantial evidence and valid support for the ALJ's determination and we have no basis to disturb the order. Section 8-43-301(8), C.R.S.

III.

To the extent the claimant argues that the parties and the ALJ were bound by the DIME physician's findings on the issue of permanent total disability and maintenance medical benefits insofar as the DIME physician found that the claimant's narcolepsy was caused by the injury, we disagree.

Under § 8-42-107(8), C.R.S., a DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Eg. Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges the DIME physician's determination of MMI or the DIME physician's impairment rating, the Court has recognized that a DIME physician's determination on causation is also entitled to presumptive weight these provisions. *Id.*; *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

When, however, a party is not challenging a DIME physician's MMI determination or impairment rating, the Courts have repeatedly held that the heightened burden of proof required by §8-42-107(8) does not apply. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002) (where issue was cause of worsened condition on reopening DIME physician's opinion not entitled to presumptive effect); *see also Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000) (DIME opinion concerning causation need not be overcome by clear and convincing evidence where dispute involved the "threshold requirement" that the claimant establish a compensable injury); *Story v. Indus. Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995) (DIME determination of MMI did not preclude change of physician order where only "Grover" medical benefits sought).

The panel also has repeatedly recognized that the presumptive effective of a DIME physician findings do not apply to issues other than MMI or impairment. *See E.g. Walker v. Life Care Centers of* America, W.C. No. 4-953-561 (March 30, 2017)(claimant not required to overcome DIME findings by clear and convincing evidence when seeking maintenance medical benefits); *Fleming v. Giesen Restaurant*, W.C. No. 4-545-531 (November 18, 2009); *Wilkinson v. Walmart Stores*, W.C. No. 4-674-582 (October 26, 2007)(DIME physician's causation opinion has no presumptive weight on the issue of *Grover* medical benefits); *Moore v. American Furniture Warehouse*, W.C. No. 4-665-024, (June 27, 2007)(the increased burden required by the DIME report did not apply to

the claimant's entitlement to a particular medical treatment); *Briggs v. Willard Plumbing and Heating*, W.C. No. 4-526-000 (March 9, 2007)(where the sole issue before the ALJ was the claimant's entitlement to medical benefits, we do not believe the claimant was required to overcome the DIME report by clear and convincing evidence); *Kingery-Stubbs v. Choice Hotels International,* W.C. No. 4-499-627 (January 20, 2006) (the claimant's failure to overcome DIME report by clear and convincing evidence does not preclude an award of Grover-type medical benefits under the preponderance standard); *Martinez v. K-Mart Corporation,* W.C. 4-164-054 (September 19, 2005).

We disagree that the cases cited in the dissenting opinion mandate a different result. We do not read *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005), *Gianzero v. Wal-Mart Stores*, W.C. No. 4-669-749 (May 5, 2010), *Crowe v. A Better Alternative, Inc*., W.C. No. 4-648-372 (August 1, 2007), *aff'd, A Better Alternative Inc. v. Industrial Claim Appeals Office*, (Colo. App. 07CA1607 May 29, 2008)(NSOP), or *Martinez v. Senior Resource Center*, W.C. No. 4-748-216 (October 14, 2009) to extend the presumptive weight of the DIME physician's causation determination to the issues of permanent total disability and maintenance medical benefits. These cases involved constructive challenges to MMI or impairment as the issues in those cases were intertwined with the DIME physician's finding on MMI opinions or impairment.

Moreover, in *Meza v. Industrial Claim Appeals Office*, 303 P.3d 158 (Colo. App. 2013), the Colorado Court of Appeals explicitly rejected the argument that *Leprino Foods* should be read to preclude the respondents' right to dispute a DIME physician's causation determination in a subsequent proceeding by filing a final admission. The Court reiterated the well-settled principle that the presumptive effect of the DIME physician's causation is statutorily limited to MMI and impairment in §8-42-107(8)(c), C.R.S.

In the situation here, in contrast, the parties are not challenging MMI or impairment. Therefore, the DIME physician's opinion concerning the causation of the narcolepsy was not entitled to presumptive weight. *Cordova v. Industrial Claim Appeals Office, supra*.

Permanent total disability is defined as the claimant's inability "to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S.. Neither § 8-40-201(16.5) nor § 8-42-111 C.R.S., requires permanent total disability to be proven by "clear and convincing evidence." Rather, the claimant is required to prove permanent total disability by a preponderance of the evidence. *See Younger v. City and County of*

Denver, 810 P.2d 647 (Colo. 1991); *Martinez v. Wendy's*, W.C. No. 4-603-270 (April 20, 2010).

The same is true of maintenance medical benefits. Regardless whether a treating physician or the DIME physician recommended future medical treatment, the respondents were free to deny liability and place the burden on the claimant to prove by a preponderance of evidence that he needed future medical treatment. *Canales v. Peak Contract Manufacturing Inc.* W. C. No. 4-348-069 (August 12, 2003), *aff'd, Canales v. Industrial Claim Appeals Office,* (Colo. App. No. 03CA1712 May 13, 2004)(NSOP).

Nor did the respondents' final admission of liability compel the ALJ to award the medical benefits without affording the respondents the opportunity to contest their relatedness to the compensable injury. The Colorado Court of Appeals has held that regardless of the filing of an admission, respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury. *See Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997)(concerning a general admission for medical benefits); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). This principle recognizes that even though an admission is filed the claimant bears the burden of proof to establish entitlement to specific medical benefits. The mere admission that an injury occurred and that treatment is needed cannot be construed as a concession that all conditions and treatment that occur after the injury were caused by the injury. *Cf. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing of a general admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

Giving presumptive effect to a DIME physician's causation determination for permanent total disability and maintenance medical benefits is contrary to the plain statutory language in §8-42-107(8) that a DIME physician's opinion is only given presumptive effect in MMI and permanent impairment determinations and is contrary to long standing case law. *Cordova v. Industrial Claim Appeals Office, supra*. Although it is possible that this can result in inconsistent determinations of causation for MMI and impairment and permanent total disability or maintenance medical benefits as happened in the present case, this is a familiar concept in workers' compensation. *See Sunny Acres Villa Inc., v. Cooper*, 25 P.3d 44 (Colo. 2001)(causation established at temporary disability stage could be re-litigated at permanent disability stage, because employer did not have same incentive to fully litigate causation at first stage).

It was the claimant's burden to persuade the ALJ that he is unable to earn any wages, and therefore is entitled to permanent total disability benefits and to show that he is entitled to maintenance medical benefits. The claimant's evidence failed to persuade the ALJ, and we cannot say the evidence compels a contrary determination. The ALJ's order reflects the proper application of the law and is supported by substantial evidence and we have no basis to disturb the order the order on appeal. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated August 28, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

Examiner Kroll submits the following dissent:

I respectfully disagree with the decision in this matter insofar as it affirms the denial of medical maintenance benefits, and permanent total benefits, by allowing the ALJ to conclude the claimant's narcolepsy condition is not a part of the industrial injury. The reasoning that allows the respondents to simultaneously stipulate the narcolepsy is a part of the industrial injury for purposes of permanent impairment benefits, and then contend it is not a part of the industrial injury for reasons of medical and permanent total benefits, is contrary to both the prior decisions of the Panel, and, more significantly, to prior decisions of the Court of Appeals. The Panel decision will also cause, as it did in this matter, duplicative litigation and inconsistent determinations involving precisely the same facts.

The DIME physician in this case, Dr. Hattem, evaluated the claimant and reviewed the medical record. He concluded that for the purposes of MMI and permanent impairment, the case indicated the claimant's industrial injury included the claimant's narcolepsy condition. He resolved the medical treatment for that condition had accomplished all the improvement possible and he calculated a 25% whole person impairment rating measured by the narcolepsy symptoms. The respondents did not dispute these findings. Instead, the respondents filed a Final Admission of Liability

adopting Dr. Hattem's finding of MMI and permanent impairment.

However, at the February and May, 2017, hearings, the respondents presented the evidence from their medical expert, Dr. D'Angelo, to argue the narcolepsy was not part of the industrial industry. This same evidence from Dr. D'Angelo had been found unpersuasive by Dr. Hattem. Following the hearing, the ALJ reached the opposite conclusion. The ALJ determined that because the claimant's narcolepsy was not a compensable injury, the claimant was not entitled to future medical treatment for that condition. In addition, the ALJ ruled any disability presented to the claimant by his narcolepsy could not be attributed to the work injury for the purposes of proving permanent total disability. The Panel's decision has approved this incongruence. Accordingly, the same medications prescribed and provided to the claimant prior to MMI, as a medical benefit to treat his narcoleptic work injury, were no longer available to him after MMI because at that point the ALJ ruled the cause of the narcolepsy never had any connection to his work accident. Similarly, the Panel decision means the symptoms of narcolepsy led to compensation for permanent impairment but those same symptoms, through this legal construction, necessarily must be seen as having no effect on the claimant's ability to actually work.

The Panel's decision justifies this juxtaposition of mutually exclusive results by reasoning that the statue which discusses the authority of DIME physicians, § 8-42-107(8)(b)(II) & (c) C.R.S., references only determinations of MMI and permanent impairment. Consequently, it holds the conclusion of a DIME examiner may be ignored when the subject of a hearing involves any other issue or benefit. Such benefits would encompass temporary benefits, medical treatment, permanent total disability and post MMI *Grover* medical benefits. In addition, the decision reasons the statement included in prior reported decisions providing that any disputed medical benefit, including post MMI benefits, may be disputed by the respondents on the basis of whether it is "reasonable and necessary, and related to the work injury," also allows a dispute over the fact there even is a work injury.

The case law however, has rejected such an analysis. We have held there is some portion of the analysis surrounding eligibility for these benefits which must bend to the weight of a DIME physician's decision. The DIME doctor's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment, which comprises the DIME process involved in determining MMI and rating permanent impairment. *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (December 30, 2008), § 8-42-107(8)(b)(II) & (c) C.R.S. When a claim involves permanent total benefits, and the dispute involves not just the ability of the claimant to earn any wages, but also involves

whether or not a particular condition or portion of the body is part of the compensable injury, we have held the determination of a DIME physician finding a causal link between the work accident and the claimant's condition, made in the context of either a determination of MMI or permanent impairment, must also be afforded presumptive effect in the dispute over permanent total benefits. *Martinez v. Senior Resource Center*, W.C. No. 4-748-216 (October 14, 2009), *aff'd, Martinez v. Industrial Claim Appeals Office*, (Colo. App. 09CA2258 June 24, 2010)(not selected for publication). We have issued similar findings in disputes over specific medical benefits. When the award of a specific benefit is in question, not because the medical procedure is reasonable or necessary or related to the compensable injury, but because it is contended the body part to which the medical treatment applies is not a compensable injury, then we have given a DIME's causation determination presumptive effect in that matter. *Gianzero v. Wal-Mart Stores*, W.C. No. 4-669-749 (May 5, 2010), *aff'd, Gianzero v. Industrial Claim Appeals Office*, (Colo. App. 10CA1058 &10CA1059 September 8, 2011)(not selected for publication), *Crowe v. A Better Alternative, Inc*., W.C. No. 4-648-372 (August 1, 2007), *aff'd, A Better Alternative Inc. v. Industrial Claim Appeals Office*, (Colo. App. 07CA1607 May 29, 2008)(not selected for publication).[1]

Accordingly, in *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005), the Court found the determination of a DIME physician provided a legally binding resolution to the question of whether the respondents were liable for temporary benefits related to the incapacity of the claimant's shoulder. In *Leprino*, the claimant had sustained a work related elbow injury. Following surgery to the elbow, the respondents filed an FAL. The claimant requested a DIME review. The DIME doctor observed the claimant was not at MMI. The doctor provided several diagnoses among which were findings the claimant suffered chronic right shoulder pain and a possible

[1] The Panel decision has referenced seven prior decisions which it is asserted stand for the holding that a DIME determination of causation is never given presumptive effect beyond determinations of MMI or permanent impairment. However, a review of those decisions suggest none of those cases feature a parties' or an ALJ's dispute of a DIME causation finding to justify an award or denial of benefits inconsistent with the DIME's causation result. *Walker v. Life Care Centers*, W.C. No. 4-953-561 (the ALJ found the request for a medical treatment was consistent with the DIME determination); *Fleming v. Giesen Restaurant*, W.C. No. 4-545-582 (the Panel decision states the DIME causation finding is presumptive, the ALJ noted the DIME said the shoulder was not related and the ALJ ruled accordingly); *Wilkinson v. Walmart Stores*, W.C. No. 4-674-582 (There was no DIME review in the claim, the claimant had never completed her request for a DIME); *Moore American Furniture*, W.C. No. 4-665-024 (The case did not feature a dispute as to whether the low back was part of the work injury, the dispute involved whether surgery was the best method to treat the back); *Briggs v. Willard Plumbing*, W.C. No. 4-526-000 (The Panel decision acknowledged the DIME causation decision does have presumptive effect but the issue was limited by the terms of a remand order from the Court of Appeals); *Kingery-Stubbs v. Choice Hotels*, W.C. No. 4-299-627 (The decision noted the DIME concluded the claimant did not have TOS, and the medical authorization for pain treatment did not include treatment for TOS); *Martinez v. K-Mart* W.C. No. 4-164-054 (This order indicates the DIME's MMI decision was found by the ALJ to have been overcome by clear and convincing evidence).

frozen right shoulder. The respondents took no action pertinent to the DIME report, neither contesting it nor filing a conforming General Admission. The claimant requested a hearing to obtain temporary total benefits subsequent to their cessation on the previously determined MMI date. The respondents contended the DIME physician was mistaken in including the shoulder among the body parts affected by the work injury. The statute, § 8-42-107(8), does not provide for a DIME physician to rule on the issue of temporary benefits. The Court ruled that the failure of the respondents to dispute the DIME's MMI decision within 20 days as required by § 8-42-107.2(4)(c) rendered binding not only the DIME's MMI decision, but also the DIME's determination of causation made necessary by the finding regarding MMI.

> However, the Panel found, and we agree, that the ALJ correctly ruled that employer is bound by the DIME physician's report because it failed to contest the findings.
>
> **…**
>
> As required by § 8-42-107(8), A DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect. Both determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. Therefore, a DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence. (134 P.3d at 482-83).

The DIME's ruling pertinent to causation was deemed no longer subject to dispute, even to the extent of clear and convincing evidence. Therefore, the ALJ had no jurisdiction to entertain the issue linking the cause for temporary benefits with the work accident.

> The DIME physician's determination is therefore binding on the parties and the ALJ because employer did not timely act to contest it. Accordingly, jurisdiction to hear such a contest has now been lost. (134 P.3d at 482).

In *Martinez v. Senior Resource Center*, *supra*, we applied the analysis set forth in *Leprino Foods* to the situation, identical to that featured in this matter, where a request was made for permanent total benefits and for post MMI medical benefits. In *Martinez*, a

DIME physician had ruled the claimant had sustained a work injury to her right leg, but also observed the claimant's work injury did not affect her low back or her left shoulder. The DIME determined further recommended treatment in the nature of right knee surgery was not causally related to the work accident. The respondents filed a Final Admission and the claimant applied for a hearing. The claimant argued that because she was seeking permanent total benefits and maintenance medical benefits, which the statute does not provide are issues for a DIME review, she was not required to overcome the DIME physician's determination of causation. The ALJ found the claimant was seeking to overcome the DIME physician's opinion and conclusions regarding causation as well as attempting to overcome the DIME physician's opinions on causation and relatedness in an effort to obtain permanent total disability benefits and medical benefits. We affirmed the ALJ's decision to ascribe to the DIME's causation decision presumptive effect.

> In our view, the issue of causation here involved an inquiry into the relatedness of particular components of a claimant's overall impairment. In such circumstances, the opinions of the DIME physician carry presumptive effect. *See, Eller v. ICAO*, 224 P.3d 397, 400 (Colo. App. 2009); *Qual-Med v. ICAO*, 961 P.2d 590, 592 (Colo. App. 1998) … *Leprino Foods Co. v. ICAO*, 134 P.3d 475, 486 (Colo. App. 2005).
>
> The issue presented to the DIME physician and later to the ALJ was the extent of this injury. Therefore, the issue of the cause of claimant's low back condition, her current left shoulder condition, and her need for additional treatment for her right knee was properly before the DIME physician, and his opinions on the causation issue became binding … .

Our decision was affirmed in an unpublished opinion by the Court of Appeals. *Martinez v. Industrial Claim Appeals Office*, (Colo. App. 09CA2258 June 24, 2010)(not selected for publication). Relying on the same case authority, the Court agreed "it was appropriate for the ALJ to give presumptive weight to the DIME physician's determinations that claimant's back pain, knee pain, shoulder injury and depression were attributable to her preexisting condition and unrelated to the industrial accident."

We have on other occasions applied the *Leprino Foods* decision to claims featuring disputes only concerning medical benefits. In *Crowe v. A Better Alternative, Inc.*, W.C. No. 4-648-372 (August 1, 2007), *aff'd, A Better Alternative Inc. v. Industrial*

Claim Appeals Office, (Colo. App. 07CA1607 May 29, 2008)(not selected for publication), the treating physician placed the claimant at MMI following successful treatment for the claimant's low back injury. A DIME review by Dr. Miller determined the claimant was not at MMI noting the claimant required treatment for his cervical spine, coccyx and TMJ injuries. The claimant requested ALJ authorization for an arthrocentesis procedure related to the TMJ condition. The ALJ revealed his reluctance to approve the TMJ treatment. He found the evidence unpersuasive that TMJ was related to the work injury. Nonetheless, the ALJ recognized the respondents had filed a General Admission following the DIME report. Accordingly, that DIME determination concerning causation of the TMJ was binding. We affirmed, reasoning: "the respondents' failure to contest the DIME physician's findings precludes them from challenging Dr. Miller's findings concerning the cause of the claimant's spinal and TMJ conditions. *Leprino Foods Co*… ."

The Court of Appeals affirmed by referencing the holding in *Leprino Foods* that if an employer does not challenge a DIME's findings, where causation is inextricably linked to a determination of MMI or impairment, the DIME physician's "opinions on the causation issue become binding because of employer's failure to challenge them." *Leprino, Id*. at 483.

Gianzero v. Wal-Mart Stores, W.C. No. 4-669-749 (May 5, 2010) involved a request for the authorization of a right shoulder surgery. The DIME physician indicated the claimant was at MMI because the right shoulder was not related to the industrial accident. We affirmed the ALJ's denial of the request observing "In our view, the issue of causation here involved an inquiry into the relatedness of particular components of a claimant's overall impairment. Here the component in question was the claimant's right shoulder injury. In such circumstances, the opinions of the DIME physician carry presumptive effect. *See, Eller v. ICAO, supra*; *Qual-Med. Inc. v. ICAO, supra*; *Leprino Foods Co v. ICAO, supra*." The Court of Appeals affirmed, *Gianzero v. Industrial Claim Appeals Office*, (Colo. App. 10CA1058 &10CA1059 September 8, 2011)(not selected for publication), relying on *Eller* and *Leprino Foods*. The Court quoted *Eller*: "An inquiry into the relatedness of a particular component of a claimant's overall impairment will carry presumptive effect when determined by a DIME physician." *Eller Id*. at 400.

In this matter the ALJ ruled the record indicated "claimant has failed to demonstrate that it is more probably true than not that his narcolepsy was caused by his August 24, 2012 industrial accident … ." This finding cannot be characterized as passing on the reasonableness and necessity of maintenance medical treatment. Rather, it is a determination pertinent to an issue already decided by the DIME physician. The

DIME provided a permanent impairment rating for a traumatic injury to the brain that was measured by the claimant's condition of narcolepsy. The respondents submitted a FAL, which adopted that impairment rating and paid benefits accordingly. Consequently, the conclusion that the claimant's work injury caused the claimant's narcolepsy is a binding determination. The ALJ does not have jurisdiction to revisit the issue. The ALJ provided as the sole basis for denying maintenance medical benefits the adjudication of no relationship between the work injury and the narcolepsy. The case law referenced above suggests we must set aside the ALJ's denial of medical benefits subsequent to MMI. To the extent the ALJ premised the rejection of permanent total disability benefits on a similar determination, we should also set aside that finding.[2]

[2] The Panel decision cites to the ruling in *Meza v. Industrial Claim Appeals Office*, 303 P.3d 158 (Colo. App. 2013) and argues that decision holds DIME determinations are to be limited to only those issues specified in § 8-42-107(8)(c), i.e. MMI and impairment. The decision involved the construction of § 8-42-107(8)(b)(II)(A) and held that section did not empower an 18 month DIME to rule on both MMI and impairment. However, the decision also resulted in the creation of dueling DIMEs in the same claim. In the *Meza* claim, because the authority of a DIME physician deciding MMI was held to be coextensive with the authority of another DIME physician ruling on permanent impairment, the claim featured a DIME conflict as to just which conditions comprised the compensable work injury. The *Meza* decision was decided on May 9, 2013. Because of the decision's determination to strictly limit the authority of a DIME finding, is was legislatively overruled 19 days later by the passage of S.B. 13-285 enacted on May 28, 2013. This world record setting time for the legislative reversal of a court decision suggests the General Assembly is not interested in seeing the authority of DIME physicians diminished.

CERTIFICATE OF MAILING

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

2/26/18 by TT .

PINNACOL ASSURANCE, Attn: HARVEY FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
ELEY LAW FIRM, Attn: CLIFFORD ELEY ESQ, 2000 S COLORADO BLVD #2-740, DENVER, CO, 80222 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: KATHERINE HR MACKEY ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-038-309-01

IN THE MATTER OF THE CLAIM OF:

MARY RINEHART,

Claimant,

v.

FINAL ORDER

EMPLOYBRIDGE HOLDING COMPANY,

Employer,

and

XL INSURANCE AMERICA,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated October 19, 2017, that determined her compensable injury was limited to a laceration on the top of her head, that ordered the respondents liable for medical benefits for the laceration, that denied her request for temporary disability benefits and penalties, and that determined Dr. Neville is not an authorized treating provider (ATP). We affirm.

This matter went to hearing on whether the claimant sustained a compensable injury on January 5, 2017, medical benefits, temporary indemnity benefits, average weekly wage, whether Dr. Neville is an ATP, and whether the respondents are subject to penalties under §8-43-503(3), C.R.S. After the hearing, the ALJ found that the claimant was hired by EmployBridge, a temporary employment agency. In July 2016, the claimant was assigned to work for Pro Mold as a machine operator.

On Thursday, January 5, 2017, the claimant parked her car in the Pro Mold parking lot and walked into the contiguous building to start work. It had been snowing and the parking lot was covered with snow and was icy. At approximately 8:45 a.m., the claimant's supervisor, Chris Ensely, asked the claimant to move her car to a different parking space to allow the owner of Pro Mold, Jerry Campbell, to plow the Pro Mold parking lot with a backhoe.

After the claimant moved her car, she started walking back into Pro Mold. The claimant saw the bucket of the backhoe, which was lifted in the air, and located near the front of the building entrance. The claimant thought she was going to clear the bucket but instead walked into it and hit her head. Mr. Campbell witnessed the claimant walk into the bucket of the backhoe. The claimant's head began bleeding and another employee, Christine Lebeda, took the claimant to the emergency room. While Ms. Lebeda was driving the claimant to the Medical Center of the Rockies Emergency Room (MCR ER), the claimant appeared to be relatively normal.

During her initial evaluation at the MCR ER on January 5, 2017, the claimant recollected everything fairly well and denied dizziness, syncope, or light-headedness. Further, when medical providers were questioning the claimant, she had no problems understanding the questions or providing responses. On examination, the claimant had a laceration on the top of her head but her head was otherwise atraumatic. The claimant also displayed a full range of motion of her neck and was non-tender to palpation of the cervical spine. The claimant was diagnosed with a scalp laceration, concussion without loss of consciousness, and neck strain. The laceration was repaired with suture staples and the claimant was discharged the same day.

The claimant returned to MCR on January 10, 2017, due to headaches and nausea. The claimant denied vomiting, visual changes, or confusion. The claimant had a normal neurologic exam. The claimant also was negative for neck pain and stiffness, dizziness, and weakness. No further workup was needed.

The claimant began treating with Dr. Hebard on January 12, 2017. The claimant denied a history of loss of consciousness. She reported she struck the top of her head on January 5, 2017, and noticed left jaw pain about two days after the injury. The claimant was negative for blurred vision and light sensitivity. However, she was positive for complaints of dizziness, headache, numbness, and neck pain. On examination, the claimant's left jaw was not sore and not tender to palpation, and her eyes, ears, nose, and throat were unremarkable. Dr. Hebard removed the suture staples, referred the claimant to physical therapy, and released her to full duty. He noted that the claimant had returned to full duty on Monday, January 9, 2017.

Due to continued complaints of ongoing headaches and neck pain, the claimant had a CT of the brain, which was normal. She also had a CT of the cervical spine, which revealed no acute bony abnormality and potentially significant C5-6 foraminal narrowing. The claimant denied having any cervical radiculopathy or any other associated symptoms. On examination, the claimant had no focal deficits, paresthesias,

or vision changes. She displayed normal range of motion of the neck and normal gait. The claimant was discharged in good and improved condition.

Due to the claimant experiencing increasing headaches, Dr. Hebard referred her for a neurology consult. The claimant then returned to Dr. Hebard for additional treatment on February 2, 2017. She complained of increasing headaches, nausea, and vomiting. Due to the claimant's complaints, Dr. Hebard referred the claimant back to the MCR ER for evaluation.

The claimant returned to MCR ER on February 2, 2017. The claimant denied visual disturbance, neck stiffness, speech difficulty, weakness, or numbness. The claimant also denied nausea and vomiting. She had a normal neurological exam.

Even though the claimant was treating with Dr. Hebard for her work accident, she treated with her primary care physician, Dr. Neville, on February 14, 2017.

Subsequently, based on the referral from Dr. Hebard, the claimant presented to Reena Dhakal, N.P. from February 21, 2017, to May 2, 2017. Ms. Dhakal is a nurse practitioner specializing in neurology. Ms. Dhakal did not staff the claimant's case with medical doctors. The claimant reported to Ms. Dhakal that she was having daily headaches and narcotics did not relieve her symptoms. The claimant had a normal physical examination. However, Ms. Dhakal placed the claimant off work due to her subjective complaints of a headache.

The claimant continued to treat with Dr. Hebard in April and May 2017. According to Dr. Hebard, the claimant's scalp laceration, left jaw contusion, and right hip contusion were at MMI as of February 2, 2017. Dr. Hebard also opined the claimant reached MMI as of April 10, 2017, for her musculoskeletal complaints with no impairment.

At the request of the respondents, Dr. D'Angelo performed an independent medical examination. The claimant reported to Dr. D'Angelo that she did not walk into the backhoe but, instead, the backhoe drove into her and she was knocked out, contrary to the medical records. Further, while there is no mention of hip or jaw pain in the initial January 5, 2017, medical record, the claimant also reported she hit her jaw and also experienced hip pain following the work incident. The claimant also reported she had short-term memory loss, but this was not reported in the medical records until February 21, 2017. Similarly, the claimant reported cervical radiculopathy, even though this was not reported by the claimant or mentioned in the medical records until March 31, 2017.

The claimant's chief complaints were headaches, dizziness, neck pain, right leg pain, memory loss, problems thinking, insomnia, depression, shoulder pain, and hip pain. Dr. D'Angelo opined the claimant was an unreliable historian and her reports of pain were a consequence of conscious malingering or factitious, somaticizing disorder. Dr. D'Angelo opined the claimant did not suffer a minor traumatic brain injury (MTBI) or concussion as a result of the January 5, 2017, incident because there were no findings on physical examination consistent with MTBI during her initial MCR ER visit. Dr. D'Angelo noted the claimant's symptoms expanded and worsened following her initial MCR ER visit, which is inconsistent with either a MTBI or spinal trauma. Dr. D'Angelo also opined that the claimant's cervical, thoracic, and lumbar spine and cervical radicular complaints are not a result of the January 5, 2017, incident. Rather, she stated the cervical MRI revealed chronic degeneration. Dr. D'Angelo diagnosed the claimant with a work-related head contusion, myofascial/cervical spine irritation, and a head laceration. She opined the claimant was at MMI with no impairment and no need for future medical treatment.

The ALJ ultimately found that the claimant's compensable injury was limited to a laceration to her forehead when she walked into the stationary backhoe in the respondent employer's parking lot. Crediting the opinions of Dr. D'Angelo, the ALJ was not persuaded the claimant sustained any other injury due to the January 5, 2017, incident. The ALJ expressly found the claimant's account as to the extent of injuries she suffered in the January 5, 2017, incident to be not credible. He also found that while numerous physicians diagnosed the claimant with a concussion and/or post concussive syndrome, their diagnosis was based on the claimant's subjective complaints, which he did not find credible. He ordered the respondents liable for medical treatment to cure and relieve the claimant from the effects of her head laceration. The ALJ also found that since the January 5, 2017, industrial incident did not cause any disability which precluded the claimant from performing her regular job, he denied her request for temporary disability benefits. The ALJ further found that the respondents did not provide the claimant a designated provider list consistent with W.C.R.P. 8 and, therefore, the right of selection passed to the claimant. He found the claimant exercised her right of selection by treating with Dr. Hebard. The ALJ also found that the claimant did not request permission to treat with Dr. Neville and Dr. Hebard did not refer the claimant to Dr. Neville. He therefore concluded Dr. Neville was not an authorized provider. Last, the ALJ found the claimant failed to present any credible evidence showing the respondents issued any commands to any of the claimant's treating physicians regarding the type or duration of her treatment or impairment. He therefore denied and dismissed the claimant's request for penalties under §8-43-503(3), C.R.S.

I.

The claimant first argues that the ALJ erred in determining that her compensable work injury is limited to just a head laceration. The claimant reasons that eight different medical professionals opined she sustained a concussion and/or post-concussion headaches and neck pain as a result of the work incident on January 5, 2017. She therefore contends that a set-aside, correction, or remand is appropriate because the ALJ's findings of fact and order are not supported by substantial evidence. The claimant also contends the ALJ erred in denying her claim for medical benefits for her concussion, post-concussion headaches, and neck pain. We are not persuaded the ALJ erred.

To prove a compensable injury, the claimant has the burden to prove by a preponderance of evidence that her condition arose out of and in the course of her employment. Section 8-41-301(1)(b) and (c), C.R.S.; *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *See Faulkner v. Industrial Claim Appeals Office, supra*. Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, the claimant's argument notwithstanding, substantial evidence supports the ALJ's finding that the claimant's industrial injury is limited to a head laceration. As was his prerogative, the ALJ credited the opinions of Dr. D'Angelo that the claimant did not sustain a MTBI or concussion as a result of the January 5, 2017, incident. Dr. D'Angelo explained that during the claimant's initial MCR ER visit, there were no findings on physical examination consistent with a MTBI. Dr. D'Angelo further explained that the symptoms of a MTBI are at their worst immediately following the head injury, and over time there is a gradual symptom reduction. Dr. D'Angelo explained, however, that the claimant's course of worsening and expanding symptoms was completely contrary to the expected medical progression of a MTBI. Dr. D'Angelo opined that the claimant's head contusion and laceration were at MMI. Ex. D at 54-55, 63; Depo. of Dr. D'Angelo at p. 8-9. Section 8-43-301(8), C.R.S.; *Wilson v. Industrial Claim Appeals Office, supra.* It is true, as the claimant alleges, there were a number of medical professionals who diagnosed the claimant with a concussion and post-concussion headaches, and the ALJ certainly could have made contrary findings based on their medical reports. However, the ALJ expressly found that these physicians and medical professionals were relying

upon the claimant's subjective complaints which he did not find to be credible. In his Order, the ALJ went into great detail as to why he found the claimant not credible, including her inconsistent and expanding physical complaints, and her demeanor during the hearing. We may only interfere with the ALJ's credibility determinations if the record contains hard, certain evidence that renders the ALJ's determination erroneous as a matter of law. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1970). That is not the case here, however.

Moreover, in support of her argument that the ALJ erred in determining her compensable work injury is limited to a head laceration, the claimant contends the ALJ erred in making certain findings of fact. First, the claimant argues the ALJ incorrectly found she walked into the backhoe. The claimant reasons that Mr. Campbell testified he was moving the bucket attached to the backhoe and the bucket hit the claimant. Second, the claimant contends the ALJ erred in finding she told MCR ER medical personnel that the backhoe was stationary and she walked into it, but then told Dr. D'Angelo that the backhoe ran into her. According to the claimant, she clearly was stating that the bucket of the backhoe was moving when it hit her but the backhoe itself was stationary and that her statements to the MCR ER medical personnel and Dr. D'Angelo were therefore consistent. We again perceive no error.

Here, during the hearing, the claimant testified that after she moved her car, she was walking back into the building, she thought the bucket was high enough, but it was not high enough, and she hit it. She explained that the bucket was not moving:

> Q. . . . And somehow when you're walking back you don't see the front loader? Or you saw it, tried to duck, and missed?
> A. No.
> Q. Well, which was it?
> A. I was walking back.
> Q. Uh-huh.
> A. Jerry was right here. I was going up, coming around. Jerry's right here. I was going to miss him. I thought the bucket was high enough. It was not high enough and I hit it.
>
> * * *
>
> Q. Okay. So you saw the bucket? You saw it before you –
> A. Yes.
> Q. And you thought you were going to get underneath it?

> A. No. I thought I was away from it far enough when I went to the left side him. (Sic) So it was high, and I thought I cleared it. But I didn't clear it.
>
> * * *
>
> Q. . . . And, I'm just trying to visualize how the heck you could hit the top of your head on a metal bucket if you saw it. I'm just trying to figure that out. So you must have thought you could clear it and just didn't? No?
> A. Yeah, correct.
> Q. Okay. All right. So it wasn't like the bucket moved and hit you, correct?
> A. Correct. Tr. at 63-65.

Mr. Campbell also testified he saw the claimant walk into the bottom of the bucket on the tractor that he used to plow the parking lot. Tr. at 129-130. Additionally, a medical record from MCR provides as follows:

> [Claimant] says she was walking in a parking lot when she ran into a stationary backhoe. . .[Claimant] states the machine was not moving She did happen to run into the plow part of the machine though Ex. 3 at 6.

Additionally, during the claimant's IME with Dr. D'Angelo, she was asked about the mechanism of injury. The following pertinent colloquy occurred:

> Dr. D: So, tell me what happened; I know you said you had to move your car and you were walking. . .
> [Claimant]: The owner is here in the backhoe, okay? Right up against the building. I was going this way. Here's my employee's door. I was going this way, heading back, the next thing I knew the backhoe moved and I was out.
> Dr. D: So, you didn't walk into a backhoe.
> [Claimant]: No.
> Dr. D: The backhoe drove into you.
> [Claimant]: It hit me. Right.
>
> ***
>
> Dr. D: It knocked you down, knocked you out?
> [Claimant]: Knocked me out. Ex. D at 35-36.

Based on this record, the ALJ could reasonably infer that the claimant walked into the bucket of the backhoe. Similarly, the ALJ could reasonably infer that the claimant

told MCR ER medical personnel that the backhoe was stationary and she walked into it, but then told Dr. D'Angelo that the backhoe ran into her. It is true, as the claimant alleges, Mr. Campbell also testified that when the incident occurred, he was raising the bucket off the ground, and that the only thing that was moving was the bucket going up in the air. Tr. at 134. However, this conflict did not preclude the ALJ from crediting the claimant's statements to the contrary and not crediting that portion of Mr. Campbell's testimony regarding the bucket moving. It is well settled that an ALJ may credit all, part, or none of a witness's testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). Further, where the testimony is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflicts, and determine the inferences to be drawn. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). We may not substitute our judgment for that of the ALJ to reach a different result. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Thus, while there was conflicting evidence in the record, the ALJ made reasonable inferences, and we may not disturb the ALJ's order on these grounds. Section 8-43-301(8), C.R.S.

Since the ALJ found, with record support, that the claimant's compensable injury was limited to a laceration on the top of her head, he properly denied medical benefits for her alleged concussion, post-concussion headaches, and neck pain. Section 8-42-101, C.R.S.

II.

Next, the claimant argues that the ALJ erred in denying her claim for temporary disability benefits. She contends that from January 5, 2017, to February 20, 2017, she missed more than three work shifts due to her work injury and on February 21, 2017, she was completely taken off work by her treating physicians. We perceive no error.

Section 8-42-103(1), C.R.S. sets forth the claimant's general right to recover temporary disability benefits for the injury. Pursuant to §8-42-103(1), C.R.S., to establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury caused a disability, that she left work as a result of the disability, that she was disabled for more than three regular work days, and that she suffered an actual wage loss. Section 8-42-103(1), C.R.S.; *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Here, the ALJ found, with record support, that the claimant's industrial incident on January 5, 2017, did not preclude her from performing her regular job. In support for this

determination, the ALJ credited Dr. D'Angelo's opinions. Again, Dr. D'Angelo opined that the industrial accident on January 5, 2017, did not cause any disability which prevented the claimant from performing her regular job. She further testified that there was no objective medical reason for Dr. Neville or Ms. Dhakal to take the claimant off work in February 2017. Depo. of Dr. D'Angelo at 27-28. Moreover, to the extent the claimant contends that prior to February 2, 2017, she was taken off of work for more than three days by Dr. Aguelles, this was for her claimed post-concussive syndrome. As explained above, however, the ALJ was not persuaded that the claimant's compensable injury included post-concussive syndrome. Thus, since the ALJ found the claimant's industrial injury did not cause a disability, or wage loss, and did not prevent her from performing her regular job, the claimant is not entitled to recover temporary disability benefits. Section 8-42-103(1)(b), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated October 19, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

2/27/18 by TT .

THE SAWAYA LAW FIRM, Attn: TRAVIS D BARBARICK ESQ, 1600 OGDEN STREET, DENVER, CO, 80218 (For Claimant)
RITSEMA & LYON PC, Attn: RICHARD A BOVARNICK ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

COLORADO COURT OF APPEALS

DATE FILED: March 8, 2018
CASE NUMBER: 2017CA895

Court of Appeals No. 17CA0895
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-942-783

Roger A. Portillo,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, ShoCo Oil-Samhill Oil, Inc., and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE J. JONES
Hawthorne and Nieto*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 8, 2018

Martinez Tenreiro & LaForett, LLC, Elsa Martinez Tenreiro, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents ShoCo Oil-Samhill Oil, Inc., and Pinnacol Assurance

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this workers' compensation action, claimant, Roger A. Portillo, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which set aside the order of an administrative law judge (ALJ) for lack of jurisdiction. The Panel held that because a division-sponsored independent medical examination (DIME) hadn't been completed, the ALJ lacked jurisdiction to conduct a hearing in claimant's case. We affirm.

I. Factual and Procedural Background

¶ 2 Claimant sustained admitted work-related injuries to his back in a motor vehicle accident in February 2014. Employer, ShoCo Oil-Samhill Oil, Inc., and its insurer, Pinnacol Assurance, initially sent claimant to Dr. Katherine Drapeau for evaluation and treatment. Dr. Drapeau diagnosed claimant with "lumbar sprain with right radicular symptoms" and indicated she was concerned "for disk pathology."

¶ 3 A few weeks after seeing Dr. Drapeau, claimant saw Dr. Yusuke Wakeshima for treatment. Dr. Wakeshima took over the management of claimant's care. He reported that claimant had "axial low back pain" and said that his findings were "most consistent with S1 radiculopathy." An MRI later revealed an

"annular disk bulge and paracentral disk protrusion at the L5-S1 level."

¶ 4 Steroid injections Dr. Wakeshima prescribed didn't alleviate claimant's pain, however. Instead, claimant reported increased pain in his right foot and ankle along with color changes, swelling, and increased perspiration of the right foot. Observing allodynia of the right foot and ankle, Dr. Wakeshima theorized that claimant was suffering from complex regional pain syndrome (CRPS) of the lower right extremity.

¶ 5 In October 2014, Dr. Wakeshima reported that claimant's thermogram studies were consistent with CRPS. Another test conducted in January 2015 (a QSART study) was also positive for CRPS. Conversely, a bone scan was negative. Dr. Wakeshima then requested lumbar sympathetic blocks to further diagnose CRPS and provide claimant some relief from his symptoms. But, these results, too, were equivocal. Although claimant's pain level decreased for two days after the first block, it worsened after the second block. Employer's insurer denied requests for subsequent blocks. Despite the inconsistencies in some of claimant's CRPS test results, Dr. Wakeshima concluded that claimant suffers from CRPS.

¶ 6 In February 2016, employer's insurer sent claimant to Dr. Albert Hattem for evaluation, asking that Dr. Hattem "assume the role of [claimant's] designated provider." According to Dr. Wakeshima, Dr. Hattem became claimant's "primary authorized treating physician." At that initial visit, claimant signed a form, which stated as follows:

> I understand that I am here for an Independent Medical or Impairment Examination (IME); this means the doctor performing the evaluation is neither treating me nor an employee of whomever requested the IME (insurance company, third party administrator, attorney, governmental agency, employer, or physician). The purpose of the IME is to provide a thorough, objective evaluation of the specific condition(s) related to the injury or illness in question, as well as prior or subsequent conditions that may affect it, and answer whatever questions the requesting party has. This document outlines the IME process, my rights, and my responsibilities.

Although he had claimant sign this IME disclosure form, Dr. Hattem examined claimant on three subsequent occasions. At claimant's fourth visit, Dr. Hattem placed him at maximum medical improvement (MMI) with an impairment rating of thirteen percent of

the whole person for his ongoing back pain. He also expressly disagreed with Dr. Wakeshima's CRPS diagnosis.

¶ 7 Employer and its insurer filed a final admission of liability (FAL) in August 2016 based on Dr. Hattem's MMI determination and impairment rating. The same day, claimant filed an application for a hearing, requesting medical benefits (specifically, the additional lumbar sympathetic blocks recommended and requested by Dr. Wakeshima). Claimant also moved to strike employer's FAL and sought a DIME to challenge Dr. Hattem's opinions.

¶ 8 The parties appeared for a hearing in December 2016 even though the DIME hadn't yet taken place. Employer contended that the lack of a DIME deprived the ALJ of jurisdiction to hear the case. Claimant countered that, contrary to employer's presumption, Dr. Hattem wasn't an authorized treating physician (ATP) for claimant. Rather, claimant maintained, Dr. Hattem was an independent medical examiner retained by employer. Claimant reasoned that if Dr. Hattem was an IME physician rather than an ATP, his MMI determination was ineffective; employer's resulting FAL was invalid; and, consequently, no DIME was needed before a hearing could commence on the issue of reasonably necessary medical treatment.

¶ 9 Although the ALJ recognized that the lack of a DIME could deprive him of jurisdiction to hear the case, he proceeded with the hearing. To support his decision to go forward with the hearing, the ALJ noted that because the blocks Dr. Wakeshima had recommended served both curative and maintenance goals, the treatment would be identical regardless of whether claimant was pre- or post-MMI. The ALJ also observed that claimant's professed inability to pay for the DIME could delay his treatment in violation of the statutory mandate "to provide speedy benefits." These factors, he determined, ripened the issue for his review:

> Respondents argue that the issue of causal relatedness, which could be part and partial [sic] of a DIME opinion, is unripe during the pendency of a DIME. Indeed, the issue of causal relatedness of the Claimant's CRPS and the lumbar sympathetic blocks to treat the CRPS is real, immediate and fit for adjudication *now* and not at a speculative future time when the Claimant is able to afford to pay for the DIME. What is actually speculative is the Respondents' "Catch-22" argument that the pendency of the DIME, which could occur in the distant future, makes the issue of specific treatment recommended by the Claimant's ATPs months ago, and continuously recommended, unripe. The Workers' Compensation Act is not designed to allow a legal "checkmate" on reasonably necessary medical care until a DIME occurs.

> The ALJ concludes that the causal and "reasonably necessary" issues were ripe some time ago and are over-ripe *now*.

¶ 10 However, the ALJ skirted the question of Dr. Hattem's status, noting only that "[t]he Claimant disputes whether Dr. Hattem is an ATP. The ALJ infers that if it walks, talks and squawks like an Independent Medical Examination (IME), it probably is an IME." Nowhere in the order did the ALJ make further findings clarifying Dr. Hattem's status. And, although claimant asked for clarification on this issue after the hearing and urged the ALJ to make a specific finding that Dr. Hattem "was an independent medical examiner, *not* an authorized treating physician," the ALJ declined the opportunity to supplement his order, instead referring the matter to the Panel for review.

¶ 11 On review, the Panel recited the rule announced by the supreme court in *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003), that a finding of MMI by an ATP "ends the claimant's entitlement to further treatment to cure and relieve the effects of the claimant's injury." In addition, the Panel noted the prohibition in the Workers' Compensation Act (Act) against conducting hearings on "a claimant's request for additional temporary benefits while a DIME

application is pending in regard to MMI." Under these rules, the Panel reasoned, once Dr. Hattem had placed claimant at MMI, no hearing could take place until the DIME was completed.

¶ 12 Pointing out that the ALJ had declined claimant's invitation to clarify his findings, the Panel rejected claimant's representation that the ALJ had found Dr. Hattem to be an IME physician, not an ATP. Based on this procedural history, the Panel therefore concluded that "the ALJ did not make a finding that Dr. Hattem was other than an ATP and the respondents could legitimately file an FAL premised on the doctor's finding of MMI." Accordingly, the Panel concluded that the ALJ lacked jurisdiction to conduct the hearing or rule on claimant's requested medical treatment at that juncture.

II. Analysis

¶ 13 Claimant contends that the Panel overstepped its authority and engaged in improper factfinding by holding that Dr. Hattem was one of claimant's ATPs. He argues that, contrary to the Panel's conclusion, the ALJ found Dr. Hattem to be an IME physician lacking authority to find claimant at MMI. Further, he asserts that if there was any ambiguity in the ALJ's findings or if the findings

didn't support the ALJ's order, the Panel should've remanded the case for additional findings. We disagree.

A. Standard of Review

¶ 14 Our review of the Panel's order is governed by section 8-43-308, C.R.S. 2017. Under that statute, we may only set aside the Panel's order for the following reasons:

> That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

Id. "In evaluating a Panel order . . . , appellate courts defer to the agency's factual findings but review its conclusions of law de novo." *Pinnacol Assurance v. Hoff*, 2016 CO 53, ¶ 24. And, like the Panel, we are bound by the ALJ's factual findings if they are supported by substantial evidence in the record. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

B. Governing Law

¶ 15 The Act explicitly sets out in detail the steps parties must follow to navigate medical care and disputes over compensation and benefits. Under section 8-42-107(8)(b)(I), C.R.S. 2017, "[a]n authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5)[, C.R.S. 2017]." MMI is defined as

> a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

§ 8-40-201(11.5).

¶ 16 No individual or entity other than an ATP has authority to make an initial MMI determination. However, as the Panel and

employer note, multiple physicians may be designated a claimant's ATP.

> Employers are liable for the expenses incurred when, as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant, an authorized treating physician refers a claimant to one or more other physicians. Thus, the designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician.

Bestway Concrete v. Indus. Claim Appeals Office, 984 P.2d 680, 684 (Colo. App. 1999) (citation omitted); *see also Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515 (Colo. App. 2002) (a specialist to whom a claimant had been referred by her primary ATP was qualified under the Act to make an MMI determination).

¶ 17 Once a claimant has reached MMI, curative medical care ceases. A claimant's "temporary total disability benefits and medical treatment automatically terminate if the treating physician determines that the claimant has reached MMI." *Whiteside*, 67 P.3d at 1245. Any treatment received post-MMI is limited to care that will "prevent further deterioration in his or her physical condition." *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988).

¶ 18 Disputes over MMI must be submitted to a DIME for resolution. "If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2[, C.R.S. 2017]." § 8-42-107(8)(b)(II).

¶ 19 And, importantly for this case, the Act mandates that a DIME take place before any hearing regarding the dispute can occur: "A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division." § 8-42-107(8)(b)(III). This provision is a jurisdictional requirement that can't be avoided on the road to a hearing. "A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination." *Town of Ignacio*, 70 P.3d at 515.

C. The Panel Correctly Upheld Dr. Hattem's ATP Status

¶ 20 This statutory scheme renders Dr. Hattem's status as either an ATP or an IME physician critical. If Dr. Hattem was merely an

IME physician, then his determination that claimant was at MMI would've been nothing more than an opinion to be weighed. But if Dr. Hattem was one of claimant's ATPs, his opinion effectively cut off further curative treatment, triggered employer's FAL filing, and imposed a hurdle to a hearing that could be overcome only by claimant undergoing a DIME.

¶ 21 Claimant contends that the ALJ found that Dr. Hattem was merely an IME physician. In support, he points to the following finding of fact: "The [c]laimant disputes whether Dr. Hattem is an ATP. The ALJ infers that if it walks, talks and squawks like an Independent Medical Examination (IME), it probably is an IME." But that finding didn't explicitly categorize Dr. Hattem as an IME physician. At best, this finding may illuminate the ALJ's leaning, but it isn't a definitive answer to the question at hand.

¶ 22 Moreover, as the Panel wrote, the ALJ's other actions and words say otherwise. First, at the hearing, the ALJ denied claimant's motion to strike the FAL. If Dr. Hattem weren't an ATP, then the FAL would be invalid. The ALJ's decision not to strike the FAL suggests that he considered Dr. Hattem to be an ATP.

¶ 23 Second, the ALJ never expressly said in his order that Dr. Hattem is *not* an ATP. To the contrary, the ALJ quoted Dr. Wakeshima, an undisputed ATP, as saying that claimant "was placed at maximum medical improvement by Dr. Hattem." This suggests that the ALJ agreed with Dr. Wakeshima's categorization of Dr. Hattem as "the primary authorized treating physician."

¶ 24 Third, and most tellingly, when offered the opportunity to clarify his finding concerning Dr. Hattem's status, the ALJ declined to do so. Specifically, in his brief in opposition to employer's petition to review, claimant made the following request of the ALJ:

> Claimant suggests that the ALJ may wish to clarify the order by adding 1 new sentence to Finding of Fact No. 2:
>
> > Dr. Hattem was an independent medical examiner, *not* an authorized treating physician,
>
> and 3 new sentences to the Conclusion of Law section d., as follows:
>
> > Dr. Hattem's placing claimant at MMI is of no moment, and cannot be the basis for a Final Admission of liability, because he was *not* an authorized treating physician. The application for DIME was plainly a protective filing, as Claimant went ahead with the hearing. Claimant's

> request for a DIME vanishes with the purported Final Admission of Liability.

¶ 25 However, the ALJ declined this opportunity and instead passed the petition to review up to the Panel for its consideration. These facts support the Panel's determination that the ALJ implicitly identified Dr. Hattem as an ATP.

¶ 26 Claimant's contention that the Panel engaged in improper factfinding in reaching its conclusion doesn't persuade us otherwise. The evidence cited by the Panel — most notably the Panel's discussion of the number of times Dr. Hattem examined claimant, Dr. Hattem's treatment recommendations for claimant, and Dr. Hattem's arranging of therapy for claimant — wasn't factfinding. It was simply the Panel's summation of evidence in the record, which it must do to determine whether substantial evidence supports the ALJ's factual findings. *See* § 8-43-301(8), C.R.S. 2017. The Panel's evidentiary discussion buttressed its conclusion that substantial evidence supported the ALJ's implicit finding that Dr. Hattem was an ATP. And, where substantial evidence supports a determination that a physician was an ATP within the chain of referral, we may not disturb the finding. *See*

Kilwein v. Indus. Claim Appeals Office, 198 P.3d 1274, 1276 (Colo. App. 2008) ("Whether a referral is made as part of the normal progression of authorized treatment is a question of fact for the ALJ to determine.").

¶ 27 Accordingly, we perceive no error in the Panel's order holding that the ALJ regarded Dr. Hattem as an ATP. Moreover, because substantial evidence supports this characterization of Dr. Hattem, we won't set it aside. *See id.*

D. A DIME Was Required Before a Hearing Could Be Held

¶ 28 As discussed above, if Dr. Hattem was one of claimant's ATPs, his opinion that claimant had reached MMI required review by a DIME before any hearing could be held. *Town of Ignacio*, 70 P.3d at 515. Because the DIME hadn't been completed, the ALJ lacked jurisdiction to conduct the hearing, and the Panel properly set it aside.

¶ 29 Although he acknowledged that a DIME was pending, the ALJ appears to have reasoned that claimant's need for treatment outweighed the jurisdictional barrier. He was persuaded that claimant suffered from CRPS and awarded him medical benefits to pay for lumbar sympathetic blocks to treat it. To achieve this and

circumvent the jurisdictional problem, the ALJ said that, because the lumbar sympathetic blocks had been requested prior to Dr. Hattem placing claimant at MMI, the request was simply for pre-MMI reasonably necessary medical treatment. He also denied employer's motion to strike the application for hearing on ripeness grounds, ruling that "Dr. Wakeshima recommended the block/injection therapy before [Dr. Hattem] placed . . . [c]laimant at [MMI]", and the "issue of reasonably necessary medical benefits is ripe for determination. The DIME process is not determinative of reasonably necessary medical care in this matter." In other words, the ALJ ruled that because the requested medical care preceded Dr. Hattem's MMI determination, the request was not dependent upon a DIME.

¶ 30 Although the ALJ tried to sidestep the DIME obstacle, the jurisdictional barrier created by the lack of a DIME can't be so easily avoided. Rather, an MMI declaration ceases curative medical treatment, because it is, essentially, a determination that no such additional treatment will cure or improve the claimant's condition and that any further treatment is for maintenance purposes only. *See Whiteside*, 67 P.3d at 1245. To our knowledge, there is no such

exception to an MMI finding for pending medical treatment requests, and claimant hasn't cited to any. Therefore, a claimant's desire for treatment, even if requested before being placed at MMI, can't trump the statutory mandate for a pre-hearing DIME. *See* § 8-42-107(8)(b)(III).

¶ 31 Nor are we persuaded that claimant's apparent inability to pay for the DIME alleviated him of the burden of obtaining one. Indeed, the Colorado Supreme Court expressly rejected an earlier statutory scheme that required indigent claimants to pay for DIMEs as an unconstitutional violation of due process. *See Whiteside*, 67 P.3d at 1251-52. Subsequently, the General Assembly amended the Act to provide that "[a] claimant who has established that he or she is indigent shall receive an independent medical examination without having to advance the cost to the independent medical examiner." § 8-42-107.2(5)(b). In such circumstances, "the insurer shall advance payment for the cost of the IME." Dep't of Labor & Emp't Rule 11-11(B)(2), 7 Code Colo. Regs. 1101-3. Thus, contrary to the ALJ's presumption, indigency isn't a bar to a DIME and can't be invoked as a jurisdictional exception.

¶ 32 In this case, a DIME was required before the ALJ could conduct a hearing. Because the lack of a pre-hearing DIME deprived the ALJ of jurisdiction to conduct the hearing, the Panel properly set aside the ALJ's order. *See Town of Ignacio*, 70 P.3d at 515.

III. Conclusion

¶ 33 The Panel's order setting aside the ALJ's order for lack of jurisdiction is affirmed.

JUDGE HAWTHORNE and JUDGE NIETO concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* *http://www.cba.cobar.org/repository/Access%20to%20Justice/AppelateProBono/CBAAppProBonoProg_PublicInfoApp.pdf*

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-965-734-03

IN THE MATTER OF THE CLAIM OF:

FRANCES OLGUIN,

Claimant,

v.

FINAL ORDER

TEXAS ROADHOUSE, INC.,

Employer,

and

TRUMBULL INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Spencer (ALJ) dated October 19, 2017, that ordered the respondents to pay for the claimant's right hip surgery. We affirm the ALJ's order.

This matter went to hearing on the claimant's request for right hip arthroscopy recommended by Dr. White. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted industrial injury on December 27, 2013, when she slipped and fell onto her left side. The claimant was not immediately referred to an authorized provider and sought treatment with her chiropractor, Dr. Pool. In January of 2014, the respondents referred the claimant to the emergency room because there was no provider associated with her workers' compensation claim. The claimant went to the St. Mary Corwin Hospital emergency room on January 9, 2014, and stated that she injured her left shoulder, arm, elbow and side. The claimant also described pain in her left buttock that radiated to her left lateral thigh. The examination of the claimant's left hip was reported as normal except for "mild tenderness about the lateral aspect."

The claimant treated with Dr. Pool for almost three years. The ALJ noted that Dr. Pool referenced the claimant's "left hip pain" on July 29, 2014, and later notes document pain and spasm in the "left pelvic" area.

Dr. Raschbacher performed an independent medical exam (IME) on November 15, 2015. Dr. Raschbacher stated that the claimant's greater trochanteric bursitis was the most likely primary diagnosis to explain the claimant's hip complaints. Dr. Raschbacher recommended discontinuing chiropractic treatment and referral for an orthopedic evaluation with consideration of injection and, if not successful, an MRI.

The claimant saw orthopedic surgeon, Dr. Danylchuk on February 16, 2016, and noted that the claimant's most significant complaint at that time was her low back but that she also reported left hip pain. X-rays of the hip were normal. An MRI revealed a mildly displaced anterior superior labral tear. Dr. Danylchuk later administered a left greater trochanteric bursa injection. At her next appointment, the claimant reported that she received no benefit from the injection. Although Dr. Danylchuk recommended an intra-articular injection, the claimant declined and was referred to Dr. White.

Prior to seeing Dr. White, the claimant returned for a second IME with Dr. Raschbacher. Dr. Raschbacher concluded that because the claimant declined the intra-articular hip injection, the claimant was at MMI with an 11 percent extremity rating.

The claimant saw Dr. White on February 1, 2017. The claimant described the accident and stated that since the accident she has had deep pain in the groin to the point now where she feels very limited with her function and activity. Dr. White noted that the x-rays showed significant over coverage of the acetabulum and the MRI confirmed a labral tear on multiple sequences. Dr. White diagnosed combined impingement with labral tear resulting from injury on December 27, 2013, and recommended a left hip arthroscopy and a labral reconstruction. Dr. White testified by deposition and stated that he could not determine the acuity of the labral tear from the MRI but added that the tear was either caused by the fall or aggravated by the fall. Dr. White stated that labral tears typically cause pain in the groin, down the front of the thigh to the knee, on the side of the hip and into the buttock. According to Dr. White, the claimant's diagrams were consistent with a labral tear.

Dr. O'Brien performed an IME for the respondents and concluded that the claimant suffered only minor injuries as a result of the work-related accident. In his opinion all of the abnormalities shown on imaging were chronic, degenerative and age-related with no evidence of any cause related to the work incident. Dr. O'Brien stated that the claimant was at MMI by January 9, 2014, and required no further treatment after that date. Dr. O'Brien further stated that the claimant's physical findings did not support a diagnosis for femoral acetabular impingement (FAI) and did not expect the condition to respond to surgery. Dr. O'Brien testified at hearing consistent with his opinions.

Dr. Rook performed an IME at the claimant's request. Dr. Rook's physical findings in contrast led him to diagnose the claimant with femoral acetabular impingement, possible instability, a labral tear and bursitis. Dr. Rook testified that he believed the fall caused the labral tear.

The ALJ found the testimony of the claimant, Dr. White, Dr. Rook and Dr. Raschbacher more credible and persuasive than the contrary opinions expressed by Dr. O'Brien. The ALJ therefore ordered the respondents to pay for the hip surgery recommended by Dr. White.

On appeal the respondents contend the ALJ's order is not supported by substantial evidence. We disagree and perceive no basis to disturb the ALJ's order on review.

The claimant had the burden to show, by a preponderance of the evidence, that her need for the hip surgery was proximately caused by her work injury, or that the work related injury aggravated, accelerated, or combined with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Because the question of the need for medical treatment is one of fact, we must defer to the ALJ's resolution of conflicts and inconsistencies in the record, and must uphold his findings if supported by substantial evidence. §8-43-301(8), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The substantial evidence standard also requires that we view evidence in the light most favorable to the prevailing party. Thus, the overall scope of our review under the substantial evidence standard is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 2003). Although causation need not be proved by medical evidence, to the extent such evidence is offered, it is for the ALJ to assess its weight, credibility, and probative effect. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Furthermore, to the extent the testimony of a medical expert contained inconsistencies, or was subject to multiple interpretations, it was for the ALJ to resolve such conflicts, and we are bound by his resolution of conflicts in the medical evidence. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Notwithstanding the respondents' contentions, substantial evidence supports the ALJ's determination that the claimant's work injury was sufficiently related to the claimant's subsequent medical condition to require the hip surgery recommended by Dr.

White. In this regard, the ALJ expressly credited the claimant's testimony, together with the medical opinions of Dr. White, Dr. Rook, and Dr. Raschbacher and specifically rejected the opinions of the respondents' expert, Dr. O'Brien. The testimony and expert opinions credited by the ALJ provide substantial evidence and valid support for his findings. Section 8-43-301(8), C.R.S.

We are not persuaded by the respondents' contention that the ALJ erred in relying on Dr. White's testimony because he allegedly did not perform a formal causation analysis and failed to consider the timing and the location of the claimant's pain complaints. The respondents' further contend that the ALJ engaged in impermissible speculation by relying on Dr. Pool's general reference to pain in the claimant's undefined "pelvic area."

In our view, the ALJ's inferences from the evidence were reasonable ones supported by the evidence. The ALJ resolved conflicts against the respondents, and we may not interfere with his determination. *Gelco Courier v. Industrial Commission*, 702 P.2d 295 (Colo. App. 1985)(if two inferences plausible, appellate court may not interfere with ALJ's selection). The respondents also assert that Dr. O'Brien's opinions were more credible and persuasive than the claimant's experts. This, however, does not afford a basis for relief on review. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996)(mere existence of contradictory evidence does not afford a basis to interfere with the ALJ's credibility determinations).

As was his prerogative, the ALJ weighed the competing medical evidence and credited the claimant's evidence over that of the respondents' competing evidence. The ALJ's findings of fact are supported by the evidence and those findings, in turn, support the ALJ's conclusion. We see no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated October 19, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

3/6/18 by TT .

MCDIVITT LAW FIRM, Attn: AARON KENNEDY ESQ, 19 EAST CIMARRON STREET, COLORADO SPRINGS, CO, 80903 (For Claimant)
LAW OFFICE OF STEVEN J PICARDI PC, Attn: STEVEN J PICARDI ESQ, 12900 STROH RANCH WAY SUITE 110, PARKER, CO, 80134-7401 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-000-017-01

IN THE MATTER OF THE CLAIM OF:

VERONICA KEHLER,

Claimant,

v.

FINAL ORDER

LABOR ETC., INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The *pro se* claimant seeks review of an order of Administrative Law Judge Cayce (ALJ) dated June 12, 2017, that determined that the claimant failed to overcome the Division independent medical examination (DIME) physician's permanent impairment rating and denied the claimant's request for maintenance medical benefits. We affirm.

This matter went to hearing on the issues of the claimant overcoming the DIME physician's impairment rating and the claimant's request for maintenance medical benefits. After the hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to her lower back while lifting a bucket of mop water. The claimant was treated in the emergency room and diagnosed with a lumbar strain/sprain with no demonstrated fracture or vertebral body malalignment visible by x-ray.

The claimant received treatment from Dr. Sofish who also assessed the claimant with a work-related lumbar strain. The claimant continued to treat with Dr. Sofish and continued to complain of pain in her low back radiating down her left leg. An MRI revealed loss of water content, mild facet hypertrophy and two small disc protrusions. Dr. Sofish later assessed thoracic lumbar strain, left leg radiculopathy and left patellar tendinitis and referred the claimant to a physiatrist, Dr. Price, commenting that the claimant "seems to have gotten worse than better over the past few weeks," and he did not have an explanation for this.

Dr. Price evaluated the claimant on January 26, 2016. Dr. Price noted that the claimant had some pain presentation and 3/5 Waddell signs. Dr. Price assessed low back pain, small disc protrusions, history of somatization of pain, history of lumbar myofascial pain and history of pain disorder. Dr. Price referred the claimant to Dr. Cohen for pain management and recommended epidural injections.

The claimant saw Dr. Mistry on January 27, 2016. Dr. Mistry assessed lumbar disc herniation and radiculopathy and recommended that the claimant attend a surgical consultation with neurosurgeon Dr. Replogle. Dr. Replogle stated that the claimant showed no evidence of nerve root impingement and stated that the lumbar spine did not seem to be the source of the claimant's symptoms.

The claimant continued to treat with Dr. Price who became concerned that the claimant had a pain disorder. The claimant underwent steroid injections by Dr. Clifford who stated that the claimant's low back was not the source of the claimant's pain. EMG testing was normal.

The claimant underwent a psychological consultation with Dr. Cohen. Dr. Cohen noted the claimant presented with moderate to severe pain behaviors and that the claimant manifested substantial indication for a disability mindset. Dr. Cohen assessed behavioral chronic pain syndrome, somatic symptom disorder and adjustment reaction with depressed mood and recommended a structured exercise program, antidepressants and at least eight sessions of psychotherapy and biofeedback. After the claimant attended multiple psychotherapy sessions Dr. Cohen determined that the claimant was a poor candidate for any major interventions.

The claimant was seen by Dr. Sohn who diagnosed radiculopathy in the lumbosacral region and lesion of the sciatic nerve and concluded that the pain may be secondary to bilateral piriformis syndrome and recommended bilateral piriformis injections. The claimant received a left piriformis injection which did not provide any long term relief.

Dr. Price placed the claimant at maximum medical improvement (MMI) on June 21, 2016, noting that the claimant reported experiencing constant pain at 10/10 in severity. Dr. Price also documented 3/5 positive Waddell signs. Dr. Price assigned the claimant a 20 percent whole person impairment rating; seven percent under the Table 53 of the Guides for the disc protrusions and 14 percent for the range of motion loss. Dr. Price further stated that the claimant would benefit from an epidural at some time in the future and may need to continue Cymbalta even though it is not helping her. Dr. Sofish

agreed that the claimant was at MMI and agreed with Dr. Price's impairment rating also noting that the claimant may need continued medication and psychological counseling.

A DIME was conducted by Dr. Thurston on October 12, 2016. The DIME physician noted non-physiologic findings and 3/5 positive Waddell signs stating that the significant pain reported by the claimant could not be confirmed or quantified. Dr. Thurston further noted that the claimant had not improved with multiple appropriate modalities of treatment. According to the DIME physician, the claimant's presentation was consistent with the formal guidelines for the assessment of malingering and that the permanent impairment range of motion loss, restrictions and additional maintenance treatment were not indicated or appropriate. The DIME also concluded that the disc protrusions in the MRI are pre-existing, age-related and not the source of the claimant's pain.

Dr. Bisgard conducted an independent medical examination and agreed with the DIME physician's assessment that an impairment rating, activity restrictions and maintenance care are not appropriate.

Relying on the DIME report and Dr. Bisgard's supporting testimony, the ALJ determined that the claimant failed to overcome the DIME physician's impairment rating by clear and convincing evidence. The ALJ further determined that the claimant failed to prove her entitlement to ongoing maintenance medical benefits by a preponderance of the evidence again relying on the opinions of the DIME physician and Dr. Bisgard.

The claimant filed a petition to review the ALJ's order but did not secure a transcript from the May 9, 2017, hearing. The claimant's petition to review contains only general complaints of error and the claimant has not filed a brief in support of her petition to review. Thus, the effectiveness of our review is limited. *Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986).

The DIME physician's opinion on permanent impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(c), C.R.S.; *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). "Clear and convincing evidence" is evidence which is stronger than preponderance, is unmistakable and is free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980); *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Whether the DIME physician's medical impairment rating has been overcome by clear and convincing evidence is a question of fact for the ALJ. *Metro Moving & Storage Co. v. Gussert, supra*. Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard requires that we defer to the ALJ's resolution of conflicts in the evidence, her credibility determinations and the plausible inferences she drew from the evidence. Accordingly, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert, supra*.

The claimant also has the burden to show, by a preponderance of the evidence, that her request for maintenance medical benefits is reasonable, necessary and related to prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether a need for treatment is causally connected to an industrial injury is a question of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Consequently, we must also uphold the ALJ's determination in this regard if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

We have reviewed the record provided and the ALJ's findings of fact and order. We conclude the ALJ applied the appropriate law and legal standards. Further, the ALJ's findings are sufficient to permit appellate review, and the findings indicate that the ALJ resolved conflicts in the evidence based upon her credibility determinations. *See Riddle v. Ampex Corp*., 839 P.2d 489 (Colo. App. 1992). Because the claimant did not provide a transcript from the May 9, 2017 hearing, we are required to presume the ALJ's findings of fact are supported by substantial evidence in the record. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

The ALJ's factual determinations support the conclusion that the claimant failed to sustain her burden to overcome the DIME physician's opinion and to prove her entitlement to ongoing maintenance medical benefits. We have no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated June 12, 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 on the certificate of mailing.

- 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

2/12/18 by TT .

VERONICA KEHLER, 2322 HIGHWAY 6 AND 50 TRLR 67, GRAND JUNCTION, CO, 81505 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: JUSTEN L MILLER ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. Nos. 4-972-238-02 &
5-112-306-01

IN THE MATTER OF THE CLAIM OF:

MARIA DE LA LUZ SAENZ,

Claimant,

v.

FINAL ORDER

TAGAWA GREENHOUSE ENTERPRISES, LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of a corrected order of Administrative Law Judge Cannici (ALJ) dated August 28, 2017, that denied and dismissed the claimant's claim for compensability in W.C. No. 4-972-238-02 and determined that the respondents overcame the Division Independent Medical Examination (DIME) physician's opinions in W.C. No. 5-112-306-01. We affirm the ALJ's order.

I.

These two claims were consolidated for purposes of hearing. The issues before the ALJ were compensability in W.C. No. 4-972-238-02 and overcoming the DIME physician's opinions, average weekly wage and temporary disability benefits in W.C. No. 5-112-306-01. Both of these claims are for the claimant's left knee.

The claimant was employed as a greenhouse laborer. The subject of W.C. No. 4-972-238-02 is the claimant's alleged injury on August 18, 2014, when she testified that she misjudged the final rung of a ladder as she was descending and fell onto both knees. Although the claimant notified her supervisor of the incident, she did not report an injury and declined medical treatment. The claimant continued to perform her regular job duties until she was laid off for the season in September 2014. The claimant returned to work for the employer in December 2014.

The claimant sought medical treatment for her left knee on December 26, 2014, through Advanced Urgent Care where she reported that she started having pain in her knee within the past three days and that her symptoms had progressively worsened. The claimant did not mention the alleged incident on August 18, 2014. The claimant was seen by an orthopedic surgeon on January 2, 2015, who reported that the claimant "states that the symptoms have been acute non-traumatic" and "began 1 day ago." An x-ray revealed tri-compartment osteoarthritis. The surgeon commented that the claimant might require a total left knee replacement as her symptoms warranted.

The claimant was referred to another knee surgeon, Dr. Baxter. Dr. Baxter documented that the history taken from the claimant indicated that the claimant injured her knee a few weeks ago while at work. The claimant did not mention that she sustained an injury approximately five months earlier on August 18, 2014. Dr. Baxter diagnosed the claimant with degenerative arthritis in her left knee and discussed the possibility of a total left knee arthroplasty. The ALJ found that Dr. Baxter did not determine that the need for a total left knee replacement was work-related and that the claimant was scheduled for a total left knee replacement but ultimately declined the procedure. ALJ Order at 2, ¶ 8.

On January 9, 2015, the claimant completed a first report of injury for the August 18, 2014, incident and filed a claim for workers' compensation on August 10, 2016.

The ALJ determined that the claimant failed to prove that she sustained a compensable left knee injury on August 18, 2014. The ALJ was persuaded by the fact that the claimant declined medical treatment, that she was able to continue to work full duty for another month when she was laid off, did not seek medical treatment until December of 2014 and when she returned to work she told co-workers that she hurt her left knee at home. The ALJ further detailed the claimant's subsequent inconsistencies in reporting the August 2014 incident when she did eventually seek medical care. The ALJ therefore, denied the claimant's claim for workers compensation in W.C. No. 4-942-238-02.

On appeal the claimant argues that the ALJ erred in his determination and factual findings are not supported by the evidence. We are not persuaded by the claimant's contentions and perceive no error in the order.

The question of whether the claimant met her burden to prove a compensable injury is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial*

Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999). As the ALJ correctly recognized in his order, a compensable injury may be the result of a pre-existing condition which is aggravated by an industrial accident. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The determination of whether the claimant's condition is due to the natural progression of the pre-existing condition or an industrial accident is one of fact for resolution by the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). We are bound by the ALJ's factual determinations if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Benuishis v. Industrial Claim Appeals Office*, 195 P.3d 1142 (Colo. App. 2008). We must consider the evidence in the light most favorable to the prevailing party and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

The ALJ here was persuaded by the fact that although the claimant initially told the employer she had fallen from a ladder, the claimant denied medical care and continued to work her regular duty and did not seek treatment until December 2014. Moreover, when she returned to work on crutches she told two co-workers she hurt her left knee at home.

The claimant takes issue with the ALJ's findings regarding Dr. Baxter and asserts that Dr. Baxter did not determine causation and disputes that a total knee replacement was ever scheduled. The claimant cites to the appellate standard of review contending that the "ALJ had to view the evidence in light most favorable to claimant and find substantial evidence that claimant was scheduled for a total knee arthroplasty." Brief in Support at 11. An ALJ's findings on the issue of causation, however, may be based on plausible inferences drawn from circumstantial evidence. *Peter Kiewit Sons' Co. v. Industrial Commission*, 124 Colo. 217, 236 P.2d 296 (1951).

We conclude here that there is sufficient evidence from which the ALJ could, and did, reasonably infer that that Dr. Baxter did not determine that the possibility of a knee surgery was work-related, as he does not mention relatedness in his report. Medical reports indicate that the claimant saw Dr. Baxter on February 19, 2015 and discussed the possibility of a total left knee arthroplasty. Respondents' Exhibit H at 39. Dr. Baxter recommended a return visit when the claimant's left knee symptoms worsened. In subsequent histories given by the claimant, she told Dr. Lindberg that Dr. Baxter "told

her she needed surgery to reconstruct her knee. She did not know exactly what the plan was." Respondents' Exhibit T at 161**.** The claimant also told Dr. Erikson that Dr. Baxter told her that she needed a total knee replacement for severe arthritis but she elected to wait**.** Respondents' Exhibit S at 146. The claimant also told Dr. Drapeau that Dr. Baxter recommended a total knee replacement but she declined. Respondents' Ex U at 186**.** This evidence provides substantial evidence and valid support for the plausible inferences made by the ALJ. The existence of evidence in the record from which the hearing officer could have drawn contrary inferences does not provide a basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

II.

The subject of W.C. No. 5-112-306-01 was the claimant's admitted injury on April 8, 2016, when she was walking at work and her right foot caught one of the pallets causing her to fall to the ground on her hands and knees. The claimant was unable to complete her shift and received treatment from Dr. Drapeau, specifically complaining of pain in her left knee. X-rays revealed degenerative joint disease with several loose bodies as well as mildly decreased medial and lateral joint space. Dr. Drapeau diagnosed the claimant with bilateral knee contusions, prescribed conservative treatment and restricted the claimant to seated work. A subsequent MRI showed a torn medical meniscus.

The claimant saw Dr. Isaacs who diagnosed a symptomatic torn medial and lateral meniscus of the left knee and mild degenerative joint disease and recommended a knee arthroscopy and debridement. Dr. Lindberg conducted a physician advisor review for the respondents and determined that the claimant's knee complaints were caused by her pre-existing osteoarthritis. The insurer denied Dr. Issacs' surgical request.

Dr. Erickson performed an independent medical examination at the respondents' request. Dr. Erikson determined that the claimant's left knee complaints were caused by advanced chronic degenerative and pre-existing tri-compartmental osteoarthritis and there was no objective evidence of worsening or aggravation related to the admitted April 8, 2016, knee injury.

Dr. Drapeau placed the claimant at maximum medical improvement (MMI) on August 15, 2016, and determined that the claimant did not sustain any permanent impairment or require ongoing maintenance medical benefits. The insurer filed a final admission of liability consistent with Dr. Drapeau's report. The admission included

temporary benefits from April 12 through August 14, 2016, and no permanent impairment benefits.

A DIME was performed by Dr. Mechanic. The DIME physician disagreed with Dr. Drapeau. The DIME physician concluded that the claimant's left knee problems were related to the April 8, 2016, incident, specifically the medical meniscus tear and that she requires surgery. The DIME physician also assigned the claimant a 49 percent left and 1 percent right lower extremity rating. The DIME physician also stated that "I must caution there are inconsistencies in the record and it is hard for me to accept at face value that everything that I see clinically today is just related to one injury of April 8, 2016." Respondents' Exhibit Y at 220.

The claimant underwent an IME with Dr. Lindberg who determined that the claimant's left knee MRI did not reflect an acute injury and did not think that the claimant's injuries were traumatic enough to cause the meniscal tears or that the mechanism of injury was consistent with the meniscal tear. The claimant's problems instead were related to advanced osteoarthritis secondary to patellar malalignment with no evidence of an aggravation, acceleration or exacerbation. Dr. Lindberg testified consistent with his report.

Dr. Erikson similarly testified that there was no objective evidence of a worsening or aggravation of the claimant's left knee related to the admitted April , 2016, injury and the claimant's symptoms would likely be identical to what they are right now had this minor injury not occurred.

The ALJ determined that the respondents' produced clear and convincing evidence to overcome the DIME opinion. The ALJ noted that the DIME physician determined that the claimant was not at MMI because she required knee surgery. However, after two knee surgeons assessed the claimant, they explained that the claimant's left knee complaints were caused by advanced chronic degenerative and pre-existing tri-compartmental osteoarthritis with no objective evidence of worsening or aggravation of the claimant's left knee related to the April 8, 2016, injury. Crediting the testimony of Dr. Lindberg and Dr. Erickson, the ALJ concluded that the DIME physician failed to perform a causality assessment pursuant to the Level II teaching and merely deferred to other doctors. The ALJ further determined, based on Dr. Drapeau, the claimant reached MMI on August 15, 2016, with no permanent impairment. The ALJ also determined the claimant's average weekly wage was $547.13 and that she was entitled to temporary disability benefits from April 13, 2016, through August 15, 2016.

On appeal the claimant argues that the ALJ erred in his determination that respondents overcame the DIME physician's opinion on MMI. We are not persuaded that the ALJ committed reversible error on this issue and affirm.

Pursuant to § 8-42-107(8)(b)(III), C.R.S, a DIME physician's finding of MMI is binding on the parties unless overcome by clear and convincing evidence. *Montoya v. Industrial Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008). "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Id.* The standard of review is whether the ALJ's findings of fact are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S; *Metro Moving & Storage Co. v. Gussert, supra*.

Once an ALJ determines the DIME physician's MMI determination has been overcome, the question of the claimant's correct MMI date becomes a question of fact for the ALJ. See *Lee v. J. Garlin Commercial Furnishings*, W.C. No. 4-421-442 (December 17, 2001); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). *See Nixon v. City and County of Denver*, W.C. No. 4-770-139 (Oct. 24, 2011)(after finding DIME physician's opinion of no MMI had been overcome, ALJ determined claimant attained MMI as of July 23, 2010); *see also Solis v. Sunshine Building Maintenance*, W.C. No. 4-726-043 (June 12, 2009)(after finding DIME physician's determination of no MMI had been overcome, ALJ determined claimant attained MMI on September 5, 2007). The only limitation is that the ALJ's findings must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This is a narrow standard of review which requires us to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert, supra*.

The ALJ relied on the opinions and testimony of Dr. Lindberg, Dr. Erikson and Dr. Drapeau to reach his conclusion that the claimant overcame the DIME physician's opinion on MMI. Dr. Erikson testified that the claimant's meniscal tears were likely degenerative meniscal tears, not related to any work incident. Tr. at 46-47. Dr. Lindberg agreed with Dr. Erikson and testified that the DIME physician failed to take into account the type of meniscal tear the claimant had, the evidence of a synovial cyst that was diagnosed in December of 2014 and the ongoing waxing and waning of the claimant's osteoarthritis. Tr. at 91-92. These opinions provide substantial evidence and valid

support for the ALJ's determinations and consequently we have no basis to disturb the ALJ's findings. §8-43-301(8), C.R.S.

As support for her argument, the claimant cites case law that stands for the proposition that a pre-existing condition does not disqualify a claimant from establishing a compensable injury. The ALJ, however, cites to the applicable law in his order but credited the ample evidence that the claimant's condition was not caused by her employment but, rather, was caused by her advanced and pre-existing tri-compartmental osteoarthritis with no objective evidence or aggravation in the claimant's left knee related to the admitted April 8, 2016, knee contusion.

The case turned in significant part on credibility determinations made by the ALJ. The weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Moreover, the existence of evidence in the record, which if credited, might support a contrary result does not establish grounds for appellate relief. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

IT IS THEREFORE ORDERED that the ALJ's corrected order dated August 29, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

2/22/18 by TT .

PINNACOL ASSURANCE, Attn: HARVEY FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
MARTINEZ TENREIRO & LAFORETT LLC, Attn: ADAN CERDA ESQ, 6000 E EVANS AVE SUITE 3-400, DENVER, CO, 80222 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN, Attn: LISA A SIMONS ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)