

# **BROWN BAG SEMINAR**

**Thursday, March 20, 2014**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation

**Free**

This outline covers ICAP and appellate decisions issued from  
January 23, 2014 through March 14, 2014

## **Contents**

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

Bopp v. Garden Square Assisted Living	2
Catlow v. Dairy Farmers of America	8
Hester v. Eco Express, LLC	13
Merrett v. State of Colorado	18
Milroy v. City of Colorado Springs	22
Monge-Ortiz v. Acme Delivery Service	28
Richardson v. Pizza Hut	32
Salad v. JBS USA	37
Simpson v. Safeworks	44
Wilcox v. JHCI Holdings	52

### **Court of Appeals decision**

Apex Transportation, Inc. v. Industrial Claim Appeals Office	58
--	----

### **Supreme Court decision**

Harman-Bergstedt, Inc. v. Loofbourrow	69
---------------------------------------	----

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-893-767

IN THE MATTER OF THE CLAIM OF

KATHLEEN BOPP,

Claimant,

v.

**FINAL ORDER**

GARDEN SQUARE ASSISTED  
LIVING,

Employer,

and

LIBERTY MUTUAL INSURANCE  
GROUP,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Friend (ALJ) dated September 20, 2013, that granted the respondents' motion for summary judgment to dismiss the claimant's application for hearing. We affirm.

The claimant sustained an admitted injury to her right shoulder and arm on April 12, 2009. This injury is the subject of W.C. No. 4-793-827. The claimant received treatment for this injury from Scott Parker, D.C. The parties entered into a full and final settlement of the claim on July 6, 2012. The settlement was approved by the Division of Workers' Compensation on July 13, 2012. The settlement agreement contained a provision which states, "Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included in and resolved forever by this settlement."

The claimant subsequently filed a claim for compensation alleging that she sustained an injury on April 18, 2012, as a result of the chiropractic treatment with Scott Parker, D.C. for the 2009 work injury. The claimant then filed an application for hearing on the issues of compensability, medical benefits, authorized provider, average weekly wage and temporary disability benefits.

The respondents filed a motion for summary judgment arguing that the alleged April 18, 2012, injury was sustained in the quasi-course and scope of employment as part

of the original 2009 work injury. The respondents argued that because the original 2009 work injury was settled, the claimant could not pursue benefits absent a reopening pursuant to §8-43-303, C.R.S. In response, the claimant argued that the alleged April 18, 2012, injury constituted a separate claim for a new injury that was not settled with the original 2009 work injury.

The ALJ granted the motion for summary judgment concluding that the claimant was treating with Scott Parker, D.C. to relieve the effects of her 2009 work injury and the claimant's alleged injury on April 18, 2012, is compensable only under the 2009 claim. The ALJ accordingly dismissed the claimant's application for hearing. The claimant now appeals contending that the ALJ erred.

Office of Administrative Courts Rule of Procedure (OACRP) 17 allows an ALJ to enter summary judgment when there are no disputed issues of material fact. See OACRP 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007). Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). However, once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

In the context of summary judgment we review the ALJ's legal conclusions *de novo*. See *A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). However, pursuant to §8-43-301(8), C.R.S., we have authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

On appeal, the claimant does not dispute that the alleged April 18 2012, injury occurred while she was receiving treatment for the original 2009 work injury. As we understand the claimant's brief, she disputes the ALJ's application of the quasi-course and scope doctrine and the ALJ's legal conclusion that the April 18, 2012, injury did not constitute a new injury for which she could file a second claim. Thus, the question on

review is whether applicable law supports the ALJ's grant of summary judgment. We conclude that the law supports the ALJ's order.

It is well established that a compensable injury is an injury which bears a causal connection to the employment. *Staff Administrators Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999). Under the “quasi-course of employment” doctrine, an injury occurring during travel to or from authorized medical treatment is compensable because the employer is required to provide medical treatment for the industrial injury and the claimant is required to submit to the treatment. *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1085 (Colo. App. 2002). Therefore, the treatment becomes an implied part of the employment contract, and injuries sustained while attending the authorized medical treatment, are considered to be a consequence of the original industrial injury. In *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003), the court of appeals specifically held injuries sustained under the quasi-course of employment doctrine are compensable consequences of the original injury and not a separate injury claim.

The claimant contends on appeal that this case is more akin to *Employers Fire Insurance Company v. Lumbermens Mutual Casualty Co.*, 964 P.2d 591 (Colo. App. 1998). In the *Employers Fire Insurance* case the claimant suffered injuries during a motor vehicle accident on the way to obtain authorized medical treatment for a work-related injury. However, the claimant had already settled the work-related injury claim. The PIP carrier brought a subrogation action against the workers' compensation carrier for benefits paid as a result of the injuries sustained in the motor vehicle accident. The court held that the new injuries did not result from the original industrial injury, and thus, the claimant's signed release did not eliminate the workers' compensation carrier's liability to the PIP carrier for amounts paid on account of the motor vehicle accident. The court reasoned that because the new injuries would have provided the basis for a second claim, the injuries sustained in the auto accident did not result from the original industrial injury and were not part of the first claim.

In *Price Mine* however, the court of appeals rejected *Employers Fire Insurance*, determining that the case was factually and legally distinguishable. The court noted that the determination whether the injury sustained under the quasi-course of employment doctrine was part of the first claim or a second claim was not central to the decision in *Employers Fire Insurance*. Rather, the dispositive determination on appeal in *Employers Fire Insurance* was the effect of a release given after the original injury, but, before the automobile accident under circumstances where the claimant, unaware that the second claim was compensable under the Act, had made a claim for benefits under his no-fault policy. The claimant's arguments notwithstanding, we are bound by the published opinions of the Court of Appeal. C.A.R. 35(f). Further, we agree with the ALJ and

determine there is no appreciable distinction between the facts of this case and the facts of *Price Mine*. Therefore, because the claimant does not dispute that she was allegedly injured while receiving treatment for the 2009 work injury, the 2012 alleged injury would only be compensable as a component of the 2009 work injury which was settled full and final. Moreover, unlike *Employers Fire Insurance*, in this case there is no allegation by the claimant that she was unaware of the compensable nature of the alleged April 18, 2012, injury when she entered into the settlement agreement. Therefore, absent a reopening, the ALJ properly dismissed the application for hearing.

To the extent the claimant argues on appeal that the settlement language is ambiguous and the parties did not intend to settle the 2012 alleged injury, we are not persuaded the ALJ erred.

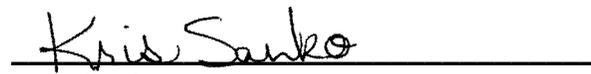
A settlement agreement is in the nature of a written contract which must be interpreted in accordance with the general rules which apply to the construction of contracts. *Cary v. Chevron U.S.A., Inc.* 867 P.2d 117 (Colo. App. 1993); *Resolution Trust Corp. v. Avon Center Holdings*, 832 P.2d 1073 (Colo. App. 1992). The general rules of contract interpretation provide that where the contract terms are clear and unambiguous the contract must be enforced as written. *Cary v. Chevron U.S.A., Inc., supra*. In determining whether the settlement is ambiguous “the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions.” *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990).

We have reviewed the record and the ALJ's findings of fact. The ALJ's order reflects his consideration and application of the applicable law. We also agree with the ALJ's conclusion that the settlement is unambiguous and the plain and clear meaning of the settlement fails to establish any agreement that the parties intended to leave open the possibility of litigating the alleged 2012 incident as a separate injury. Rather, as expressly noted by the settlement language, the agreement intended to resolve all claims stemming from the 2009 work injury. See Settlement Agreement ¶¶ 1, 6, 10.

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

INDUSTRIAL CLAIM APPEALS PANEL

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

  
\_\_\_\_\_  
Kris Sanko

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 2/6/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

KATHLEEN BOPP, 2037 35TH AVENUE, GREELEY, CO, 80634 (Claimant)  
GARDEN SQUARE ASSISTED LIVING, Attn: SUSAN KING, 3151 W 20TH ST, GREELEY,  
CO, 80634 (Employer)  
LIBERTY MUTUAL INSURANCE GROUP, P O BOX 168208, IRVING, TX, 75016-8208  
(Insurer)  
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUDELL, ESQ., 1233  
EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)  
LEE & KINDER, LLC, Attn: N. ELIZABETH QUICK, ESQ., 3801 E. FLORIDA AVE., SUITE  
210, DENVER, CO, 80210 (For Respondents)  
WAUSAU BUSINESS INSURANCE COMPANY, Attn: KIMBERLY TRAVIS, P O BOX  
168208, IRVING, TX, 75016-8208 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-886-133-01

IN THE MATTER OF THE CLAIM OF

THEODORE CATLOW,

Claimant,

v.

ORDER OF REMAND

DAIRY FARMERS OF AMERICA,

Employer,

and

AMERICAN ZURICH INSURANCE,

Insurer,  
Respondents.

The claimant seeks review an order of Administrative Law Judge (ALJ) Walsh issued to the parties on September 5, 2013, which denied and dismissed the claim for compensability and an order dated October 11, 2013, which denied the claimant's request for a motion for corrected order/petition to reopen. We set aside the ALJ's October 11, 2013, order and remand the matter for further proceedings.

This matter concerns the issue of whether the claimant's petition to review the decision of the ALJ may be accepted as timely. The matter initially went to hearing on the issue of compensability. The claimant was seeking benefits for injuries he sustained while traveling to a physical therapy appointment. The ALJ denied the claim, determining that the physical therapy appointment was unauthorized. The ALJ's order was sent to the parties via electronic mail (e-mail) on September 5, 2013. The certificate of mailing indicates that the order was sent to the claimant's counsel, Amy Brewer, at [brewerlaw1@msn.com](mailto:brewerlaw1@msn.com), the respondents' counsel and the Division of Workers' Compensation.

On October 4, 2013, the claimant filed a "Motion for Corrected Order/Petition to Reopen," requesting a corrected certificate of service, or in the alternative, that the claim be reopened on the ground of error or mistake alleging that the September 5, 2013, order was erroneously sent to the claimant's attorney at [brewerlaw1@msn.com](mailto:brewerlaw1@msn.com). In the motion, the claimant's counsel asserted that she ultimately received the order on October 2, 2013. On October 11, 2013, the ALJ denied the motion concluding that the September 5, 2013, order was appropriately sent to the claimant's attorney's e-mail address on file with the Office of Administrative Courts (OAC). On October 21, 2013, within 20 days of the

date the claimant asserted she received the order, the claimant filed a petition to review the September 5, 2013, order and the October 11, 2013, order. The ALJ struck the claimant's petition to review the September 5, 2013, order as untimely and the matter was subsequently transmitted to the panel for review.

On appeal, the claimant continues to allege that the September 5, 2013, order was improperly sent to the claimant's attorney's e-mail address and that the ALJ erred in striking the petition to review as untimely. Under the circumstances of this case, we agree.

Section 8-43-301(2), C.R.S., provides that a petition to review an ALJ's order shall be filed within 20 days of the date of the certificate of mailing of the order, or the order becomes final. This requirement is jurisdictional and must be strictly enforced. *Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991). Due process, however, requires that parties receive adequate notice of a critical determination and the effect of their failure to act. *Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986). An order is a "critical determination." *Id.* (attorney must be given notice of critical legal determinations in order to protect the client's rights). Although a properly executed certificate of mailing may create a presumption that a notice was timely received, the presumption may be overcome by competent evidence. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). It is improper to reject a party's statement that notice was not received without affording the party an opportunity for a hearing. *See Trujillo v. Industrial Commission*, 735 P.2d 211 (Colo. App. 1987). Moreover, where no notice or insufficient notice is given, the time for a petition to review does not run. *See Industrial Commission v. Martinez*, 102 Colo. 31, 34, 77 P.2d 646, 648 (1938).

Section 8-43-215 (1), C.R.S. specifically provides for an ALJ's order to be served by regular mail, e-mail *or* facsimile. (*Emphasis added*). OAC Rule 25, provides that final orders may be issued by e-mail, as permitted by 8-43-215(1), C.R.S., if the attorney or unrepresented party to be served with the order agrees on the record or in writing to service by e-mail. OAC Rule 6 further states that service of documents may be made by hand delivery, to a facsimile number given in the pleadings, *by e-mail to an e-mail address given in the pleadings*, or to the party's last known address as provided to the OAC. (*Emphasis added*).

In this case, the initial entry of appearance for the claimant was filed by Steven U. Mullens, Esq. The e-mail address identified on the entry of appearance was [lauraweston@sumullens.com](mailto:lauraweston@sumullens.com). On May 31, 2013, a notice of substitution of counsel was filed substituting "Amy L Brewer, Esq., of Steven Mullens, P.C." in place of Steven Mullens, Esq. The address block on the notice of substitution of counsel indicated a mailing address for Ms. Brewer at Steven Mullens, P.C., P.O. Box 2940, Colorado

Springs, CO 80901-2940. No e-mail address was identified on that notice of substitution of counsel. From our review of the record, it does not appear that Ms. Brewer ever provided an e-mail address on any of the pleadings that were filed.

Although the respondents contend that the claimant's counsel had an affirmative duty to provide the ALJ with a correct e-mail address, we do not understand the statute or the rules to impose such a duty. *Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985)(court has uniformly held that non-existent provisions should not be read into the Workers' Compensation Act). The hearing transcript reveals that at the conclusion of the July 24 hearing, the ALJ announced his intention to submit his order via e-mail to the address "I have on file for counsel." Tr. at 107. The claimant's counsel made no response to this announcement. However, as noted, OAC Rule 25, specifies that the attorney to be served must agree in writing or on the record. In our view, the rule, therefore, requires that the ALJ elicit a response from the attorney consenting to e-mail service and conceivably confirm the email address to be used. Because assent was not obtained by the ALJ on the record or in writing from the claimant's counsel, e-mail service does not appear to be been authorized in this case.

It follows that we agree with the claimant's argument that e-mailing the order to an e-mail address "on file" with the Division was not proper notice in this case because the claimant's counsel did not provide an e-mail address in the pleadings. Under the Act and the rules of procedure, the order was required to be sent by the alternative methods provided for delivery. *See* 8-43-215, C.R.S. and OAC Rules 6 and 25. Under these circumstances, the record does not support a finding that the claimant received timely notice of the order because the certificate of mailing was not properly addressed pursuant to the statute or the OAC rules. *Compare* *Olsen v. Davidson*, 142 Colo. 205, 350 P.2d 338 (1960) (the law presumes that mail is received by its addressee "when there is proper evidence of its mailing to a named person at a correct address, with adequate prepaid postage"); *Allred v. Squirrel*, 37 Colo. App. 84, 543 P.2d 110 (1975); (a properly executed certificate of mailing may create a presumption that a notice was received).

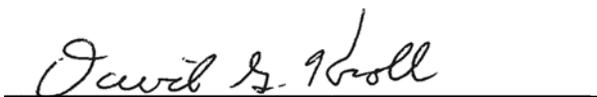
Due to the fact that the certificate of service was improperly addressed and the parties do not appear to dispute that the claimant's counsel did not receive the September 5, 2013, order until October 2, 2013, the claimant's October 21, 2013, petition to review was "timely" and should have been addressed by the ALJ. *Industrial Commission v. Martinez, supra.* (time for petition for review does not run where no notice or insufficient notice given.) We, therefore, remand the matter to the ALJ for issuance of a briefing schedule on the merits of the September 5, 2013, order.

**IT IS THEREFORE ORDERED** that the ALJ's order dated October 11, 2013, is set aside and the matter is remanded for further proceedings consistent with this order.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

THEODORE CATLOW

W. C. No. 4-886-133-01

Page 5

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 2/26/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

THEODORE CATLOW, 31550 ANTIOCH ROAD, YODER, CO, 80864 (Claimant)  
DAIRY FARMERS OF AMERICA, Attn: KELLY STOKER, P O BOX 909700, KANSAS  
CITY, MO, 64190 (Employer)  
AMERICAN ZURICH INSURANCE, Attn: VALERIE BURKE, P O BOX 968020,  
SCHAUMBURG, IL, 60196-8020 (Insurer)  
STEVEN U. MULLENS, P.C., Attn: AMY L. BREWER, ESQ., P O BOX 2940, COLORADO  
SPRINGS, CO, 80901-2940 (For Claimant)  
THE KITCH LAW FIRM, P.C., Attn: MICHELLE PRINCE, ESQ., 3064 WHITMAN DRIVE,  
SUITE 200, EVERGREEN, CO, 80439 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-838-236-03

IN THE MATTER OF THE CLAIM OF

WAYNE HESTER,

Claimant,

v.

FINAL ORDER

ECO EXPRESS, LLC,

Employer,

and

ACUITY INSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated September 10, 2013, that ordered the payment of permanent impairment benefits premised upon a 3% impairment rating assigned by the Division IME physician, and which also declined to find the IME physician incompetent to determine maximum medical improvement (MMI). We affirm the decision.

The claimant appeals the ALJ's order arguing the ALJ was in error for not considering as an issue at the August 9, 2013, hearing the accuracy of the Division Independent Medical Exam (DIME) physician's determination of MMI. We conclude the ALJ did entertain this issue and ruled on the argument raised by the claimant.

The claimant previously injured his low back at work on July 21, 2003. The claimant was treated, placed at MMI and provided a permanent impairment rating of 12% whole person by his treating doctor. In this claim, the claimant again injured his low back with this employer on October 1, 2010. The claimant was treated by Dr. Robert Kawasaki through the application of epidural steroid injections, physical therapy, acupuncture and chiropractic treatment. A referral to a specialist obtained the opinion the claimant was not a surgical candidate. After additional facet injections, Dr. Kawasaki determined the claimant was at MMI on April 28, 2011, and calculated a 14% impairment rating. After subtracting the previous impairment rating, the claimant was provided an apportioned 2% impairment rating.

The claimant then requested a DIME review. Dr. Castrejon was selected to perform the evaluation. After a January 25, 2012, IME appointment, Dr. Castrejon

concluded the claimant was not at MMI due to the need for an MRI and another surgical opinion. The MRI and the opinion for no surgery were obtained and the claimant returned for a follow up IME appointment on August 3, 2012. Dr. Castrejon again found the claimant was not at MMI. The doctor suggested an EMG study was required as was another neurosurgical consultation. A surgical opinion was secured from Dr. Jeffrey Sabin and an EMG test was performed. The EMG was normal and Dr. Sabin noted the claimant was not a surgical candidate. The claimant saw Dr. Castrejon for a third IME appointment on March 12, 2013. At that time, the doctor agreed the claimant was at MMI as of January 6, 2012, and computed an impairment rating of 3% after apportionment. However, on one of the handwritten entries on the DIME Summary Sheet, an impairment rating of 4% was entered.

In an effort to resolve any confusion pertinent to the correct impairment rating, the respondents submitted an application for a hearing specifying as the only issue “overcome the Division IME of Dr. Castrejon performed on March 12, 2013; apportionment.” The claimant supplied a response to the application which endorsed no additional issues. At the August 9, 2013, hearing the respondents submitted a set of medical records to the ALJ and explained their only issue was the resolution of this 1% discrepancy appearing in the DIME physician’s reports. The respondents then rested.

The claimant’s counsel then presented the argument that the date of MMI provided by Dr. Castrejon was not properly derived for the reason that “only spinal surgeons are competent and qualified as a matter of law to opine” as to the need for further treatment. Reference was made to § 13-64-102, and presumably to § 13-64-401, C.R.S., of the Health Care Availability Act, as authority for the claimant’s contention “that Dr. Kawasaki and the DIME doctor, Dr. Castrejon, are incompetent as a matter of law to opine as to the efficacy, necessity, or reasonableness of the recommendations of Dr. Donner ...”. The claimant submitted a medical report from Dr. Jeffrey Donner dated July 31, 2012, which assessed the need for a discography as a precursor to back surgery. The claimant’s counsel also referenced the claimant’s original application for a DIME which requested a “qualified spinal surgeon” to perform the review.

The claimant’s attorney objected that the claimant had not listed the issue of MMI as one for the hearing on either the response to the application for a hearing or on any subsequent pleading. Initially, the ALJ orally stated he would not consider an argument that the DIME physician was not qualified to determine MMI for the reason he was not a spine specialist. The ALJ did not believe that argument was encompassed within the statement of the issues included in the respondents’ application for a hearing. The claimant’s counsel then requested the ability to address the issue of “MMI ... and that only a spine surgeon, if you will, would be competent to opine ...” as to the need for additional treatment in a written position statement. The ALJ then allowed the claimant

to submit such a position statement and to “argue about what issues are encompassed within this application for hearing.” The claimant submitted a position statement which argued only that the ALJ erred in not hearing the issue of MMI. The respondents filed a position statement in response. The respondents argued the claimant had waived his issue by waiting until three DIME reviews had been conducted by Dr. Castrejon to object to his qualifications to perform the Division IME. They also pointed out that the medical records contained reports by two spinal surgeons, Dr. Castro and Dr. Sabin, both of whom articulated opinions the claimant was not a candidate for surgery.

In his September 10, 2013, order, the ALJ agreed with the respondents that the claimant’s argument that Dr. Castrejon was not legally qualified to make a DIME determination of MMI had been waived. The ALJ observed “in fact, Dr. Castrejon performed three DIME’s and claimant did not dispute his qualifications until the day of the hearing in this matter.” Therefore, the ALJ resolved “claimant has waived any right to challenge Dr. Castrejon’s qualifications.”<sup>1</sup>

In his brief in support of the petition to review, the claimant contends the ALJ committed error “in refusing at hearing to consider the issue of MMI, insofar as same was framed at the outset thereof by the undersigned.”

Our review of the ALJ’s order shows that the ALJ did consider the claimant’s argument pertinent to MMI and found that it did not apply at this juncture of the claim. The ALJ found the claimant must pursue his administrative remedies regarding his objection to the identity of the DIME physician at an appropriate point in the DIME proceedings. Those objections must be raised and preserved prior to the commencement of the DIME review. W.C. Rule of Procedure 11-1, 7 Code Colo. Reg. 1101-3, sets forth the qualifications a physician must possess to be allowed to perform IME reviews. WCRP 11-3(F) anticipates that the names of physicians may be removed from the panel of three submitted to the parties for selection “for any reason other than having been struck by one of the parties, ...”. Pursuant to WCRP 11-3(N), a party may file a motion involving a pending IME proceeding. The IME proceeding will then be held in abeyance until the motion “is disposed of by written order or other means.” Finally, WCRP 11-10 specifies “disputes concerning the division IME process that arise in individual cases that cannot be resolved by agreement of the parties, may be taken to an administrative law judge for resolution.” This administrative scheme clearly requires a party with an objection to the qualifications of any of the physicians on the panel to submit a motion setting forth that objection before the final selection of a physician is completed. *See, Maestas v. Wal Mart Stores*, W.C. No. 4-717-132 (January 22, 2009). A party is not

---

<sup>1</sup> The ALJ, in addition, ruled Dr. Castrejon had calculated the permanent impairment rating to be 3%

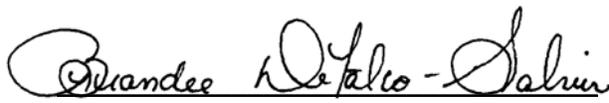
allowed to wait until the IME review is finished to make an objection based on their dissatisfaction with the results of the review. The ALJ surmised that was the procedure being followed by the claimant in this matter. Accordingly, he determined the claimant's objection made after the conclusion of the IME was untimely and had been waived. We see no basis to disagree with the ALJ's determination.

The claimant's objection that the ALJ erred because he did not consider his argument the DIME physician was incompetent to render a decision on MMI is not supported by the record. The ALJ allowed an oral presentation of the claimant's position at the hearing and he allowed a post hearing written argument by both parties. He specifically stated a finding and a ruling in his September 10, 2013, order. We are not persuaded the ALJ committed error in that regard.

**IT IS THEREFORE ORDERED** that the ALJ's order issued September 10, 2013, is affirmed.

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

\_\_\_\_\_ 3/11/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

WAYNE HESTER, P O BOX 217, HUDSON, CO, 80642 (Claimant)  
ECO EXPRESS, LLC, 1440 BRICKYARD ROAD, SUITE 2, GOLDEN, CO, 80403  
(Employer)  
ACUITY INSURANCE, Attn: JUDY VOLESKY, 2800 SOUTH TAYLOR DRIVE,  
SHEBOYGAN, WI, 53081 (Insurer)  
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUNDELL, ESQ., 1227  
EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)  
THOMAS POLLART & MILLER, LLC, Attn: TRENT E. RINEBARGER, ESQ./BRAD J.  
MILLER, ESQ., 5600 S. QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO,  
80111 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-912-519-01 &  
4-912-520-01

IN THE MATTER OF THE CLAIM OF  
KISSEVA MERRETT,

Claimant,

v.

FINAL ORDER

STATE OF COLORADO, DEPARTMENT  
OF PUBLIC SAFETY,  
COLORADO STATE PATROL,

Employer,

and

SELF-INSURED,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Harr (ALJ) dated August 14, 2013, that found the claim not compensable. We dismiss the appeal, without prejudice, for lack of a final order.

The claimant alleges she injured herself while participating in physical exercise activities while a cadet at the Colorado State Patrol academy. She initially injured her lumbar back on January 7, 2013. She notified the respondent of this injury and the claim was admitted. Subsequently, the claimant asserted she injured her thoracic back while lifting weights at the academy on January 10, 2013. A claim for this injury was assigned W.C. No. 4-912-519. On January 28, 2013, the claimant contends she also injured her left arm while completing a drill which required her to hold a flashlight under her arm for several minutes duration while walking between buildings. That claim was denominated W.C. No. 4-912-520. The January 10 and January 28 injuries were both denied by the respondent.

A hearing was convened in these claims on July 16, 2013. At the outset of the hearing, the ALJ inquired as to the issues for the hearing. Counsel for both parties agreed compensability was the issue. In addition, the claimant's counsel requested a general award of medical benefits. She did not specify that any medical benefits had been denied, or that the claimant was in need of any particular treatment. Similarly, the respondents did not identify any medical benefits that had been denied and requested

from the ALJ solely an order denying compensability. The claimant's testimony and the medical records show the claimant was referred by the respondent to the Concentra Clinic. At that clinic the claimant treated on several dates with Dr. Ted Villavicencio and with physician's assistant Marion Wells. The claimant was also referred by Dr. Villavicencio for evaluation by Dr. Samuel Chan. In the claimant's post hearing position statement, the claimant requested only an order from the ALJ finding the two injuries compensable and "for all medical benefits which are reasonably necessary to cure and relieve the effects of the injury."

The ALJ found the claimant's testimony unpersuasive. Instead, he found more authoritative the testimony of Dr. Chan and Dr. Allison Fall. That testimony explained the conclusions of those physicians that the claimant's activities at the academy could not have caused the symptoms for which the claimant complained. Their conclusions also referenced substantial evidence of symptom magnification. The ALJ denied and dismissed the claimant's two claims featuring injuries to her thoracic back and to her left arm.

Under § 8-43-301(2), C.R.S., a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty," may file a petition to review. Consequently, orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to review. *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Moreover, we have previously noted that we cannot review an interlocutory order solely on the basis that "there is no other adequate remedy." *See Jones v. Chicken-N-Pasta*, W.C. No. 4-197-841 (February 3, 1995).

The panel previously has held that orders determining compensability and containing only a general award of medical benefits are interlocutory, unless the record reveals that specific medical benefits were at issue. *See Harley v. Life Care Centers*, W.C. No. 4-810-998 (May 20, 2011); *Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996). Conversely, an order which only has the effect of denying a general award of medical benefits would also be interlocutory. Because the claimant was not seeking any benefits, other than possibly a general award of medical benefits, the order finding her claim not compensable did not deny her a benefit. *See Scott v. Exempla Health Care*, W.C. No. 4-753-124 (March 4, 2009).

We note that this determination of compensability was not necessary to the resolution of any issues regarding benefits, compensation, or penalties before the ALJ. The claimant was not claiming entitlement to any temporary or permanent disability benefits. The claimant sought only a general award of medical benefits. Rather,

presumably the claimant was advancing her argument concerning compensability so as to use the legal effect of this finding in some future litigation wherein she may actually have need of some benefits. Because the effect of the finding in future litigation is both hypothetical and speculative, we have no authority to address the argument. There has been no denial of benefits in the hypothetical litigation, because none were sought, and any order which we might issue on the question of whether the ALJ committed error in his ruling pertinent to compensability would be merely advisory. *See Board of Directors v. National Union Fire Insurance Company*, 105 P.3d 653 (Colo. 2005) (courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur).

While it may appear superficially that an ALJ's finding that a claim is not compensable would be tantamount to stating 'all' benefits are denied, it is the practical effect that is critical. An order which denies all benefits when there are no benefits requested, actually denies no benefits. *Abenth v. Northside Christian Church*, W.C. No. 4-893-024 (September 12, 2013).

The finding then, of a lack of compensability in this case, is not a dispositive one in the award or denial of any benefits, compensation or penalties. The allegations of error complained of here may well be final and reviewable in connection with a final order entered in the future resolving a dispute over compensation or medical benefits. However, at this particular hearing the claimant sought only a ruling that she sustained a compensable injury. Whether the ALJ committed error in connection with resolving that dispute is not presently a reviewable question. At present the claimant merely seeks an advisory ruling. We conclude that this order is currently not subject to review. *See Scott v. Exempla Healthcare, Inc.* W. C. No. 4-753-124 (March 4, 2009).

**IT IS THEREFORE ORDERED** that the claimant's petition to review the ALJ's order dated, August 14, 2013, is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

KISSEVA MERRETT  
W. C. No. 4-912-519-01 &  
4-912-520-01  
Page 4

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 3/10/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

KISSEVA MERRETT, 3205 BRUNSWICK DRIVE, COLORADO SPRINGS, CO, 80920  
(Claimant)

STATE OF COLORADO, DEPT PUBLIC SAFETY, Attn: CINDY BUSBY, 700 KIPLING  
STREET, LAKEWOOD, CO, 80215 (Employer)

MCDIVITT LAW FIRM, Attn: TINA R. OESTREICH, ESQ., 19 E. CIMARRON STREET,  
COLORADO SPRINGS, CO, 80903 (For Claimant)

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

BROADSPIRE, Attn: RAGAN JOHNSON, P O BOX 14348, LEXINGTON, KY, 40512 (Other  
Party)

STATE OFFICE OF RISK MANAGEMENT, Attn: BRENDA HARDWICK, 1313 SHERMAN  
STREET, ROOM 114, DENVER, CO, 80203 (Other Party 2)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-884-077-02

IN THE MATTER OF THE CLAIM OF

CRAIG MILROY,

Claimant,

v.

FINAL ORDER

CITY OF COLORADO SPRINGS,

Employer,

and

SELF INSURED,

Insurer,

The claimant seeks review of an order of Administrative Law Judge Friend (ALJ) dated August 12, 2013, that denied and dismissed his claim for compensability. We affirm the ALJ's order.

This matter went to hearing on the issues of compensability, medical benefits, average weekly wage and temporary disability. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant has worked as a firefighter for the respondent since 1997. The claimant is also a certified emergency medical technician (EMT) and is currently serving as a Lieutenant. The claimant's job duties include work within the heavy duty category.

The claimant has a history of chiropractic treatment with approximately 39 treatments over a period of 13 years, most of which were treatment for his neck and shoulder but he also received treatment for his low back. On March 30, 2012, the claimant was working at the computer at Station 1 Firehouse and felt a "twinge" in his left leg with increasing discomfort through the day. Over the next four days the claimant saw the chiropractor a total of six times and received deep muscle massage once. The claimant sustained "significant relief" by the end of the week and returned to full duty. The claimant continued with his regular duties until April 11, 2012.

On April 11, 2012, the claimant was woken by a fire alarm at the station. The claimant immediately rose from the bunk at the station house, slid down the pole and

“bunked out.” The process of “bunking out” included bending over to dress in the gear required for a structure fire, estimated to weigh up to 120 pounds. The claimant noted immediate discomfort in his back and in the left leg upon putting on his bunkers. While in route to the alarm, the claimant was unable to get comfortable while on the truck and proceeded to the alarm. While walking around the site of the fire and working with fire hose clean up, the claimant felt increasing discomfort. By the time the claimant returned to the station house his pain had increased to nine on a scale of one to ten. At the urging of his coworkers, who are also EMT certified, he began receiving intravenous fluids and pain management while still at the station.

The claimant was transported by ambulance to the Memorial Hospital Emergency room where he received treatment for his back and left leg pain, including an MRI and pain medications. The MRI showed an L4-L5 posterior disc herniation and a small posterior disc protrusion at the L5-S1 level.

The ALJ noted that Dr. Klajnbart testified that the claimant’s exertion at work exceeded his exertion in non-work situations and, in his opinion, the claimant’s disc herniation was caused by an acute event on April 11, 2012, when the claimant slid down the pole and put the bunkers on. The ALJ found that Dr. Klajnbart was not rendering an opinion that the claimant’s work activities, in and of themselves, would rise to the level of a compensable occupational disease.

The claimant also prepared a chronology of events leading up to and through April 11, 2012. The ALJ found that the claimant’s chronology does not mention that he experienced an acute onset of low back and left leg pain on April 11, 2012. The ALJ also found that medical reports do not show that the claimant gave such a history and the claimant did not testify at hearing that he experienced an acute onset of left leg and low back pain when he slid down the pole on April 11, 2012.

Dr. Bisgard examined the claimant at the respondent’s request. Dr. Bisgard reviewed information pertaining to the number and type of calls that the claimant performed for the five year time period prior to the onset of his low back pain in late March 2012, the amount of training that the claimant did per month that would involve significant physical activity and the amount of times that the claimant would be required to slide down a pole. Dr. Bisgard testified that the claimant’s job as a firefighter did not result in an occupational injury or disease. The ALJ specifically found the opinion of Dr. Bisgard more credible and persuasive than the opinion of Dr. Klajnbart.

Based on these findings, the ALJ determined that the claimant failed to establish by a preponderance of the evidence that he sustained an injury arising out of and within

the course of his employment. The ALJ, therefore, denied and dismissed the claim for compensability.

On appeal the claimant argues that the matter must be remanded for a new hearing because the June 25, 2013, video-conference hearing was not recorded and, therefore, no transcripts could be prepared. We are not persuaded that the ALJ committed reversible error and affirm the ALJ's order.

The record shows that the June 25, 2013, hearing was done through video-conference. On July 1, 2013, the ALJ notified the parties, that the Office of Administrative Courts (OAC) was unable to locate the recording of the hearing and that it was "likely not recorded due to operator error (my error)." The parties filed a stipulated motion on July 22, 2013, asking that the ALJ's hearing notes be included in the record. The stipulation further stated that "once supplied, the parties shall notify the Court within 10 days whether additional recorded testimony will be requested." The stipulation was approved by the ALJ on July 30, 2013. In the meantime, the parties filed detailed position statements, setting forth the evidence and their respective legal arguments on July 22, 2013.

The ALJ entered his order on August 12, 2013, denying and dismissing the claim. The claimant filed a petition to review on August 29, 2013. In the petition to review, the claimant requests a full "de novo review" with additional testimony from the witnesses who are missing from the record. On August 30, 2013, the claimant sent in a request to the OAC to provide the ALJ's hearing notes to the parties, as per the stipulation. Although the ALJ's hearing notes are in the record, they are undated and we are unable to determine when the notes were actually sent to the parties. A briefing schedule was issued on October 8, 2013.

The respondent initially asserts that the claimant waived the issue of whether he is entitled to a new hearing and a new determination of compensability because the claimant allegedly did not request a de novo hearing. We disagree. The claimant's petition to review clearly asks for a "de novo review" in front of a new ALJ or "higher court." Nor are we persuaded that the claimant is somehow precluded from making the argument on appeal because of the stipulation to notify the ALJ within 10 days of the desire for additional testimony. As we stated, we are unable to determine when the ALJ's notes were actually provided to the parties and when the 10 days listed in the stipulation began to run. From the record it appears that the ALJ's notes were provided after the claimant had filed the petition to review in which he clearly requests additional testimony be taken. Under these circumstances we cannot say that the claimant failed to timely make the request for a new hearing.

We disagree, however, with the claimant's contention that the record is inadequate to permit appellate review because the hearing was not recorded. Section 8-43-213(1), C.R.S., provides that all testimony taken at hearings "shall either be taken verbatim by a hearing reporter or shall be electronically recorded by the division." Where electronically recorded hearing results in a transcript containing inaudible responses, our appellate courts have not required a new hearing if the relevant portions of the transcript are sufficient to permit review of the dispositive issues on appeal. Further, the party asserting insufficiency of the transcript must set forth the nature of the testimony which is allegedly missing from the record. *Goodwill Industries v. Industrial Claim Appeals Office*, 862 P.2d 1072 (Colo. App. 1993); *Intermountain Jewish News v. Industrial Commission*, 39 Colo. App. 258, 564 P.2d 132 (1977).

Generally, the appellant is entitled to a record on appeal which includes a complete transcript of the proceedings at trial. However, under the Colorado Appellate Rules, when the transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. *See* C.A.R. 10(c). In this case, the ALJ summarized his hearing notes for the parties. Each party also submitted a position statement outlining the pertinent evidence submitted at the hearing. In addition, the record contains exhibits, the transcript of the deposition of Dr. Bisgard and most notably the claimant's own chronological statement of the alleged injury timeline. Claimant's Exhibit 21. Moreover, the ALJ made detailed findings in his order setting forth the basis for his decision. This is not a situation in which we are left to speculate concerning the essential meaning of the testimony given at the hearing.

Moreover, the claimant does not list any specific dispute as to any statements contained in the ALJ's hearing notes or findings of fact. Rather, the claimant makes the broad assertion that the incomplete record prohibits appellate review. In our view, this does not amount to a showing of specific prejudice and the claimant, therefore, is not entitled to relief. *See People v. Rodriguez*, 914 P.2d 203 (Colo. 1996). Neither does the claimant identify any dispositive testimony which he believes is absent from the record. In fact, the ALJ incorporates most of the facts from the claimant's position statement and chronological history in his findings of fact. Consequently, we conclude the record is adequate to permit appellate review. *See Martinez v. Pueblo County*, W. C. Nos. 4-312-322 (March 30, 2001); *Moore v. Old Town Square Properties, Inc.* W.C. No. 4-713-589 (October 9, 2008); *Haendler v. Forney Industrial*, W.C. 4-615-313 (September 8, 2006).

We have otherwise reviewed the record provided and conclude that the ALJ's findings are supported by substantial evidence. The claimant continues to argue that he sustained an acute event causing his disc herniation on April 11, 2012. However, the ALJ credited the testimony of Dr. Bisgard who was familiar with the type of duties the claimant performed at work and testified that there was nothing in the claimant's medical

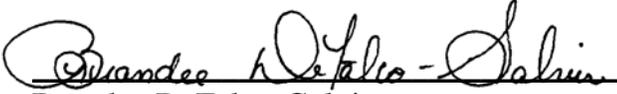
records that would indicate that there was a specific isolated event that occurred to bring on the claimant's symptoms. Dr. Bisgard also stated that the claimant's work activities, although they required significant exertion at times, did not meet the requirements for frequency and duration to cause an occupational disease.

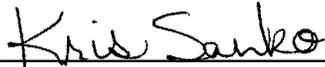
We have no authority to reweigh the medical evidence and interfere with the ALJ's conclusions concerning the probative value of the competing expert testimony. Despite the existence of evidence in the record from which the ALJ might have drawn contrary inferences, his findings are amply supported. We, accordingly, perceive no basis on which to disturb the order. Section 8-43-301(8), C.R.S.

We have considered the claimant's remaining arguments and in light of our resolution of the compensability issue we need not address them here.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 12, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/30/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

CITY OF COLORADO SPRINGS, Attn: STEPHEN FOX, C/O: MAIL CODE 630, P O BOX 1575, COLORADO SPRINGS, CO, 80901-1575 (Employer)

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

DWORKIN CHAMBERS WILLIAMS YORK BENSON & EVANS, P.C., Attn: GREGORY K. CHAMBERS, ESQ., 3900 E. MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-899-833-02

IN THE MATTER OF THE CLAIM OF

ANTONIO MONGE-ORTIZ,

Claimant,

v.

FINAL ORDER

ACME DELIVERY SERVICE  
DBA ACME DISTRIBUTION CTR.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Broniak (ALJ) dated September 4, 2013 that denied and dismissed his claim. We affirm.

The claimant alleged he injured his low back at work on September 28, 2012. A hearing was conducted in the matter on August 13, 2013. The claimant sought an order regarding compensability of the claim, medical benefits and temporary total disability benefits beginning September 28 and continuing.

After the hearing, the ALJ submitted an order making several findings of fact. The ALJ found the testimony of Brad Abell, the claimant's supervisor, and Mr. Gonzalez, a coemployee of the claimant, to be persuasive. Mr. Abell testified the claimant informed him through a hand written note on September 24, 2012, that the claimant intended to retire from work on September 29. The claimant had worked for the employer as a custodian for 13 years. On September 28, shortly after the claimant arrived at work, Mr. Abell instructed the claimant to clock out and stated he would pay him gratis for his last two days as a bonus for his long tenure with the employer. When the claimant did not leave work, Mr. Abell had Mr. Gonzalez inform the claimant in Spanish that he should clock out. A few minutes later, the claimant asserted he injured his low back while lifting pallets. Mr. Abell testified he later viewed security video of the claimant at the time of his alleged injury. The video revealed the claimant picking up a piece of shrink wrap plastic, then holding his back and stumbling out of view. Mr. Abell stated the claimant reported his injury within a few minutes with the assistance of another employee. The claimant displayed histrionic pain behaviors and would not

describe what had happened with any detail. An ambulance was summoned and the claimant was taken to the emergency room at the Medical Center of Aurora. The claimant was hospitalized for three days. He was released and instructed to follow up at the Kaiser clinic. The claimant never did so. In December, 2012, the claimant went to Honduras for two months, but did not receive any medical care there or anywhere else.

Mr. Gonzalez testified that he had heard the claimant describing to coemployees how he planned in the near future to fabricate an injury. Mr. Gonzalez did not believe the claimant would actually do this so he did not report the conversation until after September 28.

After the claimant filed an application for a hearing in May, 2013, the respondents arranged for the claimant to be examined by Dr. Mark Paz. Dr. Paz interviewed the claimant, reviewed an MRI from the Aurora Medical Center, read the medical records from the Medical Center, and viewed a surveillance video of the claimant. Dr. Paz concluded the claimant's complaints of symptoms were not consistent with an injury that would have occurred as he described. An MRI exam revealed degenerative disc disease but no compression features that would cause the pain described by the claimant. The video also showed the claimant moving about with no signs of disability.

Crediting the testimony of Mr. Abel, Mr. Gonzalez and the report of Dr. Paz, the ALJ resolved the claimant had not carried his burden of proof to establish a work injury to his low back was sustained at work on September 28, 2012. Accordingly, the ALJ denied the claim for benefits.

On appeal, the claimant does not assign any particular error to the ALJ's order but argues she misinterpreted the facts. The claimant did not arrange for a transcript of the hearing testimony to be prepared for purposes of review.

We have reviewed the order and the record provided and we do not perceive reversible error. Generally, the claimant bears the burden to establish that he sustained an injury that arises out of and in the course of the employee's employment. Section 8-41-301(1)(b), C.R.S.

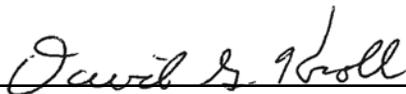
A claimant has the burden to prove that his injury was proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(b) and (c), C.R.S. The issue of whether medical treatment and indemnity benefits are necessitated by a compensable injury is one of fact for resolution by the ALJ based upon the evidentiary record. *See 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). Whether the claimant has met that burden of proof is a factual question for resolution by the ALJ, and her factual

findings must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The claimant has not included a transcript of the testimony submitted at the hearing for our review. In the absence of a transcript of the hearing we must presume that the ALJ's factual findings are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Therefore, we are not able to state the ALJ misunderstood or misperceived the witnesses' testimony. The medical reports from the Medical Center of Aurora support the findings of the ALJ. These reports state the claimant was released from the Medical Center much improved and ambulatory. The claimant was to report to a Kaiser clinic within a week. He did not do so. The MRI obtained by the Medical Center reported no compression deformity or pathologic subluxation. The report of Dr. Paz also was consistent with the findings of the ALJ. The doctor could not find evidence of an acute back injury which could be attributed to a recent work injury or that would explain the subjective complaints of the claimant. We conclude that substantial evidence in the record supports the conclusions of the ALJ.

**IT IS THEREFORE ORDERED** that the ALJ's order issued September 4, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

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

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

ANTONIO MONGE-ORTIZ

W. C. No. 4-899-833-02

Page 5

CERTIFICATE OF MAILING

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

01/23/2014 by RP.

ANTONIO MONGE-ORTIZ, 10929 EAST COLFAX, AURORA, CO, 80010 (Claimant)

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

RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: BRADLEY J. HANSEN, ESQ., 1401  
SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-560-586-05

IN THE MATTER OF THE CLAIM OF

JACK RICHARDSON,

Claimant,

v.

FINAL ORDER

PIZZA HUT, INC.,

Employer,

and

ZURICH,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated May 17, 2013, that awarded penalties to the claimant under §8-43-304(1), C.R.S., for the respondents' failure to timely reimburse the claimant for his medical mileage in violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S. We reverse that portion of ALJ Mottram's order that awarded penalties under §8-43-304(1), C.R.S.

This case has a complicated history, the details of which are unnecessary for purposes of this appeal. The claimant suffered an admitted injury on January 13, 2002, when he slipped on ice and fell, striking his head and losing consciousness while delivering pizzas for the respondent employer. The claimant was diagnosed with a closed head injury, and a herniated disc in his lumbar spine. Dr. Hemler eventually placed the claimant at maximum medical improvement (MMI) on October 29, 2002, with a permanent impairment rating.

A hearing subsequently was held before ALJ Mottram. As pertinent here, one of the issues at the hearing was the claimant's request for penalties for the respondents' violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S. for failure to timely reimburse the claimant for medical mileage. With regard to reimbursement for mileage, on October 10, 2011, the claimant's counsel issued a letter to the respondents submitting a complete mileage log for the years 2008-2011 for which the claimant was requesting reimbursement. The claimant's counsel noted there had been multiple requests and exchanges that may have had overlapping dates, but was seeking clarification as to what had been reimbursed and what had not. The correspondence attached a request for

reimbursement for 7,232.4 miles. This included the claimant's mileage up to September 14, 2011.

The respondents then provided mileage reimbursement information to the claimant, and on November 23, 2011, the claimant's counsel issued a letter indicating her belief that the claimant had not been reimbursed for 588 miles traveled for the period between May 5, 2008, and August 21, 2008, and for 1,852.2 miles traveled between November 23, 2010, and September 14, 2011. This resulted in a request for reimbursement of 2,440.2 miles. This was all mileage for the claimant's travel to and from the drug store for prescriptions.

The respondents sought information about the pharmacy to determine what dates the prescriptions were filled. The claimant responded on December 27, 2011, with an attached pharmacy list which placed an "x" next to the prescription. The vast majority of prescriptions with an "x" next to them appear to correspond to medications related to the claimant's workers' compensation claim.

Thereafter, on July 27, 2012, the respondents' counsel e-mailed the claimant's counsel and indicated that the mileage reimbursement had not been processed because of difficulty verifying that the claimant actually traveled "on an almost daily basis to have prescriptions filled at the pharmacy. . . ." Thereafter, on November 5, 2012, the respondents submitted a check for \$3,666.91 for medical mileage. This purported to cover the mileage from October 20, 2010, through November 5, 2012.

After hearing, ALJ Mottram issued his Order, awarding penalties under and §8-43-304(1), C.R.S. to the claimant for the respondents' violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S. for their failure to timely reimburse the claimant for medical mileage. ALJ Mottram found that while the check for \$3,666.91 covered all of the claimant's disputed mileage up to November 5, 2012, the respondents' delay in issuing the check for reimbursement of the mileage was not reasonable. ALJ Mottram found that the penalty period runs from 30 days after the claimant submitted the completed request for reimbursement on December 27, 2011, until payment was made on November 5, 2012, for a total of 314 days. ALJ Mottram also found, however, that a mitigating factor was that the mileage reimbursement covered a period of a number of years all at once. ALJ Mottram found that while this could have taken the respondents some time to investigate, the issues involved with the investigation should not have taken the amount of time it did. ALJ Mottram did not make any findings as to whether the eight percent penalty under §8-43-401(2)(a), C.R.S. was appropriate for the respondents' failure to timely reimburse the claimant for medical mileage. Consequently, ALJ Mottram determined that the appropriate penalty was \$20 per day for a total of \$6,280.

The respondents have appealed ALJ Mottram's order. The claimant has not filed a brief in opposition to the respondents' appeal. On review, the respondents argue that ALJ Mottram erred in awarding penalties for the respondents' violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S. for failure to timely reimburse the claimant for medical mileage. The respondents raise a number of arguments in support of their position, but we conclude that under *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008) and *Higuera v. Bethesda Foundation*, W.C. No. 4-683-101 (Sept. 22, 2009)<sup>1</sup>, penalties may not be imposed under §8-43-304(1), C.R.S. for the respondents' violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S.

Mileage expenses for travel to attend medical appointments are recoverable as incidental to medical treatment under the Workers' Compensation Act. *Sigman Meat Co. v. Indus. Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). Claimants may seek mileage reimbursement as follows:

The payer shall pay an injured worker for reasonable and necessary expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The rate for mileage shall be 53 cents per mile. The injured worker shall submit a request to the payer showing the date(s) of travel and mileage, with an explanation for any other reasonable and necessary travel expenses incurred or anticipated.

W.C. Rule of Procedure 18-6(E), 7 Code Colo. Reg. 1101-3. This Rule does not specify a time limit within which a payer shall pay an injured worker for mileage to obtain prescribed medications.

Additionally, §8-43-401(2)(a), C.R.S. provides that insurers shall pay benefits within 30 days of when any benefits are due, and if any insurer "knowingly delays payment of medical benefits for more than thirty days" then such insurer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits. Under this statute, however, no penalty is due if the insurer proves that the delay was the result of excusable neglect.

Here, in his application for hearing, the claimant sought penalties under the general penalty provision of §8-43-304(1), C.R.S. for the respondents' violation of Rule 16-11(A) and §8-43-401(2)(a), C.R.S. Rule 16-11(A) provides that an uncontested bill

---

<sup>1</sup> The Panel's prior decision in *Ficco v. Owens Brothers Concrete Co.*, W.C. No. 4-546-848 (May 30, 2007), was superseded by *Higuera v. Bethesda Foundation*, W.C. No. 4-683-101 (Sept. 22, 2009), due to the Court's intervening decision issued in *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008).

submitted by a “provider” is due and payable within 30 days. In *Safeway, Inc. v. Industrial Claim Appeals Office*, *supra*, however, the Colorado Court of Appeals held that claimants are not treated as “providers” for purposes of submitting mileage reimbursement requests and are not subject to the presumptive deadline for submission of “bills for services” set forth in Rule 16-11(A). Further, as the Panel previously held in *Higuera v. Bethesda Foundation*, *supra*, there is no principal distinction between the Court’s holding in *Safeway, Inc. v. Industrial Claim Appeals Office* and the situation presented here involving a claimant’s request for penalties for the untimely reimbursement of medical mileage. Because claimants are not treated as “providers” under Rule 16-11(A), the respondents are not liable for failing to reimburse the claimant within 30 days under the Rule 16-11(A), which only provides for reimbursing providers. Under these circumstances, therefore, we conclude that ALJ Mottram erred in granting penalties under the general penalty provision of §8-43-304, C.R.S. for the respondents’ failure to timely reimburse the claimant for mileage under Rule 16-11(A) and §8-43-401(2)(a), C.R.S. Accordingly, we reverse that portion of ALJ Mottram’s order.

Because we conclude that ALJ Mottram erred in awarding penalties under §8-43-304, C.R.S. for the failure to timely reimburse the claimant for mileage in violation of Rule 16-11(A) and §8-43-401(2)(a), C.R.S., it is unnecessary to address the respondents’ remaining arguments on this issue.

**IT IS THEREFORE ORDERED** that that portion of ALJ Mottram’s order dated May 17, 2013, that awarded penalties to the claimant under §8-43-304(1), C.R.S. for the respondents’ violation of W.C.R.P. 16-11 and §8-43-401(2)(a), C.R.S. is reversed.

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

\_\_\_\_\_ 2/7/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JACK RICHARDSON, P O BOX 770102, STEAMBOAT SPRINGS, CO, 80477-0102  
(Claimant)

PIZZA HUT, INC., P O BOX 880636, STEAMBOAT SPRINGS, CO, 80488 (Employer)

ZURICH, Attn: GLADYS THOMAS, C/O: GALLAGHER BASSETT SERVICES, INC., 6404  
INTERNATIONAL PKWY, STE 2300, PLANO, TX, 75093 (Insurer)

WILLIAM C. HIBBARD, P.C., Attn: WILLIAM C. HIBBARD, ESQ., P O BOX 773959,  
STEAMBOAT SPRINGS, CO, 80477 (For Claimant)

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

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-886-842-04

IN THE MATTER OF THE CLAIM OF

HALIMO SALAD,

Claimant,

v.

FINAL ORDER

JBS USA, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Harr (ALJ) dated September 23, 2013, that denied and dismissed the claimant's request for penalties and imposed a penalty of \$1000.00 against the claimant's counsel for failure to confer in violation of §8-43-211(2)(e), C.R.S. We affirm the ALJ's order.

The claimant sustained an admitted injury on July 29, 2011. The claimant was placed at maximum medical improvement (MMI) and given a 14 percent whole person impairment rating by her treating physician, Dr. Reichhardt. The respondents filed a final admission of liability consistent with Dr. Reichhardt's opinions. The claimant timely requested a Division Independent Medical Examination (DIME). Dr. Richman was selected as the DIME physician. On August 29, 2012, the Division of Workers' Compensation (DOWC) advised the claimant that she had five business days from the date she received the notice to schedule the DIME appointment with Dr. Richman. The claimant failed to timely schedule the DIME appointment.

The insurance adjuster for respondent, Michael Farnham, set a pre-hearing conference for October 25, 2012, to request that a pre-hearing ALJ (PALJ) cancel the DIME application. *See* WCRP 11-3(I). By letter dated October 10, 2012, the claimant's counsel advised the DOWC and the respondents that he scheduled the appointment with Dr. Richman for November 11, 2012. In response, Mr. Farnham canceled the October 25, 2012, prehearing conference as moot. Although Mr. Farnham had canceled the prehearing conference, the claimant's counsel filed an application for hearing on October 24, 2012, endorsing only the following issue:

Resolve issues raised by the 10/25/2012 scheduled prehearing to Strike DIME appointment, pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc.*, (ICAO, August 3, 1998) WC# 4-285-320).

The ALJ found that although the paralegal for claimant's counsel could not recall when Mr. Farnham canceled the pre-hearing conference, by October 24, 2012, any issue concerning the prehearing conference had been rendered moot because the pre-hearing conference had been canceled by this date.

The claimant attended the DIME appointment. The DIME physician determined that the claimant reached MMI on May 3, 2012, and rated the claimant with 16 percent whole person impairment. The respondents filed a final admission of liability consistent with the DIME physician's opinions.

On December 19, 2012, the claimant filed an application for hearing endorsing the issue of penalties, which the claimant described as follows:

Against Respondents and their Counsel for filing and maintaining materially false and fraudulent and unripe and moot Motion, and further lying about conferring thereon and for likewise representing it opposed contrary to §8-43-402, 8-43-301(1), 8-43-211(d) and (2)(e), and the corresponding WCRP and/or OACRP, in accordance with a longstanding pattern, practice or custom and for continuing to list a likewise false fraudulent, and non-existent entity as the employer herein.

The claimant also endorsed the additional following issue:

Resolve issues raised by the Motion dated 12/05/2012 pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc.*, (ICAO, August 3, 1998) WC# 4-285-320.

In the December 19, 2012, response, the respondents requested penalties against the claimant or his counsel for violating §8-43-211(2)(e), C.R.S., by filing the October 24, 2012, application for hearing without first conferring with the respondents. The respondents also claimed that the claimant failed to plead the penalty issue with specificity and that the issue in the claimant's October 24, 2012, application for hearing was not ripe and had, therefore, violated §8-43-211(2)(d), C.R.S.

The respondents propounded discovery on the claimant, requesting more specific information to defend the issues endorsed by the claimant. The claimant failed to answer

the respondents' discovery. The respondents filed a motion to compel, which was granted, and the claimant was ordered to provide responses by June 15, 2013. The claimant eventually provided partial, unsigned responses on July 10, 2013.

Based on these findings the ALJ observed that he was unable to determine the basis for the claimant's penalty claims or the relief requested by the claimant. The ALJ concluded that the claimant failed to plead the penalty claims with sufficient specificity and, therefore, denied and dismissed the claimant's request for penalties against the respondents. The ALJ also determined that although the claimant's October 24, 2012, application for hearing was unripe, the respondents did not attempt to have the unripe issue stricken by a PALJ as required by §8-43-211(2)(d), C.R.S. The ALJ therefore, denied and dismissed the respondents request for attorney fees.

The ALJ, however, found that the respondents had shown that the claimant's counsel violated §8-43-211(2)(e), C.R.S., by filing the October 24, 2012, application for hearing without attempting to confer with the respondents. The ALJ noted that although the claimant's counsel indicated on the application for hearing that he had attempted to resolve the issue before filing the application for hearing, the ALJ credited Mr. Farnham's testimony in finding no persuasive evidence otherwise showing claimant's counsel in fact attempted to resolve the issue with respondents, prior to filing the October 24, 2012, application for hearing. The ALJ noted that had the claimant's counsel conferred with the respondents before filing the application for hearing on moot issues and before setting the hearing, the OAC would not have incurred unnecessary administrative costs in docketing the hearing, preparing the notices and serving them on the parties. The ALJ noted that the violation of §8-43-211(2)(e), C.R.S. was even more egregious because the claimant's counsel proceeded in setting the hearing when he knew or should have known that the issue was moot and unripe. The ALJ, therefore, assessed a penalty of \$1000.00 pursuant to §8-43-304(1), C.R.S.

On appeal the claimant contends that the ALJ abused his discretion in failing to award penalties against the respondents and in assessing penalties against claimant's counsel. The claimant also contends that the ALJ's decision is the result of a longstanding bias against claimant's counsel. We are not persuaded the ALJ committed reversible error.

Section 8-43-304(1), C.R.S., allows an ALJ to impose penalties of up to \$1000.00 per day against any party "who violates any provision of articles 40 to 47 of [Title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court ...." The imposition of

penalties under §8-43-304(1), C.R.S., is a two step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

## I.

Section 8-43-304, (4), C.R.S., requires that the party requesting penalties “shall state with specificity the grounds on which the penalty is being asserted.” Failure to state with specificity the grounds on which a penalty is asserted subjects a claim for penalties to dismissal. *See Young v. Bobby Brown Bail Bonds, Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Gonzales v. Denver Public School District Number 1*, W. C. Nos. 4-437-328, 4-441-546 (December 27, 2001); *Brown v. Durango Transportation Inc.*, W. C. No. 4-255-485 (October 2, 1996).

In this case, we, like the ALJ, are unable to discern the basis for the claimant’s penalty claims or the relief the claimant requested. The claimant’s applications for hearing, position statement and brief make references to the incorrect caption early in the claim listing “JBS Distribution” as the employer, which was subsequently changed, by order, dated February 28, 2013, to “JBS USA, LLC.” The claimant, however, failed to identify the statute, rule or order that was allegedly violated by the error in the caption. The claimant’s reference to certain statutory sections in the application for hearing are either inapplicable or simply general penalty or attorney fee provisions and the claimant makes no reference how these are implicated in her penalty claim. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995) (penalties may not be awarded where there is no violation)

Moreover, the claimant failed to specify which filings allegedly contained “materially false and fraudulent and unripe and moot Motion” or which language was allegedly materially false and fraudulent and unripe and moot. Based on these deficiencies, we cannot say that the ALJ abused his discretion in concluding that the claimant failed to provide sufficient specificity for the alleged penalty claim.

## II.

Nor are we persuaded that the ALJ abused his discretion in assessing penalties against the claimant for violation of §8-43-211(2)(e), C.R.S. The ALJ determined that the claimant violated §8-43-211(2)(e), C.R.S. and that the violation was objectively unreasonable given the totality of the circumstances. The claimant argues that the ALJ

erroneously relied on “an adjuster’s incomplete telephonic testimony that the undersigned had falsely represented that he had conferred with opposing counsel.” However, the decision to credit a witness’s testimony is a matter solely within the ALJ’s discretion. *Levy v. Everson Plumbing Co., Inc.*, 171 Colo. 468, 468 P.2d 34 (1970); *Varsity Contractors v. Baca*, 709 P.2d 55 (Colo.App.1985). Only if the testimony credited by the ALJ was, as a matter of law incredible, may we interfere with his assessments. See *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986) (it is error to credit testimony which is so rebutted by hard, certain evidence that is incredible as a matter of law).

Although the ALJ was not required to articulate the basis for his resolution of conflicts in the evidence regarding credibility, the ALJ did discuss the evidence and his resolution of those conflicts. (ALJ Order, Findings of Fact 23 and Conclusion of Law C at 9). The ALJ made other findings supported by the record from which reasonable inferences could be drawn. It was plausible for the ALJ to infer from the testimony presented that the claimant’s counsel failed to confer with the respondents prior to filing the application for hearing because had he done so, he would have known that the issue was moot given the fact that the pre-hearing had been canceled. We may not reweigh the evidence before the ALJ. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). Moreover, the ALJ's findings are based on substantial evidence and are sufficient to support the imposition of the penalty, notwithstanding evidence from which contrary inferences could be made. Section 8-43-301(8), C.R.S.

The claimant further argues that the ALJ erred in refusing to permit post-hearing introduction of a letter which was attached to the Brief in Support. We perceive no error. The ALJ is given wide discretion in the conduct of evidentiary proceedings, including the decision of whether to grant a continuance or otherwise permit the taking of post-hearing evidence. *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988); *See also*, 8-43-207(1)(j), C.R.S. An abuse of discretion is not shown unless the ALJ's determination is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). In determining whether to take post-hearing evidence, an ALJ may consider various factors including whether a party has exercised due diligence to obtain the evidence prior to the hearing, whether the evidence might be outcome determinative, and the potential inconvenience and expense to the opposing party if additional proceedings are permitted. *See Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); *IPMC Transportation Co. v. Industrial Claim Appeals Office*, *supra*; *Potomac Insurance Co. v. Industrial Commission*, 744 P.2d 765 (Colo. App. 1987).

Here, the letter submitted by the claimant with the Brief in Support was not submitted at hearing and was not admitted under the ALJ’s discretion for post hearing submissions. The claimant cites no legal authority for his contention that the ALJ

misapplied the law in making this determination and does not provide any reason for the document not being provided in discovery or entered in evidence at the time of hearing. Under these circumstances, we do not believe that the ALJ was compelled to allow the additional evidence. See generally, *Frank v. Industrial Commission*, 96 Colo. 364, 43 P.2d 158 (1935).

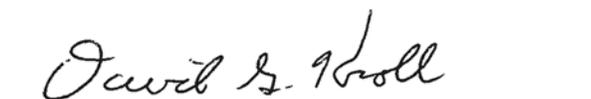
The claimant also makes general allegations that the result in this case is due to the ALJ's longstanding bias against claimant's counsel. Insofar as the claimant is now moving to recuse the ALJ on account of his alleged bias, that motion is untimely. Insofar as the claimant is arguing that the ALJ's resolution of the disputed issues demonstrates some bias against the claimant or claimant's counsel, we disagree. See *Kiewit Western, Inc. v. Patterson*, 768 P.2d 1272 (Colo. App. 1989). ALJ's are presumed to be competent and unbiased until the contrary is shown. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995). Generally, a party must allege that the ALJ had a "personal, financial, or official stake in the decision which would evidence a conflict of interest on his part." *Neoplan USA Corp. v. Industrial Claim Appeals Office*, 778 P.2d 312 (Colo. App. 1989).

Here, the claimant made no showing whatsoever that the ALJ was biased against her or claimant's counsel. The mere fact the ALJ decided issues contrary to the claimant's view of the case is insufficient to support a finding of bias. See *In Re Marriage of Johnson*, 40 Colo. App. 250, 576 P.2d 188 (1977). In our view, the record in this matter discloses no evidence of bias or partiality on the part of the ALJ. Rather the ALJ's resolution of the issues was a proper exercise of discretion and not evidence of bias.

**IT IS THEREFORE ORDERED** that the ALJ's order dated September 23, 2013, 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

\_\_\_\_\_ 3/5/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

HALIMO SALAD, 716 15TH STREET APT #36, GREELEY, CO, 80631 (Claimant)  
JBS USA, LLC, Attn: GINA GRIEGO - WC COORDINATOR, C/O: JBS USA HOLDINGS,  
INC., 1770 PROMONTORY CIRCLE, GREELEY, CO, 80634 (Employer)  
ZURICH AMERICAN INSURANCE, Attn: JACOB BREJCHA, C/O: SEDGWICK CMS, 7400  
E. ORCHARD RD., #4015, GREENWOOD VILLAGE, CO, 80111 (Insurer)  
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUNDELL, ESQ., 1233  
EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)  
DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: DAVID J.  
DWORKIN, ESQ., 3900 EAST MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210 (For  
Respondents)  
STEVEN U. MULLENS, P.C., Attn: PATTIE RAGLAND, ESQ., P O BOX 2940, COLORADO  
SPRINGS, CO, 80901-2940 (Other Party)  
SEDGWICK CMS, Attn: MICHAEL FARNHAM, P O BOX 14493, LEXINGTON, KY, 40512  
(Other Party 2)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-877-091-02

IN THE MATTER OF THE CLAIM OF

SCOTT SIMPSON,

Claimant,

v.

FINAL ORDER

SAFEWORKS, LLC,

Employer,

and

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated August 27, 2013, that determined the respondents failed to overcome the maximum medical improvement (MMI) opinion of the Division Independent Medical Examination (DIME) physician and awarded temporary disability benefits. We affirm the ALJ's order.

A hearing was held on the issues of MMI and temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on January 11, 2012, to his right inguinal area while working as a rigger for the respondent employer. The claimant received treatment and underwent surgery to repair a right inguinal hernia. The claimant continued to perform his job duties through April 25, 2012, and resigned on April 26, 2012. The claimant continued to experience pain as a result of this injury and Dr. Dallenbach subsequently imposed work restrictions. The claimant continued to receive treatment to address his pain complaints.

On January 16, 2013, Dr. Dallenbach released the claimant to full duty work and placed the claimant at MMI with a three percent impairment rating due to the ilionguinal pain. Dr. Dallenbach also noted that the claimant should continue with pain medications. The respondents filed a final admission of liability consistent with this report.

On March 25, 2013, the claimant underwent a DIME with Dr. DiNapoli, who agreed the claimant was at MMI as of January 16, 2013, and needed maintenance medical benefits for continued pain. The DIME physician rated the claimant's permanent impairment at four percent. The insurer filed a final admission of liability consistent with this report.

Dr. Healey performed an IME and in his opinion the claimant was not at MMI and was not able to return to full duty work. Dr. Healey noted that the claimant was still in pain and the medications were not giving him full pain relief. Dr. Healey recommended the possibility of nerve blocks and a surgical evaluation.

On June 12, 2013, Dr. Dallenbach reported that he agreed with Dr. Healey that the claimant was not at MMI and that he agreed with Dr. Healey's treatment recommendations. Dr. Dallenbach also testified at hearing that medications could only manage the claimant's nerve entrapment problem but that ultimately the claimant would need surgery or at least a diagnostic workup to treat the condition. Dr. Dallenbach also stated that it was premature to place the claimant at MMI when he did and the only reason he gave claimant the release to return to work was because the claimant requested it. In Dr. Dallenbach's opinion, work restrictions are appropriate and the claimant is not able to return to his regular occupation.

On August 5, 2013, the DIME physician testified by deposition, making a number of statements about the claimant's MMI status. The DIME physician noted the problems the claimant was experiencing with the medications and pain relief but assumed the claimant was still at MMI on January 16, 2013, and needed Gabapentin as a maintenance medication. Immediately after the deposition testimony, the DIME physician issued an addendum to his DIME report and concluded that the claimant was not at MMI.

The ALJ determined that the record contained conflicting MMI determinations by the DIME physician but that the DIME physician ultimately determined that the claimant was not at MMI. Therefore, the ALJ determined that the respondents had the burden to overcome the DIME physician's MMI opinion by clear and convincing evidence and that they had failed to do so. The ALJ also noted that Dr. Dallenbach and Dr. Healey were in agreement that the claimant was not at MMI and, in fact, the record contained no contrary opinions.

The ALJ also determined that the claimant had shown that he was unable to return to his regular employment as a result of the injury, as Dr. Dallenbach rescinded his prior release to return to full duty. The ALJ, therefore, awarded the claimant temporary total disability benefits beginning January 16, 2013, and continuing.

On appeal, the respondents contend that the ALJ erred in admitting the DIME physician's addendum report and in switching the burden to the respondents to overcome the DIME physician's MMI opinion. The respondents further contend that the ALJ erred by not allowing them to proceed on the affirmative defense of the offer of modified duty. We are not persuaded that the ALJ erred.

Generally, the DIME physician's finding concerning the date of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *aff'd*, *Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006)(not selected for publication). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also*, *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported). We may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*.

Here, the ALJ determined, with record support based on deposition testimony and all of the DIME physician's reports, the DIME physician's true opinion was that the claimant was not at MMI as of January 16, 2013. Given the DIME physician's ambiguous statements concerning MMI in his deposition and the subsequent addendum report in which the DIME physician unequivocally stated that the claimant is not at MMI, it was reasonable for the ALJ to reach this conclusion and we see no basis upon which to disturb this finding. Section 8-43-301(8), C.R.S.

#### I.

The respondents initially contend that good cause was not shown to include the DIME physician's addendum in the record and it violated the respondents' due process rights. We disagree.

As the respondents point out, the 20 day rule in §8-43-210, C.R.S. of the Act requires that “all relevant medical records, vocational reports, expert witness reports and employer records shall be exchanged with all other parties at least 20 days prior to the hearing date.” The court of appeals has recognized that exceptions to the 20 day rule are clearly contemplated by the allowance of continuances to file additional reports in appropriate circumstances. *Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895 (Colo. App. 2009).

The ALJ exercises “wide discretion” in conducting evidentiary proceedings. *See* §8-43-207(1), C.R.S. (detailing ALJ's authority to conduct evidentiary hearings); *see also, IPMC Transportation. v. Industrial Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (construing predecessor statute to §8-43-207 to provide hearing officer with wide discretion in conduct of evidentiary proceedings). We defer to the ALJ's evidentiary determinations unless his ruling constitutes an abuse of his discretion by “exceeding the bounds of reason.” *See, e.g. Rosenberg v. Board of Education*, 710 P.2d 1095 (Colo. 1985). We agree with the ALJ's determination here to admit the DIME physician's addendum report as the report was relevant and clarified the DIME physician's MMI position. *See Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra.* (ALJ should consider all of the DIME physician's written and oral testimony).

Moreover, we perceive no due process violation in the ALJ's decision to admit the report. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (1990).

Here, the claimant offered to reconvene the deposition of the DIME physician at the claimant's expense to allow the respondents to ask any additional questions that may have come up in light of the addendum report. Tr. at 12. *See Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000)(recognizing entitlement of opposing party to cross-examine author of admitted report), *aff'd on other grounds sub nom. Colorado Dep't of Labor and Employment*, 30 P.3d 189 (Colo. 2001). Although the respondents now argue in the Brief in Support that they were unable to obtain a separate opinion to address the change in the DIME physician's testimony, they failed to inform the ALJ at hearing that they wished to keep the record open for additional evidence. The ALJ specifically stated at hearing that he would give the respondents the opportunity at the end of the hearing to inform him whether they were ready for an order or needed to obtain further evidence from the DIME physician. Tr. at 13. However, at the conclusion

of the hearing, the respondents stated that they were not requesting any follow-up with the DIME physician and that they were resting their case. Tr. at 68.

In our view the respondents received both notice and the opportunity to be heard concerning the DIME physician's addendum report. See *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003); *City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995); *Stephens v. North & Air Package Express Services*, *supra*. In these circumstances, we cannot say the respondents were deprived of due process.

## II.

The respondents further argue that the ALJ erred in assigning them the burden of proof to overcome the DIME physician's MMI opinion because it was the claimant's burden to overcome the DIME physician's original MMI opinion. We are not persuaded the ALJ erred.

It is now well-settled case law that if a DIME physician issues conflicting or ambiguous opinions concerning MMI, it is the ALJ's province to determine the DIME physician's true opinion as a matter of fact and once the ALJ determines the DIME physician's opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. In *Fera v. Resources One, LLC, D/B/A Terra Firma*, W. C. No. 4-589-175 (May 25, 2005) *aff'd*, *Resources One, LLC v. Industrial Claim Appeals Office*, 148 P.3d 287 (Colo. App. 2006), the panel found that when the ALJ determined the DIME physician's true opinion on MMI, the ALJ did not err in assigning the respondents the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Villoch v. Opus Northwest, LLC*, W. C. No. 4-514-339 (June 17, 2005).

Additionally, in *Lambert & Sons, Inc.*, *supra*, the DIME physician opined that the claimant had a 12 percent whole person physical impairment rating, but later in a deposition stated that all of the claimant's impairment was pre-existing. The ALJ denied the respondents' request to apportion the claimant's impairment, finding that the respondents had failed to overcome by clear and convincing evidence the 12 percent impairment rating issued by the DIME physician. The court agreed with the respondents that the opinion of the DIME physician stated at the subsequent deposition should be considered, together with the initial report, as part of the DIME physician's "finding" for the purposes of §8-42-107(8)(c), C.R.S. However, the court determined that the ALJ had adopted the 12 percent impairment rating and properly required the respondents to overcome that rating. The court found no error in the ALJ's placement on the respondent the burden of proof to overcome by clear and convincing evidence the DIME physician's 12 percent impairment rating. Following the principles articulated in these cases, we

perceive no error in the ALJ's placement of the burden of proof on the respondents in the present case.

### III.

We also reject the respondents' contention that the ALJ erred by not allowing the respondents to go forward at hearing on the issue of modified duty. The respondents assert that they adequately raised the affirmative defense of modified duty because they listed §8-42-105(3), C.R.S. and W.C.R.P. 6-1(A), in the response to application for hearing section marked "Other issues to be heard for hearing" and re-raised the issue in front of the ALJ at hearing. The ALJ, however, determined that the respondents had not properly endorsed the affirmative defense of modified duty and failed to provide the claimant with the appropriate notice in the answers to interrogatories. We perceive no reversible error.

As noted above, the ALJ has considerable discretion in matters involving the time and conduct of administrative hearing and an ALJ's ruling in this regard will not be set aside absent an abuse of discretion. *See IPMC Transportation Co. v. Industrial Claim Appeal Office, supra.* An affirmative defense must be explicitly pled and is deemed waived if not raised at a point in the proceedings which affords the opposing party an opportunity to present rebuttal evidence. *See C.R.C.P. 8(c), Kersting v. Industrial Commission, 39 Colo. App. 297, 567 P.2d 394, (1977); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Lewis v. Scientific Supply Co., 897 P.2d 905 (Colo. App. 1995).* This principle protects the parties' due process rights to notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office, supra; See also Office of Administrative Court Rule 12 (after the date of the setting, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown).*

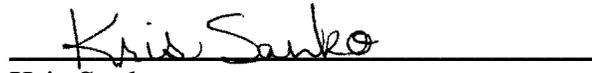
We agree with the ALJ's determination here that the respondents' general endorsement of §8-42-105(3), C.R.S. and W.C.R.P. 6-1, did not necessarily notify the claimant that the respondents intended to assert the affirmative defense of a modified duty job offer. This is especially true where the claimant requested that the respondents state what affirmative defenses they were going to pursue at hearing, and the respondents failed to identify the issue of modified duty. Tr. at 9. Thus, we cannot say that the ALJ abused his discretion in not allowing the respondents to proceed on this issue.

The ALJ's findings are supported by substantial evidence in the record. Those findings, in turn, support the ALJ's determination that the respondents failed to overcome the DIME physician's MMI opinion by clear and convincing evidence and that the claimant proved his entitlement to temporary disability benefits.

**IT IS THEREFORE ORDERED** that the ALJ's order dated August 27, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

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

  
\_\_\_\_\_  
Kris Sanko

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/23/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

SCOTT SIMPSON, Attn: VESTA LEACH, P O BOX 427, PENROSE, CO, 81240 (Claimant)  
SAFEWORKS, LLC, Attn: FRANCES SILVERTHORN, 365 UPLAND DRIVE, TUKWILA,  
WA, 98188 (Employer)

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Attn: ELIZABETH  
CONYERS, C/O: CHARTIS INSURANCE, INC., P O BOX 25971, SHAWNEE MISSION,  
KS, 66225 (Insurer)

SCHIFF & SCHIFF, P.C., Attn: HERBERT S. SCHIFF, ESQ., 332 BROADWAY AVENUE,  
PUEBLO, CO, 81004 (For Claimant)

SENDER GOLDFARB & RICE, L.L.C., Attn: SEAN ELLIOTT, ESQ./WILLIAM M. STERCK,  
ESQ., 1700 BROADWAY, SUITE 1700, DENVER, CO, 80290 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-884-343-03

IN THE MATTER OF THE CLAIM OF

LUCRETIA WILCOX,

Claimant,

v.

FINAL ORDER

JHCI HOLDINGS,

Employer,

and

ZURICH AMERICAN INSURANCE  
COMPANY,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 1, 2013, that denied and dismissed the claimant's claim for workers' compensation benefits. We affirm the ALJ's order.

A hearing was held on the issues of compensability, medical benefits and whether benefits should be reduced by 50 percent for willfully misleading the employer. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as an on-site truck driver for the employer. On February 17, 2012, at approximately 2:45 a.m., the claimant allegedly sustained an injury to her right shoulder while closing the door of a trailer at work. The claimant reported the incident to her supervisor, Mr. Rivers. The claimant did not request medical care but sought to go home. At about 5:15 a.m. on this date, the claimant visited the Lutheran Emergency Room because of severe right shoulder pain. The claimant reported that she was lifting a 100 gallon fish tank and experienced a burning sensation down her right arm. The doctor suspected a right rotator-cuff tear and referred the claimant to her personal physician, Dr. Maybach. The claimant visited Dr. Maybach later that day and again reported that she had injured her right shoulder after moving a heavy fish tank four days earlier.

The claimant had a prior workers' compensation injury to her right shoulder with a different employer in 2008. The claimant was placed at maximum medical improvement

(MMI) for this injury with permanent work restrictions of no lifting in excess of 15 pounds, occasional reaching away from the body and occasional overhead reaching with the right arm. The claimant settled this claim on a full and final basis. Rivers, and co-worker Jim Horton, testified at hearing that the claimant had difficulties performing her job with the respondent employer because her right shoulder would pop in and out from the old injury and prior surgery.

On February 21, 2012, the claimant visited Dr. Erickson for an evaluation. Dr. Erickson treated the claimant for the 2008 workers' compensation injury. Dr. Erickson stated that the claimant's "case was closed, but she was still having significant difficulties." Referring to the 2008 injury, Dr. Erickson further stated that, "I believe that her current problems are a continuation of her work injury." Dr. Erickson continued that, "as the patient never reached a point where her shoulder was functioning anywhere close to normal and still painful, I believe that she was placed at MMI without justification and that her condition, even while she attempted to continue working, has progressed. I believe her current condition is definitely related to her prior work injury." On February 22, 2012, the claimant prepared a statement for the respondent employer reiterating that her right shoulder condition was an old injury and that she was recently advised that she required shoulder replacement surgery and that this was not the responsibility of the respondent employer.

On May 4, 2012, Dr. Erickson authored a letter in which he stated that he had changed his opinion and that the claimant actually sustained all of the damage to her shoulder while performing work activities for the respondent employer. Dr. Erickson later stated on August 14, 2012, that there had been a significant error with the claimant's clinical history because the claimant's friend had erroneously completed registration sheets. In Dr. Erickson's opinion, the February 17, 2012, incident actually "caused a severe aggravation, requiring joint replacement."

The claimant testified at hearing that she initially told medical providers that she injured her right shoulder while lifting a fish tank because she did not want to be treated by workers' compensation. The claimant also stated that she told Dr. Erickson about trailer door incident but that Dr. Erickson initially attributed her condition to the prior work injury because the claimant's roommate's daughter incorrectly completed her registration paperwork.

Dr. Shih conducted an independent medical examination of the claimant and noted the numerous discrepancies in the claimant's explanation of her right shoulder symptoms. According to Dr. Shih, the medical records were inconsistent regarding the mechanism of the claimant's right shoulder injury and he was unable to attribute the right shoulder symptoms to the February 17, 2012, incident.

The ALJ found the opinion of Dr. Shih more credible and persuasive than the opinion of Dr. Erickson and the testimony of the claimant. The ALJ, therefore, concluded that the claimant failed to demonstrate that her employment duties on February 17, 2012, aggravated, accelerated or combined with her pre-existing right shoulder condition to produce the need for medical treatment.

On appeal the claimant asserts that the ALJ erred in his determination to deny the claim. The claimant argues that the respondents conceded there was an incident on February 17, 2012, and that the evidence compels a conclusion that the claimant aggravated her pre-existing shoulder condition on this date. We are not persuaded the ALJ erred.

As the claimant correctly points out, a pre-existing condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (1997).

The ALJ is charged with making pertinent factual determinations, including those concerning liability for benefits, under a preponderance of the evidence standard. Section 8-43-201, C.R.S. Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Id.*

Because the question of whether the claimant met her burden to prove compensability is factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to 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 Claims Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

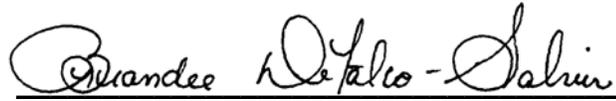
Here, the ALJ determined that the claimant failed to prove she sustained an injury at work on February 17, 2012. The ALJ's order reflects that he considered the claimant's explanations as to how she injured her right shoulder and the discrepancies in her reporting of the alleged injury and that he rejected those explanations. In rejecting the claimant's testimony and Dr. Erickson's opinion, the ALJ's order pointed out the numerous inconsistencies in the claimant's version of events. It was for the ALJ to resolve any inconsistencies and assign such weight and credibility as the ALJ determined was appropriate. *See Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). The mere fact the evidence might support a different result affords no basis for relief on appeal. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). We may not interfere with the ALJ's decision to credit the testimony of witnesses unless, in extreme circumstances, the testimony is overwhelmingly rebutted by such hard certain evidence the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). That is not the case here.

The claimant contends that the respondents conceded at hearing that her injury occurred at work. The respondent's attorney, however, stated at hearing, "Respondents concede that she sustained an *incident* at work," with the trailer door. February 19, 2013, Tr. at 17 (*emphasis added*). Contrary to the claimant's assertion, we do not understand the respondents to have conceded that the claimant sustained an *injury* as a result of this incident and that was the issue for ALJ's resolution. *See City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967) (no benefits flow to the victim of an industrial accident unless the accident results in a compensable injury.)

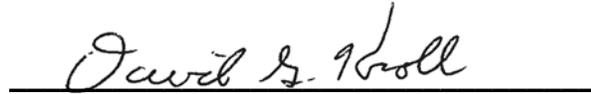
We conclude that the ALJ's dispositive findings are supported by substantial evidence and that the ALJ did not abuse his discretion in making his findings. The ALJ's findings, in turn, support his decision to deny the claimant's claim for benefits and we perceive no basis upon which to disturb the order on review. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated July 1, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Handwritten signature of Brandee DeFalco-Galvin in cursive script.

Brandee DeFalco-Galvin

Handwritten signature of David G. Kroll in cursive script.

David G. Kroll

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 1/23/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

LUCRETIA WILCOX, 8511 FRANKLIN STREET, DENVER, CO, 80229 (Claimant)  
ZURICH AMERICAN INSURANCE COMPANY, Attn: SHARON CAMARA, C/O:  
GALLAGHER BASSETT INSURANCE COMPANY, P O BOX 4068, ENGLEWOOD, CO,  
80155 (Insurer)  
DARRELL S. ELLIOTT, P.C., Attn: ROBERT F. JAMES, ESQ., 1600 PENNSYLVANIA  
STREET, DENVER, CO, 80203 (For Claimant)  
THE KITCH LAW FIRM, Attn: MARSHA A. KITCH, ESQ., 3064 WHITMAN DRIVE,  
SUITE 200, EVERGREEN, CO, 80439 (For Respondents)

---

Court of Appeals No. 13CA0016  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-850-101

---

Apex Transportation, Inc.; and Pinnacol Assurance,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado; and Paul R. Vigil,

Respondents.

---

ORDER SET ASIDE AND CASE  
REMANDED WITH DIRECTIONS

Division VI  
Opinion by JUDGE HAWTHORNE  
Lichtenstein and Gabriel, JJ., concur

OPINION PREVIOUSLY ANNOUNCED AS “NOT PUBLISHED PURSUANT TO  
C.A.R. 35(f)” JANUARY 30, 2014, IS NOW DESIGNATED FOR PUBLICATION

Announced March 13, 2014

---

Harvey D. Flewelling, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

The Frickey Law Firm, Adam McClure, Lakewood, Colorado, for Respondent  
Paul R. Vigil

¶ 1 In this workers' compensation action, employer, Apex Transportation, Inc., and its insurer, Pinnacol Assurance, seek review of a final order of the Industrial Claim Appeals Office (Panel) reversing an administrative law judge's (ALJ) order denying claimant, Paul R. Vigil, temporary total disability (TTD) benefits. We set aside the Panel's final order and remand the case with directions to reinstate the ALJ's original order.

### I. Factual and Procedural History

¶ 2 Claimant worked as a truck driver for Apex for five and a half years. In February 2011, claimant sustained an injury to his shoulder. He refused medical attention at the time because it was "Apex's busiest season" and he "thought the pain would go away." When the pain did not subside, claimant obtained a "pain pill" from his brother.

¶ 3 He did not take the pill immediately. About a week later, though, the pain became "excruciating," and claimant took the pain pill. The next day at work, the pain returned, and claimant decided to formally report the injury to employer. He was sent to employer's workers' compensation health care provider to be examined and treated. The physician's assistant (PA) who examined him imposed

no work restrictions and determined that claimant could return to work.

¶ 4 Under employer’s policies, any employee who sustains a work-related injury must submit to a drug test when initially examined. Claimant therefore underwent a drug screen. The test proved positive for morphine — the pain pill claimant received from his brother — although claimant had no prescription for the medication. Because employer has a “no tolerance” policy for drugs, claimant was immediately terminated.

¶ 5 Several days after being terminated, claimant returned to the medical clinic and was seen by a physician. Although the physician found claimant had not suffered a permanent impairment, he noted that claimant sustained a “severe spasm of the whole girdle,” prescribed pain medication, and ordered claimant “off work.”

¶ 6 Claimant then sought TTD benefits. After a hearing, the ALJ found that claimant’s termination from employment was volitional. He further found that claimant had failed to establish that his condition had worsened after he was terminated. The ALJ therefore denied claimant’s request for TTD benefits in his November 3, 2011, Findings of Fact, Conclusions of Law, and Order (the ALJ’s original

order).

¶ 7 On review, the Panel disagreed, concluding that the ALJ's factual findings failed to support the conclusion that claimant's condition had not worsened after he was terminated. The Panel instead found that because the physician had taken claimant off work nearly two weeks after the PA had not imposed any work restrictions, claimant's condition had necessarily worsened. The Panel concluded that because the physician's work restrictions were imposed post-termination, the work restrictions, not the termination, caused claimant's wage loss, entitling him to TTD benefits. The Panel consequently remanded the case for TTD benefits to be awarded. The ALJ complied, and, in its August 17, 2012, final order, the Panel affirmed the ALJ's order on remand awarding claimant benefits. Employer now appeals.

## II. Analysis

¶ 8 Initially, we note that claimant's answer brief fails to comply fully with the applicable appellate rules. The brief appears to have been prepared in twelve-point typeface, rather than the fourteen-point typeface mandated by C.A.R. 32(a)(1). Also, it does not include page numbering, despite the rule's mandate that page

numbers “shall be required.” See C.A.R. 32(b)(2). Despite these deficiencies, we take no action at this time and accept claimant’s brief as filed. However, claimant’s counsel is reminded that future deviations from the appellate rules’ requirements may result in sanctions.

¶ 9 Employer contends that the Panel exceeded its authority when it set aside the ALJ’s original order denying claimant’s request for TTD benefits. It argues that substantial record evidence supported the ALJ’s factual finding that claimant’s termination was volitional and that his condition had not worsened after he was terminated. By setting aside the ALJ’s findings, employer contends, the Panel reweighed the evidence and engaged in improper fact-finding. We agree.

¶ 10 Under the termination statutes, an employee responsible for being separated from employment may be denied TTD. The statutes, which recite identical language, provide: “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. 2013.

¶ 11 But an injured worker may be entitled to a reinstatement or continuation of TTD benefits after being terminated if it is determined that the ensuing wage loss is attributable to a worsened condition causally related to the work injury and not to the termination. *See Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004) (“We hold that section 8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss.”).

¶ 12 Whether an injured worker “is at fault for causing a separation of employment is a factual issue for determination by the ALJ. . . . A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination.” *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

¶ 13 Whether a worsened condition caused claimant’s wage loss is also a factual question to be determined by the ALJ. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (“The weight to be assigned . . . evidence [of a worsening condition]

was a matter for the ALJ, and inasmuch as there is substantial evidence to support the denial of the petition to reopen, we may not substitute our judgment for that of the ALJ on that issue.”).

¶ 14 Here, the ALJ initially determined that claimant’s volitional act of ingesting the pain pill caused his termination, and that his condition had not worsened after his termination. The ALJ specifically found that

- claimant’s “right shoulder had been painful when he obtained a pain pill from his brother”;
- both the PA and the physician diagnosed claimant as suffering from a “sprain/strain of the right scapula”;
- although the physician increased claimant’s work restrictions, claimant had “not demonstrated that his right shoulder condition worsened”; and
- the physician neither anticipated that claimant had suffered a permanent impairment nor documented that claimant’s condition had worsened.

¶ 15 In rejecting the ALJ’s findings, the Panel observed that “the ALJ’s findings that the PA returned the claimant to full duty after his industrial injury and [that the physician] subsequently took the

claimant off work . . . demonstrates that the claimant’s worsening of condition reestablished the causal connection between the injury and the wage loss.” The Panel held that because, after claimant was terminated, the physician reversed the PA’s determination that claimant could work, the work restrictions thus “demonstrate[d] that the claimant’s worsening of condition reestablished the causal connection between the injury and the wage loss.”

¶ 16 We know of no case that has held that an increase in work restrictions is per se evidence of a worsening condition. To the contrary, the Panel itself has previously held that an ALJ may look at several factors when considering whether a condition had worsened to the extent that the worsened condition, and not an intervening termination of employment, caused the claimant’s wage loss. *See, e.g. Enciso v. C.F. Meier Composites, Inc.*, 2009 WL 2520525 (W.C. No. 4-764-288, Aug. 12, 2009) (rejecting the claimant’s contention that he had necessarily suffered a worsened condition and was entitled to TTD reinstatement solely because of his increased work restrictions); *Hammack v. Falcon Sch. Dist. No. 49*, 2006 WL 3146358, \*2 (W.C. No. 4-637-865, Oct. 23, 2006) (rejecting the claimant’s propositions that a “mere showing of

additional restrictions was sufficient” to show a causal connection between her injury and her wage loss and that there is no requirement to show an actual worsening of condition to obtain post-termination TTD), *aff’d Hammack v. Indus. Claim Appeals Office*, (Colo. App. No. 06CA2344, Dec. 6, 2007) (not published pursuant to C.A.R. 35(f)). Increased restrictions alone do not necessarily establish a worsened condition. *See Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) (“[A]n ALJ is not required to reopen a claim based upon a worsened condition whenever an ATP [authorized treating physician] finds increased impairment following MMI [maximum medical improvement].”).

¶ 17 Although the evidence could support the Panel’s conclusion, we agree with employer that the Panel exceeded its authority by reweighing the evidence. As noted above, these factual determinations fall squarely within the ALJ’s province. *See Gilmore*, 187 P.3d at 1132; *Cordova*, 55 P.3d at 191.

¶ 18 To reach its conclusion, the Panel overlooked other findings made by the ALJ — particularly the ALJ’s observation that the medical records did not reflect an increase in claimant’s pain levels

and that claimant’s “right shoulder had been painful when he obtained a pain pill from his brother.” Record evidence supports the ALJ’s findings that

- claimant described his pain level when he took his brother’s pain pill as “excruciating”;
- before he took the pain pill, and thus before he was terminated, the pain “kept gradually getting worse” until he “couldn’t take it anymore” and swallowed the pill;
- the pain returned to the same level the day after he took the pain pill;
- when asked by the PA, claimant denied having difficulty using his shoulder or experiencing significant discomfort, but he testified that he was actually “in pain” when he saw the PA;
- both the PA and the physician diagnosed a right scapula sprain/strain; and
- claimant told the physician that the pain was “not that bad at first,” but later it worsened and was only eased by taking the pain pill.

¶ 19 We therefore conclude that substantial evidence supported the

ALJ's factual findings that claimant had not suffered a worsened condition and that his for-cause termination led to his wage loss.

*See Gilmore*, 187 P.3d at 1132; *Cordova*, 55 P.3d at 191.

Accordingly, the Panel exceeded its authority when it set aside the ALJ's original order denying claimant's request for TTD benefits.

*See* § 8-43-301(8), C.R.S. 2013.

¶ 20 The Panel's final order is set aside and the case is remanded with directions to reinstate the ALJ's original order.

JUDGE LICHTENSTEIN and JUDGE GABRIEL concur.

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

---

---

**2014 CO 5**

---

---

**Supreme Court Case No. 11SC926**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 10CA2176

---

**Petitioners:**

Harman-Bergstedt, Inc., d/b/a Kentucky Fried Chicken and Zurich American Insurance  
Company,

v.

**Respondents:**

Elaine Loofbourrow and Industrial Claim Appeals Office.

---

**Judgment Affirmed**

*en banc*

January 27, 2014

---

**Attorneys for Petitioners:**

Thomas Pollart & Miller LLC

Margaret Keck

*Greenwood Village, Colorado*

**Attorneys for Respondent Elaine Loofbourrow:**

Law Office of O'Toole & Sbarbaro, P.C.

John A. Sbarbaro

*Denver, Colorado*

**JUSTICE COATS** delivered the Opinion of the Court.

¶1 Harman-Bergstedt and its insurer sought review of the judgment of the court of appeals reversing an Industrial Claim Appeals Office decision, which had disallowed Loofbourrow's award of temporary disability benefits. The ICAO panel had reasoned that once Loofbourrow's treating physician placed her at maximum medical improvement, notwithstanding the failure of her injury to result in any work loss at all, temporary total disability benefits could not be awarded for the injury for which she had been initially treated in the absence of a division-sponsored independent medical examination challenging that placement. By contrast, the court of appeals concluded that under the unique circumstances of this case, including especially the fact that Loofbourrow had never yet been awarded temporary disability benefits and the fact that her employer had never filed a final admission of liability from which the statutory window for seeking a division-sponsored independent medical examination could be measured, such an independent medical exam was not a prerequisite to an award of temporary total disability benefits.

¶2 Because a determination of maximum medical improvement has no statutory significance with regard to injuries resulting in the loss of no more than three days or shifts of work time, Loofbourrow's award of temporary total disability benefits was not barred by her failure to first seek a division-sponsored independent medical examination. The judgment of the court of appeals is therefore affirmed.

#### I.

¶3 On October 2, 2009, Elaine Loofbourrow filed an application for a hearing, seeking, among other things, temporary total disability benefits for work time lost as

the result of a worsening back injury she initially sustained in November of the previous year. Although she couched her application in terms of reopening a previous award, by the time of the hearing she made clear that she considered reopening unnecessary, and the presiding Administrative Law Judge simply considered the matter as a “full contest” in an open claim. Following the hearing, the ALJ made findings and conclusions.

¶4 From those findings and the undisputed portions of the record, it appears that in November 2008, Loofbourrow sustained an injury to her lower back while lifting and cooking chicken at the Kentucky Fried Chicken restaurant where she worked. She reported the injury to her employer, Harman-Bergstedt and, by extension, its insurer, Zurich American Insurance Company, and she sought medical treatment. Her employer referred her to an authorized treating physician, and between November 12 and December 9, 2008, she received medical treatment. Although she labored under some work restrictions during that time, her employer was able to accommodate those restrictions without wage loss and therefore did not report the injury to the division of workers’ compensation or admit or deny liability. At the conclusion of this period, the treating physician reported Loofbourrow as having reached “maximum medical improvement” in documentation required by division regulation in conjunction with his bill.

¶5 Around the same time her treatment ended, Loofbourrow was demoted from manager to relief manager, apparently due to her store’s poor performance and, as a result, experienced a decrease in pay.

¶6 Several months later, Loofbourrow again experienced back pain and on August 24, 2009, sought treatment from her private physician. When her private physician recommended various work restrictions that her employer was unable to accommodate, she sought temporary disability and other workers' compensation benefits. As relevant here, the presiding ALJ found Loofbourrow's injury to be compensable and awarded her temporary total disability benefits from August 24, 2009, the date on which she was first restricted from work. The ALJ concluded that she suffered a worsening of her low back condition as a natural progression of her November 8, 2008 injury and ordered temporary benefits based on an average weekly wage reflecting her salary at the time of the initial accident. Although her employer asserted as a bar to temporary disability benefits the authorized treating physician's placement of Loofbourrow at maximum medical improvement in his December 9 billing documents, the ALJ did not address that assertion in his findings and conclusions.

¶7 Loofbourrow's employer petitioned for review of the ALJ's decision to the Industrial Claim Appeals Office. Although the ICAO panel affirmed the ALJ's order in most respects, it set aside that portion of the order awarding temporary total disability benefits. The panel concluded that because temporary disability benefits must, by statute, cease when a claimant reaches maximum medical improvement and "may not be paid so long as the claimant continues at MMI," temporary benefits could not be awarded in this case for any period after December 9, 2008, in the absence of a division-sponsored independent medical examination demonstrating otherwise. Loofbourrow v. Harman-Bergstedt, Inc., W.C. No 4-804-458 (ICAO Oct. 7, 2010). In addition, the

panel noted that the claimant's case did not appear to be one involving reopening as contemplated by the statutory scheme, referring expressly to the facts that the case was not even found to be compensable until the entry of the ALJ's order; that no admission of liability had ever been filed; and that the presiding ALJ failed to address reopening in his statement of issues.

¶8 On appeal pursuant to C.A.R. 3.1, the court of appeals set aside the panel's order and remanded the case with directions to reinstate the ALJ's award of temporary total benefits. Partially in reliance upon the unique circumstances of the case, the court of appeals concluded that the ICAO panel erred in finding that Loofbourrow was not entitled to temporary benefits because she failed to challenge, by means of a division-sponsored independent medical examination, the finding of maximum medical improvement made by her original treating physician. In support of its conclusion, the intermediate appellate court conceded that an authorized treating physician's determination would typically be binding in the absence of a challenge according to the statutory procedures for an independent medical examination and that temporary benefits must terminate once maximum medical improvement is reached. It concluded, however, that in this case, where Loofbourrow was alleging a worsening condition as distinguished from contesting the finding of maximum medical improvement; where she had not been given a chance to request an independent medical examination; and where substantial evidence supported the ALJ's determination that she had proven a worsening of her original condition, the statute requiring temporary benefits to cease upon reaching maximum medical improvement was inapplicable, and the statutory

scheme did not preclude the assertion of a post-MMI worsening of condition in an open claim.

¶9 Loofbourrow's employer, Harman-Bergstedt, and its insurer petitioned for a writ of certiorari.

## II.

¶10 The Workers' Compensation Act provides for both immediate medical treatment, see § 8-42-101, C.R.S. (2013), and disability indemnity compensation, see § 8-42-103, C.R.S. (2013), for workers who experience injuries arising out of their employment. Not all work-related injuries for which treatment must be provided, however, entitle the injured worker to disability benefits. In particular, if an injury for which treatment must be provided results in no more than three days or shifts of lost work time, only treatment, and not disability indemnity compensation, is statutorily provided for. § 8-42-103(1)(a), C.R.S. (2013).

¶11 When it comes to receiving these benefits, although the applicable statute of limitations does not bar an injured employee from initiating a claim for at least two years after his injury, § 8-43-103(2), C.R.S. (2013), the Workers' Compensation Act is actually designed to provide for disability benefits in many cases without forcing the employee to initiate a claim for compensation. The statutory scheme mandates that a worker notify his employer of an injury from accident within four days of the occurrence of the injury. § 8-43-102(1)(a), C.R.S. (2013). Giving notice, however, is not the same thing as filing a claim for disability benefits. Compare id., with § 8-43-103(2); see also Postlewait v. Midwest Barricade, 905 P.2d 21, 24 (Colo. App. 1995). In contrast

to injuries resulting in no more than three days' loss of work time, with respect to which an employer is merely obliged to notify its insurer, which is in turn merely obliged to report the accident to the division in monthly summary form, § 8-43-101(2), C.R.S. (2013),<sup>1</sup> with respect to injuries causing more than three days' loss of work time— injuries for which disability compensation benefits are payable, see § 8-43-103(1)— the employer must submit a report to the division within ten days of the injury, § 8-43-101(1), C.R.S. (2013).

¶12 In addition to this statutorily required report, the employer is also required to notify the division within 20 days after the report is or should have been filed with the division whether liability is admitted or contested. § 8-43-203(1)(a), C.R.S. (2013). If liability is admitted, the benefits are to be paid immediately. § 8-43-203(2)(b)(I), C.R.S. (2013). If a final admission of liability is not contested within 30 days, the case is automatically closed and may be reopened only according to the requirements of section 8-43-303, C.R.S. (2013).<sup>2</sup> See §§ 8-43-203(2)(b)(II)(A), (2)(d). If the admission of liability is contested by an injured worker who feels entitled to more compensation, the statutory scheme provides for the matter to be heard and for a division-sponsored

---

<sup>1</sup> The statute provides in pertinent part:

[I]njuries to employees that result in no more than three days' or three shifts' loss of time from work . . . shall be reported by the employer only to the insurer of said employer's workers' compensation insurance liability, which injuries and exposure the insurer shall report only by monthly summary form to or as otherwise requested by the division.

<sup>2</sup> Section 8-43-303, C.R.S. (2013), allows an administrative law judge to review and reopen any award, with some exceptions, "on the ground of fraud, an overpayment, an error, a mistake, or a change in condition" within a certain number of years from the date of injury or the last payment of benefits.

independent medical examination if necessary,<sup>3</sup> § 8-43-203(2)(b)(II)(A), and if liability is denied altogether rather than being admitted by the employer, the scheme provides for, but does not require, an expedited hearing at the request of the claimant, § 8-43-203(1)(a).

¶13 For those injuries resulting in sufficient loss of work time for disability compensation and benefits to be payable, the Act makes provision for both temporary disability compensation for lost work time, see § 8-42-105, C.R.S. (2013) (Temporary Total Disability); § 8-42-106, C.R.S. (2013) (Temporary Partial Disability), and for permanent disability benefits once the extent of medical impairment can be determined, see § 8-42-107, C.R.S. (2013) (Permanent Partial Disability). “Maximum medical improvement” is a concept statutorily designed to identify a point in time beyond which further treatment is unlikely to improve the injured employee’s condition. See § 8-40-201(11.5), C.R.S. (2013). A determination of maximum medical improvement is statutorily called for only in section 8-42-107(8), as the initial step in a procedure assessing whether permanent medical impairment has resulted from the injury; if so, the extent of that permanent medical impairment; and ultimately, the amount of permanent disability benefit to which the injured employee will be entitled.

---

<sup>3</sup> With specified exceptions, a division-sponsored independent medical examination is statutorily required before a hearing can be held on an employee’s contest of a final admission of liability regarding certain findings of the treating physician relevant to the amount of compensation due, such as whether the claimant has reached maximum medical improvement and the degree of permanent impairment within the meaning of section 8-42-107, C.R.S. (2013). See §§ 8-42-107(8)(b)(II), (8)(c); § 8-42-107.2(1), C.R.S. (2013).

§ 8-42-107(8).<sup>4</sup> “Maximum medical improvement” therefore has statutory significance only in a determination of the amount, if any, of a permanent disability benefit and in marking the point in time at which temporary disability benefits terminate and permanent disability benefits begin. See § 8-42-105(3)(a), C.R.S. (2013) (“Temporary total disability benefits shall continue until . . . [t]he employee reaches maximum medical improvement.”); § 8-42-106(2)(a), C.R.S. (2013) (“Temporary partial disability payments shall continue until . . . [t]he employee reaches maximum medical improvement.”); § 8-42-107(3), C.R.S. (2013) (“Temporary disability terminates as to injuries coming under any provision of this section upon the occurrence of any of the events enumerated in section 8-42-105(3).”).

¶14 “Maximum medical improvement,” as a statutory term of art, therefore has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place. See § 8-42-107(8)(b)(I). While the concept is defined in terms of the ineffectiveness of further medical treatment and may therefore be useful in assessing the extent to which an employer is obligated to continue furnishing medical services to an injured employee, as a statutory term of art with consequences for contesting a final admission of liability, reopening a closed claim, or, as in this case, filing a new claim for an injury that has become compensable for the first time, it can logically have applicability only for injuries for which disability indemnity

---

<sup>4</sup> Section 8-42-107(8) is entitled “Medical impairment benefits—determination of MMI for scheduled and nonscheduled injuries” and provides in pertinent part: “An 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).” § 8-42-107(8)(b)(I), C.R.S. (2013).

is payable. Whether or not an employer continues to furnish medical treatment for a worker whose injury can be accommodated without the loss of work time in excess of three days—and whether or not the division finds it useful for billing and recording purposes to “close” cases based on a determination that no further treatment is likely to improve the employee’s condition, without regard to whether the injury was ever compensable, see, e.g., 7 Colo. Code Regs. 1101-3:16, Rule 16-7(E)—the statutory consequences of a finding of “maximum medical improvement” can apply only to injuries as to which disability indemnity is payable.

### III.

¶15 The sole issue before this court is whether Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a division-sponsored independent medical examination, the initial treating physician’s assessment that she had reached maximum medical improvement. The intermediate appellate court found that, under the unique circumstances of this case, including particularly her claim of a worsening condition and the absence of a final admission of liability by her employer or earlier payment of temporary disability benefits, she could receive such an award. Excepting only that the circumstances of this case do not appear to us so unique, our analysis of the statutory scheme leads us to the same conclusion.

¶16 Loofbourrow’s award of temporary total disability benefits was not barred by either the initial treating physician’s placement of her at maximum medical improvement prior to her filing any claim for such benefits, or by her failure to challenge that placement by first obtaining a division-sponsored independent medical

examination, for the reason that her injury did not become compensable until her condition worsened and she was forced to lose in excess of three days of work time. See § 8-42-103(1)(a). No matter how it was characterized in his billing report to the division, the authorized treating physician's determination in December 2008 that further treatment was unlikely to improve Loofbourrow's condition could not amount to a finding of "maximum medical improvement," with its concomitant statutory consequences, because at that point, Loofbourrow had not yet suffered a compensable injury, and therefore no claim for disability indemnity benefits had been initiated by her or by her employer. As will ever be the case with a worsening injury that initially required treatment but did not result in excess of three days' lost work time, no award of temporary disability benefits or admission of final liability was possible and no claim that could be subject to reopening was ever opened or closed.

¶17 Whether the date of injury, and therefore the applicable wage for purposes of temporary disability benefits, should be measured from an original, treated but non-compensable injury or only from the point at which the injury becomes compensable through worsening, cf. City of Boulder v. Payne, 162 Colo. 345, 347, 426 P.2d 194, 195 (1967) (where injured fireman was treated but immediately returned to work and only much later became disabled from the initial injury, statute of limitations for claim for compensation implicitly ran only from the point the injury became a "compensable" injury through loss of work time), is not a matter before us on this petition. It is sufficient for resolution of the issue briefed and pending before us that Loofbourrow's award of temporary total disability benefits was not barred by her failure to challenge

the initial treating physician's assessment that she had reached maximum medical improvement.

#### IV.

¶18 Because a determination of maximum medical improvement has no statutory significance with regard to injuries resulting in the loss of no more than three days or shifts of work time, Loofbourrow's award of temporary total disability benefits was not barred by her failure to first seek a division-sponsored independent medical examination. The judgment of the court of appeals is therefore affirmed.