

BROWN BAG SEMINAR

Thursday, March 21, 2013

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

7th Floor Conference Room

(note different location)

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 February 16, 2013 through

March 15, 2013

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-717-644

IN THE MATTER OF THE CLAIM OF

WENDY GRANDESTAFF,

Claimant,

v.

ORDER

UNITED AIRLINES,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The claimant and the respondent seek review of an order of Administrative Law Judge Cannici (ALJ) dated October 18, 2012, that determined the respondent's temporary total disability (TTD) benefit payments in conjunction with the claimant's social security disability insurance (SSDI) benefits exceeded the applicable \$75,000 statutory cap contained in §8-42-107.5, C.R.S. by \$1,686.47. We affirm ALJ Cannici's order that the \$75,000 cap in §8-42-107.5, C.R.S. was exceeded, but we set aside his determination that the overpayment totaled \$1,686.47. We remand for further findings and an order on the total amount of the overpayment that the respondent is entitled to recover.

This case previously was before us. On March 12, 2007, the claimant sustained an admitted injury while driving a tug vehicle that collided with a tug vehicle operated by another airline. The claimant sued the other airline for her injuries. On March 24, 2010, the claimant and the respondent entered into a formal assignment agreement relating to the respondent's subrogation claim under §8-41-203, C.R.S. Pursuant to the agreement, the respondent assigned its subrogation rights to the claimant in exchange for 10% of the claimant's net recovery from the lawsuit, provided the net recovery did not exceed \$300,000. The agreement also provided that it was not intended to apply to or limit the claimant's right to receive future workers' compensation benefits. In March 2010, the claimant settled her lawsuit and received a net recovery of \$194,818.09. In satisfaction of the lien, the respondent received 10% of this net recovery, or \$19,481.81.

On May 31, 2011, the claimant underwent a DIME evaluation with Dr. Gellrick. Dr. Gellrick opined that the claimant reached maximum medical improvement

(MMI) as of September 20, 2010, and assigned the claimant a 23% whole person impairment rating.

The respondent filed a final admission of liability (FAL) on June 29, 2011, in accordance with the DIME opinion and admitted for medical benefits after MMI. The worksheet accompanying the FAL indicated that the claimant received TTD benefits totaling \$61,103.94. It further indicated that the claimant received SSDI benefits from December 1, 2007 through July 31, 2010. The amount of \$61,103.94 paid in TTD benefits reflected the amount the respondent paid after crediting the claimant's lump sum payment to the respondent in the amount of \$28,638.86 to account for the offset of SSDI payments. In its worksheet, the respondent stated that the total amount of TTD it paid with the SSDI offset from December 1, 2007, through July 31, 2010, totaled \$59,417.47. In its FAL, the respondent stated that the amount it overpaid to the claimant totaled \$1,686.47. The respondent did not admit liability for any PPD payments by virtue of the statutory cap provisions under § 8-42-107.5, C.R.S.

The claimant objected and set the matter for hearing.

After a hearing before ALJ Krumreich, he ordered that the claimant was entitled to payment of PPD benefits. ALJ Krumreich found that the respondent's actual TTD payments were reduced by the \$28,638.86 payment from the claimant to account for her receipt of SSDI benefits and that the respondent actually paid the claimant \$61,103.94 for TTD benefits. ALJ Krumreich determined that the applicable statutory cap of \$75,000 was not reached and he calculated that the claimant was entitled to at least \$13,896.06 in PPD payments. ALJ Krumreich was persuaded that the assignment agreement did not entitle the respondent to limit the claimant's right to receive future workers' compensation benefits.

The respondent appealed ALJ Krumreich's order, arguing that the claimant was not entitled to receive PPD benefits after application of the \$75,000 cap contained in §8-42-107.5, C.R.S. The Panel agreed with the respondent. The Panel reasoned that it was not clear from ALJ Krumreich's findings whether the respondent received the benefit of the claimant's SSDI payments in determining whether the statutory cap had been reached. The Panel noted that the record included the respondent's FAL, which contained the worksheet reflecting differing amounts of TTD payments. The worksheet indicated that without accounting for the claimant's receipt of SSDI benefits, TTD would have been paid in the amount of \$89,149.52, which exceeds the applicable \$75,000 cap. In another set of calculations, the worksheet indicated some reduced TTD payments due to SSDI payments that were not expressly identified, and reflected total TTD payments in the amount of \$59,417.47. In addition, the respondent asserted that it actually paid indemnity benefits totaling \$61,103.94 and, therefore, overpaid TTD benefits by \$1,686.47. Relying on *Flores v. Oregon Steel Mills, Inc.*, W.C. No. 4-608-694 (Dec. 14, 2009),

aff'd, Case No. 11CA1696 (Colo. App. June 14, 2012) (NSOP), the Panel remanded, determining that in order to account for the SSDI offset, the respondent's TTD payments should be calculated to determine the length of time it would take to reach the \$75,000 cap and include in the periodic payments the appropriate offset for SSDI benefits to be paid until the cap is reached.

On remand, ALJ Cannici did not hold an additional hearing. In his order after remand, ALJ Cannici determined that the respondent's TTD payments in conjunction with the claimant's SSDI benefits exceeded the statutory cap contained in §8-42-107.5, C.R.S. ALJ Cannici determined that the respondent paid the claimant indemnity benefits in the actual amount of \$61,103.94. In ascertaining whether the respondent's payments to the claimant exceeded the statutory cap set forth in §8-42-107.5, C.R.S., ALJ Cannici determined the amount of TTD benefits paid after taking the statutory offset for SSDI, through the date of MMI, totaled \$59,417.47. Finding that the claimant was only entitled to receive TTD benefits in the amount of \$59,417.47, ALJ Cannici ordered that the respondent was entitled to recover an overpayment totaling \$1,686.47 (\$61,103.94 - \$59,417.47).

Both the claimant and the respondent have appealed ALJ Cannici's order.

I.

On review, the claimant first argues that nothing in §8-42-107.5, C.R.S. indicates that the word "payment" means anything other than the actual amounts paid to the claimant from the respondent for combined TTD and PPD benefits. According to the claimant, since she repaid the respondent for the SSDI benefits received and for which the respondent was entitled to an offset in the amount of \$28,638.86, the claimant only was paid \$61,103.94 in TTD benefits and therefore had additional cap room of \$13,896.06 for PPD benefits. The claimant also asserts that had the General Assembly wanted to limit the aggregate benefits payable under the cap with a limitation for the offset found in §8-41-203, C.R.S., it would have done so. Thus, the claimant argues that ALJ Cannici erred in the method of calculating the benefits payable to the claimant by determining TTD after taking the statutory offset for SSDI. We disagree.

Section 8-42-107.5, C.R.S. limits the amount an employee may recover under the Workers' Compensation Act (Act). This section provides in pertinent part as follows:

No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. . . .

Additionally, as we stated in our prior order, the applicable statutory scheme provided that the aggregate benefits payable to the claimant for TTD and PPD benefits

shall be reduced, but not below zero, by an amount practically equal to one-half of her SSDI benefits. Section 8-42-103(1)(c)(I), C.R.S. (Recent amendments eliminated the SSDI offset for PPD benefits for cases involving injuries on or after July 1, 2010. Colo. Sess. Laws 2010, Ch. 310 at 1458-60.) As stated above, the claimant sustained an admitted injury on March 12, 2007, and her entitlement to combined temporary disability payments and PPD payments is limited to \$75,000. Section 8-42-107.5, C.R.S.

The overall purpose of the offset statute is to prevent “double recovery” of SSDI and workers’ compensation benefits for the same disability. *U.S. West Communications, Inc. v. Industrial Claim Appeals Office*, 978 P.2d 154, 156 (Colo. App. 1999). SSDI payments must be accounted for when determining whether payments have reached the statutory cap. Thus, the actual temporary or partial disability benefits paid out should include a proportionate amount of SSDI benefits for the duration of the payments. *See Flores v. Oregon Steel Mills, Inc.*, *supra* (converting total award amount payable to weekly equivalent and deducting weekly SSDI offset from converted weekly amount or including proportionate share of SSDI benefits in weekly amount of PPD payments paid until cap reached).

We apply the plain and ordinary meaning of the statute, if clear. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo.2004). Further, when construing provisions of the Act, we read the statute as a whole and, if possible, construe its terms harmoniously, reconciling conflicts where necessary. *Colorado Dep’t of Labor and Employment v. Esser*, 30 P.3d 189, 193 (Colo.2001).

Here, we disagree with the claimant’s argument that she has additional cap room of \$13,896.06 for PPD benefits. In *Flores*, the Colorado Court of Appeals rejected a similar argument to that made by the claimant in this case. In *Flores*, the Court construed §8-42-107.5, C.R.S. (\$75,000/\$150,000 cap) in conjunction with §8-42-103(1)(c)(I), C.R.S. (SSDI offset). The Court essentially held that payment of SSDI benefits are a form of payment of TTD or PPD benefits for purposes of the caps contained in §8-42-107.5, C.R.S. The Court therefore determined that the weekly benefit payment should be paid until the total of TTD and PPD benefits, together with the SSDI offset, reaches the cap. *See also Yates v. Sinton Dairy*, 883 P.2d 562 (Colo. App. 1994)(SSDI offset must be taken after the maximum capped award has been determined in order to preserve it and prevent a double recovery). We further note that when reading the Act as a whole, as we are required to do, it is clear that SSDI payments must be accounted for when determining whether payments have reached the statutory cap. Section 8-42-103(1)(c)(I), C.R.S. (prior to recent amendments effective July 1, 2010); §8-42-107.5, C.R.S. Thus, we are not persuaded to disturb ALJ Cannici’s order on this ground.

II.

Next, the claimant argues that ALJ Cannici erred in determining that the claimant was overpaid by \$1,686.47. The claimant contends that she did not receive duplicate payments of any benefits, and the respondent has no basis upon which to recoup any alleged overpayment except against future benefits for indemnity.

Conversely, the respondent argues that while ALJ Cannici correctly determined that the claimant was overpaid, he erred in calculating such overpayment as being only \$1,686.47. The respondent contends that without the SSDI offset, the claimant's TTD benefits would have reached the cap of \$75,000 on March 13, 2010, and should have been capped at \$49,600.67. The respondent asserts that since the claimant has been paid \$61,103.94 in indemnity payments, the overpayment instead is \$11,503.27.

We agree with the respondent that ALJ Cannici correctly determined that the claimant was overpaid, but we again remand for further findings and an order on the total amount of the overpayment.

Section 8-40-201(15.5), C.R.S. defines an overpayment as follows:

'Overpayment' means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

Pursuant to §8-40-201(15.5), C.R.S., therefore, "three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of title 8. § 8-40-201(15.5)." *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354, 359 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

Further, as we held above, SSDI payments must be accounted for when determining whether payments have reached the statutory cap. Thus, the actual temporary or partial disability benefits paid out should include a proportionate amount of SSDI benefits for the duration of the payments. *See Flores v. Oregon Steel Mills, Inc., supra.*

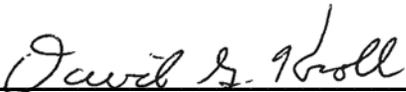
Here, in its response to the claimant's application for hearing, the respondent listed as issues to be heard the applicability of the statutory cap in §8-42-107.5, C.R.S., overpayments, offsets, credits, and no PPD payable secondary to applicable offsets, credits, and statutory cap. Before ALJ Krumreich, the respondent sought to recover an overpayment of \$11,503.27. The respondent's claim for \$11,503.27 is based on its argument that it paid the claimant total indemnity of \$61,103.94, and the dates for which TTD benefits were payable, as adjusted for the SSDI offset, totaled \$49,600.67. It is not clear from the order, however, whether ALJ Cannici considered and then rejected the respondent's claim for an overpayment in the amount of \$11,503.27. Without factual findings expressly explaining ALJ Cannici's rejection of the respondent's \$11,503.27 overpayment calculation, we are reluctant to conclude that he implicitly rejected such a calculation in favor of his own calculation of the overpayment. We may not make findings of fact. *See* §8-1-102(2), C.R.S. As such, we must remand for ALJ Cannici to calculate the respondent's total overpayment recognizing that the respondent is arguing that the dates for which TTD benefits were payable, as adjusted for SSDI, totaled \$49,600.67. The amount of the overpayment must be based on the dates and the total amount of TTD that was payable as adjusted for the SSDI offset, minus \$61,103.94 which is the total indemnity amount that the respondent paid to the claimant. *See Flores v. Oregon Steel Mills, Inc., supra*. Unless the parties are able to reach a stipulation regarding the total amount of the overpayment, in his discretion the ALJ may hold an additional hearing to resolve this issue.

We further note that despite the claimant's argument to the contrary, we do not perceive the holding in *Jones v. United Airlines*, W.C. No. 4-733-270 (June 23, 2012) as mandating a different result. In *Jones*, the respondent argued that the statutory cap in § 8-42-107.5, C.R.S. prohibited the claimant from receiving temporary or permanent partial disability benefits beyond \$75,000, even if the TTD benefits at issue could not be terminated before reaching the cap. The Panel disagreed with the respondent, determining that the "General Assembly intended to require employers to continue paying benefits without application of the cap until such time as a claimant reaches MMI." *See Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005). Since the claimant in *Jones* had not yet reached MMI and had not been given an impairment rating, she was entitled to receive temporary disability benefits during this time period and application of the statutory cap would have been premature. *See Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611, 613 (Colo. App. 1995) (only after the claimant reaches MMI and his medical impairment rating is established can the applicability §8-42-107.5 be determined). The Panel noted, however, that the ALJ correctly recognized that the respondent could credit payments against its additional liability for disability benefits. Conversely, here, this case does not present a situation in which the claimant sought additional TTD benefits beyond the cap and prior to reaching MMI and receiving

a medical impairment rating. Consequently, the determination in *Jones* is inapplicable under the circumstances presented in this action.

IT IS THEREFORE ORDERED that ALJ Cannici's order dated October 18, 2012, is affirmed to the extent he determined that the \$75,000 cap in §8-42-107.5, C.R.S. was exceeded, but we set aside his determination that the overpayment totaled \$1,686.47. We remand for further findings and an order on the total amount of the overpayment that the respondent is entitled to recover.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

WENDY GRANDESTAFF

W.C. No. 4-717-644

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CERTIFICATE OF MAILING

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

_____ 3/11/2013 _____ by _____ RP _____ .

WENDY GRANDESTAFF, 474 BLACK FEATHER LOOP #410, CASTLE ROCK, CO,
80104 (Claimant)

ROBERT W. TURNER, LLC, Attn: ROBERT W. TURNER, ESQ., 8400 E. CRESCENT
PARKWAY, SUITE 600, GREENWOOD VILLAGE, CO, 80111 (For Claimant)

RITSEMA & LYON, PC, Attn: LYNN P. LYON, ESQ., 999 18TH STREET, SUITE 3100,
DENVER, CO, 80202 (For Respondents)

GALLAGHER BASSETT SERVICES, INC., Attn: JENNIFER GREEN, P O BOX 4068,
ENGLEWOOD, CO, 80155-4068 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-782-761-04

IN THE MATTER OF THE CLAIM OF

KELLY GREGORY,

Claimant,

v.

FINAL ORDER

DAWN TRUCKING,

Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated September 19, 2012, that denied the request for penalties for the respondents' alleged failure to comply with §8-42-107(8)(b.5), C.R.S. We affirm the ALJ's order.

A hearing was held on the issue of penalties for the respondents' alleged violation of §8-42-107(8)(b.5), C.R.S., for the failure to timely obtain an impairment rating after the claimant was placed at maximum medical improvement (MMI). After hearing the ALJ entered factual findings that for the purposes of our order can be summarized as follows. The claimant sustained an admitted injury to his low back on December 27, 2008. The claimant was referred to Dr. Youssef for treatment. In a report dated February 9, 2011, Dr. Youssef stated, "[a]t this point I told the patient I think he could be at maximum medical improvement from a surgical standpoint pending an FCE which needs to be completed once he has addressed the internal derangement of his knee." Dr. Youssef went on to state that once the FCE was completed, he would see the claimant, go over the results and then refer the claimant for an impairment rating.

During his treatment for the back, the claimant began complaining of increased right knee pain and was diagnosed with a torn meniscus. The respondents denied liability for the torn meniscus and the matter went to hearing. In an order dated September 23, 2011, an ALJ concluded that the claimant's right knee condition was not related to the

December 27, 2008 work injury. Following the hearing, in October of 2011, the claimant's attorney requested that the respondents refer the claimant for the FCE and impairment rating. The respondents' claims adjuster testified that she began looking for someone to conduct the FCE in October 2011, and the FCE was eventually conducted on November 9, 2011.

The claimant had moved to Wichita, Kansas in August 2011, and was authorized to treat with Dr. Wilkinson in Kansas. The claimant saw Dr. Wilkinson in October and November 2011, and was referred to a neurosurgeon, a pain management specialist and eventually an addiction specialist to wean him off of his narcotic medications. Issues developed between the parties as to whether the respondents would be liable for the claimant's treatment for addiction to narcotic pain medication. The respondents applied for hearing on the issue but the claimant weaned himself off of the medications prior to the matter going to hearing and the respondents subsequently withdrew the application for hearing. In December of 2011, Dr. Henry recommended a selective nerve block on the right at the L5-S1 level to determine if the claimant's pain was being generated by the S1 nerve root.

On January 6, 2012, the respondents sent the FCE results to Dr. Youssef and inquired whether the claimant was at MMI, and if so, what date he reached MMI, and whether the claimant had any permanent impairment. Dr. Youssef replied to the respondents on January 10, 2012, stating that the claimant was at MMI as of November 9, 2011, the date he completed his FCE, and further recommended that the claimant be referred to a physician for evaluation of permanent impairment. Dr. Youssef did not refer the claimant for tests to be performed pursuant to §8-42-107(8)(b.5)(I)(A), C.R.S.

In a letter dated January 18, 2012, Dr. Wilkinson responded to an inquiry from the claimant's attorney and stated that he was no longer treating the claimant because he was unwilling to prescribe Lortab or Valium and had referred the claimant to Newton Addiction Center for treatment for addiction and Advanced Pain Medicine Associates for his pain. On February 8, 2012, the claimant's attorney wrote to the respondents' attorney and stated that he received Dr. Youssef's January 10, 2012 report, placing the claimant at MMI as of November 9, 2011. The claimant's attorney requested that arrangements be made to return the claimant to Colorado, "in a timely manner," for an impairment rating by a physician.

The claimant was evaluated at Advanced Pain Medicine Associates for treatment on February 16, 2012. Although the clinic requested approval for a caudal epidural injection, the claimant tested positive for marijuana and the clinic refused to perform the injection or pain medications and referred the claimant back to Dr. Wilkinson.

On March 14, 2012, the claimant's attorney wrote to the respondents' attorney again asking that the claimant be returned to Colorado for an impairment rating. On March 19, 2012, the respondents' attorney responded noting that they had spoken on March 12, 2012, and that the respondents were in the process of obtaining additional medical reports from Advanced Pain Medicine Associates and confirming that the claimant's attorney had advised the respondents that the claimant may not be at MMI as of February 17, 2012, due to a new cyst and tear of the soft tissue that the claimant was alleging was related to his surgical procedures. According to the claimant's attorney, this "may throw a wrench into whether the claimant is at MMI."

On March 20, 2012, the claimant filed an application for hearing on the issue of penalties for the respondents' failure to bring the claimant back to Colorado pursuant to §8-42-107(8)(b.5), C.R.S. On March 23, 2012, the respondents notified the claimant's attorney that an impairment rating appointment had been scheduled with Dr. Bohachevsky in Durango, Colorado for April 23, 2012. Dr. Bohachevsky issued a report dated April 24, 2012, giving the claimant a 22 percent whole person rating and placing him at MMI as of February 9, 2011. The respondents filed a Final Admission of Liability consistent with Dr. Bohachevsky's report.

Based on these findings the ALJ determined that Dr. Youssef placed the claimant at MMI in his January 10, 2012 report, and not in the February 9, 2011 report, as originally argued by the claimant. The ALJ determined that the claimant was not a state resident at this time and therefore, §8-42-107(8)(b.5)(I)(A) and (C) applied. The ALJ was not persuaded that the respondents violated §8-42-107(8)(b.5), C.R.S. in this case. ALJ Order at 6 ¶24. The ALJ also found that during the time period after completion of the FCE and before the claimant was scheduled to return to Colorado for an impairment rating, issues arose as to whether the claimant was at MMI because of Dr. Wilkinson's recommendation for additional treatment, including treatment for the claimant's possible addiction to narcotic medications, a possible cyst and tear. Thus, the ALJ concluded that even if the respondents violated §8-42-107(8)(b.5), the violation was objectively reasonable under the circumstances for this case and declined to impose penalties.

On appeal, the claimant contends that the ALJ erred in failing to assess penalties against the respondents. The claimant asserts that the ALJ's order is not supported by applicable law or substantial evidence and is in contravention of the intent and purposes of the Workers' Compensation Act. We are not persuaded the ALJ committed reversible error.

Section 8-43-304(1), C.R.S., provides for the imposition of penalties of up to \$1,000 per day against an insurer "who violates any provision of articles 40 to 47 of this title." In order to impose penalties under this statute the ALJ must first determine that the

disputed conduct constituted a violation of an express duty or prohibition established by the Workers' Compensation Act. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds there was a violation of the Act, penalties may be imposed only if the ALJ concludes the respondents' actions were not reasonable under an objective standard. The reasonableness of the respondents' actions depends upon whether the actions were predicated on a rational argument based in law or fact. *Diversified Veteran Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997). The determination of these issues is for the ALJ as fact finder, and we may not interfere if the order is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

The claimant does not contest the ALJ's finding that Dr. Youssef placed the claimant at MMI in his January 10, 2012, report. Claimant's Brief at 8. Rather, the claimant specifically contends on appeal that pursuant to §8-42-107(8)(b.5), C.R.S., the respondents were required to return the claimant to Colorado for an impairment rating within 20 days from Dr. Youssef's report dated January 10, 2012, which would have been January 30, 2012. Claimant's Brief at 8. The claimant asserts that because the respondents did not return him to Colorado until April 24, 2012, they were in violation of §8-42-107(8)(b.5)(I)(A), C.R.S.

Contrary to the claimant's assertion, however, §8-42-107(8)(b.5), C.R.S., does not place a 20 day time limit on the respondents to bring an out of state claimant to Colorado for an impairment rating. Rather, §8-42-107(8)(b.5)(I)(A), provides for a 20 day time limit for a non level II accredited authorized treating physician to determine whether the claimant sustained any permanent impairment and if so, conduct such tests as are required by the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment" to determine impairment and submit this information to the insurer. If the claimant does not want the authorized treating physician to conduct the tests or the authorized treating physician does not provide the tests to the respondent in a timely manner, the respondent must then return the claimant to Colorado for examination and testing. Section 8-42-107(8)(b.5) (I)(B), C.R.S. This subsection does not establish a time frame for returning a claimant to Colorado. Section 8-42-107(8)(b.5)(I)(C), C.R.S. goes on to provide that the respondents have 20 days *after* receipt of the testing information described in sub-subparagraph (I)(A), to appoint a level II accredited physician to determine the claimant's impairment. The claimant has not argued that the respondents failed to appoint a level II accredited physician *after* receipt of the testing information described in (I)(A).

Here, there appears to be no dispute that Dr. Youssef is not level II accredited and did not conduct the required tests and the claimant wished to return to Colorado.

Therefore, the respondents were required to arrange and pay for a return trip to Colorado, which the respondents did. Because the statute does not require that the claimant be brought back to Colorado within 20 days, the ALJ correctly determined that there was no violation of §8-42-107(8)(b.5), C.R.S., in this case. *Allison v. Industrial Claim Appeals Office*, *supra*, see also *Kraus v. Aircraft Sign Co.*, 710 P.2d 480 (Colo. 1985) (court should not read non-existent provisions into the Act). Although the ALJ's order makes reference to a 20 day requirement to return the claimant to Colorado, the ALJ's error in this regard is harmless. Section 8-43-310, C.R.S. (harmless error to be disregarded).

The ALJ went on to conclude that even if there was a violation of §8-42-107(8)(b.5), C.R.S., the respondents' delay in bringing the claimant back to Colorado for was objectively reasonable under the circumstances in this case. The reasonableness of the challenged conduct is usually a question of fact for determination by the ALJ. *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999). Thus, we must uphold the ALJ's determination of these issues if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. The narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, as well as credibility determinations and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The ALJ's findings that issues arose concerning the claimant's MMI status because of the confusion surrounding the identity of the authorized treating physician due to the claimant's move to Kansas and the continued referrals for treatment from Dr. Wilkinson are amply supported by the evidence. These findings in turn support the ALJ's conclusions that the respondents' conduct was reasonable in this case. We may not reweigh the factual record and enter findings of our own or draw inferences different from those of the ALJ's. Rather, it is solely the responsibility of the ALJ to weigh the evidence, to assess credibility, to resolve conflicts in the evidence, and to determine the inferences to be drawn. See *Goodwill Industries of Colorado Springs v. Industrial Claim Appeals Office*, 862 P.2d 1042 (Colo. App. 1993).

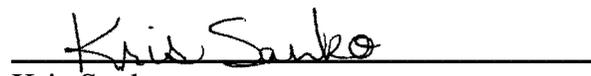
In view of the ALJ's finding that there was no violation of §8-42-107(8)(b.5), C.R.S., and our affirmance thereof, the claimant's remaining contentions concerning the respondents' receipt of the FCE prior to Dr. Youssef's MMI determination are immaterial and do not provide us with a basis to disturb the order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 19, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/12/2013 _____ by _____ RP _____ .

KELLY GREGORY, 229 S PARK STREET, MCPHERSON, KS, 67460-5012 (Claimant)
DAWN TRUCKING, Attn: E.M. TAYLOR, P O BOX 1498, FARMINGTON, NM, 87499
(Employer)

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Attn: ELIZABETH
CONYERS, C/O: CHARTIS INSURANCE, INC. - CLAYTON, MO OFFICE, P O BOX 25971,
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ROBERT DAWES, LLC, Attn: ROBERT C. SAWES, ESQ., P O BOX 2547, DURANGO, CO,
81302-2547 (For Claimant)

SENER GOLDFARB & RICE, LLC, Attn: WILLIAM M. STERK, ESQ., 1700 BROADWAY,
SUITE 1700, DENVER, CO, 80290 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-850-627-03

IN THE MATTER OF THE CLAIM OF

HERNAN HERNANDEZ,

Claimant,

v.

ORDER OF REMAND

MDR ROOFING, INC., ALLIANCE
CONSTRUCTION & RESTORATION,
INC., NORMA PATRICIA HOFF,

Employers,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The respondent, Norma Patricia Hoff (Hoff), seeks review of an order of Administrative Law Judge Friend (ALJ) dated August 14, 2012, that determined Hoff was liable for workers' compensation benefits under §8-41-402, C.R.S. We set aside and remand that portion of the ALJ's order placing sole liability on Hoff and otherwise affirm.

A hearing was held on the issues of compensability, insurance coverage, statutory employer, medical benefits, safety rule, average weekly wage, and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows. The claimant was employed by MDR Roofing as a roofer on March 10, 2011, when he fell off of a ladder as he was coming down from the roof sustaining serious injuries.

The property that the claimant and the MDR Roofing crew were working on at the time of the accident was a house owned by Hoff. In 1999, Hoff purchased the house for the use of her daughter. Her daughter moved out and Hoff rented the house through a property management agency. The roof of the house sustained hail damage in July of 2009. On November 11, 2010, Bill Hoff, Hoff's husband, entered into a contract with Alliance Construction & Restoration, Inc. (Alliance) to have the house re-roofed. Alliance then entered into a verbal contract with MDR Roofing to provide the labor to tear off the existing shingles and put new shingles on the property roof. The ALJ

concluded that neither MDR Roofing, Alliance nor Hoff had workers' compensation insurance in effect on March 10, 2011.

MDR Roofing, owned by Daniel Medina (aka Daniel Amaya) and Martin Amaya, however, had previously applied for workers' compensation insurance through the Bradley Insurance Group, an agent for Pinnacol Assurance. Pinnacol Assurance issued a workers' compensation policy to MDR Roofing that went into effect on July 9, 2010. MDR Roofing fell behind in the premium payments to Pinnacol Assurance. On February 10, 2011, Pinnacol Assurance sent a Notice of Cancellation, via certified mail to MDR Roofing, at its address of record. The Notice of Cancellation stated that the premium installment in the amount of \$712, due on January 10, 2011, had not been received. The Notice stated that if this amount was not received on or before March 2, 2011, the policy would be canceled effective 12:01 a.m. March 3, 2011. The Notice was received at MDR Roofing's address of record and signed by Blanca Cruz on February 12, 2011. Ms. Cruz is a relative of the owners of MDR Roofing but has no relationship to the company and is not authorized to accept mail addressed to MDR Roofing. Medina testified that he did not receive the Notice of Cancellation of MDR Roofing's workers' compensation insurance policy.

The Notice of Cancellation was also sent to Bradley Insurance by regular mail. Lori Boger from Bradley Insurance testified that Bradley Insurance received the Notice of Cancellation via regular mail on February 16, 2011. Bradley Insurance did not notify MDR Roofing that it had received the Notice or that its policy would be cancelled if payment was not received. MDR Roofing did not pay the premium before March 2, 2011, and on March 3, 2011, Pinnacol Assurance sent a Notice of Cancellation to the policy to MDR Roofing and the Bradley Insurance Group by regular mail.

On March 11, 2011, after the claimant's fall on March 10, 2011, Medina went to Bradley Insurance because he knew MDR Roofing was behind in payments on its workers' compensation insurance policy and to obtain a certificate of insurance requested by the general contractor. The ALJ made the inference that Medina also went to Bradley Insurance Agency to make premium payments that he knew were late and to assure that the policy would not be cancelled. Medina met with Boger at Bradley Insurance. Boger advised Medina that the policy with Pinnacol Assurance had been canceled. Boger contacted Heather Degenhart, a Pinnacol Assurance underwriter, who advised her that MDR Roofing would have to pay the back premiums and a reinstatement fee, and sign a statement of no loss in order to reinstate coverage for MDR Roofing. All communications with Medina were in English, even though on his application for insurance, Medina's primary language was listed as Spanish. Medina returned to Bradley Insurance later that day with two money orders totaling \$877 as directed by Boger. Medina also signed the statement of no loss certifying that there were no

“...losses, accidents or circumstances that might give rise to a claim under the insurance policy whose number is shown above,” during the period of cancellation, March 3, 2011 through March 11, 2011.

Upon receipt of the no loss statement and payment of the past due premium, and reinstatement fee, Pinnacol Assurance reinstated the policy of insurance retroactively to the date it had been cancelled, March 3, 2011. Pinnacol Assurance relied upon the representation in the no loss letter that no losses had occurred between March 3, and March 11, 2011, in reinstating the policy. Had Pinnacol Assurance been informed of the accident on March 10, 2011, the policy of insurance would not have been eligible for reinstatement and it would not have been reinstated. A letter indicating the reinstatement of the policy was mailed to MDR Roofing and Bradley Insurance on March 11, 2011.

On March 16, 2011, Medina went to the office of Bradley Insurance to report the March 10, 2011, incident involving the claimant and to file a report of the work injury.

Pinnacol Assurance did not receive any further payment from MDR following the receipt of the past due premium from January 2011, which was paid at the time of reinstatement of the policy in March 11, 2011. The policy of insurance canceled again effective 12:01 a.m. on March 31, 2011, with a remaining balance of \$712.00 due and owing.

Based on these findings the ALJ concluded that the claimant sustained a compensable injury on March 10, 2011, requiring medical treatment and resulting in disability. The ALJ concluded that Pinnacol Assurance properly canceled MDR Roofing’s workers’ compensation policy pursuant to §8-44-110, C.R.S., by sending the notice certified mail to MDR Roofing’s address of record. The ALJ also determined that Pinnacol Assurance substantially complied with the requirement of §8-44-110, C.R.S. to notify Bradley Insurance, by sending the notice through regular mail. Therefore, the ALJ concluded that effective March 3, 2011, MDR Roofing’s workers’ compensation policy with Pinnacol Assurance was cancelled.

Relying on *Hunt v. Aetna Casualty and Surety Company*, 387 P.2d 1405 (Colo. 1963), the ALJ further concluded that the reinstatement of the policy was *void ab initio* because Pinnacol Assurance relied on Medina’s statement in the no loss letter and Medina failed to disclose that an employee of MDR Roofing had been injured the day before and that this was a material misrepresentation and there could be no meeting of the minds for reinstatement of the policy. Consequently, the ALJ determined that Pinnacol Assurance was not liable for compensation on this claim.

The ALJ went on to determine that although Hoff did not meet the case law established definition of statutory employer under §8-41-401(1)(a), C.R.S., because the roof repair was not routine and not performed on a regular basis, nor important to the regular business of Hoff, the ALJ nevertheless concluded that Hoff was the “employer” for purposes of §8-41-402(1), C.R.S., as a “person owning real property.” The ALJ therefore, ordered Hoff to pay certain medical benefits and temporary disability benefits increased by 50 percent for the failure of the employer to have workers’ compensation insurance. The ALJ also denied Hoff’s assertion that the claimant committed a safety rule violation. In lieu of payment of compensation and benefits, Hoff was ordered to post bond with the Division of Workers’ Compensation. MDR Roofing and Alliance were dismissed from the claim.

Hoff appeals the ALJ’s determination that she is the liable employer. As we understand her arguments, Hoff contends that Pinnacol Assurance was estopped from denying coverage for MDR Roofing because its agent, Bradley Insurance, issued a Certificate of Insurance showing MDR Roofing had coverage and also that the agent failed to explain the “no loss” letter to Medina who primarily spoke Spanish. Hoff’s arguments do not persuade us to disturb the ALJ’s determination that Hoff is liable for benefits pursuant to §8-41-402, C.R.S.

I.

Initially we agree with Pinnacol Assurance’s assertion that regardless of the merit of Hoff’s contentions on appeal, Hoff does not have standing to appeal the ALJ’s order concerning the status of MDR Roofing’s insurance policy with Pinnacol Assurance. A party does not have legal standing unless there is a showing of an injury in fact to a legally protected interest. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (Colo. 1977). The courts have recognized that an insurer does not have standing to argue that the cancellation of a workers’ compensation insurance policy by another insurer was void. *First Comp. Insurance v. Industrial Claim Appeals Office*, 252 P.3d 1221 (Colo. App. 2011); *Cheveron Oil Co. v. Industrial Commission*, 169 Colo. 336, 456 P.2d 735 (1969). We see no basis on which to distinguish these cases from Hoff’s circumstances here.

Even assuming that Hoff has standing to appeal, her estoppel arguments do not provide us with a basis to disturb the ALJ’s order. Equitable estoppel exists where the following criteria are met: “[T]he party to be estopped must know the relevant facts; the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; the party asserting the estoppel must be ignorant of the true facts; and the party asserting

estoppel must detrimentally rely upon the other party's conduct.” *See Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988).

As argued by Pinnacol Assurance, estoppel is generally treated as an affirmative defense, which is waived if not expressly pled. *See* C.R.C.P. (8)(c). However, in *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996), the court concluded that an estoppel argument can be pled without using the term “estoppel.” Here, Hoff endorsed the issue of estoppel in the response to application for hearing and the substance of Hoff’s argument appears to be raised in the hearing by submitting the Certificates of Liability in the exhibits, questions to witnesses and in her position statement to the ALJ. Under these circumstances, we conclude that the estoppel argument was sufficiently preserved for review. *See Munoz v. Industrial Claim Appeals Office*, 271 P.3d 547 (Colo. App. 2011).

Hoff specifically contends that the evidence established that Alliance relied upon the Certificates of Insurance issued by Bradley Insurance that showed coverage existed and Bradley did nothing to notify Alliance or Hoff upon learning that the policy was going to be canceled for non-payment. However, while the doctrine of equitable estoppel may apply in certain instances to preclude an insurer from denying coverage, the court of appeals has held that a certificate of insurance is subject to the terms of the policy and does not constitute a binder or contract of insurance and does not create a duty to inform a certificate holder of changes in circumstances. *Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264, (Colo. App. 1990); *Lopez-Najera v. Black Roofing, Inc.* W.C. No. 4-565-863 (September 13, 2004). Therefore, we reject Hoff’s assertion that the Certificates of Insurance issued in this case estopped Pinnacol Assurance from denying coverage.

Nor are we persuaded by Hoff’s assertion the agent’s failure to explain the no loss letter to Medina prevented the reinstated policy from being declared void. The ALJ specifically found that Medina failed to disclose that an employee of MDR Roofing had been injured the day before he sought reinstatement of the policy. The ALJ determined that it was not material if Medina understood what he signed. The fact remains that Medina signed the no loss letter representing that there were no injuries when there was an injury, and Pinnacol Assurance reinstated coverage based on Medina’s signing of the no loss letter. Thus, according to *Hunt v. Aetna Casualty, supra*, there could be no meeting of the minds and the reinstated policy was *void ab initio*. As the panel has previously held, there is nothing in *Hunt* or other pertinent case law that suggests that the insurer or, for that matter, its agent has a duty to inquire about concealed facts in order to establish there is no valid contract. *See Gomez v. Hipolito Gonzales d/b/a/ H & G*

Framing, W.C. Nos. 4-447-171 and 4-449-330 (February 18, 2001). Under this analysis, we find no error in the ALJ's determination that the reinstated policy was *void ab initio*.

II.

However, the ALJ appears to have misapplied the pertinent case law by holding Hoff solely liable for the claimant's workers' compensation benefits. We, therefore, remand the matter for a new order on this issue.

Section 8-41-401, C.R.S., provides that a company is a statutory employer when it conducts business by "contracting out any part or all of the work [it has] to any . . . subcontractor." In applying this statute, an ALJ must consider the "constructive employer's total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988).

Section 8-41-402, C.R.S. establishes the statutory liability of an owner of real property who contracts out to another person any work to be done to such property, in those instances in which that other person hired or used employees in the performance of such work. In both instances, these two statutes deem the party contracting out the work to be the statutory employer of the lessee or the subcontractor and its employees, even in the absence of any actual employment relationship between them. *See Finlay v. Storage Technology Corp. supra*.

As the ALJ recognized in his order, the Supreme Court held in *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970), that the statutory employer sections contemplate that there is but one employer liable under the Act. The *Herriott* court went on to hold that employer is the insured contractor, not the uninsured subcontractor. However, where as here, no party is insured, the panel has previously determined that the employers are jointly liable for the benefits due. *Coffey v. Curry Graham d/b/a Affordable Roofing*, W.C. No. 3-909-714 (January 24, 1991). In *Coffey*, the panel distinguished the application of *Herriott* on the basis that the statutory employer in *Herriott* was insured, thus relieving the uninsured immediate employer of liability. However, we are not aware of any authority which relieves an uninsured immediate employer of liability where the statutory employer is also uninsured. *Id.* To the contrary, where all entities are uninsured, *Sechler v. Pastore*, 103 Colo. 139, 84 P.2d 61 (1938), implies that there is joint liability.

Thus, in the absence of an insured employer, neither Alliance nor MDR Roofing is clearly absolved from liability for the claimant's workers' compensation benefits. Under §8-41-401, C.R.S., the general contractor is liable as an employer in addition to the uninsured immediate employer, where the general contractor contracts out a portion of its regular business to a subcontractor. This chain of liability is independent of that set forth in section 8-41-402, C.R.S. *Coffey v. Curry Graham d/b/a Affordable Roofing, supra*. Although the ALJ determined here that Hoff was not a statutory employer under §8-41-401, C.R.S., the ALJ did not make findings as to whether Alliance was the statutory employer under §8-41-401, C.R.S. The ALJ erred in dismissing Alliance given the fact that they could potentially be liable as a general contractor in §8-41-401, C.R.S. On remand, it will be necessary for the ALJ to determine whether Alliance is a general contractor pursuant to §8-41-401, C.R.S.

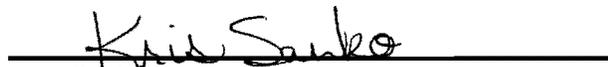
Moreover, for similar reasons, neither is MDR Roofing as the immediate employer, relieved of liability under §8-41-401, C.R.S., because the parties were uninsured. *See Sechler v. Pastore, supra; cf. Herriott v. Stevenson, supra*.

IT IS THEREFORE ORDERED that the ALJ's order dated August 14, 2012, is set aside insofar as it imposes sole liability on Hoff. On remand, the ALJ shall determine the identity of the general contractor, if any, and liability for the benefits due shall be the joint responsibility of that party, together with Hoff and MDR Roofing as the immediate employer. The order is otherwise 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

_____ 2/27/2013 _____ by _____ RP _____ .

HERNAN HERNANDEZ, 20263 E. BUCHANON DRIVE, AURORA, CO, 80011 (Claimant)
MDR ROOFING, INC., Attn: DANIEL AMAYA MEDINA, 6250 N. FEDERAL BLVD., LOT #7, DENVER, CO, 80221 (Employer)
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY BLVD., DENVER, CO, 80230 (Insurer)
F. LEE MAES, Attn: F. LEE MAES, ESQ., 1100 SOUTH SHOSHONE STREET, DENVER, CO, 80223 (For Claimant)
SCOTT A. MEIKLEJOHN, LLC, Attn: SCOTT A. MEIKLEJOHN, ESQ., 1626 WASHINGTON STREET, DENVER, CO, 80203 (For Respondents)
RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: FRANK M. CAVANAUGH, ESQ., 1401 17TH STREET, SUITE 900, DENVER, CO, 80202 (Other Party)
ALLIANCE CONSTRUCTION & RESTORATION, INC., Attn: CORY GARZA/ANGELA ISHAM, 1505 SHELLEY ROAD, RALEIGH, NC, 27612 (Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-876-455-03

IN THE MATTER OF THE CLAIM OF

JIM T. HUFFMAN,

Claimant,

v.

FINAL ORDER

MULTIPLE CONCRETE,

Employer,

and

FARMINGTON CASUALTY
COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated September 25, 2012, that determined the claim was compensable and ordered the respondents to pay for medical benefits, including a rotator cuff surgery. We affirm the ALJ's order.

A hearing was held on the issues of compensability and medical benefits. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows. The claimant resided in Monument, Colorado and has worked for a number of years as a heavy equipment mechanic. On May 4, 2011, Mr. Colton, the respondent employer's supervisor, telephoned the claimant at his residence and asked the claimant if he was looking for work. The claimant replied that he was. Mr. Colton described the jobs and the pay rate that the employer had available. The claimant agreed to that rate of pay. Mr. Colton requested that the claimant drive his own service truck and the employer would reimburse the claimant for fuel expenses. Mr. Colton instructed the claimant to show up at the employer's offices in Salt Lake City on May, 11, 2011.

The claimant then quit his current job and drove his RV to Salt Lake City and parked it, returned home and drove his service truck to Salt Lake City on May 10, 2011. On May 11, 2011, the claimant appeared at the employer's offices in Salt Lake City, where he filled out immigration, tax withholding, and employment application documents. Mr. Colton certified that the claimant had successfully completed a driving

test, but he did not actually administer a driving test to the claimant. The claimant also provided a urine sample and executed a release for the safety director to receive the test results. On May 12, 2011, the safety director informed Mr. Colton that the drug screen results were negative for all substances in the test profile and that the claimant was clear to go to work. The claimant began working at approximately 8:00 a.m. on May 12, 2011, but was not actually paid for that day.

After approximately two months the claimant was sent to work on a job in California. On September 8, 2011, the claimant was carrying a load of blades in his right hand when he tripped over a stub on the stairs to a trailer, twisted his right knee and struck the back of his right shoulder on the rear of the trailer. The claimant reported the injury to Mr. Colton but continued to work. The claimant filed a claim for workers' compensation benefits in Colorado. The respondent insurer denied the claim stating that there was no Colorado jurisdiction.

Crediting the claimant's testimony and Dr. Weinstein's opinion, the ALJ concluded that the claimant proved by a preponderance of the evidence that he suffered a compensable right shoulder injury on September 8, 2011. The ALJ further determined that the employer and the claimant formed a contract of hire on May 4, 2011, during the brief telephone conversation between Mr. Colton and the claimant. The ALJ reasoned that Mr. Colton did not inform the claimant that he was not yet an employee until after completing additional requirements in Salt Lake City. Thus, the claimant reasonably believed that he was hired over the phone and performed several additional actions that evidenced that belief such as quitting his job, driving his RV to Salt Lake City and then driving his service truck to Salt Lake City. Moreover, the ALJ found that the oral contract of hire required the claimant to bring his service truck from Colorado to the employer's job site, which the claimant did. The claimant understood he had to fill out various documents for the employer and had to pass a urine drug screen. However, the ALJ held that the urine drug screen was not a condition precedent to the formation of the contract of hire, but acted as a condition subsequent that would allow the employer to refuse to allow the claimant to work pursuant to the contract of hire.

The ALJ went on to find that the September 8, 2011, work injury occurred within six months after the claimant left the state of Colorado pursuant to his contract of hire with the employer. Consequently, the ALJ found that pursuant to §8-41-204, C.R.S., Colorado has jurisdiction over the injury in this case.

On appeal, the respondents contend that the ALJ erred as a matter of law when he made the determination that the contract of employment was formed in Colorado, giving Colorado jurisdiction over this matter. The respondents assert that the claimant was not

actually hired until he filled out the paperwork and passed the drug test in Utah. We are not persuaded that the ALJ erred.

Colorado jurisdiction over injuries suffered outside of the state is conferred by §8-41-204, C.R.S. This statute provides that Colorado has jurisdiction over out-of-state injuries if the employee was “hired or is regularly employed in this state.” Whether an employee was “hired ... in this state” is a contract question generally governed by the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Id.* The place of contracting is generally determined by the parties' intention, and is usually the place where the offer is accepted, or the last act necessary to the meeting of the minds or to complete the contract is performed. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

In *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996) *abrogated on other grounds by Horodyskyj v. Karanian*, 32 P.3d 740 (Colo. 2001), the court noted that the rule in *Denver Truck Exchange* has been tempered so that a contract of hire may be deemed formed, even though not every formality attending commercial contractual arrangements is observed, as long as the fundamental elements of contract formation are present. *See also* 1A A. Larson, *Workmen's Compensation Law* § 26.22 at 5-325 (1995)(it is necessary “[to subordinate] contract law technicalities to the reality of the [employment] relationship existing from the time the claimant [began] his journey toward the job pursuant to the overall-contract governing the way hiring is done in this particular employment”).

The question of whether the claimant has proven the existence of a contract for hire is one of fact for determination by the ALJ. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966). Similarly, the nature of the last act necessary to complete the contract and its location are generally factual questions for the ALJ's resolution. Because these questions are factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, the ALJ determined with record support that the claimant was hired over the phone. The claimant testified that on May 4th Mr. Colton called him in Monument, Colorado and said, “We got work. You interested?” Tr. at 17. The claimant told him yes, and he said, “Okay, be here by the 11th and we’ll go to work.” *Id.* The claimant also testified that Mr. Colton told him to “[b]ring your service truck and we’ll supply the gas this year.” *Id.* The claimant also testified that he was never told that his employment with the respondent employer was conditioned on filling out any type of paperwork. Tr. at 45. The claimant’s testimony was corroborated by Mr. Colton’s testimony who stated that he had the authorization to hire employees. Tr. at 76. Mr. Colton stated that he told the claimant if he was interested in the job he could “just come in and let’s get going.” Tr. at 78. Mr. Colton further testified that when he told the claimant to come out to Salt Lake City he considered that they “had an agreement that he was going to work for us.” Tr. at 81. The record supports the ALJ’s determination that when the claimant agreed to report to Salt Lake City, the fundamental elements of the contract were present. *See Moorhead Machinery & Boiler v. Del Valle, supra.*

Although the respondents contend that the hiring process was not complete until the claimant filled out the paperwork and passed the drug screen, the ALJ was not persuaded by the respondents’ evidence. The ALJ, in his sole province as fact finder, credited the claimant’s testimony and version of events. The mere fact that the evidence might have supported contrary findings and conclusions is immaterial on review.

Nor are we persuaded that the respondents’ reliance on *Ruiz v. Richardson Operating Company*, W.C. No. 4-811-996 (June 14, 2011), dictates a different result. In *Ruiz*, and other similar cases, the ALJ in those cases found that the employers made it clear to the claimants that they were not hired until after completing the paperwork. *See Wegner v. Nielsons Skanska*, W.C. No. 4-777-113, November 3, 2009 (phone call was merely informative and not the last act necessary to complete the contract of hire); *See also Roth v. Florilli Corporation*, W.C. No. 4-309-663 (December 30, 1997). Here, however, the ALJ found that no such qualification was expressed to the claimant. Rather, the ALJ determined that the necessary paperwork and the drug screen in this case were not a condition precedent to the formation of a contract of hire. *See Shehane v. Station Casino*, 3 P.3d 551 (Kan. App. 2000)(requirement to take a drug test in Missouri did not negate the formation of the employment contract in Kansas); *Potter v. Patterson UTI Drilling*, 234 P.3d 104 (N.M. App. 2010)(requirement to take a drug test in Pennsylvania did not negate the formation of the employment contract in New Mexico).

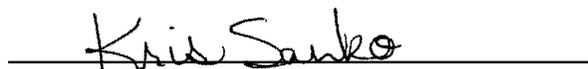
In our view, the ALJ applied the relevant law and his findings are supported by the evidence. Consequently, we see no basis for disturbing the ALJ’s order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 25, 2012, 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

_____ 2/20/2013 _____ by _____ RP _____ .

JIM T. HUFFMAN, 19190 DOEWOOD DRIVE, MONUMENT, CO, 80132 (Claimant)
FARMINGTON CASUALTY COMPANY, Attn: SARAH CADY, P O BOX 173762,
DENVER, CO, 80217 (Insurer)
THOMAS M. CONDAS, L.L.C., Attn: THOMAS M. CONDAS, ESQ., 102 S. TEJON, SUITE
1100, COLORADO SPRINGS, CO, 80903 (For Claimant)
RAY LEGO & ASSOCIATES, Attn: JONATHAN S. ROBBINS, ESQ., 6060 SOUTH
WILLOW DRIVE, SUITE 100, GREENWOOD VILLAGE, CO, 80111-5168 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-874-669

IN THE MATTER OF THE CLAIM OF

BRUCE A. NOZIK,

Claimant,

v.

ORDER OF REMAND

JBS USA, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge (ALJ) Friend dated October 1, 2012, and corrected order dated October 22, 2012, that dismissed, with prejudice, the claimant's request for penalties as a sanction for a discovery violation. We set aside the order and remand for further findings.

The parties attended a hearing on September 28, 2012, on the issue of penalties. At the hearing the respondents made a motion to strike the issue of penalties as a sanction for the claimant's failure to comply with discovery and an order to compel. The ALJ orally granted the motion and subsequently entered factual findings that for purposes of review can be summarized as follows. The claimant filed an application for hearing on the issue of penalties on May 10, 2012. The respondents sent interrogatories and request for production of documents to the claimant on June 8, 2012. The claimant did not respond to the request. After a pre-hearing conference, a pre-hearing ALJ (PALJ) entered an order compelling the claimant to produce the signed release authorizations and responsive interrogatory answers within five business days of the date of the Division's certificate of service on the order. The certificate of service indicates that the order was faxed to the claimant's counsel on July 31, 2012, making the claimant's responses due on August 6, 2012. The claimant did not provide the answers or requested documents until September 20, 2012.

Citing to Workers' Compensation Rule of Procedure WCRP 9-G (1), the ALJ

found that the claimant's violation of the order compelling discovery was willful. The ALJ's order went on to state that "one possible sanction is an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters in evidence. Rule 37 (b)(2)(B), C.R.C.P." However, the ALJ then ordered that the claimant's request for penalties occurring before May 10, 2012, be dismissed with prejudice.

The claimant timely appealed the ALJ's October 1, 2012, order contesting the dismissal of the claim. The ALJ entered a corrected order on October 22, 2012, to correct a finding concerning the parties and receipt of notice. The corrected order did not address the claimant's contentions in the petition to review the October 1, 2012 order. Therefore, the fact that the claimant did not file a petition to review the October 22, 2012, corrected order did not deprive the panel of jurisdiction. *See Michalski v. Industrial Claim Appeals Office*, 757 P.2d 1146 (Colo. App. 1988)(Failure to file a petition to review a supplemental order is not a jurisdictional defect where the supplemental order does not address any issue raised in a party's petition to review.)

On appeal the claimant contends the ALJ erred in his determination that the violation was willful and in his decision not to grant a continuance. Because the ALJ's findings are insufficient to permit appellate review, we remand the matter for additional findings.

Section 8-43-207(1)(e), C.R.S., permits an ALJ to "impose the sanctions provided in the civil rules of procedure in the district courts for willful failure to comply with permitted discovery. C.R.C.P. 37 authorizes various sanctions for failure to comply with discovery requests which range from the assessment of costs and attorney fees to the exclusion of certain claims for defense and prohibitions against the introduction of evidence. While it is also true that dismissal in C.R.C.P. 37 (b)(2)(C) of one or more claims for relief may be a proper sanction, it is "the severest form of sanction" available. *Prefer v. PharmNetRx*, 18 P.3d 844, 850 (Colo. App. 2000); *see Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991).

The ALJ has wide discretion in determining whether a violation occurred and, if so, the sanction to be imposed. *Id.* This discretion includes whether to impose discovery sanctions, as well as the nature of those sanctions. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office*, 85 P.3d 619 (Colo. App. 2003). The Colorado Supreme Court has held that, although the rule provides little guidance in the selection of a sanction, it should be applied "in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party" *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672 (Colo. 1987); *see also Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009)("When discovery abuses are alleged, courts

should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party.”) The sanction should, therefore, be commensurate with the seriousness of the conduct being sanctioned.

Because imposition of sanctions is discretionary, we may not interfere unless the order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). In this regard, we may set an order aside if the findings are not sufficient to support appellate review. Section 8-43-301(8), C.R.S.

Here, the ALJ's order cites to C.R.C.P. 37(b)(2)(B) in the factual findings and states that one possible sanction is to preclude the claimant from supporting his claims or defenses or to prohibit the introduction of certain evidence. In the order, however, the ALJ summarily strikes the claimant's application for hearing and dismisses the request for penalties with prejudice, presumably pursuant to C.R.C.P. 37 (b)(2)(C). The ALJ entered no specific findings of fact or conclusions of law determining the precise legal or factual basis for selecting dismissal as the particular sanction to be imposed.

Thus, we are unable to determine whether the ALJ weighed the various sanction options available to him and the factors that went into his determination. Despite the range of sanctions available, the ALJ did not adequately address why less drastic measures, such as sanctions barring the admission of certain evidence, would have been inappropriate in the present case. *See Pinkstaff v. Black and Decker, supra.*; *see Garrett v. McNelly Construction, Co.*, W.C. No. 4-734-158 (March 29, 2010). Consequently, the findings are insufficient to support appellate review of the ALJ's order. Section 8-43-301(8), C.R.S.; *Womack v. Industrial Commission*, 168 Colo. 364, 451 P.2d 761 (1969) (conclusory orders are insufficient to support appellate review because it is impossible for the court determine whether the award is proper); *Nunez v. Pete Duran Masonry Constructors*, W.C. No. 4-465-758 (April 8, 2002). On remand, the ALJ shall enter specific findings of fact and conclusions of law sufficient to support review in the event of an appeal.

IT IS THEREFORE ORDERED that the ALJ's order dated October 1, 2012 and corrected order dated October 22, 2012, are set aside and the matter is remanded for further proceedings and entry of a new order consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/13/2013 _____ by _____ RP _____ .

BRUCE A. NOZIK, 5921 HUFF MOUNTAIN AVE., LAS VEGAS, NV, 89131 (Claimant)
JBS USA, LLC, Attn: MICHAEL HALL, 2401 2ND AVENUE, GREELEY, CO, 80631
(Employer)

ZURICH AMERICAN INSURANCE COMPANY, Attn: MICHAEL FARNHAM, C/O:
SEDGWICK CMS, P O BOX 14493, LEXINGTON, KY, 40512-4493 (Insurer)

LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUNDELL, ESQ., 1233
EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)

RITSEMA & LYON, P.C., Attn: KIM D. STARR, ESQ., 2629 REDWING ROAD, SUITE 330,
FORT COLLINS, CO, 80526 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-121-888-11

IN THE MATTER OF THE CLAIM OF

PAMELA K. RINGLER,

Claimant,

v.

FINAL ORDER

KING SOOPERS, INC.,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Martin D. Stuber (ALJ) dated December 3, 2012, that denied the claimant's request for a penalty under §8-43-304(1), C.R.S. due to the late payment of a medical bill. We affirm the ALJ's order.

The claimant filed an application for a hearing in regard to the sole issue of a penalty. The claimant alleged the respondent should be assessed a penalty for \$1,000 per day due to the failure to timely pay for a health club membership prescribed by Dr. Rook, the claimant's attending physician. The claimant was injured on May 26, 1991, when she hurt her left wrist. After surgery, she developed RSD. She was eventually awarded permanent total disability benefits and continuing medical benefits. Part of her continuing treatment included a health club membership. In 2010, the respondent disputed the reasonableness of the health club. After obtaining a medical review opinion, the respondent continued to pay for the membership.

On May 1, 2011, Dr. Rook wrote a renewed one year prescription for the health club membership. The claimant paid for the renewal of the club membership out of her pocket on June 2. On June 7, the claimant's attorney wrote a letter to the respondent requesting the claimant be reimbursed for the membership fee in the amount of \$539.40. The respondent obtained an opinion from a Dr. Lewis stating the health club membership was not reasonably necessary. Based on this report, the respondent wrote on July 12 that the reimbursement request was denied. The claimant filed an application for hearing on August 3, 2011, in regard to this issue of the reimbursement.

The respondent then obtained another report to review the reasonableness of the health club membership. This report from Dr. Bernton found the request to be reasonable. The respondent then sent a check for the reimbursement to the claimant on October 13, 2011.

The claimant filed her most recent application for penalties on June 29, 2012. The application requested both a “percentage penalty” and a penalty for “up to \$1,000 per day” for the failure to authorize and pay for the health club membership beginning at a point thirty days after the June 7, 2011, letter requesting reimbursement and continuing until the request was paid in October, 2011. The only statutory citations were to §§8-43-304(1) and 8-43-305, C.R.S. Those sections provide for a penalty of up to \$1,000 per day for violations of the statute, a rule, or an order, and that each day is a separate offense. That section provides for a penalty of up to \$1,000 per day for violations of the statute, a rule or an order.

The respondent replied by asserting the pleading was insufficient due to the failure to specify which statute, order or rule was alleged to have been violated. The respondent also argued §8-43-304(1), C.R.S. did not apply in this case because another penalty provided a sanction for the violation alleged by the claimant. Section 8-43-401(2)(a), C.R.S. states that should an insurer knowingly delay payment of a medical bill for more than thirty days it may be assessed a penalty of eight per cent of the withheld medical benefits.

After hearing, the ALJ submitted his December 3, 2012, order which assessed a penalty against the respondent for eight percent of the reimbursement request, \$43.15, based on §8-43-401(2)(a), C.R.S. and denied a penalty for up to \$1,000 per day pursuant to §8-43-304(1), C.R.S. The ALJ denied the latter penalty request based upon the clause in §8-43-304(1), C.R.S. stating the section applied only to a person who “violates any provision of articles 40 to 47 of this title, 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 ...” (italics provided). The ALJ reasoned another penalty was specifically provided by §8-43-401, C.R.S. and a second penalty pursuant to §8-43-304, C.R.S. was therefore precluded.

The claimant appeals arguing this limiting clause contained in §8-43-304(1), C.R.S. does not apply in this case because the respondent violated Workers’ Compensation Rule of Procedure 16-11(G), which is a lawful order of the Director. (and so not controlled by the limiting clause). She also asserts the respondent’s violation was not a failure to pay a ‘bill’, but rather a failure to provide medical treatment. Since §8-43-401, C.R.S. states it only applies to the payment of medical bills, it is reasoned that

section does not apply to this claim. The respondent did not appeal the assessment of the \$43.15 penalty.

The ALJ correctly points out that both §§8-43-304(1) and 8-43-401(2)(a), C.R.S. were amended in 2010 by Senate Bill 10-012. Section 3 of that bill provided it took effect on August 11, 2010, and specified “the provisions of this act shall apply to conduct occurring on or after the applicable effective date of this act.” Despite the age of the date of injury in this claim, the activity which was the subject of the ALJ’s order occurred after August of 2010 and the current provisions of both these sections apply.

The claimant argues a penalty in this case may be awarded under both §§8-43-304(1) and 8-43-401(2)(a), C.R.S. She states that the limiting clause “for which no penalty has been specifically provided” only limits the three types of violations which precede the clause and does not apply to a refusal to obey an order of the director or panel which follows the clause. The claimant refers in her brief on appeal to Workers’ Compensation Rule of Procedure 16-11(G) as being an order of the Director. A violation of that rule then, would not be limited by the alternative penalty clause. The difficulty with this analysis turns on the failure of the claimant to state at any point prior to her appeal that she was asserting a violation of a Rule as a basis for her penalty claim. An issue raised for the first time on appeal is not ripe for consideration. *Colorado Compensation Ins. Authority v. Industrial Claim Appeals Office*, 884 P.2d 1131 (Colo. App. 1994) (an issue may not be raised for the first time on appeal). The only penalty the claimant pled is a violation of §8-43-401(2)(a), C.R.S. That section provides “If any insurer ... knowingly delays payment of medical benefits for more than thirty days or knowingly stops payments, such insurer ...shall pay a penalty of eight percent of the amount of wrongfully withheld benefits”. A violation of “articles 40 to 47 of this title” precedes the alternative penalty clause and is thereby subject to its limitations. *Barbieri v. Helzberg’s Diamond Shops*, W.C. No. 4-679-315 (September 25, 2008).

Pena v. Industrial Claim Appeals Office, 117 P.3d 84 (Colo. App. 2004) is dispositive of this issue. In *Pena* the court of appeals held that the limiting clause in §8-43-304, C.R.S. applies to three of the four categories for which penalties may be imposed under that provision. Section 8-43-304(1), C.R.S. provides that penalties up to \$1,000 per day may be assessed against “any person who violates any provision of articles 40 to 47 or this title, 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.” This provision therefore authorizes four categories of conduct for which penalties may be imposed. The court in *Pena* held that the limiting clause “for which no penalty has been specifically imposed” applies to the three categories that precede that clause. Thus, the limiting clause applies to the categories of

penalties that may be imposed under §8-43-304, C.R.S. for violations of any provision of the Act and for doing any act prohibited by the Act, as well as for failing or refusing to perform any duty lawfully mandated by the Director or the Panel. In *Pena*, the court held that where some other penalty “has been specifically provided” no penalties are permissible under §8-43-304, C.R.S. for violation of the Act, for doing something prohibited by the Act, or for failing or refusing to perform a duty lawfully mandated by the Director or the Panel.

In *Pena* the court also held that the claimant in that case could pursue penalties under §8-43-304 and was not restricted to the penalty set forth in ♣8-43-401(2)(a), C.R.S. That was however, because *Pena* was not a case in which the claimant received treatment, the provider submitted a bill for that treatment, and the insurer delayed payment of the bill for more than thirty days. Rather, in that case the insurer refused to provide taxi vouchers to permit the claimant to travel safely to and from medical appointments. Hence, the insurer’s conduct in *Pena* was the equivalent of unreasonably refusing to provide medical treatment. The court in *Pena* held that that conduct was not penalized by §8-43-401(2)(a), C.R.S. and that penalties were therefore available under the general penalty statute, §8-43-304, C.R.S.

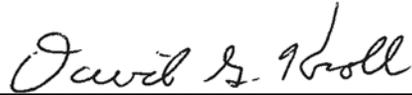
Here, unlike in *Pena*, the claimant’s penalty claim does not rely on conduct by the respondent which delayed or denied the claimant medical treatment. Rather, the claimant expressly states in her application for a hearing, and as she did at the hearing itself, the penalty sought is for the period of time after the respondent was requested to reimburse the claimant for her out of pocket payment of the health club fee. She was not deprived of any medical treatment due to her payment to the health club. The conduct complained of was the failure of the respondent to pay this bill for the health club charge. The claimant did not seek penalties based on any other conduct. Therefore, the claim under §8-43-304, C.R.S. as presented by the claimant, was precluded by the limiting clause in that statute and by the fact that a penalty was available under §8-43-401(2)(a), C.R.S. The point of the ALJ’s order, and of *Pena*, is that the respondent could not be penalized under § 8-43-304, C.R.S. for the violation of § 8-43-401(2)(a), C.R.S.

Contrary to the claimant’s argument, we do not view *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001) as dictating a different result. In *Giddings* the court held that the specific penalty provision in ♣8-43-401(2)(a), C.R.S. did not preclude the imposition of penalties under the general provision in ♣8-43-304(1), C.R.S. However, in that case the conduct complained of was the respondents’ violation of an order to pay medical benefits. Unlike in *Giddings*, here the conduct complained of was the late payment of health club membership or of medical bills, which is properly penalized under §8-43-401(2)(a), C.R.S. and the limiting clause of §8-43-304, C.R.S. makes that statute inapplicable. The ALJ has correctly denied the claim for a penalty

pursuant to §8-43-304(1), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued December 3, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David Kroll



Kris Sanko

PAMELA K. RINGLER

W.C. No. 4-121-888-11

Page 7

CERTIFICATE OF MAILING

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

_____ 3/13/2013 _____ by _____ RP _____ .

PAMELA K. RINGLER, 2101 W PEACEMAKER TERRACE, COLORADO SPRINGS, CO, 80920 (Claimant)

STEVEN U. MULLENS, P.C., Attn: STEVEN U. MULLENS, ESQ., 105 EAST MORENO AVENUE, COLORADO SPRINGS, CO, 80901 (For Claimant)

THOMAS POLLART MILLER LLC, Attn: STACY J. TARLER, ESQ., 5600 S QUEBEC STREET, STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

SEDGWICK CMS, Attn: SHARMIE JENSEN, P O BOX 14485, LEXINGTON, KY, 40512-4485 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-756-350

IN THE MATTER OF THE CLAIM OF

AMY SMITH,

Claimant,

v.

FINAL ORDER

AMLI MANAGEMENT COMPANY,

Employer,

and

AMERICAN GLOBAL INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Broniak (ALJ) dated September 27, 2012, that determined the claimant overcame the 18-month Division Independent Medical Examination (DIME) physician's determination that she was at maximum medical improvement (MMI). We affirm.

Beginning on April 1, 2008, the claimant worked for the respondent employer as a community manager of new construction lease-up. On April 2, 2008, the claimant was carrying an armload of blue prints with her arms extended in front of her when she caught her foot on a chair and fell backwards. As a result of the fall, the claimant struck the back of her head on a table, and then struck the back of her head again on the floor.

Dr. Plotkin assessed the claimant with a concussion with post concussive symptoms, cervical strain, left upper thoracic contusion/strain, and bilateral elbow contusions. The claimant eventually was referred to Dr. Entin who diagnosed a major depressive disorder, post concussive syndrome with cognitive and emotional problems, and insomnia. Dr. Entin opined that all of the claimant's diagnoses were caused by the industrial injury.

The claimant subsequently underwent medical treatment with a number of different physicians. The claimant eventually saw Dr. Mobley through her personal health insurance plan. Dr. Mobley is a neurosurgeon specializing in spine surgery. Dr. Mobley referred the claimant for an MRI of the cervical spine, after which he

recommended “as a last option” an anterior cervical discectomy and fusion (ACDF) at C5-C7.

In November 2009, the claimant underwent a neuropsychological evaluation with Dr. Thwaites. Dr. Thwaites indicated that the claimant had possible personality factors that could contribute to somatization and a functional aspect to her presentation. Dr. Thwaites concluded that the diagnosis of concussion was based on the claimant’s self-report alone.

On August 6, 2010, the claimant was referred to Dr. Reiss, an orthopedic spine surgeon. Dr. Reiss documented that the MRI showed what he believed was a protruding disc perhaps in combination with a spur at C5-6 mostly on the left causing foraminal narrowing. On December 7, 2010, Dr. Reiss recommended an ACDF at C5-C7, which he indicated had a 70% chance of improving her symptoms. Dr. Reiss further recommended that the claimant see Dr. Entin prior to surgery so that he could clear and prepare her. On March 22, 2011, Dr. Mobley also recommended an ACDF at C5-C7, and requested prior authorization for this procedure on March 28, 2011.

On September 20, 2010, Dr. Rauzzino performed a medical records examination of the claimant at the request of the respondents. Dr. Rauzzino opined that the changes to the claimant’s cervical spine suggested that she did not have a work-related injury, and that her neck issues were not causally related to the event on April 2, 2008.

The respondents subsequently requested an 18-month DIME, which was performed by Dr. Ginsburg on September 22, 2011. In his report, Dr. Ginsburg documented the recommendations for anterior cervical discectomy and fusion at C5-7 by both Dr. Mobley and Dr. Reiss. Despite these recommendations for surgery, Dr. Ginsburg nevertheless opined that the claimant was at MMI as of January 1, 2011, because during 2011, no significant medical care occurred.

The claimant applied for a hearing, seeking to overcome the 18-month DIME determination that she was at MMI.

After hearing, the ALJ determined that the claimant overcame the 18-month DIME opinion on MMI. The ALJ found that Dr. Ginsburg’s initial opinion that the claimant reached MMI on January 1, 2011, was ambiguous. The ALJ found that Dr. Ginsburg placed the claimant at MMI because she had no significant medical treatment in 2011, which was not a proper basis for determining MMI. The ALJ further found that Dr. Ginsburg testified that because two surgeons were in a “standoff” over whether the

claimant should have the ACDF surgery, he felt that this meant she was at MMI, which the ALJ also found was not a proper basis for determining MMI. The ALJ determined that Dr. Ginsburg's true opinion was that the claimant was not at MMI since the ACDF surgery may cure and relieve her of the effects of the work injury. Findings of Fact at 15 ¶¶70. The ALJ further found that Dr. Ginsburg testified he would recommend the ACDF surgery if a neurosurgeon recommended the surgery and if the claimant had been informed of the risks and limitations of the surgery. The ALJ resolved the ambiguity in Dr. Ginsburg's opinion on MMI by finding that the conditions placed on a surgical recommendation by Dr. Ginsburg had been met, with Dr. Mobley recommending ACDF surgery, and Dr. Reiss informing the claimant of the risks and limitations of the surgery. Thus, the ALJ ordered the respondents liable for the claimant's anterior cervical disc fusion and ordered the respondents to pay the claimant temporary disability benefits.

On review, the respondents argue that the ALJ erred in determining the claimant overcame the DIME's MMI determination. The respondents contend that the ALJ abused her discretion in finding that Dr. Ginsburg's opinions were ambiguous. The respondents assert that Dr. Ginsburg "was steadfast in his opinion that Claimant's condition was at maximum medical improvement, and that Claimant did not require the anterior cervical disc fusion." Brief In Support at 4. We do not perceive reversible error.

The MMI opinion of a DIME must be overcome by clear and convincing evidence. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482–83 (Colo. App. 2005). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME's conclusion must demonstrate that it is "highly probable" that the DIME's MMI finding is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

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

Here, we conclude that substantial evidence supports that ALJ's determination that the claimant overcame the DIME's MMI opinion. Section 8-43-301(8), C.R.S. As noted above, in his initial report, Dr. Ginsburg placed the claimant at MMI on January 1, 2011, because she had no significant medical treatment in 2011. He specifically opined as follows:

I will assign the date of January 1, 2011 as maximum medical improvement. Actually, I am not able to say this specifically, but during 2011 no significant medical care occurred. Ex. 1 at 13.

As found by the ALJ, however, this was not a proper basis for determining MMI. Findings of Fact at 14 ¶68. See §8-40-201(11.5), C.R.S.; *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo.App.1995)(MMI is defined as that point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve condition). Additionally, while Dr. Ginsburg repeatedly testified during his deposition that the claimant was at MMI, he also testified that there appeared to be a "standoff" on whether the claimant should have surgery and he, therefore, determined that she was at MMI. Depo. of Dr. Ginsburg (5/10/12) at 11, 34-36; (6/12/12) at 4-5, 9, 12. As found by the ALJ, this also was not a proper basis for determining that the claimant was at MMI. Section 8-40-201(11.5), C.R.S.; *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office, supra*.

Moreover, during his deposition, Dr. Ginsburg testified that if he were treating the claimant privately, he would get a second opinion from a neurosurgeon as to whether the claimant should undergo the surgery and as to whether the surgery was reasonable and necessary. Dr. Ginsburg further testified that if assuming a neurosurgeon and an orthopedic surgeon believed that the claimant could be helped by undergoing the surgery, and if the claimant wanted to undergo the surgery, then he would support the claimant's decision. Depo. of Dr. Ginsburg (5/10/12) at 39-40. Dr. Ginsburg also testified that if he were asked to reassess the situation and decide whether surgery was necessary, he would have to look at the situation from a totally different perspective. When asked why he would look at it differently, Dr. Ginsburg explained that knowing the surgery is now being proposed and seriously being considered, he would look at the situation from a totally different standpoint. Depo. of Dr. Ginsburg (5/10/12) at 36-40. Additionally, in forming his opinion that the claimant was at MMI, Dr. Ginsburg relied upon the reports of Dr. Rauzzino. Dr. Ginsburg testified that he believed Dr. Rauzzino was "a major participant in making the clinical decision" of whether the claimant should undergo the surgery. Depo. of Dr. Ginsburg (5/10/12) at 16-19. As found by the ALJ, however, Dr. Rauzzino only performed a records review of the claimant on behalf of the respondents and was not involved in the clinical decision making. Ex. E at 140-144; Findings of Fact at 14 ¶66.

Based on the written report of Dr. Ginsburg and his deposition testimony, the ALJ found that Dr. Ginsburg's opinion on MMI was ambiguous or conflicting and that the claimant, therefore, overcame the DIME's opinion. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000)(if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine DIME's true opinion). Given the totality of the circumstances, we are unable to say that the ALJ abused her discretion in finding that Dr. Ginsburg's opinions were ambiguous or conflicting and that the claimant therefore overcame the DIME's opinion on MMI. *See Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998)(if there are ambiguities or conflicts in DIME physician's report regarding whether a claimant is at MMI, resolution of such ambiguities and conflicts presents a question of fact for the ALJ to resolve, and in doing so, ALJ should consider all of DIME's written and oral testimony).

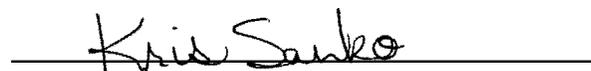
We further note that the reports and testimony of other medical providers support the ALJ's finding that the claimant required additional treatment and therefore was not at MMI. Dr. Mobley and Dr. Reiss both recommended that the claimant undergo a cervical fusion to relieve her of her neck pain. Ex. 6 at 1-9; Ex. 8 at 1-10; Depo. of Dr. Reiss at 24-30. *See Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997)(it is ALJ's sole prerogative to determine credibility and probative weight of conflicting evidence). The respondents point to other evidence and testimony which, if credited, could support a different result. It is well settled, however, that an ALJ may credit all, part, or none of an expert's testimony. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Further, the mere fact that some of the evidence would support a contrary finding and conclusion affords no basis for relief on appeal. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

IT IS THEREFORE ORDERED that the ALJ's order dated September 27, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/15/2013 _____ by _____ RP _____ .

AMY SMITH, 7171 PALISADE DRIVE, HIGHLANDS RANCH, CO, 80130 (Claimant)
AMLI MANAGEMENT COMPANY, Attn: MARY TANZER, C/O: AMLI RESIDENTIAL,
200 W. MONROE, SUITE 2200, CHICAGO, IL, 60606 (Employer)
AMERICAN GLOBAL INSURANCE COMPANY, Attn: LEIA DIXON, C/O: CHARTIS
INSURANCE, P O BOX 25972, SHAWNEE MISSION, KS, 66225 (Insurer)
LAW OFFICE OF STEVEN J. PICARDI, P.C., Attn: STEVEN J. PICARDI, ESQ., 12900
STROH RANCH WAY, SUITE 110, PARKER, CO, 80134 (For Claimant)
TREECE, ALFREY MUSAT, P.C., Attn: MATTHEW C. HAILEY, ESQ., 999 18TH STREET,
SUITE 1600, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-682-496-01

IN THE MATTER OF THE CLAIM OF

SHARON WEAKLEY,

Claimant,

v.

RONALD R. CARR,

Employer,

and

EMPLOYERS COMPENSATION INSURANCE CO.,

Insurer,
Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated September 10, 2012, that ordered an increase of the claimant's average weekly wage (AWW). We affirm.

A hearing was held on the issue of increasing the claimant's AWW. After hearing, the ALJ found that the claimant was working as a waitress for the employer, the Backwoods Inn, when she suffered an injury to her neck in 2006. The respondents admitted liability and paid the claimant temporary total disability (TTD) benefits at an AWW of \$96.01. The claimant eventually was placed at maximum medical improvement (MMI) and provided with an impairment rating. The respondents filed a final admission of liability (FAL), admitting for the permanent impairment rating. The claimant did not object to the FAL and her claim was closed.

The Backwoods Inn sold the business in December 2006, and the claimant continued working for the new owners. The claimant subsequently left this job for her new job as a general manager of Pancho's Mexican Grill (Pancho's) where she has worked up until her latest surgery on March 19, 2012. The claimant will return to work for Pancho's when released by her physicians. The claimant was paid hourly when she worked for the Backwoods Inn and is paid a salary at Pancho's. The parties stipulated that the claimant's salary with Pancho's equates to an AWW of \$665.38.

The claimant eventually suffered a worsening of her cervical condition and underwent another surgery on her neck on March 19, 2012. The respondents voluntarily reopened the claimant's claim and filed an amended general admission of liability on April 18, 2012.

The ALJ subsequently entered his order, concluding that the claimant's AWW should be increased to \$665.38 effective March 16, 2012. Relying upon the discretionary exception contained in §8-42-102(3), C.R.S., the ALJ concluded that such an increase provided the most fair basis on which to calculate the claimant's AWW. The ALJ reasoned that such an increase was fair due to the changes the claimant experienced with regard to her new job at Panchero's and "the reliance her family had on her increased earnings as of the date that she underwent her surgery on her cervical spine." Conclusions of Law at 4 ¶3. The ALJ also determined that merely because the respondent insurer does not collect premiums from the Backwoods Inn any longer does not create a situation so factually unfair to the insurer that the claimant's AWW should continue to be at a level significantly below the AWW she presently is earning at Panchero's.

I.

On appeal, the respondents contend that the ALJ abused his discretion in increasing the claimant's AWW by over six times what she originally earned while at the Backwoods Inn, and basing her AWW on wages earned at a different job with a different employer. The respondents further argue that the ALJ erred by basing the claimant's AWW on the claimant's financial hardship. We disagree that the ALJ abused his discretion in increasing the claimant's AWW.

Under §8-42-102, C.R.S., the ALJ may choose either of two methods to calculate a claimant's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 780 (Colo. 2010). The first method, which is known as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured employee was receiving at the time of the injury." Section 8-42-102(2), C.R.S.; *Benchmark/Elite, Inc.*, 232 P.3d at 780.

The second method, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." Section 8-42-102(3), C.R.S.; *see also Benchmark/Elite, Inc.*, 232 P.3d at 780. An ALJ has broad, statutorily granted discretion to calculate AWW "in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." Section 8-42-102(3), C.R.S.; *see also Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867, 869 (Colo. App. 2001)("[Section] 8-42-102(3) ... grants the ALJ discretionary authority to calculate the [AWW] in some other manner if the prescribed methods will not fairly calculate the wage in view of the

particular circumstances.”); *Loofbourrow v. Industrial Claims Office*, ___ P.3d ___ (Colo. App. 2011), *cert. granted, in part, on other grounds* (Oct. 15, 2012); *see also Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 855 n. 6 (Colo.1993)(Director of the Division of Workers' Compensation has delegated his authority to hold hearings and to determine an employee's AWW to the ALJ).

The overall objective when calculating AWW is to arrive at “a fair approximation of the claimant's wage loss and diminished earning capacity.” *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). Because the authority to select an alternative method for computing the AWW is discretionary, we may not set aside the ALJ's AWW calculation unless it amounts to an abuse of discretion. An abuse of discretion exists when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Pizza Hut v. Industrial Claim Appeals Office, supra*. We may not interfere with the ALJ's findings of fact, however, if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to uphold 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).

In *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589, 590 (Colo.2008), *overruled, in part, on other grounds, Benchmark/Elite, Inc. v. Simpson, supra*, the Colorado Supreme Court addressed an ALJ's discretionary authority to base an employee's AWW on the salary and benefits the claimant received while working for a subsequent employer. In that case, the claimant was injured in an industrial accident while employed at Avalanche Industries, Inc. The claimant later worked for a second employer, which provided both health insurance and a higher salary. While the claimant was at the second employer, her physical condition worsened and the ALJ reopened her workers' compensation claim. The ALJ increased the claimant's AWW based on the compensation she received from her subsequent employer. The Court held that the discretionary exception allows an ALJ to compute an employee's AWW based on compensation received at a subsequent employer, provided there is no abuse of discretion. *Id.* at 591–97.

Here, we conclude that the ALJ did not abuse his discretion in increasing the claimant's AWW under the discretionary exception found in § 8-42-102(3), C.R.S. The ALJ properly considered the changes that the claimant experienced with regard to her new job. *See Avalanche Industries, Inc. v. Clark, supra*. The claimant testified that she presently works as a general manager at Panchero's, and that her job at Panchero's pays her a great deal more than her previous job as a hostess/waitress at the Backwoods Inn. Tr. at 9-10, 12. Thus, after her original industrial neck injury, the claimant continued working and significantly increased her salary. We agree with the ALJ that basing her AWW on the salary she had been earning while at the Backwoods Inn at the time of

accident would have yielded an unjust result. As such, we are not persuaded that the ALJ's determination to increase the claimant's AWW by over six times what she originally earned while at the Backwoods Inn is so beyond the bounds of reason as to require setting such determination aside. Consequently, the ALJ's discretionary determination was reasonable and supported by the applicable law. *See Campbell v. IBM Corp.*, 867 P.2d at 82 (Court held it would be "manifestly unjust to base claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979," and determined that her AWW should be based upon higher salary earned at time her deteriorating condition caused her to stop working).

Further, to the extent the respondents argue that the ALJ erred in considering the claimant's financial hardship or the reliance the claimant's family had on her increased earnings for purposes of increasing her AWW, we conclude that there was no prejudicial error. Section 8-43-310, C.R.S. As stated above, the ALJ properly considered the changes that the claimant experienced with regard to her new job when increasing her AWW. Consequently, the ALJ's increase of the claimant's AWW does not amount to an abuse of discretion.

II.

Next, the respondents contend that the ALJ's application of §8-42-102(3), C.R.S. violates their guarantees of equal protection of the laws under the United States and Colorado constitutions. The respondents argue that the ALJ's application of §8-42-102(3), C.R.S. created dissimilar treatment of similarly situated insurance carriers. The respondents assert that the insurer is unable to mitigate its loss via increased premium calculations since the Backwoods Inn no longer is in business, whereas other similarly situated carriers are able to recoup such a loss through a premium adjustment or an audit and collection of a retroactive premium from those employers that continue to be in business. The respondents therefore contend that the ALJ's application of §8-42-102(3), C.R.S. has created an impermissible classification, or a group of carriers subject to having to pay increased AWW based on wages paid by subsequent employers without remedies available to mitigate such a loss.

We lack jurisdiction to address a facial constitutional challenge to a statute. *Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721 (1971). In *Horrell v. Department of Administration*, 861 P.2d 1194, 1196 (Colo. 1993), however, the Colorado Supreme Court indicated that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *See also Pepper v. Industrial Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005) ("The distinction between a 'facial' and an 'as applied' equal protection challenge is not always clear cut. A facial challenge is supported where the law by its own terms classifies persons for different treatment. In contrast, a statute, even

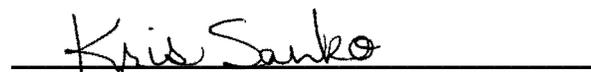
if facially benign, may be unconstitutional as applied where it is shown that the governmental officials who administer the law apply it with different degrees of severity to different groups of persons who are described by some suspect trait.”), *aff’d on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006); *see also Dickson v. Pueblo Transportation Company*, W. C. Nos. 3-777-995 & 3-857-321 (July 31, 1995).

Nonetheless, because our analysis is so dependent upon the plain and ordinary meaning of §8-42-102(3), C.R.S., a “facial” and “as applied” challenge are so intertwined that we do not perceive how we can consider the “as applied” challenge without addressing the “facial” constitutionality of §8-42-102(3), C.R.S. To do so would violate the principle of separation of powers. *See Denver Center for Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. App. 1985) (administrative rulings concerning “facial” challenges to statutes will not be considered “authoritative” on judicial review). Thus, we decline to address the respondents’ “as applied” argument.

IT IS THEREFORE ORDERED that the ALJ’s order dated September 10, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/1/2013 _____ by _____ RP _____ .

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Colorado Court of Appeals -- March 14, 2013
2013 COA 32. No. 12CA0226. *Krol v. CF&I Steel.*

COLORADO COURT OF APPEALS

2013 COA 32

Court of Appeals No. 12CA0226
Pueblo County District Court No. 09CV97
Honorable Deborah R. Eyler, Judge

Stanislaw Krol,
Plaintiff-Appellant,

v.

CF&I Steel, a/k/a CF&I Steel, LP, d/b/a Rocky Mountain Steel Mills, d/b/a RMSM, d/b/a Colorado Steel Mills, d/b/a Pueblo Metals Company, d/b/a CF&I Fabricators, d/b/a Pueblo Railroad Service Company,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE J. JONES
Bernard and Richman, JJ., concur

Announced March 14, 2013

James M. Croshal, Pueblo, Colorado, for Plaintiff-Appellant

Faegre Baker Daniels LLP, Colin C. Deihl, Denver, Colorado; SNR Denton US LLP, Alan G. Gilbert, Tiffany L. Amlot, Chicago, Illinois, for Defendant-Appellee

¶1 Plaintiff, Stanislaw Krol, an employee of SK's Industrial Management, LLC (SKIM), sued defendant, CF&I Steel, in tort for injuries he suffered while he was on CF&I's property training a CF&I employee. The district court granted CF&I's motion for summary judgment, concluding that the Workers' Compensation Act of Colorado, sections 8-40-101 to 8-47-209, C.R.S. 2012 (the Act), provided Mr. Krol's exclusive remedy because (1) Mr. Krol was doing work while "on" CF&I's property when he was injured, see § 8-41-402, C.R.S. 2012; and (2) the training was part of CF&I's regular business, such that CF&I ordinarily would have performed that function itself if it had not contracted it out to SKIM, see § 8-41-401, C.R.S. 2012.

¶2 We conclude that the court erred in entering summary judgment for CF&I. Section 8-41-402 expressly provides that an entity is deemed a statutory employer thereunder only if the injured person did work both "on and to" real property or improvements thereon owned by the purported statutory employer. The district court's ruling that the injured person need only have been "on" the property when he was injured is contrary to the plain language of the

statute, from which we see no legally viable reason to depart. There is a question of material fact as to whether Mr. Krol was doing work “to” CF&I’s real property (or improvements thereon), precluding summary judgment based on section 8-41-402.

¶3 Summary judgment based on section 8-41-401 is also inappropriate at this stage of the case. CF&I did not raise that statute in moving for summary judgment. The court raised the statute on its own, in the order granting summary judgment, without providing Mr. Krol with any notice or opportunity to present argument and factual evidence relating thereto. That course of action ordinarily is procedurally improper, and we cannot conclude that the court’s error in this regard was harmless.

I. Background

¶4 CF&I owns a rail mill in Pueblo, Colorado. It has several industrial cranes on that property, many of which are inside buildings.

¶5 In July 2002, CF&I and Alpine Crane entered into a contract obligating Alpine Crane to maintain and inspect CF&I’s cranes. In January 2007, however, CF&I and SKIM entered into a contract obligating SKIM to train CF&I’s employees to maintain and inspect the cranes, apparently in an effort to save CF&I money it was continuing to pay Alpine Crane.

¶6 That month, Mr. Krol went to the mill to provide inspection training as called for by the CF&I-SKIM contract. While Mr. Krol was standing on top of one of the cranes, training a CF&I employee how to inspect a crane, the crane moved. Mr. Krol was injured as a result.

¶7 Mr. Krol received workers’ compensation benefits through SKIM’s workers’ compensation insurance. He sued CF&I, asserting various tort claims. Following about a year of litigation, CF&I moved for summary judgment. It did so based solely on section 8- 41-402, contending that the undisputed facts established that Mr. Krol was on its property when he was injured; therefore, it was Mr. Krol’s “statutory employer”; and therefore, Mr. Krol could not seek additional compensation from CF&I as a matter of law.

¶8 Mr. Krol opposed CF&I’s summary judgment motion. He did not dispute that he was on CF&I’s property when he was injured. But he argued that the express language of section 8-41-402 provides that it applies only when the injured person was doing work both “on and to” another’s property, and that there was at least a genuine issue of fact whether he was doing work to CF&I’s property when he was injured.

¶9 The district court noted the statute’s plain language, but ruled that it applies whenever an injured person was doing work while on another entity’s property, even if the injured person was not doing work to the property. Because there was no dispute that Mr. Krol was on CF&I’s property when he was injured, the court concluded that CF&I was Mr. Krol’s statutory employer and was therefore entitled to immunity under section 8-41-402.

¶10 The court went on to find (the court said it “also finds”) that “training its employees is part of the regular business of [CF&I],” that if CF&I did not contract out that work it would do the work itself, and that SKIM had carried adequate workers’ compensation insurance. Citing *Black v. Cabot Petroleum Corp.*, 877 F.2d 822 (10th Cir. 1989), a case involving the predecessor to section 8-41- 401, the court granted summary judgment to CF&I on the basis of section 8-41-401 as well.¹

II. Standard of Review

¶11 We review an order granting summary judgment de novo, applying the same principles that guided the district court’s determination. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 290 (Colo. App. 2009). Thus, we will affirm such an order only when the pleadings and supporting documents clearly demonstrate that no issue of material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008). In considering whether the moving party has ultimately established its entitlement to summary judgment, we must grant the nonmoving party the benefit of all favorable inferences that reasonably may be

drawn from any uncontested facts, and we must resolve any doubts as to whether a triable issue of material fact exists against the moving party. *Lombard*, 187 P.3d at 570.

III. Section 8-41-402

¶12 CF&I relies on subsection (1) of section 8-41-402, which provides in relevant part as follows:

Repairs to real property – exception for liability of occupant of residential real property. (1) Every person, company, or corporation owning any real property or improvements thereon and contracting out *any work done on and to* said property to any contractor, subcontractor, or person who hires or uses employees in the doing of *such work* shall be deemed to be an employer under the terms of articles 40 to 47 of this title. Every such contractor, subcontractor, or person, as well as such contractor's, subcontractor's, and person's employees, shall be deemed to be an employee, and such employer shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said contractor, subcontractor, or person and said employees or employees' dependents and, before commencing said work, shall insure and keep insured all liability as provided in said articles. . . .

(Italicized emphasis added.)

¶13 The upshot of this provision, construed with related provisions, is that, if the landowner is a statutory employer thereunder, and the contractor, subcontractor, or person hired to do the work carries workers' compensation insurance covering the injured party's injuries, the injured party is deemed an employee of that statutory employer, and the injured party may not seek damages from the statutory employer. See §§ 8-41-102, 8-41-104, 8-41-402(2), C.R.S. 2012.

¶14 The first question we must answer is whether, as CF&I contends and the district court concluded, an injured person need only have been "on" the landowner's property when performing work for section 8-41-402 to apply, or whether, as Mr. Krol contends, an injured person must have been both on the property and doing work "to" the property for it to apply.

¶15 This question presents an issue of statutory interpretation.²In interpreting a statute, our primary goals are to discern and give effect to the General Assembly's intent. *Hassler v. Account Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶15; *L & R Exploration Venture v. Grynberg*, 271 P.3d 530, 533 (Colo. App. 2011). We look first to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. *Hassler*, ¶15; *L & R Exploration Venture*, 271 P.3d at 533. We read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme, giving consistent, harmonious, and sensible effect to all of the statute's language. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010); *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 813 (Colo. 2008). After doing this, if we determine that the statute is not ambiguous, we enforce it as written and do not resort to other rules of statutory construction. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011); *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199, 1203 (Colo. App. 2010).

¶16 Though CF&I contends that there is "no authority" for interpreting the statute to apply only if the injured person was doing work both "on and to" the property, we cannot help but observe that the statute itself plainly includes such language. § 8- 41-402(1) ("any work done on and to said property"). Ordinarily, the use of the word "and" in a statute is intended to be conjunctive – that is, where a statute connects requirements by means of "and," both requirements must be met for the operative provision to apply. *People v. Parcel of Property*, 841 N.E.2d 928, 939-40 (Ill. 2005); see 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 21:14, at 177-79, 184, 189 (7th ed. 2009).³

¶17 The district court concluded, however, that to require that the injured person have been doing work both while on property of another and to that property would be an "absurd and unreasonable" interpretation of the statute. CF&I argues similarly. We cannot agree.

¶18 As the district court noted, there is authority for the proposition that in determining the meaning of “and” and “or” in statutes, the substitution of one for the other is permissible to avoid an absurd or unreasonable result. *E.g.*, *Waneka v. Clyncke*, 134 P.3d 492, 494 (Colo. App. 2005), *aff’d*, 157 P.3d 1072 (Colo. 2007) (*Clyncke*). But here, the district court’s interpretation does not substitute “or” for “and.” Typically, when a court reads “and” as “or,” some effect is given to both categories or requirements separated by the conjunction. See, *e.g.*, *People v. Smith*, 921 P.2d 80, 82 (Colo. App. 1996); *Smith v. Colo. Dep’t of Human Services*, 916 P.2d 1199, 1201 (Colo. App. 1996). The district court’s construction here does not give any effect to “and to”: it reads that phrase entirely out of the statute. The district court’s construction renders “to” entirely meaningless because one cannot be doing work to another’s real property (or improvements thereon) without being on the property. That construction is therefore inconsistent with the fundamental precept of statutory interpretation that we should seek to give meaning to every word or phrase in a statute. See *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000); *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 790 P.2d 827, 830 (Colo. 1990); *Colorado General Assembly v. Lamm*, 700 P.2d 508, 517 (Colo. 1985).

¶19 Further, courts have substituted “and” for “or,” and vice versa, in recognition that these terms may be used loosely, and that the use of one rather than the other may be inadvertent. *E.g.*, *Waneka*, 134 P.3d at 494 (“Where the word ‘and’ is used inadvertently and the intent or purpose of the statute seems clearly to require the word ‘or,’ this is an example of a drafting error which may properly be rectified by a judicial construction.”) (quoting Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 21:14, at 188 (6th ed. 2002)); *Thomas v. City of Grand Junction*, 13 Colo. App. 80, 84-85, 56 P. 665, 667 (1899); see also *Clyncke*, 157 P.3d at 1079 (Coats, J., concurring in the judgment) (opining that the word “and” is “notoriously ambiguous” and that its meaning must be determined by syntax and context).

¶20 We perceive no such inadvertence or mistake here, for three primary reasons.

¶21 First, the terms “on” and “to,” considered in the statutory context, clearly have different meanings (a point no party disputes).⁴ A legislature might use redundant terms inadvertently, but we think it far less likely that a legislature would use two terms with different meanings inadvertently.

¶22 Second, the General Assembly employed the phrase on two different occasions, once when it enacted the original version of section 8-41-402 and later when it amended it. The statute was enacted in 1919. Ch. 210, 1919 Colo. Sess. Laws 718-19. The phrase “on and to” was part of that enactment, in what is now subsection (1) of the statute. In 1985, the General Assembly added subsection (3) to section 8-41-402. Ch. 76, sec. 1, 1985 Colo. Sess. Laws 354. Therein, the phrase “on and to” appeared twice. (Subsection (3) was repealed in 1991. Ch. 219, sec. 8, 1991 Colo. Sess. Laws 1295-96.) In adding subsection (3), the General Assembly passed on the opportunity to broaden the statute’s application by omitting “and to” and instead chose to repeat, and thereby reaffirm, the more limiting phrase “on and to.” This sequence of events demonstrates a lack of inadvertence.⁵

¶23 Third, use of the phrase “and to” is consistent with the overall scheme of the Act. “The primary purpose of the [Act] is to provide a remedy for job-related injuries, without regard to fault. . . . The statutory scheme grants an injured employee compensation from the employer without regard to negligence and, in return, the responsible employer is granted immunity from common-law negligence liability.” *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 63 (Colo. 1988) (citations omitted); accord *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 38, 510 P.2d 891, 893 (1973).

¶24 The General Assembly has seen fit to include within the ambit of “employer” entities that, under common law, ordinarily would not be considered an injured person’s employer. *Finlay*, 764 P.2d at 64. That is not to say, however, that the concept of “statutory employer” (as an employer subject to the insurance liability and immunity provisions of the Act is referred to) includes every entity with some conceivable relationship to an injured person. “To

be afforded this immunity, an employer must be a 'statutory employer' as contemplated by the [Act]." *Id.* at 63; see *Doyle v. Missouri Valley Constructors, Inc.*, 288 F. Supp. 121, 123 (D. Colo. 1968) ("While statutory employer provisions have been liberally construed by the courts, it is not every relationship that constitutes a contract within the purview of the Act.") (applying Colorado law); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1264 (Colo. 1985); see also *Frohlick Crane Serv.*, 182 Colo. at 38, 510 P.2d at 893 ("[The Act] is not to shield third-party tort-feasors from liability for damages resulting from their negligence.").

¶25 Part 4 of article 41 of the Act contains several provisions rendering certain entities who are not "direct" employers of injured persons "statutory employers" within the meaning of the Act. Section 8-41-401, the broadest of those provisions, renders certain entities statutory employers if they contract out their work. But it applies only if the work is part of an entity's regular business, as defined by its total business operation. *Finlay*, 764 P.2d at 66-67; *Humphrey v. Whole Foods Market Rocky Mountain/Southwest, L.P.*, 250 P.3d 706, 709 (Colo. App. 2010). In determining whether work is part of the entity's regular business, the court must consider the "routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Finlay*, 764 P.2d at 67. Thus, not every type of work contracted out will render an entity a statutory employer under section 8-41-401: the nature of the work is critical.

¶26 A similar limitation applies to section 8-41-403, which limits the application of part 4 when a landowner leases real property to another entity. If the lessee is performing the landowner's regular business, the landowner is a statutory employer for purposes of part 4; but if the lessee is not performing the landowner's regular business, the landowner is not a statutory employer. See *Virginians Heritage Square Co. v. Smith*, 808 P.2d 366, 368-69 (Colo. App. 1991); *Bain v. Doyle*, 807 P.2d 1225, 1226-27 (Colo. App. 1990); *Rian v. Imperial Mun. Services Group, Inc.*, 768 P.2d 1260, 1262 (Colo. App. 1988); *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 40, 552 P.2d 1029, 1030 (1976). Thus, again, the nature of the work performed is critical.

¶27 Section 8-41-404 confers statutory employer status on an entity contracting for the performance of "construction work" on a construction site. The statute defines "construction work" as including "all or any part of the construction, alteration, or remodeling of a structure," but not including "surveying, engineering, examination, or inspection of a construction site or the delivery of materials to a construction site." § 8-41-404(5)(b). Yet again, the nature of the work performed is critical.

¶28 It is therefore clear that, in weighing policy interests implicated by extending the burdens and benefits of the Act to entities not traditionally regarded as injured persons' employers, the General Assembly has decided that the nature of the work performed is important, indeed, crucial. Its use of "and to" in section 8-41-402 is entirely consistent with that approach. Statutory employer status thereunder does not turn entirely on the fortuity of an injured party being on another's property, but depends also on what work the injured party was performing while on the property.⁶

¶29 The district court posited that reading the statute to require that the injured person have been doing work to the property would be absurd and unreasonable because that would mean, potentially, that immunity from liability would not be available in a variety of circumstances. But we perceive nothing absurd or unreasonable about the General Assembly placing such a limit on the statutory immunity (in return for which, of course, the injured party receives a guarantee of workers' compensation coverage). The statute was enacted to address particular situations, and is consistent with the nature of the work approach reflected in the statutory scheme. We are not free to second-guess that approach. Simply put, the fact the General Assembly could have chosen to apply immunity to a broader set of circumstances does not render its decision not to do so, as expressed by the plain language it chose, absurd or unreasonable.

¶30 The cases on which CF&I relies, *Thornbury v. Allen*, 991 P.2d 335 (Colo. App. 1999), and *Schwartz v. Tom Brown, Inc.*, 649 P.2d 593 (Colo. App. 1982), are distinguishable.

Neither case addressed the issue with which we are faced. Further, in *Thornbury*, the worker was supervising the cleaning of the property. Thus, the worker was involved in doing work “to” the property. 991 P.2d at 337. In *Schwartz*, the worker was operating and maintaining a gas well on the owner’s property. 649 P.2d at 734. Such work arguably fits within the statutory meaning of doing work to the property (or improvements thereon).

¶31 Therefore, we conclude, consistent with the plain language of section 8-41-402, that it applies only if the injured person was doing work while on the real property of a covered entity and to that real property (or to improvements thereon).

¶32 CF&I contends in the alternative that the undisputed facts show that Mr. Krol was doing work to its property when he was injured. The district court did not rule on this issue. Though we may affirm a court’s judgment on any ground supported by the record, *Barnett v. Elite Props. of America, Inc.*, 252 P.3d 14, 23 (Colo. App. 2010); *Zweygardt v. Bd. of Cnty. Comm’rs*, 190 P.3d 848, 851 (Colo. App. 2008), we are not persuaded that summary judgment on this basis is appropriate, on the record before us. There appears to be at least a factual question as to the nature of the work Mr. Krol was performing pursuant to SKIM’s contract with CF&I.

¶33 Accordingly, we conclude that the district court erred in granting summary judgment for CF&I based on section 8-41-402. IV. Section 8-41-401

¶34 We also conclude that the district court erred in granting summary judgment for CF&I based on section 8-41-401. As discussed, that statute provides immunity when, as relevant here, the work contracted out by the entity sought to be held liable is part of that entity’s regular business, as defined by its total business operation. *Finlay*, 764 P.2d at 66-67; *Humphrey*, 250 P.3d at 709. And in applying this test, a court must consider the “routineness, regularity, and the importance of the contracted service to the regular business of the employer.” *Finlay*, 764 P.2d at 67.

¶35 As noted, the district court granted summary judgment for CF&I based on section 8-41-401 even though CF&I had not raised that statute. Under the circumstances here, we conclude that the court erred.

¶36 So far as we can tell, no Colorado appellate court has addressed directly whether a district court has authority to grant summary judgment for a moving party for a reason that party has not raised. Federal courts have held that a court has such inherent authority. See, e.g., *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010); *Imaging Bus. Machines, LLC v. BancTec, Inc.*, 459 F.3d 1186, 1191 (11th Cir. 2006); *F.D.I.C. v. Grupo Girod Corp.*, 869 F.2d 15, 17 (1st Cir. 1989); *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150, 1154 (6th Cir. 1980). But those courts have also held that a court should not do so without giving notice to the parties of its intent to consider an issue sua sponte sufficient to provide the parties with an opportunity to argue the issue and present evidence bearing on the existence of a genuine issue of material fact. See, e.g., *Imaging Bus. Machines*, 459 F.3d at 1191; *Schwan-Stabilo Cosmetics GmbH & Co. v. Pacificlink Int’l Corp.*, 401 F.3d 28, 33 (2d Cir. 2005); *U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan Ass’n*, 873 F.2d 731, 735 (4th Cir. 1989); *Ware*, 623 F.2d at 1154; see generally 11 James Wm. Moore, *Moore’s Federal Practice* § 56.71[4] (3d ed. 2012).⁷

¶37 In *Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1998), a division of this court held that the district court had erred in granting summary judgment for a reason the movants had first raised in their reply brief supporting their summary judgment motion. *Id.* at 331-32. The division held that the nonmoving party must be put on notice of the need to present evidence concerning the issue. *Id.* at 332. In support, the division cited *Jefferson Cnty. Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 773 (Colo. 1986), in which the court declined to affirm a summary judgment for a reason the moving party had first raised in its supreme court briefs.

¶38 In accordance with these authorities, we conclude that while a court may grant summary judgment for a reason not raised by the moving party, it should not do so without first giving the parties notice and reasonable opportunity to argue the issue and present evidence relevant to the existence of a genuine issue of material fact. This rule is consistent

with notions of fairness and judicial impartiality. It also recognizes that decision-making is improved when the parties are able to make the court aware of all relevant information. And requiring such notice and opportunity avoids placing the nonmoving party in an untenable situation. As one court has said:

When a party moves for summary judgment on ground A, the opposing party need not address grounds B, C, and so on; the number of potential grounds for (and arguments against) summary judgment may be large, and litigation is costly enough without requiring parties to respond to issues that have not been raised on pain of forfeiting their position.

Titran v. Ackman, 893 F.2d 145, 148 (7th Cir. 1990).

¶39 By failing to provide Mr. Krol with notice that it was considering granting summary judgment based on section 8-41-401, the district court erred. Though there may be situations in which such an error is not prejudicial, *see Kannady*, 590 F.3d at 1170, we cannot say that this case presents one of those situations. The issues implicated by sections 8-41-402 and 8-41-401 are different, at least in this case. And Mr. Krol did not have any opportunity to present evidence pertaining to the facts relevant to the application of section 8-41-401. Among those facts are the scope of CF&I's total business operation, and, more specifically, the routineness, regularity, and importance of the training service provided by SKIM and Mr. Krol. *See Finlay*, 764 P.2d at 67. We also note that divisions of this court have held on several occasions that the question whether an entity is a statutory employer under section 8-41-401 ordinarily is one of fact. *Humphrey*, 250 P.3d at 708; *Thornbury*, 991 P.2d at 339. Mr. Krol should have the opportunity to demonstrate, if he can, that there is a genuine issue about that factual question.

¶40 The judgment is reversed. The case is remanded for further proceedings.

JUDGE BERNARD and JUDGE RICHMAN concur.

¹ Though the court did not cite section 8-41-401, the parties agree that the court ruled in CF&I's favor, in the alternative, based on section 8-41-401.

² Because we review an issue of statutory interpretation *de novo*, we give no deference to the district court's interpretation. *Associated Gov'ts of Northwest Colo. v. Colo. Pub. Utils. Comm'n*, 2012 CO 28, ¶11.

³ The authors of *Statutes and Statutory Construction* say that "and" should be given its literal, conjunctive meaning "unless it renders the statute inoperable or the meaning becomes questionable." 1A *Statutes and Statutory Construction* § 21:14, at 184 (7th ed. 2009); *see also id.* at 189 ("But ["and" and "or"] are not interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense of the statute confusing and there is no clear legislative intent to have the words not mean what they strictly should.").

⁴ The parties appear to agree that "on," as used here, refers to a status of being located on the property, and is not used in the sense of performing work to the property, as would be the case, for example, when someone is working "on a car."

⁵ Mr. Krol also relies on the heading to the statute, which begins "Repairs to real property." But that heading was not part of the statute as originally enacted. A heading first appeared in the section in the 1921 compilation of Colorado Laws, and that heading was different from the current heading. C.L. § 4424 (1921). The current heading first appeared in the 1953 version of the Colorado Revised Statutes. § 81-9-2, C.R.S. 1953. There is no indication the heading was ever added or changed by an act of the General Assembly. Thus, although the current heading supports Mr. Krol's position, we give it no weight. *See* § 2-5-113(4), C.R.S. 2012 ("section headings" created by the reviser of statutes are not "part of the legislative text," and "no implication or presumption of legislative construction is to be drawn therefrom").

⁶ CF&I is correct that section 8-41-102, which states the general rule that an employer complying with the Act is not subject to liability, “articulates a legislative decision to establish exclusive as well as comprehensive remedies for injuries that are covered by the Act.” *Travelers Ins. Co.*, 706 P.2d at 1264 (applying the predecessor to section 8-41-102). But that policy does not justify disregarding the plain language of section 8-41-402 by reading an operative phrase out of the statute. See *Snyder v. Indus. Comm’n*, 138 Colo. 523, 526, 335 P.2d 543, 545 (1959) (that the Act is to be liberally construed could not justify extending the statutorily expressed meaning of statutory employer beyond its terms); *In re M.D.E.*, 2013 COA 13, ¶16 (the principle of liberal construction does not allow a court to interpret a statute to alter its plain meaning). And, of course, reference to that policy begs the question whether an entity qualifies as an employer entitled to immunity, a matter dependent on an entity’s ability to show that the relevant facts bring the case within statutorily expressed boundaries. We cannot disregard those boundaries without legislating from the bench, and that is not our role. See *Snyder*, 138 Colo. at 526, 335 P.2d at 545 (“To regard one in [the plaintiff’s] status as a statutory employer ‘would require judicial legislation.’ . . . Such ‘judicial legislation’ would indeed operate as semantic emasculation; it would give an effect contrary to the expressed intention of the section of the Act.”) (quoting in part *Colo. Fuel & Iron Co. v. Indus. Comm’n*, 88 Colo. 573, 576, 298 P. 955, 956 (1931)); *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) (“We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate.”).

⁷ In 2010, Fed. R. Civ. P. 56 was amended to provide, consistent with then-prevailing federal court jurisprudence, that a court may grant summary judgment on grounds not raised by the moving party, or may consider summary judgment on its own, “[a]fter giving notice and a reasonable time to respond” Fed. R. Civ. P. 56(f). Our C.R.C.P. 56 is very similar to Fed. R. Civ. P. 56, as the federal rule was worded before amendments in 2010. Thus, we may look to federal court decisions applying the former version of the federal rule in determining how to apply the Colorado rule. See *Garcia v. Schneider Energy Services, Inc.*, 2012 CO 62, ¶10; *Garrigan v. Bowen*, 243 P.3d 231, 235 (Colo. 2010).

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

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