BROWN BAG SEMINAR

Thursday, March 17, 2016

(third Thursday of each month)
Noon - 1 p.m.

633 17th Street

2nd Floor Conference Room
(use elevator near Starbucks)

1 CLE (including .4 ethics)

Presented by

Craig Eley

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 through March 11, 2016

Contents

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INDUSTRIAL CLAIM APPEALS OFFICE

FEIN 84-1545878

IN THE MATTER OF THE CLAIM OF

DIVISION OF WORKERS' COMPENSATION,

Petitioner,

v.

DAMI HOSPITALITY, LLC,

Respondent Employer,

CORRECTED FINAL ORDER

Pursuant to §8-43-302(1)(b), C.R.S., the following Corrected Final Order is issued to correct an error made in the original Order that the Panel issued on January 11, 2016, which was incorrectly noted to have been sent in 2015. The ICAO order dated January 11, 2015, is hereby amended pursuant to §8-43-302(a), C.R.S. to reflect the correct year as that of 2016. We otherwise reenter the order without change to its original text as set forth below.

In our original Order, we stated that the respondents did not file a brief in support of their petition to review in this matter. This is incorrect. The respondents did, in fact, timely file their brief in support.

The respondent seeks review of an order of the Director of the Division of Workers' Compensation (Director) dated August 27, 2015, that assessed and ordered the respondent to pay a fine totaling $841,200 for failing to meet its statutory obligation to maintain workers' compensation insurance. We affirm.

This matter is before us for the second time. In order to understand the respondent's arguments on appeal and our analysis, it is necessary to recite the procedural history of this case.

On February 19, 2014, the Director issued a Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice also directed the respondent to complete and return a compliance questionnaire. The record does not disclose that the respondent submitted a response to the Director's Notice.

Thereafter, on June 25, 2014, the Director issued another Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice also directed the respondent to complete and return a compliance questionnaire. The respondent was given 20 days to respond to the Director's Notice. The Director notified the respondent that if it was in default of its insurance obligations, fines would be assessed from a minimum of $250 per day up to $500 per day for its second or subsequent violation. The respondent also was advised of and afforded the opportunity to request a prehearing conference regarding the issue of default. The record does not disclose that the respondent requested a prehearing conference.

On October 30, 2014, the Director issued his order, finding that the respondent had employed one or more persons on or after July 1, 2005, and that the respondent failed to provide satisfactory proof of workers' compensation insurance coverage and failed to satisfactorily demonstrate why it was exempt from the insurance requirements for the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014. Finding the respondent in default of its insurance obligations, the Director imposed a fine totaling $841,200.00 pursuant to §8-43-409, C.R.S. and Workers' Compensation Rule of Procedure 3-6. Fines were assessed in various amounts from August 10, 2006, through June 8, 2007, and from September 12, 2010, through July 9, 2014. Moreover, in an order dated May 24, 2006, the Director previously had found the respondent in default of its insurance obligations. The Director found that the respondent's previous period of default ended on June 9, 2006, when the respondent obtained a workers' compensation insurance policy.

The respondent appealed the Director's order, arguing, in part, that it was unaware its workers' compensation insurance coverage had lapsed because it had relied on its insurance broker to follow its instructions to obtain the required insurance coverage. In support of this argument, the respondent relied upon a letter of its insurance agent, which stated as follows:

> I think I feel part of responsibility for this matter that I did not tell about Worker's Compensation and I will be managing my client in the future. Actually, she confused Property Insurance and Worker's Compensation.

The respondent also argued that the Division of Workers' Compensation (Division) had failed to notify the respondent in a timely manner that its insurance coverage had been cancelled. The respondent further contended that the Director imposed an "absurd fine," essentially arguing that the Director had not exercised any discretion regarding the amount of the fine, and that the fine is unconstitutional.

The Director subsequently issued his supplemental order on April 21, 2015. The Director assumed the allegations contained in the respondent's appeal were true. After weighing the evidence presented by the respondent, the Director determined that it was the responsibility of the insurance carrier, not the Division, to notify the respondent that its policy had lapsed, and in any event, it is the respondent's responsibility to maintain its insurance coverage. Section 8-44-110, C.R.S. The Director also noted that pursuant to the National Council on Compensation Insurance, Inc., the respondent's 2006 workers' compensation insurance policy was cancelled for nonpayment of premium, and its 2010 policy was cancelled for "failure to comply with the terms & conditions or audit failure." Thus, the Director concluded that both of these circumstances were within the respondent's control. The Director further determined that the letter from the insurance agent failed to indicate that the respondent was unaware of the absence of a policy of workers' compensation insurance, and it did not indicate the agent failed to secure the insurance despite the request of the respondent. Also, the Director found that there is no indication in the letter that the respondent continued to pay for workers' compensation insurance even though no policy was in place. The Director further held that even if the respondent's reliance on the agent was reasonable, it still was not relieved of its obligation to maintain workers' compensation insurance under the Workers' Compensation Act (Act). The Director also decided he had no basis for addressing the constitutionality of §8-43-409, C.R.S. The Director, therefore, concluded that the respondent was in default of its insurance obligation during the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014, and ordered the respondent to pay a fine totaling $841,200.00. Section 8-43-409, C.R.S.; WCRP 3-6.

The respondent again appealed the Director's order, arguing, in part, that under §8-43-304(4), C.R.S. the Director failed to prove by clear and convincing evidence the respondent knew or reasonably should have known it was in violation of the Act, that its reliance on the advice of its insurance agent demonstrated it did not have reasonable

knowledge of the lack of insurance, and that the penalty assessed by the Director was "absurd," and the amount of the fine assessed was unconstitutional.

On July 30, 2015, we issued our order of remand. Initially, we rejected the respondent's argument that the clear and convincing standard set forth in §8-43-304(4), C.R.S. was applicable. We held that the clear and convincing standard set forth in §8-43-304(4), C.R.S. does not set forth the burden of proof governing a case involving an employer's default of its mandatory workers' compensation insurance obligations under §8-43-409, C.R.S. However, based on the respondent's allegation that the fine, as applied, was excessive and unconstitutional, we remanded the matter for the Director to consider the three factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323, 326 (Colo. App. 2005) when determining the constitutionally permissible fine to be imposed against the respondent for defaulting on its statutory obligation to maintain workers' compensation insurance. These three factors are as follows: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases.

On August 27, 2015, the Director issued his order on remand. In his order, the Director stated that the factors in *Associated Business Products* were incorporated in Rule 3-6. The Director held that the first prong of the *Associated Business Products* test, or the degree of reprehensibility of the defendant's misconduct, is contained in Rule 3-6 because it reflects the degree of reprehensibility of a second lapse of workers' compensation insurance coverage since the fine is substantially greater than that of an initial default. The Director held that Rule 3-6(D) also incorporates the second prong of the *Associated Business Products* test, or the disparity between the harm or potential harm suffered and the fine to be assessed, because it recognizes that the longer the employer is without insurance, the greater the risk that a non-insured injury will occur. According to the Director, because Colorado has no state monetary fund to pay for injuries sustained by workers whose employers lack insurance, the employee must rely solely on the limited financial resources of the uninsured employer. The Director thus held that for this reason, an employer that obtains insurance quickly in the event of a lapse of coverage minimizes the chance of having a non-insured injury, and the employer will receive a relatively low fine per day under the schedule of fines set forth in Rule 3-6(D). As to the third prong of the test under *Associated Business Products*, or the difference between the fine imposed and the penalties authorized or imposed in comparable cases, the Director held that Rule 3-6(D) creates a system by which any employer that has committed a subsequent violation is subject to the same table of fines.

The Director recognized that while the total amount of the fine can differ between employers, such difference is dependent on the length of time the employer fails to carry insurance. Importantly, in his order, the Director also incorporated the findings of fact made in his prior supplemental order dated April 21, 2015.

The respondent again has appealed. On appeal, the respondent raises many of the arguments that it previously made, and that we already addressed and rejected in our prior order on July 30, 2015. These arguments include the following: (1) pursuant to §8-43-304(4), C.R.S., the Director must prove by clear and convincing evidence that the respondent violated §8-43-409, C.R.S.; (2) the respondent did not have reasonable knowledge of its default; and (3) its offer of $3,750 is an adequate penalty assessment. Accordingly, we will not address these issues again in this order. The respondent also argues on appeal, however, that the fine imposed by the Director is a clear violation of the United States Constitution and the Colorado State Constitution, the fine imposed by the Director is not constitutionally sound because it is excessive, the General Assembly never intended to impose a fine in violation of the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution, and the Director has failed to consider the factors set forth in *Associated Business Products* when reaffirming the imposition of the $841,200 fine. With regard to its argument about the factors enunciated in *Associated Business Products*, the respondent contends that by assessing a fine under Rule 3-6(D) as written, the Director has failed to consider the facts of this case, the character of the respondent, and any harm that the default has caused. Rather, the respondent argues that Rule 3-6(D) only considers the amount of time of the default. The respondent further contends that the Director's approach with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes.

The Attorney General has not filed a Petition to Review, but instead has filed a Brief In Opposition on behalf of the Director. In the Brief In Opposition, the Attorney General argues that the Panel has erred in requiring the Director to apply the factors set forth in *Associated Business Products* when determining a constitutionally permissible fine. The Attorney General contends that the constitutional analysis set forth in *Associated Business Products* is inapplicable to §8-43-409, C.R.S. and to this case because that case instead addressed the discretionary application of penalties under §8-43-304, C.R.S., which applies to a violation for which no penalty has been specifically provided elsewhere in the Act. The Attorney General goes on to argue that since this case instead involves §8-43-409, C.R.S., and that statute mandates that the Director impose a fine on the respondent for its subsequent violation of failing to meet its statutory obligation to maintain workers' compensation insurance, the Director has no discretion to determine the amount of the fine to be imposed. Brief In Opposition at 13. The Attorney

General concedes, however, that the fine the Director is required to impose against the respondent must range between a minimum of $250 per day and a maximum of up to $500 per day. The Attorney General then contends that requiring the Director to apply the *Associated Business Products* factors would require compliance with nonexistent statutory provisions.

We disagree with the Attorney General's argument that the constitutional analysis set forth in *Associated Business Products* is inapplicable to §8-43-409, C.R.S. or to the facts here. In *Austin v. U.S.*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the United States Supreme Court ruled that the excessive fines clause is not limited in application to criminal cases. Rather, it applies in civil cases where the government seeks, at least in part, to punish a party. *See Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099-1100 (Colo. App. 1996). Thus, the Colorado appellate courts have held that a discretionary fine, such as the one applied here by the Director under §8-43-409(4), C.R.S., must pass constitutional muster. *See Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014, 1017-1018 (Colo. App. 2012) (while the ALJ is required to impose a penalty under §8-43-305, C.R.S., the ALJ has discretion to determine the amount of the penalty, provided that the amount does not exceed the legislatively enacted penalty range); *cf. Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d at 1100 (where it was mandatory to impose a penalty at a "daily rate" for insurer's continuing violation up to amount of $100 per day, the Director's fine of $10 per day did not violate excessive fine clause of Eighth Amendment).

In numerous contexts, Colorado appellate courts have identified factors a court should consider when exercising its discretionary authority. *See Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 570 (Colo. 2009); *Ingold v. AIMCO/Bluffs*, L.L.C. Apartments, 159 P.3d 116, 125-26 (Colo. 2007); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 948 (Colo. App. 2009); *Dubray v. Intertribal Bison Cooperative*, 192 P.3d 604, 608 (Colo. App. 2008)(reasonable amount of attorney fees); *RMB Services, Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo. App. 2006); *Kennedy v. King Soopers Inc*., 148 P.3d 385, 389 (Colo. App. 2006)(concerning an award of certain costs); *Clark v. Farmers Ins. Exchange*, 117 P.3d 26, 29-30 (Colo. App. 2004). As we stated in our prior order, while the opinion in *Associated Business Products* addressed a fine under §8-43-304, C.R.S., we nevertheless view the factors enunciated in that case as most applicable to the facts and circumstances presented here.

In *Associated Business Product*s, the Colorado Court of Appeals discussed the considerations necessary to the exercise of the ALJ's discretion to prevent any fine so imposed from violating the excessive fines prohibition. The Court relied on the decision

in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). That case required three criteria to be considered when fashioning a constitutionally appropriate level for a fine. These include the following: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d at 326. Because the General Assembly has charged the Director with exercising similar authority and discretion in regard to fines pertinent to §8-43-409, C.R.S., these factors must also be applied by the Director when assessing a fine here. *See In the Matter of El Nuevo Time Out Corp*., FEIN No. 01-0801734 (March 20, 2008)(recognizing consideration of three criteria announced in *Associated Business Products v. Industrial Claim Appeals Office, supra* when determining constitutionally appropriate level of a fine). Consequently, the Attorney General's argument notwithstanding, the excessive fines prohibition of the Eighth Amendment and of Article II, section 20, of the federal and state constitutions require the factors in *Associated Business Products* to be applied to determine whether the fine imposed by the Director is excessive. We also note that our July 30, 2015, order was not the first time we have remanded a penalty assessment of the Director for the reason that the assessment did not include reference to the criteria designed to avoid a constitutionally excessive fine. See, *Division of Worker's Compensation v. Silva Floor Solutions,* W.C. No. 2002-50381 (January 8, 2004) and *Division of Workers' Compensation v. Sundance Equestrian Center*, W.C. No. 2002-110238 (January 13, 2004). Accordingly, in our first order we were required to remand this matter for the Director to apply the factors in *Associated Business Products*. On remand, the Director determined that Rule 3-6 does, in fact, incorporate the applicable factors enunciated in *Associated Business Products.*

The Rules of Procedure adopted by the Director of the Division of Workers' Compensation pursuant to his authority under §8-47-107, C.R.S., may not expand, enlarge, or modify the underlying statute the rule is intended to enforce, and any rule which is contrary to or inconsistent with the statute it is enacted to enforce is void. *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). Because Rules are invalid if inconsistent with the underlying statute the Rule is designed to enforce, we must, where possible, construe the Rule consistent with the enabling statute. *Id.; Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

The Director's Rule 3-6(D) provides in pertinent part as follows:

> For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from $250/day up to $500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or *until further order of the Director*. . . . (emphasis added)

Here, based on the plain language of Rule 3-6(D), the Director's order on remand, and the Director's findings of fact from his supplemental order dated April 21, 2015, we conclude that the Director has, in fact, considered the facts of this case and exercised his discretion when imposing the fine on the respondent. As noted above, in his order on remand, the Director stated that the factors in *Associated Business Products* already have been incorporated in Rule 3-6. He held that Rule 3-6 requires a greater fine for the second violation, which reflects the degree of reprehensibility of the defendant's misconduct. The disparity between the harm or potential harm suffered and the fine to be assessed is shown in Rule 3-6(D) because the fine increases the longer the employer is without insurance, which corresponds with the greater the risk that a non-insured injury will occur. The difference between the fine imposed and the penalties authorized or imposed in comparable cases is shown in Rule 3-6(D) because the fine increases depending on the length of time each employer fails to carry insurance. Further, pursuant to Rule 3-6(D) and the Director's supplemental order dated April 21, 2015, which is incorporated in his order on remand, it is clear that the Director considered and weighed the evidence submitted by the respondent in its appeal. The Director accepted, as true[1], the allegations presented by the respondent, he weighed this evidence, considered the mitigating and aggravating factors which reflected the degree of reprehensibility, the potential harm suffered, and the differences between the fines imposed in comparable cases. The Director then issued his supplemental order or "further order" which determined that the evidence presented by the respondent in its

[1] We note that §8-43-409(1), C.R.S. was amended in 2005 to allow the Director, in his discretion, to hold an evidentiary hearing. However, that change applied only to the determination of the employer's default. It does not apply to the issue of the amount of a penalty. As we pointed out in *Division of Workers' Compensation v. Silva Floor Solutions, supra*, §8-43-207(1), C.R.S. provides that hearings are required to determine "any controversy concerning any issue arising" under the Act. This would preclude the Director from proceeding to determine the amount of the penalty in a summary judgment fashion in the face of disputed issues of fact. However, where, as here, the Director accepts the respondent's factual assertions as accurate, a hearing may not be required.

appeal did not provide him with sufficient grounds to modify the amount of the fine imposed.

For example, the Director assumed, as true, the respondent's contention that it had relied on its insurance broker to follow its instructions to obtain the required insurance coverage. Nevertheless, the Director determined that such evidence did not demonstrate that the respondent was unaware of the absence of a policy of workers' compensation insurance, and did not demonstrate the respondent continued to pay for workers' compensation insurance despite no policy being in place. Also, the Director's supplemental order determined that the respondent employed more than one person for its motel. The greater the number of employees increases the potential harm that could be suffered at the respondent's motel. It also is implicit that many of the jobs at the respondent's motel are not sedentary but, rather, involve heavier lifting, such as housekeeping and maintenance, which increases the potential of industrial injuries. These are aggravating factors that were considered by the Director when determining the appropriate amount of the fine to be imposed against the respondent. Consequently, the respondent's argument notwithstanding, we are convinced that the Director exercised his discretion under §8-43-409, C.R.S. and Rule 3-6(D) to determine a constitutionally permissible fine to be imposed.

Moreover, the respondent argues, on appeal, that Rule 3-6(D) is unconstitutional because it only considers the amount of time of the default. According to the respondent, such an approach by the Director with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes. Section 8-43-409, C.R.S. was amended in several respects in 2005 by House Bill 05-1139. Those amendments added a minimum $250 per day fine for a repeat violation of an employer's duty to maintain workers' compensation insurance. It also added to §8-43-304(1.5), C.R.S. That subsection instructed the Director to promulgate rules setting forth the circumstances pursuant to which the Director may impose a fine and "criteria for determining the amount of the fine." The Director thereupon drafted and implemented Rule 3-6. As noted above, we interpret this rule as one setting forth criteria. The Rule discusses primarily the effect the number of days in which an employer goes without insurance has on the amount of the penalty. However, the Rule also provides that a fine calculated solely on the basis of the number of days involved is made subject to modification through "further order of the Director." The Director then, may consider other mitigating and aggravating factors in the record in addition to the number of days specified in the Rule when assessing the final penalty. As discussed above, we note the Director has considered several other specific details of the respondent's case. After reviewing the impact of those factors, the Director determined the penalty calculated through reference to the number of days listed in Rule 3-6

remained an appropriate assessment. Consequently, we conclude that the respondent is mistaken in characterizing Rule 3-6 to be dependent solely on the amount of time represented by the default in coverage.

Otherwise, the respondent's remaining arguments raise a facial constitutional challenge to Rule 3.6 and to whether the Rule sufficiently addresses the constitutional requirements. We lack jurisdiction, however, to address a facial constitutional challenge to a statute or to a Rule of the Director. *See Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721 (1971); *Zarlingo v. Safeway*, W.C. No. 4-427-756 (Nov. 16, 2000) (insofar as Dr. Janssen argues the Rule is unconstitutional, we lack jurisdiction to consider the issue). The respondent's arguments are matters left for the judicial branch of government.

IT IS THEREFORE ORDERED that the Director's order dated August 27, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

1/20/2016 by KG .

DAMI HOSPITALITY LLC, 2341 EAST DARTMOUTH PLACE, ENGLEWOOD, CO, 80110 (Employer)
KRISTA MAHER, ASSISTANT ATORNEY GENERAL, STATE SERVICES SECTION, RALPH L. CARR COLO JUDICIAL CTR, 1300 BROADWAY, 6TH FLOOR, DENVER, CO, 80204 (Counsel for Division of Workers' Compensation)
THE LAW OFFICES OF DANIEL T. GOODWIN, Attn: DANIEL T. GOODWIN, ESQ., 8001 ARISTA PLACE, SUITE 400, BROOMFIELD, CO, 80021 (For Respondents)
DAMI HOSPITALITY LLC, 10993 EAST EVANS AVENUE, AURORA, CO, 80014-4721 (Other Party)
PAUL TAURIELLO, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, 633 17TH STREET, SUITE 400, DENVER, CO, 80202 (Other Party 2)
NIKKI GWIN, DIVISION OF WORKERS' COMPENSATION, COVERAGE ENFORCEMENT, 633 17TH STREET 3RD FLOOR, DENVER, CO 80202 (Other Party 3)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-980-185-01

IN THE MATTER OF THE CLAIM OF

AARON HOPKINS,

Claimant,

v.

FINAL ORDER

NORTHWEST DISTRIBUTION, INC.,

Employer,

and

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Insurer,
Respondents.

The respondents seeks review of an order of Administrative Law Judge Michelle Jones (ALJ) dated September 1, 2015, that found the claim compensable and ordered the payment of medical expenses. We affirm the order of the ALJ.

The respondents contend the claimant was injured while engaged in horseplay which represented a deviation from his work related activities.

The claimant was injured on April 1, 2015, while proceeding down a residential street accompanied by four colleagues all involved in the door to door sale of Kirby vacuum cleaners. The claimant ran up to one of the others, grabbed his hat, tripped as a result and fell under the wheel of the van which was transporting the supply of vacuum cleaners. The claimant sustained injuries to his right leg and ankle. The respondents denied liability for the claimant's injuries asserting that the claimant was an independent contractor, not an employee, and that the claimant was injured while engaged in a horseplay deviation from employment activities.

The claimant testified he had applied for a job as a vacuum cleaner salesman when he responded to an advertisement on Craigslist, an on-line commercial business exchange site. The claimant traveled to the employer's office location and completed paper work. He then attended five days of training conducted by the employer. At the conclusion of the training he was placed on a team with five other salesmen who were supervised by a

lead man. The lead drove a van slowly down residential streets while the salesmen knocked on each house door inquiring if the resident would be interested in a demonstration of a Kirby vacuum cleaner. If a demonstration was requested, the salesman would retrieve a vacuum cleaner from the back of the van and conduct the demonstration. If the salesman did not successfully sell the vacuum cleaner after the demonstration, he would replace the vacuum in the van and continue down the street to the next house. On April 1, the claimant had replaced a vacuum cleaner in the van and ran around to the front of the van, grabbed his team member's hat, and then fell in front of the van causing it to run over his right leg.

The ALJ noted the printed documents submitted by the employer contained several provisions pertinent to the claimant's status as an independent contractor. However, the ALJ found the testimony of the claimant persuasive. That testimony indicated the claimant was trained and supervised by the employer. He was assigned to a canvassing team, and the team lead was provided by the employer. The employer directed the claimant on what he was to wear and what he was to say in his demonstrations of the vacuum cleaners. The claimant was instructed what time in the morning he was to report to start his daily canvass trip. The employer selected the neighborhoods in which the canvassing teams were to operate. During a demonstration, the claimant would be required to call his lead to ask if the price of the vacuum could be negotiated to a lower amount. The claimant was required by the employer to work seven days per week, completing shifts of 12 to 14 hours per day. The claimant did not use any of his own tools and the vacuums and the van were all provided by the employer.

The ALJ also made several findings pertinent to the history and routine of horseplay activities involved in the sales canvassing efforts. The members of the team were young men in their twenties. They were found to be routinely joking with each other and performing pranks with the other team members. These included throwing snow balls, pushing others into the bushes, performing pull ups on trees, and push-ups in the middle of the street. The team lead engaged in these activities. When the claimant grabbed his team member's hat on April 1, the team was in the process of crossing the street in front of the van in order to access the next block for further canvassing. The lead would sometimes tell team members to stop joking around, but only when he thought customers might see them and object.

The ALJ found the claimant did not qualify as an independent contractor. The ALJ also determined the claimant was not engaged in a significant deviation from employment at the time he was injured.

Pursuant to § 8-40-202 (2) (a), C.R.S., any individual who performs services for pay for another shall be deemed to be an employee unless the person is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

The ALJ found the employer paid the claimant individually, provided significant training, specified the time the claimant was to arrive at work and the number of days and hours to be worked each week, the type of clothing the claimant was to wear, the location at which he was to perform the job and specified the sales had to be made exclusively through home demonstrations and by following the nine point sales instructions developed by the employer. These factors indicated to the ALJ that the employer exercised direction and control over the work activities of the claimant.

The ALJ also determined the claimant was not customarily engaged in an independent business. The ALJ relied on the Supreme Court's decision in *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P. 3d 560 (Colo. 2014), which held that a determination there was an independent business was to turn on "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2) (b) (II), but also any other relevant factors. The ALJ also pointed as an example to the decision in *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." *Id.* at 565. The ALJ noted the claimant's situation featured none of these attributes. It was surmised that the claimant was not customarily engaged in an independent business and that the respondent employer reasonably knew the claimant was not so engaged in an independent business.

The ALJ concluded the horseplay of the claimant was comingled with his work for the employer involved in the door to door sales of the Kirby vacuums. The horseplay had become an accepted part of the sales routine. The activity involved was a minor deviation during the walk from one house to another and the length of time involved in each daily canvass would be expected to encompass some amount of joking and horseplay. Because the claimant was involved in covered employment with the employer and his injuries occurred while engaged in the employer's business, the ALJ deemed the claim compensable. The respondents stipulated that if the injury was ruled compensable,

then the respondents would be liable for the medical costs incurred at the St. Anthony's Hospital. The stipulation was accepted by the ALJ.

On appeal, the respondents contend the claimant's horseplay was a substantial deviation from his conditions of employment such that the claimant's injury cannot be seen to have occurred within the course and scope of his employment. The respondents also assert the claimant's lead supervisor on his team was not an employee of the respondent employer such that any knowledge of the claimant's horseplay could not be imputed to the employer.

The ALJ relied on the discussion of horseplay as a potential deviation from the course of employment given in *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995) and in *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). In the *Lori's Family Dining* opinion the court set forth four criteria by which to gauge the horseplay activity pertinent to a finding the activity arose out of employment. In *Panera Bread* the court pointed out that only the first two of the criteria are critical. Those two suggest consideration of: (1) the extent and seriousness of the deviation; and (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of duty. The claimant argues he was engaged in a brief grab of a co-worker's hat while the group was walking in the direction of the next block they were to canvass. Because the snatch of the hat had to do with this work activity and it was a brief and insubstantial deviation, it was asserted to be similar to the claimant's playful kick found compensable in *Panera Bread*.

The ALJ agreed. The ALJ noted the incident with the hat was comingled with the work activity of walking to the next block to continue the sales activity. The activity was noted to be a momentary and an insubstantial deviation. The ALJ found the sales crew, including the crew's lead, often engaged in similar joking activities which were not prohibited by the lead. The ALJ resolved that in a situation involving a group of young men, pursuing an activity which would consume at least 80 hours of their week, it would be expected this amount of insubstantial deviation from the chores of work would be a routine part of the work activity. The ALJ found the test employed by the *Lori's Family Dining* decision compelled the finding the claimant was engaged in the activities of employment when he was injured.

Because the issues are factual in nature, they must be reviewed under the substantial evidence standard. Section 8-43-308, C.R.S... The evidence must be considered in the light most favorable to the prevailing party, and we must defer to the

ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *See Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The findings of the ALJ are supported by the testimony of the claimant and also to a large extent by the testimony of the crew lead. The claimant described the numerous joking and irreverent actions pursued by the crew members while making their door to door rounds of a neighborhood. This included the snowball fights, the tree climbing and the pushing of each other into the shrubbery. It also included the observation that the team lead was not particularly motivated to rein in this activity. This testimony constitutes substantial evidence to support the findings of the ALJ that the claimant's injury could be characterized as arising out of and in the course of the claimant's employment. § 8-41-301(1) (b) C.R.S.

On appeal, the respondents do not argue the ALJ was mistaken in concluding the claimant was not an independent contractor. Instead, they contend the claimant's team lead, Benjamin Herd, was an independent contractor. Due to Mr. Herd's status of independent contractor, the respondents maintain the ALJ mistakenly attributed knowledge of horseplay to the employer.

The respondents assert it was never shown Mr. Herd was an employee of the respondent employer. However, Mr. Herd testified he functioned as a supervisor of the claimant. Tr. at 15. The van was owned by the employer, and Mr. Herd was chosen to drive the van. Tr. at 51. He was chosen in order to train the new sales people. Tr. at 116. The claimant testified Mr. Herd was not chosen by the claimant. Tr. at 52. Mr. Herd stated the location to which he was directed to drive the van was chosen by company higher-ups. Tr. at 19. Mr. Herd indicated "we" tell the crew members what time to show up, and that "we" hire the new sales people. Tr. at 18 and 113. He did not indicate it was his decision alone. Mr. Herd stated he was paid by the employer. Tr. at 13. His pay was deducted from the crew member's commission similar to deductions made for the other expenses such as gas and pads that are paid for by the employer. Tr. at 143. Mr. Herd stated he was an independent contractor, but that statement was made when he was asked about his personal experience selling vacuum cleaners, not in regard to acting as a crew lead. Tr. at 113-15. The ALJ's implicit determination that Mr. Herd was a representative of the employer in regard to the conduct and supervision of his sales crew on April 1 is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

In addition, the ALJ's finding that the claimant was not an independent contractor would also have applied to Mr. Herd. Mr. Herd was subject to the same direction and control by the respondent employer as was the claimant. Mr. Herd's testimony also revealed he had no other job than selling Kirby vacuum cleaners for the employer. He

was not engaged in the conduct of an independent business. He would be an employee of the respondent employer as was the claimant. We find the contention of the respondents that Mr. Herd's knowledge of routine horseplay could not be attributed to the employer and that the ALJ's determination to the contrary was error, is not established by the record There is in fact, substantial evidence in the record to support this finding of the ALJ. Section 8-43-301(8), C.R.S.

We therefore find no compelling reason to disturb the ruling of the ALJ that the claimant sustained a compensable injury while engaged in covered employment with the respondent employer.

IT IS THEREFORE ORDERED that the ALJ's order issued September 1, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

2/22/2016 by RP .

RING & ASSOCIATES, P.C., Attn: BOB L. RING, ESQ., 2550 STOVER STREET, BUILDING C, FORT COLLINS, CO, 80525 (For Claimant)
RAY LEGO & ASSOCIATES, Attn: JONATHAN S. ROBBINS, ESQ., 6060 S. WILLOW DRIVE, SUITE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-972-625-03

IN THE MATTER OF THE CLAIM OF

JUNIOR LOY,

Claimant,

v.

FINAL ORDER

DILLION COMPANIES,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The respondent seeks review of a corrected order of Administrative Law Judge Mottram (ALJ) dated September 23, 2015 that ordered the claim compensable, ordered the respondent to pay temporary disability and medical benefits, and ordered the claimant to pay penalties for the late reporting of his injury. The issue endorsed for appeal involves the ALJ's order that the respondent pay the medical bills of Dr. Wade and of Dr. Martin. We affirm that order of the ALJ.

The ALJ found the claimant sustained an occupational disease affecting his right shoulder. The claimant worked as a grocery checker in the respondent's super market. The claimant noted that the activity of moving grocery items from his right to his left while scanning their prices caused and aggravated pain in his shoulder. He had seen his personal physician, Dr. Gina Martin, at the Delta Family Physicians, in regard to his shoulder for two months before he reported his injury to the employer on January 15, 2015. On January 17, 2015, the employer provided the claimant a list of two authorized physicians approved to treat him. The list instructed the claimant to pick one of the two to treat. Although the form did not call for it, the claimant checked on the form the name of Dr. John Marlin at the Delta Family Physicians. The second name on the list was that of Dr. Terry Wade.

The claimant testified he went to the Delta Family Physicians office to see Dr. Marlin but was unable to get an appointment. The claimant testified he was told by a

member of the staff that Dr. Marlin was not accepting new workers' compensation patients. The respondent's counsel objected to the admission of this statement on the basis of hearsay. The claimant testified that he then went to see Dr. Wade on January 20. Dr. Wade examined the claimant, recommended Aleve for pain and ordered an MRI exam of his right shoulder. The respondent then denied liability for the claim. On April 28, Dr. Wade noted the claim denial and advised the claimant to treat with his personal doctor until the dispute was determined. The claimant then returned to see Dr. Martin at Delta Family Physicians. She saw the claimant on five additional dates through June 25. Dr. Martin also prescribed physical therapy. The claimant attended several sessions of physical therapy through April 24.

The ALJ admitted the claimant's statement into evidence regarding Dr. Marlin's reason for declining to schedule an appointment. The ALJ ruled the statement was admissible pursuant to Colorado Rule of Evidence 803(4) as an exception to the exclusion of hearsay evidence when the hearsay statement is a statement made for the purposes of medical diagnosis or treatment. The ALJ found the claimant initially selected Dr. Marlin to treat his injury but was denied treatment for a nonmedical reason. The ALJ then noted the claimant selected the other physician offered by the respondent, Dr. Wade, and was provided treatment through April 28. The ALJ concluded Dr. Wade eventually also denied the claimant further treatment for nonmedical reasons. The choice of selection for a treating doctor was then found to pass to the claimant and he selected Dr. Martin to treat his injury. Accordingly, the ALJ authorized the treatment of Dr. Wade and of Dr. Martin between January 20 and June 25, 2015.

The respondent argues the claimant selected Dr. Marlin pursuant to § 8-43-404(5) (a) (I) (A) C.R.S. and did not follow the procedure specified in § 8-43-404(5) (a) (III) to change physicians. The respondent contends the ALJ was in error in admitting into the record the claimant's testimony regarding a statement from unknown staff in Dr. Marlin's office stating the doctor was not accepting workers' compensation patients. The respondent then argues the claimant did not establish a refusal by Dr. Marlin to treat the claimant for nonmedical reasons. As a result, the ALJ is asserted to have no basis to authorize the treatment by Dr. Wade, or that doctor's refusal to treat as a reason to authorize Dr. Martin and her treatment.

We agree CRE 803(4) does not apply to the hearsay statement offered by the claimant. The statement was not made by the claimant to a medical professional to obtain a medical diagnosis or treatment. *King v. People*, 785 P.2d 596 (Colo. 1990). However, we find the record does support the conclusion of the ALJ that the claimant appropriately selected Dr. Wade as the physician to treat him after Dr. Wade was offered

by the respondent pursuant to § 8-43-404(5)(a)(I)(A). The claimant argues he did not end up selecting Dr. Marlin but, instead, selected Dr. Wade from the list of two physicians submitted to him by the respondent. We find this to be the case.

The record shows the claimant intended to treat with Dr. Marlin but was unable to secure an appointment to see him. As a result, he then sought out Dr. Wade, the other physician offered by the respondent as an authorized physician. The claimant was successful in seeing Dr. Wade and in receiving treatment. The issue of what constitutes the 'selection' of a physician by a claimant was addressed in *Squittieri v. Tayco Screen Printing, Inc*., W.C. No. 4-421-960 (September 18, 2000). In *Squittieri*, the employer failed to refer the claimant to a treating physician. The claimant was given emergency room treatment and then went to see his personal physician, Dr. Farag. After two appointments with Dr. Farag, the claimant went to see Dr. Mitchell. The claimant insisted that the right to select the treating physician had passed to him and he had selected Dr. Mitchell. He testified he had tried to see Dr. Mitchell prior to treating with Dr. Farag, but did not do so because "it took too long." The ALJ agreed the claimant had the right to select a physician, but the ALJ held the claimant had 'selected' Dr. Farag and not Dr. Mitchell.

> The term "select" is unambiguous. *Webster's New College Dictionary* (1995) defines the term "select" as referring to the act of making a choice or picking out a preference from among several possible alternatives. Thus, in the context of § 8-43-404 (5), the claimant "selects" a physician when he demonstrates by words or conduct that he has chosen a physician to treat the industrial injury. … the evidence also supports an inference the claimant considered treating with Dr. Mitchell but, because he was not immediately available, selected Dr. Farag until he could change physicians to Dr. Mitchell. Under these circumstances, the record supports the ALJ's finding the claimant exercised his right of selection by commencing treatment with Dr. Farag, not Dr. Mitchell, and this finding supports the ALJ's order denying medical

> benefits for the treatment by Dr. Mitchell and his referrals.

Similarly, in *Tidwell v. Spencer Technologies*, W.C. No. 4-917-514 (March 2, 2015), the employer also failed to refer the claimant to a physician. The claimant went to see his personal physician at a Kaiser Permanente clinic. He later sought to have Dr. Yamamoto designated as the treating doctor.

> The panel, however, has previously recognized that in the context of §8-43-404(5), the claimant "selects" a physician when he demonstrates by words or conduct that he has chosen a physician to treat the industrial injury. *Squitieri, supra*. The claimant in this case testified that he sought medical care from Kaiser Permanente and was treated by physicians at Kaiser for his industrial injury. Tr. at 29. We, therefore, agree with the ALJ's finding that the claimant "selected" Kaiser Permanente as the authorized treating physician.

Here, the claimant also sought to treat with Dr. Marlin, but he did not ever see Dr. Marlin. Rather, he obtained an appointment with Dr. Wade and treated with him. This record supports the ALJ's finding that the claimant initially selected Dr. Marlin, but was unable, for whatever reason, to treat with him. Accordingly, the ALJ then found the claimant 'selected' Dr. Wade to treat him. Because the claimant actually obtained treatment from Dr. Wade, the ALJ's finding that Dr. Wade was 'selected' is supported by substantial evidence in the record. Consistent with the holdings in *Squittieri* and *Tidwell*, the claimant demonstrated by his actual conduct in undergoing treatment with Dr. Wade that he had made his selection.

Both parties contend the ALJ was then in error when he concluded Dr. Wade denied further treatment in April, 2015, for nonmedical reasons which allowed the claimant to select Dr. Martin as a new treating physician. We agree the ALJ's findings of fact do not support this conclusion.

The respondent asserts the parties stipulated at the August 19, 2015, hearing that the respondents designated a Dr. Tipping to treat the claimant. This was said to have occurred at the point the respondents learned that Dr. Wade was no longer personally

providing the claimant treatment. The respondent relies on decisions in *Gale v. United Parcel Service*. W.C. No. 4-606-010 (June 16, 2005), and in *Yeck v. Industrial Claim Appeals Office*, 996 228 (Colo. App. 1999), which hold that the respondent insurer retains the right to authorize an additional physician to provide care forthwith upon their receipt of knowledge that the previous designated doctor is now refusing to provide necessary care for nonmedical reasons. Although not referenced by the parties, we note that effective July 1, 2014, § 8-43-404 was amended by the addition of a subsection (10). Section 8-43-404(10) (b) provides that an injured employee may send an insurer a written notice asking for designation of a new doctor. The notice must assert that an authorized physician has refused to provide treatment for nonmedical reasons. The insurer (including a self-insured employer) has 15 calendar days after receipt of the notice to designate a new authorized physician. Such written notice was not provided in this case.

However, the claimant points out that the contention of the respondent does not apply here (nor would the amendment to § 8-43-404(10) (b)) because Dr. Wade did not refuse to treat. Instead, Dr. Wade made a specific referral to Dr. Martin to treat the claimant. Dr. Martin therefore became authorized through her inclusion in an authorized chain of referral. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). The claimant's exhibit 2 includes the April 28, 2015, note written by Dr. Wade at the point of his last exam of the claimant.

> Discussion held concerning his dilemma and advised him to follow up with his family doctor for now since his workers' compensation claim had been denied.

In his findings of fact, ¶ 16, the ALJ found:

> Dr. Wade's notes include a note on April 28, 2015 that indicate Dr. Wade had a discussion with claimant and advised him to follow up with his family doctor for now since his workers' compensation claim had been denied.

This finding by the ALJ indicates that while Dr. Wade declined to personally continue to treat the claimant, he did make a referral to the claimant's family doctor, Dr. Martin, to provide necessary treatment. This included Dr. Wade's specific recommendation for an MRI study of the claimant's shoulder. Dr. Wade's previous notes

reveal he was familiar with Dr. Martin's diagnosis of the claimant and of her prior directions for treatment. This finding of the ALJ therefore, is based on substantial evidence in the record. We only depart from the ALJ's legal conclusion that Dr. Martin became authorized because Dr. Wade refused to treat for nonmedical reasons. Instead, the ALJ's finding of fact in ¶ 16 compels the legal conclusion that Dr. Martin became authorized through a referral to treat from Dr. Wade. *See*, *Morin v. Ace Hardware*, W.C. No. 4-906-748 (May 6, 2014). As a result, neither the authorization of Dr. Tipping by the respondent nor the application of § 8-43-404(10)(b) affects the ALJ's order to require the respondents to pay for Dr. Martin's dates of treatment and her referral for physical therapy.

IT IS THEREFORE ORDERED that the ALJ's corrected order issued September 23, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

2/19/2016 by RP .

WITHERS SEIDMAN RICE & MUELLER P.C., Attn: SEAN E.P. GOODBODY, ESQ., 101 S 3RD STREET, STE 265, GRAND JUNCTION, CO, 81501 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: JEFF FRANCIS, ESQ., 1401 17TH STREET, STE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-940-803-01

IN THE MATTER OF THE CLAIM OF

ALEX D MILLER,

Claimant,

v.

ORDER

UNITED INSURANCE GROUP,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Broniak (ALJ) dated August 28, 2015, that determined the claimant was an employee rather than an independent contractor, and that entered a general award of workers' compensation benefits. We dismiss the petition to review without prejudice.

The issues presented for determination were whether the claimant sustained a compensable injury and whether the claimant was an employee of the respondent or an independent contractor. Prior to the commencement of the hearing, the claimant filed an "unopposed motion to withdraw medical benefit issue without prejudice." This motion was granted on September 5, 2014.

The matter proceeded to hearing on November 10, 2014, and on December 15, 2014. After the hearing, the ALJ found that the claimant executed a contract on September 9, 2009, to become a "Career Agent I" for the respondent. The claimant's initial responsibilities included selling Medicare supplement insurance plans and other insurance products. In March 2010, the respondent promoted the claimant to District Sales Manager which resulted in additional responsibilities. The District Sales Managers, including the claimant, signed a separate Independent Contractor Agreement which outlined the compensation and production requirements for the District Sales Manager position. The claimant signed this agreement on March 11, 2011.

The respondent asserted that the claimant electronically signed another contract in July 2012 entitled New Agency Contract. The ALJ found the claimant was subject to this New Agent Contract which was signed on July 5, 2012. However, the ALJ found the contract failed to create a rebuttable presumption of an independent contractor relationship between the claimant and the respondent pursuant to §8-40-202(2)(b)(IV), C.R.S.

On January 2, 2014, the claimant was involved in an automobile accident near Fort Lupton, Colorado. The claimant was on his way to Arvada for a 1:00 p.m. appointment with a potential client. Prior to the accident, the claimant had gone to the Fort Lupton post office to mail documents to the respondent pertaining to another client. The claimant sustained serious injuries, including a broken left femur, right ankle dislocation, left rotator cuff shoulder injury, left knee injury, and traumatic brain injury, including a brain bleed and vision impairment. The claimant has undergone multiple surgeries on his right leg and additional surgeries are anticipated. The claimant was hospitalized for six months as a result of his injuries and his medical bills exceed $2,500,000.

After weighing the conflicting evidence presented by both parties, the ALJ ultimately determined that the claimant was an employee of the respondent and not an independent contractor. The ALJ held that after balancing all the factors enumerated in §8-40-202(2)(a), C.R.S., and after considering the nature of the relationship between the claimant and the respondent, the respondent had failed to overcome the presumption that the claimant was an employee under the Workers' Compensation Act. She also determined that the claimant sustained a compensable incident arising out of and during the course and scope of his employment. The ALJ entered a general award of workers' compensation benefits.

On appeal, the respondent raises several arguments as to why the ALJ erred in determining that the claimant was an employee of the respondent. We, however, have no jurisdiction to address the respondent's arguments.

Section 8-43-301(2), C.R.S. provides that a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review. . ." It is well settled that orders which do not require the payment of benefits or penalties, or deny the claimant any benefit or penalty, are interlocutory and not subject to immediate review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989). Further, an award must determine the amount of benefits to be

awarded before it may be considered final and reviewable. *United Parcel Service v. Industrial Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999).

Here, the ALJ's order determined that the claimant was an employee of the respondent rather than an independent contractor. The order generally awards workers' compensation benefits to the claimant. As noted above, the issue of medical benefits was withdrawn prior to the commencement of the hearing. As such, the ALJ's order does not award any medical benefits and reserves all unresolved issues for future consideration. As such, the ALJ's order is not final and reviewable. Consequently, we dismiss the petition to review without prejudice for lack of a final, reviewable order. *See* §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the respondent's petition to review the ALJ's August 28, 2015, order is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

2/25/2016 by RP .

BELL & POLLOCK, PC, Attn: ROBERT J. LEONARD, ESQ, 5660 GREENWOOD PLAZA BLVD., SUITE 220, GREENWOOD VILLAGE, CO, 80111 (For Claimant)
WHITE AND STEELE, PC, Attn: KEITH D. ORGEL, ESQ & ROBERT H. COATE, ESQ, DOMINION TOWERS, NORTH TOWER, 600 SEVENTEENTH STREET, SUITE 600N, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-939-901-03

IN THE MATTER OF THE CLAIM OF

ANTHONY MORRISON,

Claimant,

v.

FINAL ORDER

ROCK ELECTRIC, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 24, 2015, that determined the claimant's injury was not sustained in the course and scope of employment and denied benefits. We affirm.

This matter went to hearing on the issues of compensability, medical and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for the employer as an electrician. The claimant testified that he drove his personal vehicle to jobsites to perform electrical duties and he also sometimes used his truck during the course of the day to travel between jobsites and purchase material from Home Depot.

Dakota Carter also worked for the employer as an electrician apprentice. Carter's car was not working during early to mid-January 2014 so he needed rides to the jobsite. On the evening of January 14, 2014, Carter contacted the claimant by text message to confirm a possible ride to the jobsite. The claimant responded that he could give Carter a ride but sent a text to the owner of the employer, Rob Burek, stating "so I'm picking up Dakota in the morning. Am I supposed to take him with me.(*sic)*" Burek responded to the claimant that "He [Dakota] just texted me. If you want he can go with you." The claimant then told Carter that he had just gotten off the phone with Burek and confirmed that he would be driving Carter to work. The claimant and Carter then exchanged text messages about the pick-up location.

The claimant had to deviate from his typical route to pick up Carter. The claimant drove Carter to the jobsite on January 15th and 16th and he also drove to Home Depot and at least one other jobsite on January 15-16th. On January 17th, the claimant was traveling to pick up Carter and was involved in a motor vehicle accident at approximately 6:30 am. The claimant was rear-ended and suffered numerous injuries. The claimant received medical treatment and was prohibited from working because of his injuries.

The ALJ found that the claimant and Carter had an arrangement whereby Carter paid the claimant $15.00 for transportation to the jobsite and that the employer did not care how or if Carter got to work. The ALJ also credited Burek's testimony that the employer does not compensate employees for driving their personal vehicles to work and that no employee has ever included "travel time" in his job description on a time sheet. Burek also testified that he has never been involved in how employees get to and from work and has never reimbursed employees for gas, travel or associated expenses for getting to and from jobsites. Burek also explained that the text message he sent to the claimant simply meant that the claimant could take Carter to work if he wanted to and that he had enough employees on his jobsites and that he would not have incurred a detriment if Carter was not at work the week of January 14, 2014.

Based on these findings the ALJ determined that the claimant's travel was not contemplated by the claimant's employment contract. The ALJ specifically noted that the employer did not require the claimant to use his automobile in order to work and the claimant's vehicle was not used to perform job duties and did not confer a benefit to the employer beyond his mere arrival at work. The ALJ, therefore, denied and dismissed the claimant's claim for benefits.

On appeal the claimant argues that the ALJ erred in his application of the factors set forth in *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). The claimant contends the ALJ's finding that he used his vehicle to travel to jobsites and to make trips to Home Depot mandates a conclusion that that the travel was contemplated by the employment contract. The claimant also argues that there is little evidence to support the assertion that Carter paid the claimant to drive him to work. We are not persuaded that the ALJ committed reversible error.

An injury must arise out of and in the course of the claimant's employment to be compensable. Section 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (Colo. 1967). However, there is an exception when

"special circumstances" create a causal relationship between the employment and the travel beyond the sole fact of the employee's arrival at work. *Madden v. Mountain West Fabricators, supra.*; *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989).

In *Madden,* the court listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. These factors are: 1) whether the travel occurred during work hours; 2) whether the travel occurred on or off the employer's premises; 3) whether the travel was contemplated by the employment contract; and 4) whether the obligations or conditions of employment created a "zone of special danger." *Id.* at 864.

The question of whether the claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Staff Administrators Inc., v. Reynolds*, 977 P.2d 866 (Colo. 1999); *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978). The ALJ's factual determinations must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

The pertinent inquiry at issue here is whether the travel was contemplated by the employment contract. The claimant’s arguments notwithstanding, the ALJ reasonably inferred that under the facts presented here, the travel was not contemplated by the employment contract because it was the claimant’s own choice to pick up Carter and the travel agreement was between them and not with the employer. The ALJ also found that the claimant’s use of his personal vehicle did not confer a benefit to the employer and it was his decision to use his personal vehicle to travel to another jobsite or go to Home Depot.

In *Madden* the claimant was injured in a motor vehicle accident while traveling from his home in Grand Junction, Colorado to a construction site in Rifle, Colorado. The accident occurred approximately one hour before the claimant was to begin his duties as a construction worker, and the claimant was not earning wages or paid mileage expenses to drive to work. Although the employer required the claimant to get to the work site, the court concluded that travel was not contemplated by the employment contract because Madden was free to car pool or use any method of transportation to get to the job site, and once Madden arrived at the job site he was not required to use his own vehicle to perform his job duties. Moreover, the court held that Madden's travel on the day of the injuries did not confer a benefit on the employer apart from Madden's arrival at work. *Id.*

at 866. Therefore, the court held that Madden's injuries while driving to work were not compensable.

Here, as in *Madden,* the ALJ found the claimant was injured during travel that did not occur during work hours and was not on the employer's premises. Nor was the claimant earning a wage at the time of the injuries, paid for travel or provided a vehicle by the employer. Further, the claimant was not required to use a personal vehicle to get to work and was free to use any transportation method. *Sanchez v. Accord Human Resources*, W.C. No. 4-551-435, 4-552-982 (May 19, 2003). As found by the ALJ, the claimant's job was to perform electrician duties at a designated jobsite. The claimant may have chosen to use his vehicle to travel to jobsites and make trips to Home Depot, but the ALJ found that the claimant's job did not require him to do so. The employer witness testified that employees are not compensated for travel time and it is up to them how they get to a job site. Tr. at 157. The claimant similarly chose to give Carter a ride to work and picking up Carter was not compensated by the employment contract. Therefore, under the factors listed in *Madden,* the claimant failed to demonstrate a nexus between his injuries and his employment. *Hall v. Western Summit Construction, Inc*. W.C. No. 4-689-120 (November 2, 2007)(claim not compensable where claimant injured transporting co-workers to work).

The claimant contends that *Rieks v. On Assignment Inc.*, W.C. No. 4-921-644 (August 12, 2014) and *Norman v. Law Offices of Frak Moya W.C. No 4-919-557* (April 23, 2014), are analogous to the facts of the present case and compel a different result. In both of these cases the panel held that where the contract of employment required the claimant to transport his personal vehicle to the employer's premises or jobsites for the use during the day, an injury occurring to the claimant in the act of transporting that vehicle initially to the jobsite in the morning arises out of the employment and is compensable. However, these cases are distinguishable from the facts of the present case. In *Rieks* and *Norman,* the claimant's use of a vehicle was required. Here, in contrast, the ALJ found, with record support, that the claimant's use of a vehicle was not required on the jobsite or to perform the claimant's electrician duties.

Although the evidence may have been susceptible to different inferences, we cannot say that the ALJ erred in his interpretation of the evidence. There is conflicting evidence in the record and it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). In view of the employer

witness testimony, we cannot say that the claimant has produced such evidence here. Nor do we perceive any error in the ALJ's finding that Carter was paying the claimant to transport him to the jobsite. The existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Because the ALJ's findings are supported by substantial evidence and those findings, in turn, support the ALJ's order, we have no basis to disturb the order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated July 24, 2015, 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

2/22/2016 by RP .

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY BLVD, DENVER, CO, 80230 (Insurer)
THE ELLIOTT LAW OFFICES, Attn: MARK D ELLIOTT, ESQ./ALONIT KATZMAN ESQ, 7884 RALSTON ROAD, ARVADA, CO, 80002 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN, Attn: LISA SIMONS, ESQ, 1401 17TH ST., STE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-614-319-07

IN THE MATTER OF THE CLAIM OF

BEVERLY OLDANI,

Claimant,

v.

FINAL ORDER

HARTFORD FINANCIAL SERVICES.,

Employer,

and

HARTFORD FIRE INSURANCE COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated October 15, 2015, that denied her request for Botox injections. The Respondents appeal the same order because the ALJ failed to acknowledge their request to extinguish their liability for medical benefits after the date of maximum medical improvement (MMI). We affirm the order of the ALJ and deny both appeals.

The claimant had worked for the respondent employer as a litigation consultant until February of 2006. In that capacity the claimant was diagnosed in April, 2004, as suffering from carpal tunnel syndrome (CTS) as a result of her work activities. The claimant was found to be at MMI on April 15, 2007, by a Division Independent Medical Examiner (DIME). The DIME physician concluded the claimant suffered from bilateral CTS myofascial neck pain and carpal metacarpal arthropathy. The respondents filed a Final Admission of Liability on October 1, 2007. The Final Admission allowed for the provision of maintenance medical benefits after the date of MMI.

On April 3, 2008, the parties negotiated a full and final settlement. A provision of the settlement recited that "… the Respondents retain their responsibility to pay all authorized, reasonable/necessary medical care causally related to the industrial injury." After the settlement, the claimant underwent bilateral carpal tunnel release surgeries, a pronator release surgery on her right arm and a radial and pronator release surgery on her left. As of 2015, the claimant was receiving treatment in the form of prescriptions for

Cymbalta, Baciofen and Flexor patches. She also received Botox injections every three months, dry needling treatment, pool therapy and massage therapy.

In December, 2014, one of the claimant's authorized physicians, Dr. Machanic, reviewed a recent EMG study and suggested the claimant had developed a new disease process in the form of axonal nerve problems which was in addition to her previous work related conditions. He noted the new condition had a component of peripheral neuropathy due to metabolic processes such as diabetes or other vitamin deficiencies. Another of the claimant's authorized physicians, Dr. Villims had begun administering Botox injections to control the claimant's pain relative to thoracic outlet syndrome, carpal tunnel syndrome and peripheral nerve entrapments. On February 12, 2015, Dr. Villims submitted a one sentence request for Botox trigger point injections to the respondents. The respondents had the request reviewed by Dr. Roth and submitted a denial of the request based on that review on February 12, 2015. Also on that date the respondents filed an application for hearing. The application endorsed for hearing the specific issue of the request for Botox injections and the general issues of the reasonableness of the medical treatment and the treatment's relation to the work injury. The claimant added the issue of penalties due to an alleged violation of Rule 16-10 (E) and (F) (unreasonable delay of a prior authorization request) and for costs pursuant to § 8-42-101(5) C.R.S.

A hearing was convened on June 10, 2015. Testifying at the hearing was the claimant and Dr. Machanic. The deposition testimony of Dr. Pitzer, Dr. Roth and Dr. Machanic was submitted subsequent to the hearing. In his order of October 15, 2015, the ALJ ruled the request for Botox injections was not related to the claimant's work injury. Instead, he determined the injections were required to treat an underlying rheumatologic condition that affects a widespread axonal dysfunction of the claimant's nerves and was not caused by her 2004 work injury. The request for authorization of the injections was denied. The ALJ also denied the claimant's request for penalties.

On appeal, the claimant contends the ALJ was in error in finding the claimant had not maintained her burden of proof to establish the Botox injections were reasonable and also caused by the work injury. The claimant also argues there is insufficient evidence in the record to conclude she suffers from rheumatoid arthritis. The respondents assert the ALJ committed error by declining to entertain their request to terminate all post MMI medical benefits.

I.

The claimant notes that thoracic outlet syndrome was stipulated by the respondents in the 2008 settlement to be a work related condition. She points to the

testimony of Dr. Machanic that Botox injections are an appropriate treatment for that condition. The claimant also asserts that Dr. Machanic successfully rebutted the testimony of Dr. Pitzer that the long term application of Botox injections leads to an accumulating toxic effect and weakens the patient's muscles. The claimant was noted to have testified that the Botox injections provided her pain relief for her thoracic outlet syndrome. She maintains Dr. Pitzer was not aware the Botox injections were administered in regard to the claimant's thoracic pain. Finally, she observes there is no evidence in the record to indicate she suffers from a rheumatologic condition.

The ALJ made findings of fact in reference to numerous pieces of testimony contained in the record. He found the statements of Dr. Pitzer and of Dr. Roth to be persuasive. Dr. Pitzer noted in his April 20, 2015, report that the Botox injections are being provided to treat myofascial pain and that the medical records do not demonstrate the injections lead to any improvement in the claimant's condition. Neither Dr. Pitzer nor Dr. Roth conclude the claimant has rheumatoid arthritis. However, Dr. Roth noted the claimant testified at the hearing, (Tr. at 45), that she has received treatment for a diagnosis of psoriatic arthritis and was prescribed Humira medication for that condition. Dr. Roth explained psoriatic arthritis is a rheumatologic disorder and functions as a chronic inflammatory disease. Such a malady can contribute to the axonal neuropathy Dr. Machanic found documented by the December, 2014, EMG he conducted. Dr. Roth stated the medication prescribed to treat that condition can cause or aggravate axonal neuropathy. Dr. Roth also noted that when a patient suffers from psoriatic arthritis it is common to see chronic diffuse myofascial disorders. The Botox injections, he believed, are aimed at treating those myofascial pain complaints. Dr. Pitzer also observed that the treatment represented by Botox injections were not only responsible for the side effect of muscle weakness, but, in the claimant's case, failed to cause functional improvement in her condition. He noted the claimant's response to Botox injections was not consistent with the fact that those injections do not provide instant relief. That however, was the testimony of the claimant. Dr. Pitzer concluded the injections were actually providing an effect similar to a placebo. This evidence was adopted by the ALJ in paragraphs 16 through 23 of the ALJ's findings of fact.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337

(Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.d. 1182 (Colo. App. 1990). However, the ALJ is not held to a crystalline standard in articulating his findings, and we may consider findings which are necessarily implied by the ALJ's order. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Initially, to the extent the claimant argues the ALJ erred in allowing Dr. Roth to offer testimony regarding causation, we do not agree. Even if the respondents are obligated to pay ongoing medical benefits after MMI, they always remain free to challenge the cause of the need for continuing treatment and the reasonableness and necessity of specific treatments. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997)*; see also Martin v. El Paso School District No. 11*, W.C. No. 3-979-487 (June 6, 2012)(settlement agreement did not preclude respondents from challenging or disputing medical benefits and treatment since the terms unambiguously allowed respondents to contest any treatment or payment of medical bills). If the claimant's contention is that the settlement agreement bars the respondents from opposing a medical treatment on the basis that it is designed to treat thoracic outlet syndrome, which was a diagnosis accepted by the respondents in the settlement agreement, her objection would not apply to this record. Dr. Roth and Dr. Pitzer testified Botox injections were nor prescribed to treat thoracic outlet syndrome. Their analysis was that the Botox treatment was aimed at controlling an inflammatory disease process

that was responsible for the deterioration of the claimant's nerve function. The rheumatoid disease, which included psoriatic arthritis and the medication to treat it, were said to lead to myofascial and fibromyalgia disorders which are the targets of the Botox injections Relying on the testimony, reports and opinions of Dr. Roth and Dr. Pitzer, the ALJ resolved that the Botox injections requested by Dr. Villims were not related to the claimant's work injury of 2004. The ALJ surmised the claimant suffered from a widespread axonal dysfunction of her nerves which was not caused or aggravated by her work exposure or to her 2004 occupational disease. The medical evidence from Dr. Roth and Dr. Pitzer represents substantial evidence to support the findings of the ALJ. Section 8-43-301(8), C.R.S. As a result, we perceive no persuasive reason to question the ALJ's findings or conclusions in this regard.

II.

The respondents appeal the refusal of the ALJ to rule on their request that their further obligations to provide maintenance medical benefits subsequent to the date of MMI (Grover meds) be concluded. At the outset of the June 10, 2015, hearing in the claim, the respondents' counsel stated the respondents were not only resisting the request for Botox injections, but they were asking for a cessation of their responsibility to continue to provide any medical treatment at all. The respondents asserted that because all the treatment the claimant was currently receiving was determined by Dr. Roth and Dr. Pitzer to be unrelated to the 2004 work injury, the respondents should be found absolved of the need to pay for any further medical treatment. The claimant was noted by her counsel to be receiving treatment in the form of medications, including Cymbalta, Baclofen Flexor patches and topical cream. The claimant also received dry needling therapy, pool therapy and massage therapy. The claimant objected to the respondents' issue being considered because it was not raised in an application for a hearing or in any previous motion. The claimant asserted the respondents had the burden of proof on the issue because they were either amending their Final Admission of Liability or reopening the 2008 settlement agreement. Accordingly, the claimant argued they also had the responsibility to plead the issue. The issue of causation in regard to the Botox injections was characterized by the claimant as distinct from the issue of terminating all current and future medical benefits in her claim.

Following the hearing and after the parties submitted their post hearing written arguments, the claimant moved to strike the issue of withdrawal of the final admission regarding maintenance medical benefits. The claimant reiterated as a basis for the motion that neither the issue of modification of the Final Admission nor a petition to reopen the settlement was ever raised by the respondents prior to the June 10 hearing. The

respondents answered that they had endorsed the issue of causation in their pleadings and that it was disclosed in their discovery responses. They also argue that the ALJ ruled prior to the June 10 hearing that they could proceed to defend on the basis that the current treatment was not causally related to the 2004 work injury. The ALJ however, ruled in the claimant's favor on October 7 and struck the issue from consideration. The ALJ did not deal with the issue further in his October 15, 2015, Findings of Fact, Conclusions of Law and Order.

The hearing file contains the respondents' application for hearing as well as their Case Information Sheet. Neither features a reference to a request to withdraw liability for Grover medical benefits or to reopen the 2008 settlement. There is no copy of discovery materials in the file which mentions the issue.

The 2008 settlement agreement contains two statements pertinent to maintenance medical benefits. Paragraph (9) (i) provides that the claimant "is not waiving any reasonable and necessary medical" benefits. Paragraph (11) specifies that "… the Respondents retain their responsibility to pay all authorized, reasonable/necessary medical care causally related to the industrial injury." While the former clause in paragraph (9) would mean the settlement is not taking a position in regard to Grover medical benefits, the latter clause in paragraph (11) is an explicit agreement by the respondents to provide those benefits. Accordingly, the respondents are required by § 8-43-303(1) to reopen the settlement in order to eliminate their obligation to provide reasonable and related medical benefits. In order to do so they must establish the settlement was concluded due to fraud or a mutual mistake of a material fact.

Our review of the ALJ's file does not reveal either that the issue of withdrawing liability for Grover medicals was successfully endorsed as an issue for hearing or that there was presented evidence of fraud or a mutual mistake at the time of the settlement on which an ALJ could rely to grant a reopening. We do not find error in the ALJ's striking of the issue to end the respondents' responsibility to continue to provide all medical treatment in the future. Instead, they reserve their ability to contest specific medical treatment recommendations on the basis they are not reasonable or related. The respondents may also initiate new proceedings in the future to address their continuing obligation for medical benefits contingent on the requirement that they provide sufficient advance notice of the issue.

IT IS THEREFORE ORDERED that the ALJ's order issued October 15, 2015, is affirmed and the appeals of both the claimant and the respondents are denied.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

3/9/2016 by KG .

THE BISSET LAW FIRM, Attn: JENNIFER BISSET, ESQ., 1720 S. BELLAIRE, SUITE 500, DENVER, CO, 80222 (For Claimant)
THOMAS POLLART & MILLER LLC, Attn: BRAD J. MILLER, ESQ., 5600 S. QUEBEC ST., STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

15CA1347 Archuletta v. ICAO 03-03-2016

COLORADO COURT OF APPEALS

Court of Appeals No. 15CA1347
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-951-507

Arnold Archuletta,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Concrete Frame Associates Inc., and American Zurich,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE FOX
Taubman and Miller, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 3, 2016

McDivitt Law Firm, Nicole Smith, Colorado Springs, Colorado; The Elliott Law Offices, P.C., Mark D. Elliot, Alonit Katzman, Arvada, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Thomas Pollart & Miller LLC, Brad J. Miller, Greenwood Village, for Respondents Concrete Frame Associates Inc. and American Zurich

In this workers' compensation action, claimant, Arnold Archuletta, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which set aside the portion of an administrative law judge's (ALJ's) decision granting him temporary total disability (TTD) benefits. The Panel determined that claimant was not entitled to TTD benefits because his "attending physician" had released him to full duty work. We set aside the Panel's decision and remand the case with directions to reinstate the ALJ's order.

I. Background

Claimant worked as a carpenter for employer, Concrete Frame Associates, Inc. On a very windy day in February 2014, claimant's supervisor instructed him to secure materials, such as plywood, that could be blown by the wind. Claimant picked up a piece of plywood to secure it, but the wind immediately caught the plywood, causing claimant to "slid[e] into a steel beam." His knee hit "the edge of the beam and [he] pretty much kind of like blacked out for a few minutes." He sustained lacerations to his knee that required suturing at the emergency room.

The next day, claimant visited Premier Urgent Care for follow-up treatment. The physician imposed temporary restrictions and released him to modified duty. But, by March 5, the attending physician released him to full work duty with no restrictions. The physician reiterated this opinion in subsequent reports. On May 21, the attending physician determined claimant had reached maximum medical improvement (MMI) with no impairment or restrictions, and again released him to full duty. Based on the attending physician's MMI report, employer filed a final admission of liability (FAL).

Despite being released to full duty, claimant maintained that he was unable to work anything but light duty because of his injury, which his foreman permitted him to do. He was laid off one week after reaching MMI because, he said, he was "hurt on the job," could "no longer perform [his] duties," and "was on light duty."

Claimant therefore requested a division-sponsored independent medical examination (DIME) to challenge the attending physician's MMI finding. The physician who performed the DIME concluded claimant was not at MMI. In addition, the DIME physician noted: "In consideration of his long professional career

without difficulty, the inciting event on 02/24/2014 resulted in a dramatic change to his functional capacity for gainful employment and deserves further management."

After conducting a hearing, the ALJ awarded claimant TTD benefits. The ALJ found that claimant was unable "to perform his full job duties as a result of his industrial injury." The ALJ also noted that claimant understood "that he was laid off because his employer didn't have any light duty and he was unable to perform full duty work." The ALJ concluded that claimant established that "his wage loss is directly attributable to his industrial injury," entitling him to TTD benefits commencing on the day he was laid off, May 28, 2014.

On review, though, the Panel held that the ALJ had misapplied the governing law. Citing *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995), the Panel explained that under section 8-42-105(3)(c), C.R.S. 2015, once a claimant has been released to full duty work by his attending physician, as claimant had been here, TTD benefits must cease and the ALJ was not free to award them to claimant. Claimant now appeals.

II. Application of Section 8-42-105(3)(c)

Claimant first contends that the Panel misconstrued the statute. He argues that section 8-42-105(3)(c) cannot apply to him because that statute applies to the termination of benefits. In his situation, however, no benefits had started when the attending physician released him to work. Therefore, he reasons, the Panel should have analyzed his case under sections 8-42-103, C.R.S. 2015, and 8-42-105(1), which apply to the commencement of benefits. Because those sections do not expressly bar the commencement of TTD benefits if an attending physician has released claimant to full duty, claimant contends his TTD benefits should not have been foreclosed by the Panel. We agree.

A. Statutes at Issue

Section 8-42-103 provides for disability benefits. It states:

> (1) If the injury or occupational disease causes disability, a disability indemnity shall be payable as wages pursuant to section 8-42-105(2)(a) subject to the following limitations:
>
> (b) If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work.

§ 8-42-103(1)(b). Under the Workers' Compensation Act (Act), then, "a claimant is entitled to an award of TTD benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days." *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). But, the Act also specifies that disability benefits "shall cease upon the occurrence of any of the events enumerated in subsection (3) of this section." § 8-42-105(1). That subsection mandates the conditions and occurrences which terminate TTD benefits:

> (3) Temporary total disability benefits shall continue until the first occurrence of any one of the following:
>
> (a) The employee reaches maximum medical improvement;
>
> (b) The employee returns to regular or modified employment;
>
> (c) The attending physician gives the employee a written release to return to regular employment; or
>
> (d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

§ 8-42-105(3)(a)-(d)(I).

B. Law Governing Statutory Interpretation

We turn first to the rules governing statutory construction to guide us here. If its language is clear, "we interpret the statute according to its plain and ordinary meaning." *Davison v. Indus. Claim Appeals Office,* 84 P.3d 1023, 1029 (Colo. 2004). In addition, "when examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

We review statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). "[A]n administrative agency's interpretation of its own regulations is generally entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with" the statutory or regulatory language. *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002); *see also*

Support, Inc. v. Indus. Claim Appeals Office, 968 P.2d 174, 175 (Colo. App. 1998).[1]

C. Section 8-42-105(3)(c) Does Not Apply

Section 8-42-105(3)(c) provides that a claimant's TTD benefits must end if the claimant's "attending physician" releases him or her to full work duty. "The effect of this mandate is to limit the scope and frequency of disputes concerning the duration of TTD benefits by treating the opinion of the attending physician as conclusive with respect to a claimant's ability to perform regular employment." *Burns*, 911 P.2d at 662. It is a question of fact *whether* a claimant has been released to return to work by the attending physician. *Imperial Headware, Inc. v. Indus. Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000). But, once it is established that the attending physician has released a claimant to full duty, "the opinion of the attending physician carries conclusive effect with respect to a claimant's ability to perform regular employment."

[1] Although we give deference to the Panel's reasonable interpretations of the statute it administers, *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006); *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App. 2005), *aff'd,* 134 P.3d 407 (Colo. 2006), we are not bound by the Panel's interpretation or its earlier decisions. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006).

Bestway Concrete v. Indus. Claim Appeals Office, 984 P.2d 680, 685 (Colo. App. 1999).

The legislative mandate also limits an ALJ's discretion when reviewing a release to work. "[U]nless the record contains conflicting opinions from attending physicians regarding a claimant's release to work, the ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment." *Id.* Indeed, in light of an attending physician's opinion releasing a claimant to full duty, "any evidence concerning claimant's self-evaluation of his ability to perform his job [is] irrelevant and should be disregarded by the ALJ." *Lymburn*, 952 P.2d at 833.

The Panel, relying upon *Burns* and *Lymburn*, held that the ALJ improperly disregarded the attending physician's note releasing claimant to full duty. It ruled that the termination provision applied here, and that, because the ALJ had found claimant was released to work without restrictions, the ALJ was obligated to discontinue TTD benefits.

Claimant contends that the Panel's reading misapplies the statute. He argues that section 8-42-105(3)(c) cannot apply

because his benefits were not awarded until *after* the attending physician's release. Essentially, he asks, how can benefits be terminated when they have not yet commenced?

Under the plain meaning of section 8-42-105(3), they cannot. Section 8-42-105(3) specifies that TTD "benefits *shall continue*" until one of the enumerated events occur. "Continue" is defined as follows:

> 1.a. to be steadfast or constant in a course or activity; keep up or maintain [especially] without interruption a particular condition, course, or series of actions.
>
> b. to keep going; maintain a course, direction, or progress
>
> 3. to remain in a place or condition.

Webster's Third New Int'l Dictionary 493 (1969). None of these definitions suggests that an action which has not yet begun can "continue." All apply to an action that has already started and will go on uninterrupted. If the statutory language is "clear and unambiguous," we must apply the statute "as written unless such an application produces an absurd result." *Lymburn*, 952 P.2d at 833. Moreover, we may not read non-existent provisions into the Act. *See Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855, 864 (Colo.

1992). In our view, under the plain meaning of the statute, claimant's benefits could not "continue," and therefore could not cease, because claimant had not yet received any TTD benefits.

Contrary to the Panel's conclusion, neither *Burns* nor *Lymburn* mandates a different result. In *Burns*, the claimant had been receiving TTD benefits for several months before "the attending physician released [him] to return to work with full duties." 911 P.2d at 662. The claimant's benefits therefore had commenced and continued until the physician issued a work release. *Id.* *Lymburn*, on the other hand, reinstated an ALJ's award of TTD benefits to the claimant and set aside the Panel's ruling that the claimant had to produce a medical report restricting her from her regular employment in order to collect TTD benefits. 952 P.2d at 833-34. The *Lymburn* division held that the statute imposed no such burden on a claimant and rejected the employer's and the Panel's invitation to read additional requirements into the statute. *Id.*

Similarly, here, section 8-42-105(3) provides that benefits "shall continue" until one of the enumerated terminating events occur. We therefore conclude that, under the plain meaning of the statute, a medical return to work order that pre-dates the

commencement of TTD benefits cannot trigger the benefits cessation provisions of section 8-42-105(3) because there are no benefits in place to "continue until" one of the listed circumstances occur. *See Lymburn*, 952 P.2d at 833.

III. Claimant's Remaining Contentions

Having decided that section 8-42-105(3) does not apply to claimant's situation, we need not address claimant's contentions that: (1) an internal conflict existed in the attending physician's reports; or, (2) the statute's application violates his constitutional guarantees of due process and separation of powers.

IV. Conclusion

Accordingly, we hold that section 8-42-105(3)(c) did not apply to claimant's case because the statute can only terminate benefits that have already commenced and consequently can only be applied prospectively.

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

JUDGE TAUBMAN and JUDGE MILLER concur.

COLORADO COURT OF APPEALS

DATE FILED: February 4, 2016
CASE NUMBER: 2015CA231

Court of Appeals No. 15CA0231
Industrial Claim Appeals Office of the State of Colorado
WC No. 491-542-001

Restaurant Technologies, Inc. and Hartford Fire Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Timothy Fortune,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE NAVARRO
Terry and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 4, 2016

Hall & Evans, LLC, Megan E. Coulter, Alyssa L. Levy, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Levine Law, LLC, Patrick A. Barnes, Denver, Colorado, for Respondent Timothy Fortune

In this workers' compensation action, Restaurant Technologies, Inc., and its insurer, Hartford Fire Insurance Company c/o York Risk Services Group (collectively employer), seek review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) increasing the average weekly wage (AWW) of claimant, Timothy Fortune. The ALJ increased claimant's AWW to include the cost of health insurance. We affirm.

I. Background

Claimant sustained an admitted, work-related injury in March 2013, and became eligible for temporary total disability benefits. Unable to accommodate claimant's work restrictions, employer terminated claimant's employment in August 2013.

Before his termination, employer had been paying approximately two-thirds of claimant's health insurance premium. After terminating claimant's employment, employer sent him information about continuing coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1166 (2012). Under the offered COBRA plan, employer would continue paying about two-thirds of claimant's premium; claimant would pay

the balance. Because claimant could not afford to pay any portion of the premium, however, he did not elect COBRA coverage.

At the hearing and in its subsequent position statement, employer maintained that claimant was not entitled to an increase in his AWW because he had not elected any coverage. Although the ALJ initially agreed with employer, upon reviewing claimant's petition to review, the ALJ ruled that claimant was entitled to an increase in his AWW equivalent to the full cost of covering his health insurance premium under COBRA. The Panel affirmed, and this appeal followed.

II. Analysis

Employer contends that, because claimant failed to elect a particular health insurance plan, he should not receive the equivalent cost of continuing health insurance provided through employer under COBRA. Employer argues that, in the absence of claimant's election of a specific plan, the actual cost of claimant's health insurance premium is unknown and could be less than the cost of COBRA, leaving claimant with a potential windfall. In addition, employer points out that, unless a specific plan has been elected, claimant "may use that increase in any way he pleases"

rather than toward a health insurance plan as the legislature intended. Therefore, employer suggests that claimant should seek to increase his AWW only after he has secured coverage and the cost is known. We are not persuaded by these arguments to set aside the Panel's order.

As pertinent here, the Workers' Compensation Act (Act) defines wages as follows:

> (a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.
>
> (b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. . . . If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

§ 8-40-201(19), C.R.S. 2015. Employer argues that, under this provision, the cost of health insurance should not be included in

claimant's AWW because employer had been paying a portion of claimant's cost before his termination and would have continued to do so had claimant elected a plan.[1]

Employer relies on the narrow, and still valid, holding in *Midboe v. Indus. Claim Appeals Office*, 88 P.3d 643, 644 (Colo. App. 2003), *overruled on other grounds by Indus. Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), that "the amount a claimant pays as his share of the premium for group health and dental insurance coverage [is not] included in the calculation of his average weekly wage *when the employer continues to pay its share of the premium*." *Indus. Claim Appeals Office v. Ray*, 145 P.3d at 667. As the supreme court observed in *Ray*, section 8-40-201(19)(b) "expressly" provides that, when an employer pays a portion of a claimant's health insurance premium, the amount paid by the claimant shall not be included in the AWW. *Ray*, 145 P.3d at 667. Citing this

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[1] In its Opening Brief, employer also asserts that it "continued to pay Claimant's health insurance premiums, including his portion of the insurance premiums, even after Claimant's termination." However, the record does not support this assertion. To the contrary, the evidence cited by employer, a letter it sent to claimant in June 2013, states that while claimant was "on leave" employer was "covering the cost of [claimant's] benefits for the missed payrolls so that [his] benefits remain[ed] active." This letter predates the termination of claimant's employment.

language, employer essentially argues that, because it *intended* to continue paying a portion of claimant's premium, the amount of the premium should not be included in claimant's AWW.

But *Midboe* is factually distinguishable from the case before us because employer here was *not* paying any portion of a health insurance premium for claimant after his termination. The COBRA policy lapsed because claimant was unable to pay his share and did not elect a plan. Employer downplays this distinction by focusing on claimant's failure to *elect* a plan as the precipitating event which bars inclusion of the cost of premiums in AWW. As we read *Ray*, however, it is the *actual payment* of premiums by an employer that may alleviate its obligation to include health care premiums in AWW. To read the statute otherwise — to exclude those costs from AWW if a claimant fails to elect a coverage plan — incorporates a non-existent provision into the statute, which we are not permitted to do. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) ("We have uniformly held that a court should not read nonexistent provisions into the Colorado Work[er]'s Compensation Act.").

Indeed, a careful reading of *Ray* reveals that the supreme court considered the very scenario posed in this case. Like claimant here, one of the claimants in *Ray*, Jodie Marsh, "chose not to continue her coverage under COBRA or to purchase substitute health insurance." *Ray*, 145 P.3d at 663. The supreme court rejected the employers' request "to include the value of an employee's health insurance as part of the average weekly wage only when an employee *elects* and continues coverage according to the method defined by . . . COBRA, and the equivalent Colorado statute." *Id.* at 667 (emphasis added). Thus, we disagree that *Ray* is distinguishable from or inapplicable to this case.

Employer also articulates policy reasons for the exclusion of health care insurance costs from AWW if a claimant fails to elect a plan. It argues that, because claimant did not elect a plan, the cost is uncertain and will likely vary from the known cost of the COBRA policy. It points out that, if and when claimant obtains a health insurance policy, the cost could be significantly less than the COBRA premium calculated into AWW, giving claimant a potential windfall. Employer also worries that claimant could use the

increased AWW funds in any manner he chooses, not necessarily for health insurance coverage.

In our view, though, claimant's failure to elect coverage is inconsequential. The policy concerns employer highlights have, in fact, already been rejected. As employer concedes, the statute "does not require proof that the claimant actually purchased the coverage." *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). "When and where to purchase coverage is a decision for the claimant. The statute merely seeks to ensure that the claimant will have funds available to make the purchase." *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546, 549 (Colo. App. 2001). Thus, there is a risk in every case in which a claimant's AWW is increased to cover the cost of health insurance that the claimant might not use the increased AWW funds to purchase a health insurance policy. That risk, however, does not permit us to disregard the statute's directives.

In addition, the purpose of the statute is to enable a claimant, who may not otherwise have the means, to obtain health insurance coverage. *See id.* ("[T]he General Assembly enacted

§ 8-40-201(19)(b) to ensure that the claimant has sufficient funds available to purchase health insurance, regardless of whether the cost is more or less than the employer's cost of providing similar insurance.") Claimant here testified that he could not afford his portion of the premium with the funds he was receiving. Thus, the increased AWW could accomplish the statute's goal of providing him the means to purchase necessary insurance. In the event that the policy chosen by claimant costs more or less than the calculated cost of insurance under COBRA, either party may seek a readjustment of the AWW. *See* § 8-43-303, C.R.S. 2015; *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 152 (Colo. App. 2007) (permitting recalculation of AWW in conjunction with reopening for a change in condition), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *Schelly v. Indus. Claim Appeals Office*, 961 P.2d 547, 548 (Colo. App. 1997).

Finally, employer's concern that a claimant's failure to purchase coverage could run afoul of the Affordable Care Act is an issue beyond the scope of this appeal. *See* 26 U.S.C. § 5000A (2012).

Accordingly, we agree with the Panel that claimant's failure to elect coverage is inconsequential to the determination of AWW. The ALJ correctly increased claimant's AWW to include the cost of obtaining health insurance coverage as calculated under COBRA. To the extent employer asserts that the ALJ also improperly ordered it to pay interest, we necessarily reject this contention because we have concluded that the ALJ properly increased claimant's AWW.

III. Conclusion

The order is affirmed.

JUDGE TERRY and JUDGE FREYRE concur.

COLORADO COURT OF APPEALS **2016COA31**

DATE FILED: February 25, 2016
CASE NUMBER: 2015CA1165

Court of Appeals No. 15CA1165
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-951-385

Youngquist Brothers Oil & Gas, Inc.,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Travis Miner,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE DUNN
Richman and Berger, JJ., concur

Announced February 25, 2016

Treece Alfrey Musat P.C., James B. Fairbanks, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Killian & Davis P.C., Damon J. Davis, Christopher H. Richter, Grand Junction, Colorado, for Respondent Travis Miner

¶ 1 Youngquist Brothers Oil & Gas, Inc., has no business operations in Colorado, but it recruits employees from Colorado to work on its North Dakota oil rigs. Within days of being hired, one of these Colorado recruits, Travis Miner, was injured in North Dakota while working on a Youngquist oil rig. Miner returned to Colorado and sought benefits under the Workers' Compensation Act of Colorado (Act), §§ 8-40-101 to 8-47-209, C.R.S. 2015.

¶ 2 The administrative law judge (ALJ) awarded Miner benefits, concluding he was hired in Colorado and suffered a compensable work-related injury. Because Youngquist did not carry Colorado workers' compensation insurance, the ALJ also imposed a fifty percent penalty against Youngquist. The Industrial Claim Appeals Panel (Panel) affirmed the ALJ's order.

Youngquist contends it is not subject to the Act and therefore the Panel's decision should be set aside. We disagree and affirm.

I. Background

¶ 3 Youngquist is an oil and gas company with operations in North Dakota. It hires workers nationally and internationally, but primarily from Texas, Oklahoma, Indiana, and Colorado. It

maintains workers' compensation insurance in North Dakota, but not in Colorado.

¶ 4 Miner lived in Grand Junction, Colorado. After learning that Youngquist was looking for employees to work on its oil rigs in North Dakota, Miner submitted an online application. Later that day, a Youngquist representative called Miner and conducted a telephonic interview. Miner testified that at the conclusion of the interview, Youngquist offered him a job, which he accepted. Youngquist then arranged for Miner to fly to North Dakota the following day. A Youngquist representative met Miner at the airport and took him to get supplies before driving him to Youngquist's offices.

¶ 5 Once there, Miner completed new employee paperwork and passed a preliminary drug screen. He also provided a hair follicle for a drug test, the results of which were not immediately available. After completing the paperwork and the preliminary drug screen, Miner began his first evening rig shift.

¶ 6 During the following evening shift, Miner slipped and fell down the rig's stairs, hurting his back. Miner did not immediately report

the injury to Youngquist because he did not "want to be that guy that got hurt the second day of work." Miner worked three more shifts and then reported his injury to his supervisor.

¶ 7 Youngquist agreed to allow Miner to seek medical treatment in Colorado and arranged for Miner to return to Colorado. Miner's treating physician concluded that although Miner had a pre-existing back injury, the condition was worsened by his work-related fall.

¶ 8 Miner filed a workers' compensation claim with North Dakota Workforce Safety and Insurance. North Dakota denied his claim without a hearing, apparently due to Miner's pre-existing back condition.[1]

¶ 9 Miner then filed a claim for workers' compensation benefits in Colorado. After a hearing, the ALJ determined that Miner was hired

[1] Unlike Colorado, North Dakota does not consider injuries attributable to pre-existing conditions to be compensable "unless the employment substantially accelerates its progression or substantially worsens its severity." N.D. Cent. Code § 65-01-02(10)(b)(7) (2015); *compare id.* (excluding "[i]njuries attributable to a preexisting . . . condition"), *with H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990) (stating that a pre-existing medical condition does not preclude an employee from suffering a compensable injury under the Act).

in Colorado and his claim was therefore subject to the Act. The ALJ further found Miner suffered a compensable work-related injury, awarded him benefits, and imposed a fifty percent penalty on Youngquist for failing to carry workers' compensation insurance in Colorado.

II. Jurisdiction

¶ 10 Youngquist contends it is not subject to the Act because (1) it does not conduct business in Colorado; (2) Miner was not hired in Colorado; and (3) it does not have sufficient contacts with Colorado to establish personal jurisdiction. We disagree.

A. The Extraterritorial Provision

¶ 11 Colorado has jurisdiction to award benefits for out-of-state work-related injuries if an employee was (1) hired or regularly employed in Colorado and (2) injured within six months of leaving Colorado. § 8-41-204, C.R.S. 2015; *see also Hathaway Lighting, Inc. v. Indus. Claim Appeals Office*, 143 P.3d 1187, 1189 (Colo. App. 2006) (Section 8-41-204 "addresses entitlement to compensation for injuries occurring outside Colorado.").

¶ 12 Youngquist argues that because it has no business operations in Colorado, the extraterritorial provision does not apply to it. But the extraterritorial provision does not require an employer hiring a Colorado employee to have other contacts with Colorado. § 8-41-204; *see generally Hathaway Lighting, Inc.*, 143 P.3d at 1190. Nor is the provision limited to Colorado employers or employers who conduct business in Colorado. § 8-41-204. If an employer hires an employee in Colorado, that is enough. *Id.*; *see also State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 592-93, 298 P.2d 963, 968 (1956).

¶ 13 The power to extend protection to workers injured beyond its borders is rooted in Colorado's interest in the welfare and protection of its citizens and their dependents. *Howington*, 133 Colo. at 592-93, 298 P.2d at 968. Such power falls within Colorado's legitimate police powers. *See id.*; *see also Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 542-43 (1935) (upholding California's extraterritorial provision and recognizing California's "legitimate public interest in controlling and regulating" the

employment relationship and "in providing a remedy available" in California).

¶ 14 In light of the strong policy interests underpinning extraterritorial workers' compensation provisions, Colorado is hardly alone in providing protection to employees hired in state and injured outside its borders. Indeed, most states have some form of extraterritorial workers' compensation provisions. *See* 1 *Modern Workers Compensation* § 104:16, Westlaw (database updated Nov. 2015) (collecting provisions and cases). Even North Dakota — where Youngquist operates — imposes extraterritorial jurisdiction in certain circumstances. *See* N.D. Cent. Code § 65-08-01 (2015).

¶ 15 We therefore are not persuaded by Youngquist's contention that it is not subject to the Act because — other than recruiting and hiring employees in Colorado — it conducts no business in this state. The extraterritorial provision means what it says. If an employer hires a Colorado employee in this state and the employee

is injured within six months of leaving Colorado, the employer is subject to the Act.[2]

B. The Place of Hire

¶ 16 Because it is undisputed Miner was injured within six months of leaving Colorado, the extraterritorial provision applies if Miner was hired in Colorado. Youngquist contends that Miner was hired in North Dakota and that the ALJ erred in finding Miner was hired in Colorado. We disagree.

¶ 17 Where a contract is made is generally determined by the parties' intent. *See Denver Truck Exch. v. Perryman*, 134 Colo. 586, 592, 307 P.2d 805, 810 (1957). "[I]t is considered to be the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed." *Id.* (citation omitted). As long as the fundamental elements of contract formation are present, however, an employment contract may be

[2] At oral argument, Youngquist asserted that affirming the ALJ's decision subjects it to unbounded jurisdiction in every state when one of its out-of-state workers is injured in North Dakota. Not true. We offer no opinion on whether Youngquist is subject to jurisdiction in other states. And the Act's extraterritorial provision is not without bounds. It applies to employees hired in Colorado and injured within six months of leaving Colorado.

formed even though not every formality attending commercial contracts is observed. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384, 1387 (Colo. 1994); *see generally* 13 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 47.10 (2015) (discussing contract of hire principles in the context of workers' compensation acts).

¶ 18 The existence of a contract for hire is a question of fact to be determined by the fact finder. *See Tuttle v. ANR Freight Sys., Inc.*, 797 P.2d 825, 827 (Colo. App. 1990) (it is for the jury to decide whether a contract exists). We uphold an ALJ's factual determination if it is supported by substantial record evidence. § 8-43-308, C.R.S. 2015; *see also Rocky Mountain Dairy Prods. v. Pease*, 161 Colo. 216, 222-23, 422 P.2d 630, 633 (1966) (industrial commission's determination that contract of hire was formed between employer and employee would not be set aside where "supported sufficiently by the record").

¶ 19 Specifically crediting Miner's testimony, the ALJ found that the last act necessary to complete Miner's hire occurred in Colorado when Youngquist telephonically offered Miner a job — and Miner

accepted the job offer — while he was at home in Colorado. The ALJ also found that Youngquist's actions after the telephone call supported the finding that Miner was offered and accepted employment in Colorado. In particular, Youngquist arranged and paid for Miner's flight, met him at the airport, transported him to Youngquist's offices, and had him working on an oil rig shortly after completing paperwork and passing a preliminary drug screen.

¶ 20 To be sure, Youngquist presented testimony from which different inferences could be drawn. Specifically, Youngquist's office and safety manager testified that all offers of employment are conditional and only become permanent following successful completion of a drug test and a hair follicle test. But in weighing that testimony, the ALJ noted that the office and safety manager also testified that an employee would be removed from the jobsite and "terminated" if he failed to pass his drug screen. The ALJ found that such testimony implied that Miner "at that point" was "under a contract of hire." The ALJ therefore rejected the position advanced by Youngquist — that Miner was not yet hired when he arrived in North Dakota.

¶ 21 Youngquist disagrees with the ALJ's findings and asks this court to find that Miner was not hired until he completed paperwork and passed the drug test in North Dakota. To the extent Youngquist generally contends an employment contract cannot be formed until the completion of all employment-related paperwork or drug testing, we disagree. *E.g.*, *Shehane v. Station Casino*, 3 P.3d 551, 555-56 (Kan. Ct. App. 2000) (where employee accepted telephonic job offer while in Kansas, requirement that employee pass drug test before beginning out-of-state employment did not affect formation of the underlying contract); *accord Potter v. Patterson UTI Drilling Co.*, 234 P.3d 104, 108-10 (N.M. Ct. App. 2010); *see also Murray v. Ahlstrom Indus. Holdings, Inc.*, 506 S.E.2d 724, 726-27 (N.C. Ct. App. 1998) (rejecting argument that last act for employment contract occurred outside North Carolina where employee was offered and accepted employment by phone while in North Carolina but completed "requisite paperwork" in Mississippi).

¶ 22 As well, we decline Youngquist's invitation to reweigh the evidence. We, in fact, are not at liberty to do so. It was for the ALJ to weigh the testimony, assess credibility, and resolve any

competing inferences or disputes in the evidence. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). "If two equally plausible inferences may be drawn from the evidence, we may not substitute our judgment for that of the ALJ." *Id.*

¶ 23 Because substantial evidence supports the ALJ's finding that the "last act necessary" to form the employment relationship occurred in Colorado, we may not disturb that finding.

C. Minimum Contacts and Comity

¶ 24 Youngquist next advances two constitutional reasons why it should not be subject to the Act. First, it argues that it lacks sufficient minimum contacts to establish personal jurisdiction in Colorado. Second, it contends that enforcing the Colorado benefits award violates principles of comity because North Dakota denied Miner's workers' compensation claim. We reject the first argument and, because it is not developed, do not reach the second.

1. Minimum Contacts

¶ 25 Relying primarily upon non-workers' compensation cases, Youngquist argues that it does not have sufficient contacts with Colorado to subject it to jurisdiction here. Workers' compensation

cases, however, are different. *See Alaska Packers*, 294 U.S. at 540-41. And such cases do not require the same extent of contacts as other types of cases, including tort cases. *See id.*

¶ 26 In *Alaska Packers*, a person living in California was hired in California to work in Alaska during salmon canning season. *Id.* at 538. He was injured in Alaska and returned to California, where he filed a workers' compensation claim and received benefits. *Id.* at 538-39. The employer appealed, asserting, among other arguments, a due process bar to the employee's claim. *Id.* at 539. The Supreme Court affirmed, rejecting the due process claim. *Id.* at 543.

¶ 27 The Supreme Court observed that the contacts might have been insufficient to support the exercise of jurisdiction over a tort claim, but it explained that the execution of the employment contract in the state, by a person living in the state, distinguished the case from a tort claim. *Id.* at 540-41 ("[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation, and its sanctions are subject, in some measure, to the legislative control of the state."). The Court

concluded that objections to a state's exercise of jurisdiction in this circumstance must be directed "not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process." *Id.* at 541-42. And the Court could not say that California's extraterritorial provision "lacks a rational basis or involved any arbitrary or unreasonable exercise of state power." *Id.* at 543.

¶ 28 Applying the *Alaska Packers* rationale, other courts have concluded that out-of-state employers may be subject to the workers' compensation laws of those states where they hire employees. *See, e.g.*, *Bowen v. Workers' Comp. Appeals Bd.*, 86 Cal. Rptr. 2d 95, 105 (Cal. Ct. App. 1999) (holding that California resident injured outside California while working for out-of-state employer was entitled to California workers' compensation benefits); *Cavers v. Hous. McLane Co.*, 958 A.2d 905, 908 (Me. 2008) (out-of-state employer subject to Maine's workers' compensation jurisdiction where it entered into employment contract in Maine and employee was injured outside Maine); *Rodwell v. Pro Football,*

Inc., 206 N.W.2d 773, 780 (Mich. Ct. App. 1973) (out-of-state employer subject to Michigan Workmen's Compensation Act where it hired a Michigan resident in Michigan and injury occurred out of state); *Pierce v. Foley Bros.*, 168 N.W.2d 346, 354 (Minn. 1969) (stating that if Oklahoma employee who was injured in Montana was hired in Oklahoma by Montana employer, employer was subject to Oklahoma's workers' compensation act); *Houle v. Stearns-Rogers Mfg. Co.*, 157 N.W.2d 362, 365-67 (Minn. 1968) (affirming Minnesota benefits award to a Minnesota employee injured in South Dakota while employed by a Colorado employer where employment contract was entered into in Minnesota).

¶ 29 No Colorado case has expressly applied the principles articulated in *Alaska Packers* to out-of-state employers hiring Colorado employees. The principles have been applied, however, to cases involving Colorado employees injured outside Colorado while working for a Colorado employer. *Howington*, 133 Colo. at 595-96, 298 P.2d at 970 (Colorado resident injured in Utah entitled to Colorado workers' compensation benefits); *see also Moorhead Mach. & Boiler Co. v. Del Valle*, 934 P.2d 861, 864 (Colo. App. 1996)

(deciding that Colorado had jurisdiction over employee's workers' compensation claim where a Colorado union member was hired in Colorado but injured in Wyoming), *abrogated on other grounds by Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).[3]

¶ 30 Because the *Alaska Packers'* jurisdictional analysis hinged on where the employment relationship was entered into and the state's legitimate interest in the protection of its residents, we see no principled reason why the rationale does not apply with equal force to any employer hiring employees in Colorado. And Youngquist points to no case concluding otherwise. Thus, if an employer hires an employee in Colorado and the employee is injured within six months of leaving Colorado, the employee may seek benefits under the Act.

¶ 31 For two reasons, we are not persuaded by Youngquist's assertion that *Alaska Packers* is factually distinguishable because

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[3] In *Moorhead Machine & Boiler Co. v. Del Valle*, the employer contacted the Denver union hall when it had job openings, and the union provided appropriately skilled employees. 934 P.2d 861, 862-63 (Colo. App. 1996), *abrogated on other grounds by Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The opinion does not say whether the employer was a Colorado employer or an out-of-state employer.

"the injured worker [in *Alaska Packers*] might have been 'remediless'" if the Supreme Court did not apply California's workers' compensation act and "[t]hat is not the situation here." First, it is the situation here. Miner's North Dakota workers' compensation claim was denied without a hearing. If Colorado were unable to exercise jurisdiction, Miner would be left with no remedy for his work-related injury, leaving the very real possibility that he "might become [a] public charge[]" — a matter of "grave public concern" to Colorado. *Alaska Packers*, 294 U.S. at 542. Second, even assuming Miner was not "remediless," the Supreme Court's jurisdictional analysis hinged on the location of the employment contract and a state's interest in protecting the contracting employee. *See id.* at 542-43. Both of these factors support Colorado's jurisdiction.[4]

[4] At oral argument, Youngquist repeatedly suggested that we should not follow *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935), because it was decided in 1935 and does not reflect modern employment realities. The age of the decision, however, does not impact its precedential vitality. And that a worker may be hired in one state to work in another state (and is then injured) is far from a dated employment practice.

¶ 32 Finally, to the extent Youngquist argues it was denied due process because it had no notice that it could be subject to the Act's extraterritorial provision, we do not agree. The Act's extraterritorial provision is unambiguous and is not limited to Colorado employers. And *Alaska Packers* was decided over seven decades ago. It provided Youngquist with notice that state courts can exercise jurisdiction over work-related injuries occurring outside the state's territorial boundaries where an employment contract was entered into in the state.

¶ 33 Accordingly, because Youngquist hired Miner in Colorado and Miner was injured within six months of leaving this state, Colorado had jurisdiction over Miner's workers' compensation claim.

2. Comity

¶ 34 Youngquist asserts that "dual jurisdiction" in Colorado is "patently unfair and constitutionally inappropriate" under principles of comity. Beyond this general assertion, however, Youngquist does not explain why principles of comity are violated, nor does it cite any relevant supporting legal authority. Because this argument is not sufficiently developed, we decline to address it.

E.g., *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486, 495 (Colo. App. 1997) (failing to identify specific errors and provide supporting legal authority results in affirmance).

III. Penalty for Failure to Carry Colorado Insurance

¶ 35 Having rejected Youngquist's argument that it was not subject to the Act, we necessarily reject its argument that the ALJ erred in applying the Act's penalty provision.

¶ 36 Colorado imposes a fifty percent penalty on employers subject to the Act who fail to carry workers' compensation insurance. § 8-43-408(1), C.R.S. 2015; *see also Kamp v. Disney*, 110 Colo. 518, 522, 135 P.2d 1019, 1021 (1943). The penalty is mandatory, not discretionary. § 8-43-408(1); *accord Eachus v. Cooper*, 738 P.2d 383, 386 (Colo. App. 1986). Because Youngquist admittedly did not carry Colorado workers' compensation insurance, the ALJ was required to impose the fifty percent penalty. *Eachus*, 738 P.2d at 386 ("Courts have no discretion in imposing the penalty.").

IV. ALJ's Resolution of Evidentiary Conflicts

¶ 37 Last, Youngquist argues the ALJ failed to resolve conflicts in the evidence as required by section 8-43-301(8), C.R.S. 2015. We disagree.

¶ 38 An "ALJ is required to make specific findings only as to the evidence [the ALJ] found persuasive and determinative." *Gen. Cable Co. v. Indus. Claim Appeals Office*, 878 P.2d 118, 120-21 (Colo. App. 1994). An ALJ has no obligation to address every issue raised or any particular evidence which the ALJ finds unpersuasive. *Id.* Nor are we aware of any requirement that an ALJ must review and discuss the testimony of each and every testifying witness.

¶ 39 The ALJ found that Miner suffered a work-related injury. In so finding, the ALJ expressly credited Miner's testimony that he fell while working on the oil rig and suffered a back injury. The ALJ also credited Miner's doctor's testimony "as being persuasive on the issue of compensability." Based on the doctor's testimony, the ALJ found that the work-related fall aggravated Miner's underlying pre-existing condition and was compensable under Colorado law.

¶ 40 The ALJ's findings, however, did not comment on the testimony of a Youngquist employee who stated that "there's

typically a lot of people" on the rigs and it is unlikely that someone could have an accident without being observed. The employee admitted he was "not really" familiar with Miner, and he offered no direct testimony about Miner's accident or injury.

¶ 41 We perceive no error in the ALJ's findings. In crediting Miner's explanation of his fall and injury, the ALJ implicitly rejected the speculation that someone would have seen Miner's fall because "there's typically a lot of people" working on the rig. And the ALJ expressly stated that he "ha[d] not addressed every piece of evidence that might lead to a conflicting conclusion and ha[d] rejected evidence contrary" to the findings of fact. The ALJ therefore did consider and reject Youngquist's employee's testimony.

¶ 42 The ALJ properly weighed the evidence and provided sufficient and specific reasons for his finding that Miner suffered a compensable work-related injury. The decision is supported by substantial record evidence. Accordingly, we may not disturb the ALJ's finding.

V. Conclusion

¶ 43 The Panel's order is affirmed.

JUDGE RICHMAN and JUDGE BERGER concur.