COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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November Case Law Update

Presented by Judge Craig Eley and Judge Laura Broniak

This update covers ICAO and COA decisions issued between October 14, 2017 to November 10, 2017

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-881-225-06

IN THE MATTER OF THE CLAIM OF:

SALAHADDIN AMIN,

Claimant,

v.

SCHNEIDER NATIONAL CARRIERS,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated June 2, 2017, that granted the respondents' summary judgment motion on the issue of the claimant's petition to reopen his claim under §8-43-303, C.R.S. for a change of condition. We affirm the ALJ's order to the extent it granted the respondents' summary judgment motion on the issue of the claimant's petition to reopen his claim under §8-43-303, C.R.S. for a change of condition.

The claimant alleged he suffered a work-related injury on January 18, 2012. He timely filed a claim for workers' compensation benefits, and the respondents timely filed a Notice of Contest denying liability for the claimant's claim. Thereafter, on September 21, 2012, the respondents filed a Petition to Close the claimant's claim for failure to prosecute. *See* Workers' Compensation Rules of Procedure 7-1(C), 7 Code Colo. Reg. 1101-3.

On October 9, 2012, the Director of the Division of Workers' Compensation (Director) entered a Show Cause Order, requiring the claimant to show what recent effort had been made to pursue his claim. The Order informed the claimant that his response was due within 30 days of the date of the certificate of mailing or his claim would be automatically closed. The Order also indicated that if the case was closed after 30 days, then the claimant had "the right to petition to reopen" his case as set forth in §8-43-303, C.R.S.

The claimant never responded to the Director's Show Cause Order, and the claimant did not petition to review the Director's Order. Therefore, under the terms of the Director's Order, the claimant's claim was deemed automatically closed.

The claimant took no further action on his claim and no activity on the claim occurred for over two years until November 25, 2014, when counsel for the claimant entered his appearance with the Division. On December 1, 2014, the claimant filed an Application for Hearing endorsing the issues of compensability, temporary disability benefits, authorized provider, medical benefits, and average weekly wage (AWW). The hearing, however, never was set.

The claimant filed a second Application for Hearing on September 14, 2015, endorsing the issues of compensability, temporary disability benefits, authorized provider, reasonably necessary, medical benefits, and AWW. The parties subsequently appeared on February 3, 2016, before ALJ Broniak. The claimant's Application for Hearing ultimately was stricken without prejudice because the claim had been closed pursuant to the Director's Order.

The claimant subsequently filed a Petition to Reopen based solely on a change of condition. Attached to the claimant's Petition was the report of Dr. Miller. The claimant then filed an Application for Hearing on June 22, 2016, listing the issues of compensability, temporary disability benefits, medical benefits, authorized provider, reasonably necessary, AWW, and Petition to Reopen. A hearing never was set.

The claimant filed additional Applications for Hearing on November 19, 2016, and February 22, 2017, endorsing the issues of compensability, temporary disability benefits, authorized provider, reasonably necessary, AWW, but not endorsing the issue of Petition to Reopen.

Thereafter, a pre-hearing conference was held before Pre-Hearing ALJ Sandberg (PALJ). The respondents moved to strike the claimant's February 22, 2017, Application for Hearing and to dismiss the claimant's claim with prejudice. The PALJ struck the claimant's Application for Hearing, determining that the endorsed issues were not ripe for adjudication because the claim was closed pursuant to the Director's Order. However, the PALJ also declined to dismiss the claimant's claim with prejudice since a Petition to Reopen could present issues of fact to be resolved by a merits hearing ALJ.

The claimant subsequently filed another Application for Hearing endorsing only the issue of Petition to Reopen. A hearing was set, and the respondents filed a Motion for

Summary Judgment, arguing that the claimant's claim could not be reopened because there was no compensable injury to reopen. The respondents reasoned that they never admitted liability for benefits or filed an admission. Instead, they filed a Notice of Contest and it was undisputed that the underlying compensability of the claim had always been denied and never found compensable by an ALJ.

The ALJ ultimately granted the respondents' summary judgment motion. The ALJ first determined that there had been no "award of any sort" in the claimant's case because compensability remained a contested issue. Second, citing to the Colorado Court of Appeals' opinion in *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002), the ALJ concluded that in order for the claimant to reopen his claim under §8-43-303, C.R.S. for a change of condition, it first must be established that the claimant previously sustained a compensable injury. He held that it was undisputed the underlying compensability of the claim had always been denied by the respondents and never found compensable by an ALJ. Thus, the ALJ determined the claimant's claim could not be reopened under §8-43-303, C.R.S. for a change of condition.

The claimant has petitioned to review the ALJ's order. The claimant argues that the ALJ misinterpreted §8-43-303, C.R.S. and ignored Workers' Compensation Rule of Procedure 7-2 when granting the respondents' summary judgment motion. He argues that the ALJ erred in interpreting the word "award" as used in §8-43-303, C.R.S. to require that only closed compensable claims or closed admitted claims can be reopened. The claimant also contends that his rights to due process and equal protection of law guaranteed to him under the Colorado and United States Constitutions were violated when his claim was dismissed before he was given an opportunity to show a change of condition under §8-43-303, C.R.S.

It is well established that OAC Rule of Procedure 17 allows an ALJ to enter summary judgment where there are no disputed issues of material fact. Moreover, to the extent it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(Colorado Rules of Civil Procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). However, summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser*

Foundation Health Plan v. Sharp, 741 P.2d 714 (Colo. App. 1987). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

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

Initially, we conclude that the Director's Order amounts to an "award" under §8-43-303, C.R.S. such that his claim is subject to the reopening provisions. However, we also conclude that the ALJ properly held the claimant is precluded from reopening under §8-43-303, C.R.S. for a change of condition since there has been no original determination that the claimant sustained a compensable injury.

Section 8-43-303(1), C.R.S. permits a claim to be reopened based on fraud, an overpayment, an error, a mistake, or a change in condition:

> (1) At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and *reopen any award* on the ground of fraud, an overpayment, an error, a mistake, or a change in condition. . . . (emphasis added)

See also Workers' Compensation Rules of Procedure 7-2, 7 CCR 1101-3.

In the context of workers' compensation matters, a final award means only that the matter has been concluded subject to later reopening if warranted under the applicable statutory criteria. *See Renz v. Industrial Claim Appeals Office*, 924 P.2d 1177 (Colo. App. 1996); *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994); In *Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780, 784 (Colo. App. 1991), the Colorado Court of Appeals explained that an order issued by the Director which dismisses the claim or closes the file for failure to prosecute, amounts to an "award" under the reopening statute:

> Here, however, the ALJ's initial 1984 order did not fail to mention permanent disability benefits. Rather, it specifically referred to such benefits and reserved the ALJ's jurisdiction over that issue for further determination. Given this reservation, we cannot conclude that this order constituted an "award" under the statute. *See James v. Irrigation Motor & Pump, Co.*, 180 Colo. 195, 503 P.2d 1025 (1972) (Grove, J., concurring); 3 A. Larson, *Workmen's Compensation Law* §81-53 (1989).
>
> We are influenced in this view by the provisions of Department of Labor & Employment Rule XA, 7 Code Colo. Reg. 1101-3. That regulation provides that, if no "action" has occurred upon a case for a period of 24 months or longer, the director, after notice and opportunity for hearing is granted to both parties, may enter an order dismissing the claim or closing the file.
>
> The entry of such an order constitutes an "award" under the reopening statute. *Harlan v. Industrial Commission, supra; cf. Granite Construction Co. v. Leonard*, 40 Colo. App. 20, 568 P.2d 500 (1977) (letter from Commission to carrier authorizing carrier to close file not a proper order, absent notice to claimant).

Here, the Director's Order provides that if the claimant failed to prosecute his claim for a period of at least 6 months, which is what occurred in this action, then his claim is closed subject to the reopening provisions under §8-43-303, C.R.S.:

> 3. If your case is closed after 30 days, you have the right to petition to reopen your case as set for (sic) in §8-43-303, C.R.S.
>
> 4. If this claim is automatically closed for lack of timely response to this Order, then this decision becomes final unless a Petition to Review this decision is filed within twenty (2) days of the date this claim was closed. The claim is presumed to be closed in the absence of a response on the thirty-first (31st) day following issuance of this Order. . . .

Consequently, based on the Director's Order and pursuant to the holding in *Brown & Root*, we conclude the Order did, in fact, amount to an "award" as contemplated by §8-43-303, C.R.S. Consequently, the ALJ's holding to the contrary is set aside.

Next, we affirm the ALJ's determination that the claimant is precluded from reopening his claim under §8-43-303, C.R.S. for a change of condition since there has

been no original determination of a compensable injury. In *City and County of Denver*, the claimant sustained a compensable injury in an automobile accident in 1988. The treating physician placed her at maximum medical improvement (MMI) in 1999 with a twenty-six percent whole person medical impairment rating. The employer filed a final admission of liability (FAL) for permanent medical impairment benefits, the claimant received the award in a discounted lump sum, and the claim was closed. After the treating physician prescribed additional treatment, the claimant filed a petition to reopen based on a worsened condition. The ALJ granted the reopening and awarded additional temporary total disability and medical benefits. The claimant received additional treatment, and in 2000, a treating physician again placed her at MMI, this time with only a nine percent whole person impairment rating. The employer filed a FAL claiming an "overpayment" of $ 23,412, based on the difference between the twenty six and nine percent whole person impairment ratings. The claimant requested a Division-sponsored independent medical examination (DIME), and the DIME physician gave the claimant a zero percent impairment rating. Based on the DIME physician's report, the employer filed another FAL increasing the claim for overpayment to $ 43,312. The claimant applied for a hearing to challenge employer's assertion of an overpayment based on the DIME rating. After finding that the claimant "did not improve to a lesser degree of permanent impairment after her case was reopened," the ALJ denied the employer's request for recoupment of the lump sum disability benefits.

On appeal, the Colorado Court of Appeals affirmed. In rejecting the employer's argument that the claimant failed to overcome the DIME opinion, and therefore she is bound by the zero percent impairment rating, and the employer is automatically entitled to recoup the "overpaid" lump sum benefits, the Court held in pertinent part as follows:

> After a case is reopened based on a change in condition, the causation issue is limited to whether there is a change in the claimant's physical or mental condition that can be causally connected to the original compensable injury. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The original finding of causation has already been conclusively litigated and therefore cannot be challenged in reopening or post-reopening proceedings. *See* 8 *Larson's Workers' Compensation Law* § 131.03(2)(a) (2001)(reopening based on a change in condition does not permit relitigation of every potential issue because the question is restricted to the "extent of improvement or worsening of the injury on which the original award was based;" "neither party can raise original issues such as work-connection, employee or employer status, occurrence of a compensable accident, and degree of disability at the time of the first award"); *cf. Sunny*

> *Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 45 (Colo. 2001)(causation established at temporary disability stage could be relitigated at permanent disability stage, because employer did not have same incentive to fully litigate causation at first stage).
>
> Thus, the change must be measured from claimant's condition when the claim was closed, as established in the original proceeding, and to her condition after reopening.

Id. at 1164.

Here, it is undisputed that there has been no original determination that the claimant sustained a compensable injury. Instead, the claimant's claim was automatically closed for his failure to prosecute for a period of at least 6 months. *See* OAC Rule 7-1(C); *Brown & Root, Inc. v. Industrial Claim Appeals Office, supra* (order issued by Director which dismisses the claim or closes the file for failure to prosecute is an "award" under §8-43-303, C.R.S.). Pursuant to the holding in *City and County of Denver*, since there has been no original determination of compensability, the claimant is precluded from reopening his claim under §8-43-303, C.R.S. for a change of condition. *See also Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189 ("change of condition refers to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury"); *see also Chavez v. Indus. Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985)(same); *see also 8 Larson's Workers' Compensation Law* 131.03(2)(a)-(b) (2013).

We recognize that the reopening statute is evidence of a legislative policy that the goal of achieving a fair and just result overrides the parties' interests in finality. *Renz v. Larimer County School District Poudre R-1, supra*. Nevertheless, we are bound by published opinions of the Colorado Court of Appeals which provide that reopening for a change of condition involves an original determination of compensability. C.A.R. 35(e); *see Donohoe v. ENT Federal Credit Union*, W.C. No. 4-171-210 (Sept. 15, 1995)(worsening of condition for purposes of reopening refers to worsening of claimant's condition from industrial injury after MMI); *cf. Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000)(reopening for change of condition is appropriate when degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted); *cf. Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988)(reopening for change of condition is appropriate where

additional medical and temporary disability benefits are warranted). Thus, we affirm the ALJ's order granting the respondents' summary judgment motion.

We further add that our holding does not preclude the claimant from attempting to reopen his claim under §8-43-303, C.R.S. based on the grounds of error or mistake. *See e.g. Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989)(where claim originally denied and dismissed and new medical technology became available establishing claimant's disease related to long term on the job exposure, fact-finder justified in concluding mistake of fact was made thereby resulting in reopening); *see also Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005)(mistake in diagnosis sufficient to justify reopening).

Next, to the extent the claimant argues that his rights to due process and equal protection of law were violated when his claim was dismissed before he was given an opportunity to show a change of condition under §8-43-303, C.R.S., we lack jurisdiction to address a facial constitutional challenge to a statute. *Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721 (1971). In *Horrell v. Department of Administration*, 861 P.2d 1194, 1196 (Colo. 1993), however, the Colorado Supreme Court indicated that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *See also Pepper v. Industrial Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005)("The distinction between a 'facial' and an 'as applied' equal protection challenge is not always clear cut. A facial challenge is supported where the law by its own terms classifies persons for different treatment. In contrast, a statute, even if facially benign, may be unconstitutional as applied where it is shown that the governmental officials who administer the law apply it with different degrees of severity to different groups of persons who are described by some suspect trait."), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

Nonetheless, because our analysis is so dependent upon the plain and ordinary meaning of §8-43-303, C.R.S., a "facial" and "as applied" challenge are so intertwined that we do not perceive how we can consider the claimant's apparent "as applied" challenge without addressing the "facial" constitutionality of §8-43-303, C.R.S. To do so would violate the principle of separation of powers. *See Denver Center for Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. App. 1985)(administrative rulings concerning "facial" challenges to statutes will not be considered "authoritative" on judicial review). Thus, to the extent the claimant is raising an "as applied" argument, we decline to address it.

Therefore, to the extent the ALJ held that the Director's Order was not an "award" as contemplated by §8-43-303, C.R.S., we set this determination aside. However, we affirm the ALJ's order to the extent it determined the claimant was precluded from reopening his claim under §8-43-303, C.R.S. for a change of condition since there has been no original determination that the claimant sustained a compensable injury.

IT IS THEREFORE ORDERED that the ALJ's order dated June 2, 2017, that granted the respondents' summary judgment motion on the issue of the claimant's petition to reopen his claim under §8-43-303, C.R.S. for a change of condition 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

11/9/17 by TT .

IRWIN CARMICKLE & FRALEY LLP, Attn: ROGER D FRALEY JR ESQ, 6377 S REVERE PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
LAW OFFICES OF SKRABO & ATKINS, Attn: MARCUS J ZARLENGO ESQ, 5670 GREENWOOD PLAZA BOULEVARD SUITE 400, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-013-335-02

IN THE MATTER OF THE CLAIM OF:

LINDA DIZMANG,

Claimant,

v.

FINAL ORDER

AXIS FINANCIAL MANAGEMENT,

Employer,

and

BERKSHIRE HATHAWAY,

Insurer,
Respondents.

The *pro se* claimant seeks review of an order of Administrative Law Judge Edie (ALJ) dated June 5, 2107, that determined the claimant did not sustain a compensable injury and denied and dismissed the claimant's request for medical benefits. We affirm.

This matter went to hearing on the issues of compensability and medical benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed through a government assisted program as a full-time caretaker for her disabled husband. The claimant testified that she sustained an injury on March 1, 2015, when she was helping her husband out of bed and their hands slipped apart resulting in him falling back on the bed and her falling backwards into an entertainment center. The claimant did not seek medical treatment for the alleged injury until October 19, 2015, when she saw Dr. Pak.

Dr. Pak noted that the claimant reported that she was injured when "she was lifting [her husband] out of bed and she felt a shock of pain going through her shoulder," and did not include a report that she fell backwards into an entertainment center. Dr. Pak assessed "shoulder pain," bursitis of the shoulder and scapulalgia. He administered an injection and referred the claimant for an x-ray and physical therapy. The X-ray revealed a type II acromion and multi-level cervical degenerative disc changes with arthritis. The claimant began reporting left shoulder pain on November 17, 2014.

Dr. Illig examined the claimant for a surgical consultation and determined that she was not a surgical candidate in view of the benign appearance of her MRI showing minimal degenerative changes. Dr. Illig referred the claimant for EMG studies to rule out any radiculitis. The EMG testing results were normal other than chronic reinnervation in the left triceps muscle. Dr. Illig did not find the claimant to be a good candidate for cervical spine surgery. He referred the claimant for pain management. Dr. Ross saw the claimant on July 19, 2016, and prescribed medial branch block injections at three levels of the cervical spine as well as oxycodone for daily pain. The claimant testified the respondents have declined to authorize this treatment.

Dr. Messenbaugh performed an independent medical examination at the respondents' request and concluded that the claimant did not sustain an acute injury on March 1, 2016. Dr. Messenbaugh noted the claimant's inconsistent pain complaints throughout the treatment history and the fact that the claimant did not seek treatment until October, seven months after the alleged injury. Dr. Messenbaugh also testified that the claimant's pain complaints were subjective and that the MRI imaging showed degenerative changes and not an acute injury, traumatic change or alteration in the pathology.

The ALJ found the opinions of Dr. Messenbaugh credible and persuasive and determined that the claimant failed to prove she sustained a compensable injury on March 1, 2015. The ALJ therefore denied the request for medical benefits including the recommendations by Dr. Ross for spinal injections and a prescription for Oxycodone.

On appeal the claimant contends that she had ineffective counsel and that the respondents failed to adequately investigate the injury. The claimant also questions the credibility of Dr. Messenbaugh and the ALJ's application of the law to deny the claim. We are not persuaded the ALJ committed reversible error.

The question of whether the claimant met her burden to prove a compensable injury is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Under this standard we must defer to the ALJ's credibility determinations, his resolution of conflicts in the evidence, and his assessment of the sufficiency and probative weight of the evidence. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). In particular, the weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Rockwell International*

v. Turnbull, 802 P.2d 1182 (Colo. App. 1990).

Here, the ALJ was persuaded by Dr. Messenbaugh's opinions credible in conjunction with the claimant's inconsistencies demonstrated in the medical records. There is substantial evidence supporting these determinations. Dr. Messenbaugh testified that in his experience he would have expected the claimant to seek medical treatment sooner than the 7 ½ months the claimant waited. Dr. Messenbaugh depo. at 7-8. Dr. Messenbaugh also pointed out her inconsistent pain complaints throughout her treatment. *Id.* at 10-11, 13-15, 23, 25-26. Dr. Messenbaugh also testified that the changes demonstrated on the claimant's MRI were the result of degenerative changes and not an acute injury. *Id.* at 16-18. Dr. Messenbaugh's testimony provides substantial evidence and valid support for the ALJ's findings.

The ALJ's order is based on credibility determinations and the ALJ found that the claimant's testimony about the alleged work injury was not credible. Under the substantial evidence standard of review it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). 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). Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *See People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Consequently, the ALJ's credibility determinations are binding except in extreme circumstances. *Arenas v. Industrial Claim Appeals Office*, *supra*. We perceive no extreme circumstances here.

The claimant contends that she testified incorrectly based on the advice of ineffective counsel. The claimant, however, does not dispute the material facts listed above underlying the ALJ's findings. As such, we have no basis to interfere with the ALJ's order. The claimant otherwise makes general allegations of bad faith in the respondents' actions but does not identify a statute, rule or order allegedly violated by the respondents' alleged bad faith conduct. The imposition of penalties is restricted to the violation of provisions of the Act or orders, while damages for bad faith adjusting are left to the civil law and courts. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). The claimant's general allegations of bad faith here do not support an award of penalties under 8-43-304(1), C.R.S.

The claimant also contends that the ALJ erred in his application of the law. While it is true, as the claimant argues, that a pre-existing condition does not disqualify a claimant from workers' compensation benefits, the ALJ did not deny the claim on this basis. The fact that the claimant did not file a workers' compensation claim until her claim for SSDI benefits was denied was a factor in the ALJ's assessment of the claimant's credibility and not a basis to deny the claim. This is valid factor for the ALJ to consider as a fact finder and in our view does not demonstrate prejudice or bias against the claimant. *See Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995). (ALJ is presumed to be unbiased and their actions are entitled to a presumption of integrity, honesty, and impartiality, unless the contrary is shown).

The ALJ's findings are supported by the facts and those facts in turn support the ALJ's determination to deny compensability. We have no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated June 5, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

10/17/17 by TT .

LINDA DIZMANG, 7437 THERESA DRIVE, COLORADO SPRINGS, CO, 80925 (Claimant)
HALL & EVANS LLC, Attn: EVAN M BLONIGEN, 1001 17TH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-020-103-01

IN THE MATTER OF THE CLAIM OF:

BRADLEY FINCHAM,

Claimant,

v.

ORDER

HOME DEPOT,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Margot W. Jones (ALJ) dated May 18, 2017, that determined they were liable for the claimant's April 14, 2014, right shoulder injury but did not award the claimant any temporary or specific medical benefits, and also determined that the respondents were not liable for the claimant's request for right shoulder surgery. We dismiss, without prejudice, the respondents' petition to review insofar as it seeks review of the ALJ's order on the issue of compensability of the claimant's April 14, 2014, injury.

The ALJ found that the claimant works as a truck driver for the respondent employer. On April 14, 2014, the claimant was unloading a "double door" refrigerator from the truck with a co-worker. As he was lowering the refrigerator, both the refrigerator and the dolly pulled. The claimant, refrigerator, and dolly eventually were pulled down from the truck and the claimant landed on top of the refrigerator.

Four months after the April 14, 2014, work incident, the claimant requested medical treatment for his right shoulder. The claimant sought treatment at Concentra, and Dr. Bird diagnosed him with shoulder impingement. She referred the claimant for physical therapy but did not provide any work restrictions.

The claimant underwent physical therapy and at his last session, he reported he felt 90% improved. Dr. Bird subsequently placed the claimant at maximum medical

improvement with no permanent impairment. She also opined that the claimant did not need any maintenance medical care or permanent work restrictions.

After being released from physical therapy, the claimant continued to work full duty. There are no records of complaints during the next year-and-a-half. However, on May 5, 2016, the claimant returned to Dr. Bird complaining of two out of ten right shoulder pain. The claimant's complaints included new pains in the bicipital groove. The claimant reported experiencing achiness with a popping sensation with external rotation. A right shoulder MRI on May 13, 2016, showed a partial tear of the supraspinatus and infraspinatus, subluxation or dislocation of the bicep tendon, and acromioclavicular arthritis.

On May 26, 2016, the claimant saw Dr. Failinger for an orthopedic evaluation. He stated that the claimant's strength and range of motion was poor. Dr. Failinger opined that the claimant suffered a dislocated bicep tendon. He opined that the only option was surgery. Dr. Failinger also noted that physical therapy "should not help" the claimant's right shoulder pain, and he recommended the claimant undergo a biceps tenodesis.

The claimant subsequently underwent an independent medical examination with Dr. Fall. Dr. Fall opined that based on the lack of documented symptoms between September 2014 and May 2016, it was unlikely that the claimant's need for right shoulder surgery was related to the April 14, 2014, injury. Dr. Fall also attributed significance to the fact that the claimant did not pursue treatment for more than a year-and-a-half after being released in September 2014. According to Dr. Fall, such a long period of time with no pursuit of treatment, findings, or documented complaints cast doubt on the casual relationship between the claimant's April 14, 2014, injury and his new pain complaints in May 2016. Dr. Fall also testified that if the claimant had suffered an acute biceps tendon rupture on the date of the April 14, 2014, injury, he would have experienced immediate pain and bruising such that he would have needed immediate attention at a hospital. Dr. Fall testified that the claimant did not exhibit these symptoms, but instead exhibited good strength, good range of motion, and low pain levels during his short course of treatment prior to being released in September 2014. Dr. Fall ultimately opined that the claimant's need for surgery could not be related back to the initial injury on April 14, 2014.

The claimant saw Dr. Hewitt for a second surgical opinion on November 21, 2016. Dr. Hewitt opined that a traction injury would be foreseeable given the claimant's described mechanism of injury. He concluded the MRI findings were causally related to the April 14, 2014, injury. Dr. Hewitt recommended arthroscopic rotator cuff repair and biceps tenodesis.

The ALJ ultimately determined that the claimant suffered a muscle strain with impingement during the course and in the scope of his employment on April 14, 2014. She held the respondents liable for the claimant's April 14, 2014, right shoulder injury. However, the ALJ did not award any specific medical or temporary benefits with regard to the claimant's April 14, 2014, right shoulder injury. Further, crediting Dr. Fall's opinions, the ALJ also determined that the claimant's 2016 request for right shoulder surgery was not reasonably necessary or related to the April 14, 2014, work injury. She therefore denied the claimant's request for right shoulder surgery.

On appeal, the respondents argue that the ALJ erred in "implicitly" concluding that the claimant proved a compensable injury. Relying on the holding in *Harman-Bergstedt, Inc.* v. *Loofbourrow*, 320 P.3d 327 (Colo. 2014), the respondents contend that the claimant's injury did not result in sufficient disability to constitute a compensable injury.[1] Conversely, the claimant contends that the ALJ's order is not subject to appeal because it does not require the respondents to pay any benefits. The claimant further argues that the ALJ's denial of the right shoulder surgery is not the issue of the respondents' appeal.

Under §8-43-301(2), C.R.S., a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty," may file a petition to review. Orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to review. *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Further, orders which determine liability without determining the amount of benefits to be awarded are not final and appealable. *United Parcel Service, Inc. v. Industrial Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999). Moreover, an order may be partially final and reviewable and partially interlocutory. *See Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843, 846 (Colo. App. 1989).

Here, the ALJ found that the claimant suffered a muscle strain with impingement during the course and in the scope of his employment on April 14, 2014. She ordered the respondents liable for the claimant's April 14, 2014, right shoulder injury. However, the ALJ's order in this regard determined a general, unspecified, liability without requiring

[1] The respondents attribute consequences to the word 'compensable' which are not intended by the Workers' Compensation Act (Act) or by various judicial uses of the term. As the *Loofbourrow* opinion explains, the Court in that decision is using the word to refer a claim for which indemnity benefits are payable. However, in different contexts the Act applies the word 'compensable' to simply mean an injury that arises out of the and in the course of the employment, even if the injury requires no more than the payment of medical benefits. *See* § 8-42-101(6)(a) and (b) or § 8-43-404(9), C.R.S.

the payment of any benefit or penalty. As such, this portion of the ALJ's order is not final and appealable. *See United Parcel Service, Inc. v. Industrial Claim Appeals Office, supra.* The ALJ's order also denied and dismissed the claimant's 2016 request for right shoulder surgery as being not reasonably necessary or related to the April 14, 2014, work injury. This portion of the ALJ's order has denied the claimant a medical benefit and, therefore, is final and reviewable. *Oxford Chemicals, Inc. v. Richardson, supra.* However, neither the claimant nor the respondents has appealed this portion of the ALJ's order. In fact, the respondents would not have standing to appeal this portion of the ALJ's order because it does not result in an actual injury to their interests. Consequently, they are not an aggrieved party to pursue an appeal of this portion of the ALJ's order. *See Savidge v. Air Wisconsin Airlines, Inc.*, W.C. No. 4-620-669 (Dec. 29, 2014), *aff'd Savidge v. Industrial Claim Appeals Office*, Colo. App. No. 15CA0086 (June 11, 2015)(NSOP).

IT IS THEREFORE ORDERED that the respondents' petition to review the ALJ's order dated May 18, 2017, on the issue of compensability of the April 14, 2014, injury 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

11/9/17 by TT .

THE ELEY LAW FIRM, Attn: CLIFFORD E ELEY ESQ, 2000 S COLORADO BLVD NO 2-740, DENVER, CO, 80222 (For Claimant)
LEE + KINDER LLC, Attn: SHEILA TOBORG ESQ, C/O: STEPHEN ABBOT ESQ, 3801 E FLORIDA AVENUE SUITE 210, DENVER, CO, 80210 (For Respondents)

STATE OF COLORADO
DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF WORKERS' COMPENSATION

OAC Hearing Date:
Venue:

W.C. Number: 4-952-492

PREHEARING ORDER
FOR PREHEARING CONFERENCE HELD ON OCTOBER 5, 2017

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,
Claimant,
v.
,
Employer, and

,
Insurer, Respondents.

A prehearing conference was held on October 5, 2017 before Prehearing Administrative Law Judge (PALJ) Laura Broniak pursuant to Section 8-43-207.5, Colorado Revised Statutes (C.R.S.). Respondents appeared through counsel, _____. Claimant appeared by telephone through counsel, _____ No hearing is pending before the Office of Administrative Courts (OAC).

Notice pursuant to Rule 9-2(C) of the Workers' Compensation Rules of Procedure (W.C.R.P.) is proper or is waived by the parties regarding the following issues:

1. Claimant's oral motion to obtain a Division-sponsored independent medical examination (DIME).

2. Claimant's oral motion to allow his dependent to apply for indigency with regard to payment for the DIME.

3. Claimant's oral motion to hold the Claimant's remains at the morgue.

This PALJ has considered the statements of the parties, and reviewed the computer files maintained by the Division of Workers' Compensation (Division) and the OAC concerning this claim, and is fully advised regarding the issues for determination.

Claimant sustained an admitted injury to his ankles on May 31, 2014. Claimant apparently suffered from ongoing nerve pain related to the ankle injury. To treat the nerve pain, Claimant had undergone implantation of a spinal cord stimulator. A couple of weeks ago, the Claimant underwent a third procedure related to the spinal cord stimulator. Shortly thereafter, the Claimant died. The Mesa County coroner performed an autopsy, but has not yet released a report, leaving the cause of death unknown at this time. The Claimant's wife filed a new workers' claim for compensation which was assigned claim number WC 5-058-259. This order

will assume, without deciding, that _____ is a dependent widow as that term is defined in Section 8-41-501(1)(a), C.R.S.

In WC 4-952-492, the Division's records reflect that Respondents filed a Final Admission of Liability (FAL) on April 26, 2017, and that Claimant initiated the DIME process. On August 8, 2017, Claimant's counsel canceled the DIME appointment. After conclusion of the prehearing conference, the Respondents advised this PALJ that Claimant's authorized treating physician rescinded his maximum medical improvement (MMI) determination. Indeed a report from Dr. David Lorah dated June 21, 2017 states that MMI is rescinded and that Claimant is "put back on temporary total disability." The Respondents admittedly did not file a new General Admission of Liability even though they paid temporary total disability. During the prehearing conference, Claimant's counsel stated that Claimant's wife continues to receive temporary total disability benefits because a death certificate has not been created.

Claimant's dependent asserts that by virtue of his death, Claimant is now necessarily at MMI, and should be entitled to a DIME (in the form of another autopsy) pursuant to Section 8-42-107(8), C.R.S. Claimant's dependent also asserts that she should be permitted to file a petition for an indigency determination pursuant to W.C.R.P. 11-11 in order to shift the cost of the DIME to the Respondents. Claimant cited to no authority in support of the relief requested. Respondents objected to Claimant's motions. Respondents argued that the statutory events that trigger a DIME such as an ATP's finding of MMI, or filing of a FAL have not occurred; therefore, a DIME, if permitted, is premature.

The issues presented by Claimant's dependent here are nearly identical to those presented in *Dependents of Nunnally v. Wal-Mart Stores, Inc.*, 943 P.2d 96 (Colo. App. 1996). In Nunnally, the dependents asserted that death was the ultimate stable condition rendering Mr. Nunnally at MMI upon his death. The Court of Appeals rejected the dependents' arguments, and held that enactment of the DIME procedure was logically premised upon the assumption that the injured employee would be alive to participate. The Court ultimately held that the provisions of Section 8-42-107(8)(b), C.R.S. were not triggered as a matter of law by the decedent's death because he was not at MMI when he died. *Id.* at 28. Further, the Industrial Claims Appeals Office has held that a DIME is unavailable to a deceased claimant regardless of whether he reached MMI prior to his death. *Moore v. Cobb Mechanical Contractors*, WC 4-599-920 (ICAO 2006).

Based on the foregoing, this PALJ concludes that this deceased Claimant is not entitled to undergo a DIME, which renders moot the motion to permit a petition for indigency. The Claimant's dependent withdrew the motion regarding holding Claimant's remains at the morgue.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Claimant's oral motion to obtain a Division-sponsored independent medical examination is **DENIED.**

2. Claimant's oral motion to allow his dependent to apply for indigency with regard to payment for the DIME is **DENIED** as moot.

Dated: October 6, 2017

Laura Broniak
Prehearing Administrative Law Judge

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO, **Respondent:** ERIK G. FISCHER.	Case Number: **09PDJ016**

DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)

On September 29, 2009, a Hearing Board composed of Larry A. Daveline, a citizen board member, Bruce W. Sattler, a member of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("PDJ"), held a one-day hearing on the issue of sanctions pursuant to C.R.C.P. 251.18. Lisa E. Frankel appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Alexander R. Rothrock appeared on behalf of Erik G. Fischer ("Respondent"), who also appeared. The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. ISSUE AND SANCTION

Suspension is generally appropriate when a lawyer *knows* of a conflict of interest and fails to fully disclose to a client the possible effect of that conflict. Public censure is generally appropriate when a lawyer is *negligent* in determining whether his own interests may materially affect the representation of a client. Respondent admitted he violated Colo. RPC 1.8(a). If the Hearing Board finds he acted knowingly, but also finds substantial mitigating factors, what is the appropriate sanction for his misconduct?

The Hearing Board finds the appropriate sanction for Respondent's misconduct is a suspension from the practice of law for a period of ninety days, stayed upon the successful completion of a one-year period of probation, on the condition that there shall be no further violations of the Colorado Rules of Professional Conduct.

II. PRODCEDURAL HISTORY

On March 10, 2009, the People filed a complaint alleging two separate violations of the Colorado Rules of Professional Conduct.[1] Respondent filed an answer on April 9, 2009. On September 4, 2009, the PDJ denied "Respondent's Motion for Summary Judgment on Claim I." The parties then filed a "Stipulation, Agreement and Affidavit Containing the Respondent's Conditional Admission of Misconduct" on September 8, 2009. In the stipulation, Respondent admitted to a violation of Colo. RPC 1.8(a) for failing to provide adequate disclosures of conflict in one instance, and for failing to provide any written disclosure in three other instances, as discussed below. As a part of the stipulation, the People moved to dismiss an alleged violation of Colo. RPC 1.7. The PDJ hereby grants that request.

III. ESTABLISHED FACTS AND RULE VIOLATIONS

The Hearing Board hereby adopts and incorporates by reference the factual background of this case fully detailed in the parties' stipulation.[2] Specifically, the parties stipulated that Respondent violated Colo. RPC 1.8(a) (2007), which stated, "[a] lawyer shall not enter into enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless the terms of the transaction are fully disclosed to the client in writing, the client is informed that use of independent counsel may be advisable and is given reasonable opportunity to seek such counsel, and the client consents in writing to the conflict disclosure.[3]

Jurisdiction

Respondent took and subscribed the Oath of Admission and gained admission to the Bar of the Colorado Supreme Court on October 21, 1987. He is registered upon the official records, Attorney Registration No. 16856, and is therefore subject to the jurisdiction of the Hearing Board pursuant to C.R.C.P. 251.1.

Stipulated Facts

On October 26, 2005, Vanessa Dominguez suffered injuries in an automobile incident as a passenger in an automobile driven by her cousin. On June 14, 2006, Ms. Dominguez retained the firm of Fischer & Fischer, P.C.

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[1] The People filed an "Amended Complaint" on July 28, 2009.

[2] *See* Exhibit 19. The parties also stipulated to the admission of Exhibits 1-22, which have been incorporated into the Hearing Board's findings of fact.

[3] This rule was in effect at the time Respondent entered into a business relationship with his client. The current rule is similar but not identical.

("Fischer & Fischer") to represent her in a personal injury action related to the incident.[4] Fischer & Fischer filed a lawsuit against Ms. Dominguez's cousin and pursued an uninsured motorist claim against Ms. Dominguez's insurer, American Family Insurance Company ("American Family"). Ms. Dominguez was Respondent's client at the time of each of the loans described below.

Real Estate Recovery, L.L.C. ("Real Estate Recovery") is a company formed and organized by Respondent. At the time of the loans discussed herein, Respondent and Dr. Rocci Trumper owned the company and shared all profits equally. Dr. Trumper never met with Ms. Dominguez nor spoke with her regarding the loans described herein, and all of Ms. Dominguez's interactions regarding the loans were with Respondent. However, Respondent and Dr. Trumper jointly participated in the decisions regarding whether to loan Ms. Dominguez money.[5]

On June 30, 2006, Real Estate Recovery loaned Ms. Dominguez $10,300.00, as evidenced by a promissory note.[6] To pay her indebtedness on the promissory note, Ms. Dominguez assigned Real Estate Recovery the amount of her monetary recovery from the personal injury case.[7] The promissory note provides for interest at a rate of 18% per annum, with unpaid principal and defaulting interest bearing an interest rate of 24% per annum. Respondent provided Ms. Dominguez with a disclosure concerning this loan on June 30, 2006.[8]

The parties stipulated and the Hearing Board agrees that Respondent provided inadequate disclosures to Ms. Dominguez with respect to this initial loan. The disclosures did not contain a clear explanation of the differing interests of the lawyer and client, the advantages of seeking independent advice or a detailed explanation of the risks and disadvantages to the client entailed in the business arrangement. Further, the disclosure regarding the initial loan was signed on the same date the loan was made and only a couple of weeks after Ms. Dominguez retained Respondent. Thus, although Ms. Dominguez waived her right to consult with independent legal counsel in the June 30, 2006, disclosure, she did not waive the conflict itself.

On October 11, 2006, Ms. Dominguez borrowed an additional $5,150.00 from Real Estate Recovery, evidenced by another promissory note under the same terms and conditions as the previous note.[9] On November 30, 2006, Ms. Dominguez borrowed additional funds, at which time Respondent requested

[4] *See* Exhibit 1.
[5] *See* Exhibit 20.
[6] *See* Exhibit 2.
[7] *See* Exhibit 3. On or about December 1, 2006, Real Estate Recovery filed a UCC security interest against any proceeds collected in the personal injury lawsuit. *See* Exhibit 9.
[8] *See* Exhibit 4.
[9] *See* Exhibit 5.

additional collateral on behalf of Real Estate Recovery. Ms. Dominguez signed a deed of trust granting Real Estate Recovery a second mortgage on her home, and she gave Respondent a Movado watch as collateral.[10] Ms. Dominguez also signed a final promissory note reflecting the total principal for all three loans in the amount of $21,509.23.[11] This promissory note replaced the two notes previously executed by Ms. Dominguez. On June 19, 2007, Ms. Dominguez received a fourth loan from Real Estate Recovery in the amount of $2,607.00.[12]

Respondent never advised Ms. Dominguez of the consequences of providing security for the loans. Respondent likewise failed to advise Ms. Dominguez of the desirability of seeking independent counsel prior to these transactions, and he failed to allow her reasonable time to do so. Finally, Respondent did not obtain Ms. Dominguez's consent to these conflicts in writing. Although Respondent obtained a written waiver from Ms. Dominguez of her right to consult with independent counsel, these circumstances raise a question as to whether her waiver was knowing and intelligent. In short, Respondent never provided Ms. Dominguez with any written disclosures regarding the three additional loans between the parties, nor did he alert her to possible conflicts of interest as regards the security interest Real Estate Recovery took in her home or her watch.

By failing to make adequate disclosures with respect to the first loan, and by failing to provide any written disclosures with respect to the second through fourth loans, Respondent engaged in a conflict of interest with his client in violation of Colo. RPC 1.8(a).

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law are the guiding authorities for selecting and imposing sanctions for lawyer misconduct.[13] In imposing a sanction after a finding of lawyer misconduct, the Hearing Board must first consider the duty breached, the mental state of the lawyer, the injury or potential injury caused, and the aggravating and mitigating evidence pursuant to ABA *Standard* 3.0.

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[10] *See* Exhibit 8.

[11] *See* Exhibits 6-7.

[12] *See* Exhibits 10 – 12. On January 29, 2008, Real Estate Recovery and Fischer & Fischer filed a complaint for declaratory judgment against Ms. Dominguez and American Family in Weld County District Court, seeking to grant full force and effect to a $75,000.00 settlement they alleged Ms. Dominguez entered into with American Family. Ultimately, this case was resolved through settlement; the parties agreed to split the $75,000.00 proceeds, with Real Estate Recovery receiving $22,500.00, Fischer & Fischer receiving $25,000.00 and Ms. Dominguez receiving $27,500.00. Regrettably, Ms. Dominguez eventually filed for Chapter 7 bankruptcy on February 14, 2008. She was granted a discharge on June 11, 2008. *See* Exhibits 14, 16 and 17.

[13] *See In re Roose,* 69 P.3d 43, 46-47 (Colo. 2003).

ABA *Standard* 3.0 – Duty, Mental State, and Injury

Respondent violated a duty owed to his client.[14] Respondent specifically failed to avoid a conflict, which may have impaired his independent judgment during the representation. This duty arises out of the nature of the basic relationship between the lawyer and the client. Here, Respondent failed to comply with this duty.

With regard to mental state, the People argue Respondent acted knowingly, while Respondent contends he acted negligently.[15] Both parties point to the disclosure Respondent provided to Ms. Dominguez for the initial loan. The People allege it demonstrates, despite its inadequacy, that Respondent knew he had to provide the disclosure. Respondent argues he believed the first disclosure obviated the need for subsequent disclosures with respect to the additional loans.

The Hearing Board finds Respondent *knowingly* engaged in the established misconduct, but without the conscious objective to accomplish a particular result. While Respondent attempted to comply with his general and subjective understanding of Colo. RPC 1.8, he knowingly failed to comply with its specific provisions at the time of the business transactions with his client. Although Respondent acted without the conscious objective to cause particular injury to his client, he nevertheless caused her potential injury through his knowing conduct by jeopardizing his ability to remain objective throughout the attorney-client relationship.[16]

ABA *Standard* 3.0 – Aggravating & Mitigating Factors

Aggravating circumstances include any considerations or factors that may justify an increase in the degree of discipline to be imposed.[17] Mitigating circumstances include any considerations or factors that may justify a reduction in the degree of discipline to be imposed.[18] The Hearing Board considered evidence of the following aggravating and mitigating circumstances in deciding the appropriate sanction.

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[14] *See* ABA *Standard* 4.0.

[15] *See* ABA *Standards*, *Definitions*. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

[16] *See* ABA *Standards*, *Definitions*. "Potential injury" is harm to a client . . . that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

[17] *See* ABA *Standard* 9.21.

[18] *See* ABA *Standard* 9.31.

Vulnerability of Victim – 9.22(h)

Ms. Dominguez faced severe financial difficulties and the possibility of losing her home at the time she entered into the loans with Respondent. Furthermore, Respondent represented her client in a matter in which she placed her trust in him. Under these circumstances, unsophisticated as well as sophisticated clients are always vulnerable. The provisions of Colo. RPC 1.8 are designed to address this precise situation.

Substantial Experience in the Practice of Law – 9.22(i)

Respondent has practiced law for approximately twenty-two years and therefore should have recognized the pitfalls of entering into a business transaction with a client.

Absence of a Prior Disciplinary Record – 9.32(a)

Respondent does not have a prior disciplinary record over the course of approximately twenty-two years of practicing law.

Absence of a Dishonest or Selfish Motive – 9.32(b)

The Hearing Board finds Respondent acted with an absence of a dishonest motive, having considered and accepted Respondent's testimony that his client, Ms. Dominguez, was very worried about losing her home, and that he attempted to help her retain this asset in the face of foreclosure.

Cooperative Attitude Toward the Proceedings – 9.32(e)

Respondent fully cooperated in these disciplinary proceedings.

Good Character and Reputation – 9.32(g)

The Hearing Board considered and accepted the testimony of David J. Dansky, Thomas F. Mulvahill, and David A. Mestas as demonstrating Respondent's good character and reputation in the legal community.

Remorse for His Actions – 9.32(l)

Respondent felt remorse for his misconduct in his dealings with Ms. Dominguez.

Analysis Under ABA *Standards* and Colorado Case Law

In light of its finding that Respondent *knowingly* violated Colo. RPC 1.8, the Hearing Board concludes the following ABA *Standard* is applicable:

> Suspension is generally appropriate when a lawyer *knows* of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.[19]

The Colorado Supreme Court recently addressed Colo. RPC 1.8 in a case affirming a six-month stayed suspension upon successful completion of a two-year period of probation for a lawyer who violated this rule.[20] While helpful to the analysis here, the Hearing Board finds that case distinguishable due to the lack of remorse from the respondent attorney and because it involved additional substantive claims.

Here, Respondent presented substantial and credible evidence of his excellent reputation in the legal community, his good character, his clean disciplinary record and his remorse for his misconduct. Each of these factors influenced our decision as to the appropriate sanction, which we believe should be a suspension stayed upon the successful completion of a period of probation.

V. CONCLUSION

Respondent violated a duty to his client to avoid a conflict of interest. This duty of loyalty is fundamental to the attorney-client relationship because the client places trust in his or her attorney to use judgment that is not compromised by the attorney's own personal interests during the course of the representation. Therefore, upon consideration of the duties violated, the established mental state, the injury caused, and the aggravating and mitigating factors, the Hearing Board concludes Respondent should be suspended from the practice of law for ninety days, stayed upon the successful completion of a period of a one-year period of probation.

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[19] *See* ABA *Standard* 4.32 (emphasis added).
[20] *See In re Fisher,* 202 P.3d 1186 (Colo. 2009).

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **ERIK G. FISHER**, Attorney Registration No. 16856, is hereby **SUSPENDED** from the practice of law for a period of **NINETY (90) DAYS, STAYED** upon the successful completion of a one-year period of probation, which shall include no further violations of the Colorado Rules of Professional Conduct pursuant to C.R.C.P. 251.7. This order **SHALL** become effective thirty-one (31) days from the date of this order in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h).

2. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

DATED THIS 7TH DAY OF MAY, 2010.

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

original signature on file

BRUCE W. SATTLER
HEARING BOARD MEMBER

original signature on file

LARRY A. DAVELINE
HEARING BOARD MEMBER

Copies to:

Lisa E. Frankel Office of Attorney Regulation Counsel	Via Hand Delivery
Alexander R. Rothrock Respondent's Counsel	Via First Class Mail
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Susan Festag Colorado Supreme Court	Via Hand Delivery