

BROWN BAG SEMINAR

Thursday, October 15, 2015

(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

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Free

This outline covers ICAP and appellate decisions issued through
October 2, 2015

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-897-023-03

IN THE MATTER OF THE CLAIM OF
JUAN JOSE MARTINEZ GALDAMEZ,

Claimant,

v.

FINAL ORDER

JOSE ENRIQUEZ and JACK
SCHNEIDER FARMS, LLC,

Employer,

and

NON-INSURED and
PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated February 24, 2015, that granted the respondents Jack Schneider Farms, LLC (Schneider Farms) and Pinnacol Assurance's joint motion for summary judgment to deny and dismiss the claimant's claim against Schneider Farms as a statutory employer. We affirm.

This matter has previously been before us. Schneider Farms hired Jose Enriquez to clean irrigation ditches on property owned or leased by Schneider Farms. Enriquez, in turn, would bring one or more workers to work with him to assist in cleaning the ditches. In early April 2011, Enriquez brought the claimant with him to clean the ditches. Enriquez spoke to Schneider about cleaning the ditches and the claimant stayed near Enriquez's truck and did not speak to Schneider. Schneider did not tell the claimant what he would be paid for the work he performed. The nature of the relationship between the claimant and Enriquez was not discussed. Schneider, or one of the employer's employees, told Enriquez which ditches to clean, and Schneider did not supervise Enriquez when he was cleaning a ditch.

On April 5, 2011, Enriquez and the claimant had finished cleaning one ditch. As they were walking across the fields, they came across a stack of metal pipes. Enriquez

and the claimant lifted a pipe and it made contact with a power line and electrocuted the claimant. The claimant received extensive treatment for electrical burns.

The claimant then filed an application for hearing seeking workers' compensation benefits against Schneider Farms as a direct employer. The claimant did not litigate whether Schneider Farms was a statutory employer in this action. In an order dated March 16, 2012, ALJ Friend determined that the claimant was not an employee of Schneider Farms and, therefore, denied and dismissed the claimant's claim for benefits. The panel affirmed ALJ Friend's order and the claimant did not appeal the matter to the court of appeals.

The claimant later filed another application for hearing for this same injury against Enriquez and named Schneider Farms and Pinnacol Assurance as parties. In a pre-hearing conference order dated December 12, 2012, it was ordered that the only respondent proceeding to that hearing would be Jose Enriquez. The order did not provide any detail on why Schneider Farms and Pinnacol Assurance were not proceeding to hearing or even whether they were actually dismissed. The claimant then filed a motion for summary judgment against Enriquez. Enriquez did not respond to the motion and ALJ Friend issued an order granting summary judgment on February 6, 2013, finding that Enriquez was the direct uninsured employer of the claimant at the time of the claimant's work injury. Enriquez did not appeal the order.

After this order became final, the claimant sought payment of benefits from Pinnacol Assurance on the grounds that Schneider Farms was the statutory employer of the claimant at the time of the work injury. Pinnacol Assurance denied payment of benefits. The respondents subsequently filed an application for hearing which is the subject of this order. The respondents, Schneider Farms and Pinnacol Assurance, filed a joint motion for summary judgment as a matter of law on the theory of claim preclusion, asserting that all elements for claim preclusion were met in this case because of ALJ Friend's prior final order on the issue of compensability. The respondents also sought summary judgment contending that §8-41-401(4)(c), C.R.S., removes any potential cause of action against the respondents due to the farm and agricultural exemption. The claimant argued that the elements of claim preclusion had not been met because the issue of statutory employer had not been litigated in a prior claim and the issue did not become ripe until the entry of summary judgment against non-insured employer, Enriquez. The claimant also argued that the application of §8-41-401(4)(c) requires that summary judgment be entered in favor of the claimant because Schneider Farms failed to obtain an insurance certificate from Enriquez and alternatively failed to appropriately raise the affirmative defense.

The ALJ determined that not all of the elements of claim preclusion had been met because the statutory employer issue had not been litigated in either proceeding. In the initial hearing, the claimant specifically stated that they were not proceeding on the issue of statutory employer. In the second action against Enriquez, the issue of Schneider Farms' status as a statutory employer could not have been litigated because Schneider Farms was not a party to that action. The ALJ, therefore, declined to grant summary judgment on the grounds of claim preclusion.

The ALJ, however, granted the motion for summary judgment on the basis that §8-41-401(4)(c), C.R.S. provides an agricultural exemption to statutory employer liability. The ALJ found that the claimant's job duties of cleaning out irrigation ditches warranted the application of the agricultural exemption. As a result the ALJ concluded that pursuant to §8-41-401(4)(c), the claimant, as an employee of a person who contracted with Schneider Farms, has no right to a cause of action against the owner or lessee of the farm operation, Schneider Farms. The ALJ granted the respondents' motion for summary judgment and denied the claimant's cross motion for summary judgment.

On appeal the claimant argues that Schneider Farms and Pinnacol Assurance are bound by ALJ Friend's February 6, 2013, order holding Enriquez liable as the direct employer, despite the fact that Schneider Farms and Pinnacol Assurance did not participate in the hearing pursuant to a pre-hearing order. The claimant also contends that the ALJ erred in her application of §8-41-401(4)(C), C.R.S. The claimant contends that under the statute, the farm operator's failure to obtain a certificate of insurance from a contractor prior to allowing work to commence upon the farm precludes the statutory protection to the farm operator from statutory employer liability. Finally, the claimant contends that the exemption in §8-41-401(4)(c) is unconstitutional on its face and as applied. We are not persuaded the ALJ erred.

Initially, the respondents argue that the claimant's brief exceeds the 20 page limit set forth in Office of Administrative Courts Rule of Procedure (OACRP) 26(E), and, therefore, should be stricken. The respondents also contend that the claimant has submitted exhibits with his brief that were not part of the record before the ALJ and that these documents should also be stricken. We disagree with the respondents that the brief should be stricken. However, we do agree with the respondents' argument concerning the exhibits submitted after hearing.

Although the claimant did not request permission to exceed the brief limit set forth in OACRP 26(E), we do not find that it is necessary to strike the 22 page document

submitted by the claimant. Given the convoluted and disputed procedural posture of the case we determine that the claimant's failure to adhere to the 20 page limit in this regard is not unreasonable. *See People v. Rodriguez*, 914 P.2d 230 (Colo. 1996) (in its discretion, a court may grant permission to file an oversize brief).

However, we do not consider the exhibits submitted by the claimant after the hearing which were not part of the record before the ALJ. Our review is restricted to the record before the ALJ, and the exhibits and factual assertions made on appeal by the claimant may not substitute for evidence which is not in the record. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995) (appellate review limited to the record before the ALJ); *Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988).

The claimant also requested permission to file a reply brief. We have considered the claimant's request. The statute, however, does not provide for such a brief, the claimant's brief in support was lengthy, and we perceive no need for a reply brief. Consequently, the request is denied. Section 8-43-301(9), C.R.S. (panel may issue such procedural ordered as may be necessary to carry out appellate review).

OACRP 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See* OACRP 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). 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).

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 only 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.

I.

The claimant contends that Schneider Farms and Pinnacol Assurance are bound by ALJ's Friend's February 6, 2013, order which determined the claimant sustained a compensable injury and held Enriquez liable as a direct employer. The claimant concedes that Pinnacol Assurance and Schneider Farms were dismissed from the action against Enriquez as a direct employer by a prehearing order. Claimant's Brief in Support at 8. The claimant argues, however, that the dismissal was erroneous and claims that the respondents misinformed the PALJ on the legal issues involved which resulted in the PALJ issuing the order dismissing Schneider Farms and Pinnacol. The claimant alleges that this was invited error on the respondents' part and because the respondents were served a copy of the February 2013 order holding Enriquez liable and did not take any action, the respondents should be bound by ALJ Friend's February 2013 order and found liable as statutory employers.

In response to this argument the respondents reassert their position that the issue of statutory employer was barred by the doctrine of claim preclusion. The respondents did not appeal the ALJ's order on this issue and, therefore, we do not address it here.

We are not persuaded by the claimant's argument that the February 2013 order presented any implications for Schneider Farms or Pinnacol Assurance. Even assuming, *arguendo*, that the respondents were erroneously dismissed from this action, this does not alter the fact that they were not parties to this action at the time of the hearing and did not participate in the hearing. Consequently, they cannot be bound by any order resulting from that hearing. Moreover, as the respondents point out, because Schneider Farms and Pinnacol Assurance were not parties to the action, they had no standing to take any action with regard to the February 2013 order. *See* §8-43-301(2), C.R.S. *Adams v. Neoplan U.S. A. Corp.*, 881 P.2d 373 (Colo. App. 1993) (order imposed no obligation upon respondents to pay any penalty or benefits; therefore, they lacked the requisite standing to challenge the award).

We also note that when the claimant made the claim against Enriquez, the claimant also asked for temporary disability and medical benefits to be increased by 50 percent due to the absence of insurance coverage. These benefits and penalty were awarded by ALJ Friend in the February 2013 order. In *Heriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970), the Supreme Court held that if there is present a statutory employer, the uninsured sub-contractor cannot be made liable for benefits and the 50 percent penalty. The Court held "... the subcontractor who has failed to keep his liability insured is an employee and the contractor-out is the only employer contemplated under

the act.” By pursuing Enriquez for these benefits, the claimant appears to have taken the position that there is no statutory employer. Otherwise, Enriquez would not be liable for benefits pursuant to *Heriott*. ALJ Friend agreed in his order. The claimant was a party to that order and is bound by it. He has then, waived his ability to take the contrary position he is now asserting in this appeal.

II.

The claimant also argues that when §8-41-401(4)(c) is read as a whole, if a farm operator fails to obtain proof of coverage, the operator is precluded from asserting the farm ranch exemption to statutory employer liability. We agree with the ALJ that such a reading is inconsistent with the plain language of the relevant statutory provisions.

Section 8-41-401 (4)(a) provides in pertinent part:

(4)(a) Notwithstanding any provision of this section to the contrary, any person, company, or corporation who contracts with a landowner or lessee of a farm or ranch to perform a specified farming or ranching operation shall, prior to entering into such contract, provide for and maintain, for the period of such contract, workers' compensation coverage pursuant to articles 40 to 47 of this title covering all the employees and laborers to be utilized under such contract. Proof of such coverage on forms or certificates issued by the insurer shall be provided to the person, company, or corporation contracting for the labor prior to performing such contract.

Section 8-41-401(4)(c) goes on to provide:

(c) Notwithstanding any provision of this section to the contrary, no person, company, or corporation contracting with a landowner or lessee of a farm or ranch operation to perform a specified farming or ranching operation nor any employee of such person, company, or corporation required to be covered by workers' compensation pursuant to this subsection (4) shall have any right of contribution from, or any action of any kind, including actions under section 8-41-203, against, the person, company, or corporation contracting to have such agricultural labor performed.

In interpreting these statutes, we must attempt to further the legislative intent. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). To discern the intent we must give the words in the statute their plain and ordinary meanings, unless the result is absurd. *Id.* If the statutory language unambiguously sets forth the legislative purpose, we need not apply additional rules of statutory construction to determine the statute's meaning. *Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 816 (Colo. App. 2007).

According to the plain language, the effect of this statute is to exempt agricultural operations from statutory employer liability under §8-41-401(1)(a), C.R.S. *See Sorensen v. Goldman*, 837 P.2d 266, 267 (Colo. App. 1992). Thus, where it is determined that a putative statutory employer is engaged in a farming business, the only question is whether the contracted services are part of the farming operation. *State Compensation Insurance Fund v. Industrial Commission*, 713 P.2d 405, 406 (Colo. App. 1985).

Contrary to the claimant's arguments, §8-41-401(4) places the obligation on the contractor to obtain and maintain workers' compensation insurance for farm or ranch labor. Subsection (b) makes it a criminal offense for the contractor not to do so but places no such burden on the farm operator. The statute requires the contractor to insure its operations and prohibits the contractor from performing the work unless the appropriate insurance is in place. The statute does not require the farmer to demand or obtain a certificate of insurance from the contractor. Because the legislature did not create such an obligation, we cannot read non-existent provisions into the statute. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000).

Here, the ALJ found, and the parties do not dispute, that the claimant was hired to clean the irrigation ditch and that this constitutes part of the farming operation. *Billings Ditch Co. v. Industrial Commission*, 127 Colo. 69 253 P.2d 1058 (Colo. 1953). Under §8-41-401(4), Enriquez was required to cover his employees for workers' compensation and did not. The plain meaning of the statute is to exempt Schneider Farms, as the farm operator, from liability as a statutory employer. We therefore agree with the ALJ's application of §8-41-401(4)(c) to this case and conclude that summary judgment was appropriate.

III.

Finally, the claimant argues that the farm exemption is unconstitutional on its face contending that the statute violates the First and Fourteenth amendments because it

allegedly precludes migratory farm workers from maintaining any action against farm owners for any reason, including intentional torts, without serving a legitimate government purpose. The claimant also argues that the statute violates his Fourteenth amendment equal protection rights as compared to non-farm workers and that the statute violates the Supremacy Clause because it is allegedly contrary to Federal Law 29 C.F.R. §500. Although the claimant asserts that the statute was unconstitutionally applied in this case he does not explain how it was allegedly applied differently to him than it would be applied to any other farm worker. In fact, it seems that the claimant is arguing the statute cannot be applied in any case without violating the Constitution. His argument then, necessarily represents a facial challenge.

In any event, as both parties recognize, we lack jurisdiction to address a facial constitutional challenge to a statute. *Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721 (1971). In *Horrell v. Department of Administration*, 861 P.2d 1194, 1196 (Colo. 1993), however, the Colorado Supreme Court indicated that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *See also Pepper v. Industrial Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005) ("The distinction between a 'facial' and an 'as applied' equal protection challenge is not always clear cut. A facial challenge is supported where the law by its own terms classifies persons for different treatment. In contrast, a statute, even if facially benign, may be unconstitutional as applied where it is shown that the governmental officials who administer the law apply it with different degrees of severity to different groups of persons who are described by some suspect trait."), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006); *see also Dickson v. Pueblo Transportation Company*, W. C. Nos. 3-777-995 & 3-857-321 (July 31, 1995).

Nonetheless, because our analysis is so dependent upon the plain and ordinary meaning of § 8-41-401(c), C.R.S., a "facial" and "as applied" challenge are so intertwined that we do not perceive how we can consider the "as applied" challenge without addressing the "facial" constitutionality of § 8-41-401(4)(c), C.R.S. To do so would violate the principle of separation of powers. *See Denver Center for Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. App. 1985)(administrative rulings concerning "facial" challenges to statutes will not be considered "authoritative" on judicial review). Thus, we decline to address the claimant's constitutional arguments.

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

_____ 8/17/2015 _____ by _____ RP _____ .

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

LAW OFFICES OF JASON W. JORDAN, LLC, Attn: JASON W. JORDAN ESQ./JOHN D. HALEPASKA, ESQ., 5445 DTC PARKWAY, SUITE 910, GREENWOOD VILLAGE, CO, 80111 (For Claimant)

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

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-878-759-05

IN THE MATTER OF THE CLAIM OF

AMY GORDON,

Claimant,

v.

FINAL ORDER

ROSS STORES INC.,

Employer,

and

ARCH INSURANCE COMPANY,

Insurer,
Respondents.

The claimant and the respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated February 5, 2015. The claimant contests the ALJ's failure to award the authorized treating physician's assessment of 2% whole person permanent impairment for depression due to chronic pain. The respondents contest the ALJ's determination that they failed to produce clear and convincing evidence to overcome the opinion of Division Independent Medical Examination (DIME) physician that the claimant suffered Chronic Regional Pain Syndrome (CRPS) and was entitled to a 5% permanent impairment rating as a result. We affirm the ALJ's determination not to award 2% whole person permanent impairment for depression due to chronic pain, and set aside his order awarding the claimant a 5% permanent impairment rating for CRPS.

The claimant began working for the respondent employer in March 2010 as a Markdown Associate. While performing her job duties, the claimant began to experience tingling in her forearms, wrists, and hands. In 2011, the claimant was promoted to the position of Stock Room Lead. The claimant's job duties caused her hands to become tingling and painful. Based on her upper extremity symptoms, the claimant filed a claim for benefits and was examined by Dr. Cook. Dr. Cook took the claimant off of work and ordered an EMG/NCS. The EMG revealed Carpal Tunnel Syndrome (CTS). The claimant was then referred to Dr. Bussey for surgical consultation.

On February 23, 2012, the respondents filed a GAL acknowledging that the claimant's job duties caused her to develop CTS.

On March 13, 2012, Dr. Bussey performed an open single incision decompression of the median nerve of the claimant's left upper extremity.

Following her CTS surgery, the claimant developed chronic pain in her upper body. She was referred to authorized treating physician, Dr. Reichhardt, for treatment. On September 14, 2012, Dr. Reichhardt evaluated the claimant for chronic pain. Dr. Reichhardt referred the claimant for diagnostic testing for possible CRPS.

The claimant underwent a Functional Infrared Thermogram on September 24, 2012. The Thermogram results met the criteria for bilateral CRPS Type II with associated median nerve root involvement. Testing performed on December 18, 2012, by Dr. Tashof Berton revealed a high probability for CRPS Type II.

On July 10, 2013, Dr. Cebrian performed an independent medical examination at the request of the respondents. Dr. Cebrian opined that the claimant's job duties failed to meet the causation requirements for CTS outlined in the Medical Treatment Guidelines (Guidelines).

On March 14, 2014, Dr. Reichhardt determined that the claimant had reached maximum medical improvement (MMI), and assigned a 14% whole person impairment rating. Dr. Reichhardt assigned the claimant a 2% whole person mental impairment rating for depression due to chronic pain.

The respondents challenged Dr. Reichhardt's 14% whole person impairment rating and sought a DIME. Dr. Blau performed the DIME and opined that the claimant suffered from bilateral CTS and left upper extremity CRPS. Dr. Blau agreed with Dr. Cebrian that the claimant's bilateral CTS did not meet the Guidelines for a work-related injury. Dr. Blau also explained that the claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under the workers' compensation claim. Based on the AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised), he assigned the claimant a 5% whole person impairment because of her left upper extremity CRPS. He agreed with Dr. Reichhardt that the claimant reached MMI on March 14, 2014. Dr. Blau failed to assign a 2% whole person mental impairment rating for depression.

A hearing ultimately was held. After the hearing, the ALJ found that the respondents had proven that the claimant did not suffer an occupational disease in the form of CTS during her employment. Consequently, the ALJ ordered that the respondents were permitted to withdraw their February 23, 2012, GAL. The ALJ also found that the respondents failed to produce clear and convincing evidence to overcome the DIME physician's opinion that the claimant suffered CRPS as a result of her CTS surgery. The ALJ rejected the respondents' argument that since the claimant's underlying CTS was not caused by her work activities, then her subsequent surgery for CTS and her resulting CRPS also cannot be work-related. The ALJ based his determination on the quasi-course of employment doctrine. The ALJ explained that the claimant developed CRPS while undergoing authorized medical treatment for an industrial injury, that surgical treatment was provided to relieve the effects of the admitted industrial injury, and that it became an implied part of her employment contract.

Thus, the ALJ determined that the respondents failed to produce unmistakable evidence and free from serious or substantial doubt that Dr. Blau's 5% whole person impairment determination for CRPS was incorrect. He ordered the respondents liable for the 5% whole person impairment rating for CRPS. The ALJ also found that the respondents' application for a DIME did not include any request to review the claimant's 2% whole person impairment rating that Dr. Reichhardt assigned for depression. Therefore, the ALJ concluded that the failure of Dr. Blau to address the 2% mental impairment rating was not clearly erroneous. He found that "Dr. Reichhardt's assignment of a 2% whole person mental impairment rating does not constitute unmistakable evidence free from serious or substantial doubt that Dr. Blau's failure to assign a rating for depression was incorrect." The ALJ ordered that the claimant was not entitled to a 2% whole person impairment rating for depression due to chronic pain.

Both the claimant and the respondents have appealed the ALJ's order.

I.

The claimant has appealed, arguing that the ALJ erred in not ordering the 2% whole person permanent mental impairment for depression due to her chronic pain. The claimant contends that the respondents failed to dispute the issue of mental impairment, and, therefore, the 2% whole person rating assessed by Dr. Reichhardt for mental impairment should be paid to the claimant. We are not persuaded to disturb the ALJ's order on this ground.

Section 8-42-107(8), C.R.S. provides for the selection of a DIME physician in order to dispute the ATP's determination concerning either MMI or a medical

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impairment rating. The failure to do so in a timely manner results in the treating physician's findings and determinations becoming binding under §8-42-107.2(2)(b), C.R.S. See *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003)(payment for a DIME is "mandatory, jurisdictional prerequisite to challenge" MMI and impairment determinations of ATP); see also *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002)(ALJ lacks jurisdiction to resolve dispute concerning ATP's MMI determination unless DIME conducted).

Additionally, the Rules of Procedure XI(3)(B), 7 Code Colo. Reg. 1101-3 provides that a DIME shall be requested on a form prescribed by the Division of Workers' Compensation (Division). The Division form requires that the party requesting the DIME list "specific part(s) of the body to be evaluated, including psychiatric where appropriate." The purpose of the DIME process is to reduce litigation on the issues of MMI and medical impairment by deferring the determinations of MMI and medical impairment to a neutral, medical expert. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995). The DIME physician's findings are then presumed to be correct, subject to a party's right to overcome that presumption by clear and convincing evidence to the contrary. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Additionally, Rule XI(3)(B) also requires the party requesting a DIME to designate the preferred geographic location for the DIME; and list other physicians that have previously evaluated, treated, or are currently treating the claimant. Based on this language, we consider the requirement to list the body parts and psychiatric to be evaluated as designed to aid the Division in determining what medical specialty is needed for the DIME.¹

Here, the claimant argues that that the respondents' application for a DIME did not list the claimant's mental impairment to be evaluated. However, we have long held that the DIME process contemplates the DIME physician will evaluate all components of the claimant's condition and determine the cause of the various medical components. See *Gray v. Dunning Construction*, W. C. No. 4-516-629 (Feb. 14, 2005); *Oldenberg v. First Group America*, W.C. No. 4-640-886 (Sept. 3, 2008); see also *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). For example, the failure of a party to list all the specific body parts in the application for a DIME is not determinative. *Gray v. Dunning Construction, supra*. Indeed, the claimant's argument here would preclude an ALJ from considering a DIME physician's opinion that a

¹ We note that the Director's Rules ascribe a wholly different function for the listing of body parts on the application for a Division Independent Medical Examination. W.C. Rule of Procedure 11-3(B)(2) requests the listing of the medical conditions to be evaluated. Rule 11-3(C) then explains the purpose for the listing is to allow the Division to select a pool of DIME physicians with the appropriate level II certification to evaluate that condition or body part.

particular diagnosis was caused by the industrial injury if that condition was not explicitly listed on the DIME application for evaluation. That construction undermines the special weight to be afforded the DIME physician. Therefore, we disagree with the claimant and the ALJ that the respondents' failure to specifically list mental impairment to be evaluated on the DIME application as a knowing waiver of their right to litigate the accuracy of the DIME physician's opinions on impairment. Further, as detailed above, in their DIME application, the respondents specifically listed permanent impairment as an issue to be considered by the DIME physician. Ex 1 at 4. Also, since Dr. Blau is fully accredited on the Division's Accredited Provider Listing, it was for him to determine whether the claimant had permanent impairment from depression and whether that impairment was caused by the industrial injury. We also note that in his DIME report, Dr. Blau explicitly stated that the claimant was given 2% whole person impairment for psychiatric impairment for a total of 14% whole person impairment. Ex. 1 at 9. By not providing a mental impairment rating for her depression, however, we perceive that Dr. Blau implicitly determined there was no such mental impairment related to the injury.

Thus, while the ALJ erred in determining that the respondents waived the issue of mental impairment by failing to specifically list the issue on their DIME application, he nonetheless properly determined that the DIME physician implicitly found that no impairment was warranted for the claimant's mental impairment. *See Gray v. Dunning Construction, supra*. Accordingly, we set aside that part of the ALJ's order that found a waiver, but we nevertheless affirm that part of the ALJ's order that determined the respondents were not liable for 2% permanent impairment for depression due to chronic pain.

II.

The respondents also appeal, arguing that the ALJ erred in ordering them liable for the 5% whole person permanent impairment rating for the claimant's CRPS under the quasi-course of employment doctrine. The respondents contend that since the ALJ determined the claimant's CTS was not compensable, then the CRPS which arose out of medical treatment for the CTS also is not compensable. Conversely, the claimant argues that she was obligated to undergo the medical treatment for her admitted CTS injury. She contends that her CRPS should be considered to be an injury covered by the quasi-course of employment because Dr. Blau related the cause of the CRPS to the surgery performed at a time when the CTS was an admitted injury. While we certainly understand the plight of the claimant in these particular and unusual circumstances, precedent from the Colorado Supreme Court and Colorado Court of Appeals dictate the conclusion that the respondents are not liable for the 5% whole person permanent impairment rating for her CRPS.

With regard to the quasi-course of employment doctrine, the Colorado Supreme Court has held as follows:

[A] subsequent injury is compensable under the quasi-course of employment doctrine only if it is the "direct and natural" consequence of an original injury which itself was compensable. See 1 A. Larson, *supra* § 13.11 at 3-348.91; *Wood v. State Accident Insurance Fund*, 30 Or. App. 1103, 569 P.2d 648 (1977)(accidental injury suffered during rehabilitation program compensable because direct and natural consequence of original injury).

Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1265 (Colo. 1985); *see also Turner v. Industrial Claim Appeals Office*, 111 P.3d 534, 535-536 (Colo. App. 2004); *see also Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993)(where claimant was injured in a slip-and-fall accident while leaving a physical therapy session, second injury was compensable because it was a natural and proximate result of the original compensable injury).

Thus, the "quasi-course of employment" doctrine applies to activities undertaken by the employee which follow a compensable injury. And, although they take place outside the time and space limits of normal employment and would not be considered employment activities for usual purposes, they are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *See Turner v. Industrial Claim Appeals Office, supra; Excel Corp. v. Indus. Claim Appeals Office, supra.*

As mentioned above, the claimant contends that pursuant to her employment contract, she was obligated to undergo the treatment for her CTS and as a result of this, she developed CRPS. To this extent, she contends that the employer is under a statutory duty to furnish medical care, and the employee is similarly under a duty to submit to reasonable medical treatment under Colorado's Workers' Compensation Act (Act). It is true, as the claimant argues, that the provisions of the Act, in turn, become by implication part of the employee's employment contract. The Act contemplates that injured employees will undergo recommended treatment for their admitted injuries or otherwise face the potential of losing their right to benefits. *See* §8-43-404(3), C.R.S.; *Price Mine Serv. v. Industrial Claim Appeals Office*, 64 P.3d 936, 937 (Colo. App. 2003)(an employer is required to provide medical treatment, and an injured employee is required to submit to it; thus, a trip to the doctor's office becomes an implied part of the employment

contract). This being so, however, we are unable to circumvent the language of the above cited cases to determine that while the original CTS injury is not compensable, the claimant's CRPS or the subsequent injury which flowed proximately and directly from medical treatment for the CTS, is compensable. As explained in detail above, the claimant's subsequent CRPS condition is not compensable under the quasi-course of employment doctrine because it is not the "direct and natural" consequence of an original injury which itself is compensable. *See Travelers Ins. Co. v. Savio*, 706 P.2d at 1265. Thus, since the ALJ found, with record support, that the claimant's CTS is not compensable, the ALJ erred in ordering the respondents liable for 5% whole person permanent impairment for the claimant's CRPS which flowed directly and naturally as a consequence of the original injury which itself was not compensable.

We further note that employers frequently provide medical treatment to injured workers even though the employers can subsequently contest compensability of the injury. For example, in *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), the Colorado Supreme Court held that "in a dispute over medical benefits after the filing of a general admission of liability, an employer can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment." *Id.* at 1339. Thus, the mere admission that an injury occurred and that treatment is needed cannot be construed as a concession that all conditions and treatment that occur after the injury were caused by the injury. *Cf. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990)(filing of a general admission does not vitiate respondents' right to litigate disputed issues on a prospective basis), *superseded by statute on other grounds*. Thus, were we to affirm the ALJ's award for the 5% whole person permanent impairment for the claimant's CRPS, we necessarily would be taking the position that the respondents did endorse all diagnosis and treatment strategies formulated by the medical providers. This would be inconsistent with their right to dispute the causal connection between the work injury and the treatment or the reasonableness of that treatment.

Additionally, the claimant's argument notwithstanding, the decision in *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (Colo. 1949) does not dictate a contrary result. In that case, the claimant, a filling station attendant, was injured when he slipped on a grease spot and fell on cement pavement. He suffered pain in his lower back and spine. The claimant eventually was hospitalized and his kidney was removed since it was diseased with hydronephrosis. The Industrial Commission found that the work-related accident precipitated symptoms of the hydronephrosis. The Colorado Supreme

Court affirmed, concluding that the claimant was entitled to recover the medical expenses and for the disability resulting from the operation. The Court held that the Commission properly considered whether the work injury aggravated the pre-existing condition. The Court concluded there was a causal connection between the injury, the operation, and the disability. Conversely, here, the ALJ found that the claimant's original injury, or the CTS, was not work-related and, therefore, it cannot be said that a work-related injury caused the claimant's subsequent CRPS.

IT IS THEREFORE ORDERED that the ALJ's order dated February 5, 2015, is set aside to the extent it ordered the respondents liable for 5% whole person permanent impairment rating for the claimant's CRPS, and in all other respects the order is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

AMY GORDON
W. C. No. 4-878-759-05
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CERTIFICATE OF MAILING

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

_____ 8/20/2015 _____ by _____ RP _____ .

LAW OFFICE OF REGINA M. WALSH ADAMS, Attn: REGINA M. WALSH ADAMS,
ESQ., 7251 W 20TH ST BLDG G1, GREELEY, CO, 80634 (For Claimant)
THOMAS POLLART & MILLER LLC, Attn: BRAD J. MILLER, ESQ., 5600 S QUEBEC ST
STE 220A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-919-554-06

IN THE MATTER OF THE CLAIM OF

FELICIA JUSTINIANO,

Claimant,

v.

FINAL ORDER

FRIENDS TRADING COMPANY, INC.,

Employer,

and

PROPERTY & CASUALTY INS.
COMPANY OF HARTFORD,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated March 30, 2015, that denied the claimant's petition to reopen her claim and denied her request for additional temporary disability and medical benefits. We affirm the ALJ's decision.

The claimant sustained a work related injury to her right wrist on May 16, 2003. The injury was admitted as compensable by the respondents. The claimant treated with Dr. Hawke and with Dr. Anderson-Oeser. Dr. Anderson-Oeser placed the claimant at maximum medical improvement (MMI) as of December 10, 2013. Dr. Hawke assessed a permanent medical impairment rating of 8% of the upper extremity. Dr. Hawke also released the claimant to return to work without restrictions. The claimant continued to treat with Dr. Anderson-Oeser reporting continuing complaints of right wrist pain and limitations of function. In June, 2014, Dr. Anderson-Oeser recommended an MRI arthrogram of the right wrist, a restriction on use of the right wrist to lifting only two pounds and a surgical consultation with Dr. Fremling. The claimant had been seen the previous August by Dr. Sachar. Dr. Sachar had reviewed an earlier MRI of the claimant's wrist but concluded the claimant was not a candidate for surgery. Dr. Anderson-Oeser reviewed the claimant's MRI arthrogram on June 23, 2014. She read the MRI to show a full thickness tear of the claimant's triangular fibrocartilage complex (TFCC). Dr. Anderson-Oeser also noted the claimant reported possible additional injury to her wrist through cooking at home and trying to unsuccessfully lift her granddaughter.

The claimant attended an evaluation with Dr. Fremling on September 8, 2014. The doctor recommended a surgical repair of the TFCC tear. This surgery was performed on September 16, 2014. The claimant testified at hearing that the surgery provided no relief.

Prior to Dr. Fremling's surgery, the claimant had requested a Division Independent Medical Examination (DIME) to challenge her treating doctor's determination of MMI and the impairment rating. This DIME was conducted by Dr. Ginsberg on August 21, 2014. Dr. Ginsberg reviewed all the medical reports issued prior to that date. He also interviewed and examined the claimant. Despite the pending appointment for a surgical evaluation with Dr. Fermling, Dr. Ginsberg found the claimant was correctly placed at MMI on December 10, 2013. Dr. Ginsberg then provided a somewhat higher permanent impairment rating.

The respondents filed a Final Admission of Liability (FA) adopting Dr. Ginsberg's determinations on October 2, 2014. The claimant did not file an application for a hearing to dispute the findings of the DIME. Instead, on October 10, 2014, the claimant submitted an application for hearing asking that her claim be reopened.

At the hearing convened on February 19, 2015, the claimant's counsel asserted the basis for reopening was not a contention that the DIME physician was mistaken. Rather, the claimant contended her condition had changed for the worse since the December 10, 2013, date of MMI.

In her decision of March 30, 2015, the ALJ observed the claimant was not using a change of condition as grounds for reopening. Instead, the ALJ reasoned the claimant's argument was actually that the DIME physician was mistaken in finding the claimant to be at MMI. The ALJ noted the claimant's assertion that if she could show a change in her condition after the date of MMI in December, 2013, rather than one subsequent to the closure of the claim in November, 2014, then a reopening is justified. The ALJ surveyed the record and found the DIME physician had reviewed all the medical reports produced both before and after the date of MMI up to the date of the DIME appointment on August 21, 2014. This included the medical reports the claimant relied upon to prove she had a worsened condition and was no longer at MMI. The only medical development that had occurred after the DIME appointment was the claimant's wrist surgery. However, Dr. Ginsberg was aware from both the written reports and his interview of the claimant that a TFCC tear had been diagnosed and surgery was recommended. Nonetheless, Dr. Ginsberg did not believe that diagnosis or recommendation was significant to the extent it would justify a departure from the December 10, 2013, date of MMI. The ALJ therefore,

concluded the claimant was not presenting a case for reopening due to a change of her condition. She was making a case the DIME physician was mistaken in finding she was at MMI.

The ALJ then reasoned the claimant had possession of all the evidence necessary to present her dispute with the DIME determination of MMI as of the date of the respondents' FA. The fact that the claimant had immediately filed an application for hearing on reopening instead of on a challenge to the DIME, indicated to the ALJ that the claimant was engaged in a collateral attack on the DIME decisions. It was surmised by the ALJ that the claimant sought to take advantage of the lower burden of proof involved in a reopening (preponderance of the evidence) so as to avoid the higher burden applicable to a hearing to dispute the DIME findings (clear and convincing evidence). The ALJ discussed the decision of the Court of Appeals in *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005), and its statement that in the case of such an improper collateral attack on a DIME finding, an ALJ may properly invoke their discretionary authority to deny such a request for a reopening. The ALJ thereupon denied the claimant's petition to reopen.

Disputes related to MMI are governed by § 8-42-107(8), C.R.S., which requires an independent medical examination (IME) when either party disputes the MMI determination of an authorized treating physician. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.App.2002)(under § 8-42-107(8)(b) and (c), a treating physician's determination as to MMI and medical impairment cannot be disputed in the absence of an IME). The opinion of the IME physician has presumptive effect unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo.App.2000).

Pursuant to § 8-43-303, "any award" may be reopened on the grounds of error, mistake, or change in condition. The intent of this statute is to provide a remedy to claimants who are entitled to awards of any type of benefits, whether medical or disability. *Cordova v. Indus. Claim Appeals Office, supra*. The claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo.App.2000). The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo.App.1996).

On appeal, the claimant contends the claimant is not disputing that she was at MMI as of December 10, 2013. She argues that her condition got worse. This she says, is shown by the fact that she was recommended for wrist surgery and completed that

surgery several weeks after the DIME report was written. She asserts the DIME did not have the advantage of Dr. Fremling's surgical recommendation or his surgery report. The claimant states that as soon as she obtained these reports from Dr. Fremling, she submitted her application for a hearing on reopening.

The ALJ found in her decision that Dr. Ginsberg had among the records reviewed all of the documents pertinent to a determination of MMI and any possible worsening of the claimant's condition following that December 10, 2013, MMI date. The ALJ implicitly found the reports of Dr. Fremling a source of little additional insight. Indeed, the discussion included in Dr. Fremling's September 8, 2014, report recommending surgery states in its entirety:

TFCC tear. Active.

This patient has persistent ulnar-sided wrist pain at the right wrist and an MRI which demonstrates a TFCC tear. She has tried conservative management but continues to have significant pain and would like to proceed with operative treatment. We'll proceed to the operating room for arthroscopic exam/debridement/repair. (exhibit J, pg. 35).

His surgical report says even less. There is no information in these three sentences which did not previously appear in the reports of Dr. Anderson-Oeser or the other treating physicians. Dr. Ginsberg was aware of the recommendation for surgery. The simple fact that the claimant actually had surgery, by itself, was not adjudged by the ALJ to be an indication of a significant change in the claimant's condition. The claimant's testimony at the hearing was that the surgery has not changed the condition of her hand from its status prior to the surgery. Tr. at 20-22. In addition, the change referenced in the reopening statute, § 8-43-303, pertains to "an unexpected or unforeseeable change in condition subsequent to the entry of a final award." *Berg, supra* at 273. Here, the award of benefits did not become final until November 1, 2014. This date is many weeks subsequent to the claimant's wrist surgery. Finally, the ALJ noted the claimant petitioned to reopen her claim before it even closed. The claimant is allowed thirty days after the filing of an FA to request a hearing to dispute the award of benefits provided by that admission. § 8-43-203(2)(b)(II). This would include the findings of the DIME physician providing the basis for the FA. Here, the claimant could have made the same assertion regarding a worsened condition as a dispute of the DIME's MMI determination as she did to argue her (still open) claim should be reopened. Both were based on the fact

she had wrist surgery. The ALJ viewed this circumstance as evidence that the claimant was engaged in a collateral attack on the DIME's MMI finding, rather than a legitimate assertion her claim should be reopened. These findings by the ALJ are based on substantial evidence in the record and we see no persuasive reason to disturb them.

The ALJ reasoned the claimant's decision to forego the opportunity to invoke the statutory procedure to appeal a disputed issue is not an adequate reason to reopen a claim. The ALJ relies not only on the *Berg* decision but also on the Supreme Court's opinion in *Industrial Commission v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (Colo. 1967). In *Cutshall*, the Industrial Commission ruled the claimant did not have a compensable claim. The claimant did not appeal that decision. Ten months later, the claimant requested a reopening asserting subsequent cases decided by the Supreme Court justified a different decision in his case. The Industrial Commission denied that request. The Court affirmed the Commission stating "the fact that the Commission refused to reopen Cutshall's case to permit him to substitute action under [§ 8-43-303, appeal] for the right to review granted him by [§ 8-43-303, reopening], which he lost by inaction, does not in our view amount to an abuse of discretion." *Cutshall, supra* at 244.

In *Berg*, the Court of Appeals acknowledged the authority of the *Cutshall* decision, but found the record in that case was dissimilar. The Court in *Berg* cited to evidence in the record which revealed the claimant was not advised by his doctors that his condition was much worse than previously thought until he had undergone back surgery. The respondents had filed an FA in March, 2003, based upon a February, 2003, DIME review. The DIME stated surgery was not appropriate in the case and found the claimant was at MMI. Shortly after the submission of the FA, the claimant underwent back surgery. However, not until he was provided a May, 2003, report from his surgeon did he become aware the surgery had revealed a much worse herniated disc. The claimant at that point submitted a petition to reopen his claim. The ALJ granted the request. The respondents argued the claimant was simply attempting to proceed by applying the lower burden of proof required for a reopening. The Court observed "the record contains no evidence to support employer's argument that claimant made the tactical decision to let his claim close to avail himself of the lower standard of proof." In that case, the ALJ was found to have properly exercised his discretion to reopen the claim. The Court however, did note that where such evidence was present, it would serve as a basis for the denial of a reopening request.

Further, because the power to reopen is discretionary, there is an inherent protection against improper collateral attacks on a DME

determination of MMI. If a claimant files a petition to reopen in an attempt to circumvent the DIME process and gain the advantage of a lower burden of proof, the ALJ has authority to deny it. *Berg, supra*, at 273-74.

We find the record in this case, unlike that in *Berg*, does support the ALJ's exercise of her discretion to deny the claimant's petition to reopen. Because the claimant had available the same information pertinent to her condition at the time she received the respondents' FA that she had when she petitioned to reopen her case, there was no adequate reason to explain her failure to follow the statutory appeal procedure as opposed to that of a reopening. The record shows she simply elected the reopening route when she could just as well have proceeded to a hearing to dispute the DIME's MMI finding. It is a reasonable inference by the ALJ that this tactic was aimed at circumventing the higher proof standard attached to disputing a DIME finding. As noted in both *Cutshall* and in *Berg*, a denial of a petition to reopen in such a circumstance does not represent an abuse of discretion by the ALJ. Accordingly, we find no compelling reason to reverse the decision of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's order issued March 30, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

FELICIA JUSTINIANO
W. C. No. 4-919-554-06
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CERTIFICATE OF MAILING

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

_____ 8/21/2015 _____ by _____ RP _____ .

LAW OFFICE OF O'TOOLE AND SBARBARO, P.C., Attn: NEIL D. O'TOOLE, ESQ., 226
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LAW OFFICES OF SCOTT TESSMER, Attn: MATTHEW C. HAILEY, ESQ., 6430 S.
FIDDLERS GREEN CIRCLE, SUITE 410, GREENWOOD VILLAGE, CO, 80111 (For
Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-726-134 &
W.C. No. 4-712-263

IN THE MATTER OF THE CLAIM OF
JECKONIAS MURAGARA,

Claimant,

v.

ORDER OF REMAND

SEARS ROEBUCK & CO,

Employer,

and

INDEMNITY INS CO OF NORTH
AMERICA,

Insurer,
Respondents.

The *pro se* claimant seeks review of an order of Acting Director of the Division of Workers' Compensation Craig Eley (Acting Director) dated April 1, 2015, that affirmed the order of a pre-hearing Administrative Law Judge McBride (PALJ) dated January 7, 2015, striking the claimant's Application for Expedited Hearing. We set aside the Acting Director's order only to the extent it struck the claimant's Application for Expedited Hearing on the issue of penalties under §8-43-304(1), C.R.S. and precluded the claimant from filing any Applications for Hearing without an attorney. We remand the matter to the Office of Administrative Courts for findings and an order on the issue of penalties under §8-43-304(1), C.R.S., subject to any and all of the respondents' defenses.

This claim has a protracted procedural history, involving discovery disputes, the imposition of sanctions, and the filing of numerous Applications for Hearing.

On December 19, 2007, ALJ Walsh entered an order denying and dismissing the claimant's claim for benefits for a left hip injury under W.C. No. 4-726-134. ALJ Walsh determined that the claimant did not sustain a compensable injury that arose out of and in the course and scope of his employment with the respondent employer. The claimant appealed ALJ Walsh's order, and a Panel from the Industrial Claim Appeals Office (ICAO) affirmed ALJ Walsh's order on April 8, 2008. The Colorado Court of Appeals subsequently dismissed the claimant's appeal of the ICAO's order.

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Thereafter, on October 23, 2009, a prehearing conference was held before Prehearing Administrative Law Judge (PALJ) DeMarino for W.C. Nos. 4-712-263 and 4-726-134. In W.C. No. 4-712-263, the claimant sought benefits for an injury he claimed he suffered to his right shoulder. The prehearing conference was held to address prior issues and orders issued by PALJ DeMarino regarding discovery and the striking of the claimant's applications, vacating prior scheduled hearings, and other matters. On November 5, 2009, PALJ DeMarino issued his order, finding that the claimant's claim under W.C. No. 4-726-134 previously had been fully adjudicated and denied and dismissed, and that any and all remaining claims that may be advanced by the claimant were dismissed. PALJ DeMarino also dismissed the claimant's entire claim for benefits under W.C. No. 4-712-263. Citing *Board of County Commissioners v. Barday*, 197 Colo. 519, 594 P.2d 1057 (1979), PALJ DeMarino also ruled that the claimant was precluded from representing himself in any further proceedings regarding his claims, and any future pleadings must be presented and filed through an attorney. He further ordered that any pleading filed by the claimant himself shall be stricken and any hearing that might be set pursuant to such pleading shall be vacated.

Subsequently, on January 10, 2011, May 16, 2013, October 2, 2014, and December 3, 2014, the claimant filed Applications for Hearing. In particular, the claimant filed an Application for Expedited Hearing on December 3, 2014, in the Office of Administrative Courts in Denver, seeking emergency surgery and penalties under §8-43-304(1), C.R.S. This Application was filed under W.C. No. 4-726-134. The respondents filed a motion to strike, which was granted by PALJ McBride on January 7, 2015. PALJ McBride ruled that the claimant previously litigated his claim under W.C. No. 4-726-134 at a hearing held on November 28, 2007, before ALJ Walsh which resulted in an order denying and dismissing his claim. PALJ McBride ruled that the claimant appealed that order to the ICAO, and a Panel affirmed ALJ Walsh's order on April 8, 2008. The claimant's subsequent appeal to the Colorado Court of Appeals was dismissed. PALJ McBride determined that the claimant's claim is closed and, therefore, he is estopped and precluded from litigating any claim for compensability, medical benefits, temporary disability benefits, permanent disability benefits, or penalties that allegedly arose out of his dismissed claim. PALJ McBride concluded that the claimant's Application for Expedited Hearing must be stricken as it is barred by issue and claim preclusion and because the claimant has not complied with prior orders.

The claimant filed a lengthy petition to review, asserting that the prior adjudication of his claim was incorrect because of counsel's "misleading and intentionally manipulating evidence." PALJ McBride interpreted this petition to review

as a motion for reconsideration, and he then referred the matter to Acting Director Eley for further disposition.

On April 1, 2015, the Acting Director entered an order affirming the January 7, 2015, order entered by PALJ McBride. The Acting Director entered his order under both W.C. No. 4-726-134 and W.C. No. 4-712-263. The Acting Director determined that the claimant refused to cooperate with discovery, failed to comply with previous orders entered by PALJs, and persisted in filing Applications for Hearing on a claim that had been fully litigated. He determined that the November 5, 2009, order entered by PALJ DeMarino was appropriate and, therefore, PALJ McBride's order entered on January 7, 2015, that affirmed the prior order also was appropriate. As a basis for his order, the Acting Director also appears to rely on PALJ DeMarino's prior ban on the claimant himself filing Applications for Hearing without an attorney. He concluded, therefore, that the claimant's Application for Expedited Hearing was properly stricken.

The claimant subsequently filed his Petition to Review, "seeking justice." The claimant essentially argues that the motion to strike his Application for Expedited Hearing should not have been granted. He argues that he is entitled to penalties under §8-43-304(1), C.R.S. because the respondents did not comply with a previous order issued by the Division of Workers' Compensation dated March 29, 2007. This order required the respondents to specify which subsection of W.C. Rule 6 they were relying on to terminate the payment of benefits, including temporary benefits. The order states that additional documentation was required. In his Petition to Review, the claimant alleges that the respondents never complied with this order. The claimant also complains that it was wrong to prevent him from ever filing an Application for Hearing without counsel.

Section 8-43-304(1), C.R.S. provides for the imposition of a penalty under the following grounds:

- (1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned,

in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112 (7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

Here, in his order dated December 19, 2007, ALJ Walsh specifically determined only the issue of compensability of the claimant's left hip injury under W.C. No. 4-726-134. The issue of a penalty under §8-43-304, C.R.S. was not the subject of his order. As noted above, the Acting Director struck the claimant's Application for Expedited Hearing partially on the basis of issue preclusion. However, issue preclusion cannot be applied in this action to the claimant's claim for a penalty under §8-43-304, C.R.S. because ALJ Walsh never considered a penalty under §8-43-304, C.R.S. *See Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001)(issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding). Accordingly, this part of the Acting Director's order is set aside. We further note that under §8-43-304, C.R.S., unlike under §8-43-203(2)(a), C.R.S., a party can pursue a penalty for the violation of a statute, rule, or order even if his or her claim is found not compensable. We therefore remand this matter back to the Office of Administrative Courts in Denver to reinstate the claimant's Application for Expedited Hearing only on the issue of a penalty under §8-43-304, C.R.S. The claimant's Application, of course, is subject to any and all affirmative defenses that the respondents may have available.

Additionally, in striking the claimant's Application for Expedited Hearing, the Acting Director relies, in part, on the prior order issued by PALJ DeMarino in 2009. As detailed above, PALJ DeMarino's 2009 order provided that the claimant was precluded from representing himself in any further proceedings, and any future pleadings, including Applications for Hearing, must be presented and filed through an attorney. This is in error, however. Pursuant to §8-43-207.5(1) and (2), C.R.S., a prehearing ALJ may strike an application for a hearing for a failure to comply with the issues of "ripeness for legal, but not factual, issues for formal adjudication ...discovery matters; and evidentiary disputes." This statute, however, does not allow a prehearing ALJ to issue an order barring all future Applications for Hearing on the basis that a party is not represented by counsel. We further note that §8-43-211(1)(c), C.R.S. allows a party to appear and to be represented by a person other than an attorney. Additionally, in *Board of County*

JECKONIAS MURAGARA

W. C. No. 4-726-134 & W.C. No. 4-712-263

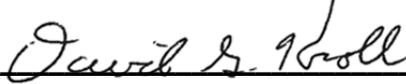
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Comm'rs v. Howard, 640 P.2d 1128, 1129 (Colo. 1982), the Colorado Supreme Court held that where necessary to stop an abuse of the judicial process, the Colorado Supreme Court has the power to enjoin a person from proceeding *pro se* in any litigation in state courts and administrative agencies. In *Board of County Commissioners v. Winslow*, 706 P.2d 792 (Colo. 1985), the Colorado Supreme Court provided that state district courts may also exercise such authority, but solely because a district court is “a court of equity and general jurisdiction.” Prehearing ALJs and hearing ALJs are not judges of general jurisdiction, however. See *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003). Accordingly, the authority to enjoin an individual from participating in an administrative proceeding without legal counsel is not a power allocated to prehearing ALJs. This would be particularly true given the express permission for an individual to do so in §8-43-211(1)(c), C.R.S. Consequently, the Acting Director’s order which requires the claimant to have an attorney to file an Application for Hearing is contrary to the holding in *Board of County Commissioners v. Winslow, supra*. The authority to enter such order is reserved to the judicial branch of government. See *Karr v. Williams*, 50 P.3d 910, 914 (Colo. 2002)(discussing judicial remedies for abuse of judicial resources by a *pro se* litigant). Thus, this part of the Acting Director’s order also is set aside.

IT IS THEREFORE ORDERED that the Acting Director’s order dated April 1, 2015, is set aside to the extent it struck the claimant’s Application for Expedited Hearing on the issue of penalties under 8-43-304(1), C.R.S. and precluded the claimant from filing future Applications for Hearing without counsel;

IT IS FURTHER ORDERED that the matter is remanded to the Office of Administrative Courts for findings and an order only on the claimant’s claim for penalties under §8-43-304(1), C.R.S.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

JECKONIAS MURAGARA

W. C. No. 4-726-134 & W.C. No. 4-712-263

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CERTIFICATE OF MAILING

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

_____ 9/8/2015 _____ by _____ RP _____ .

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STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA MCGOVERN, 1525 SHERMAN
STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-897-489-02

IN THE MATTER OF THE CLAIM OF
PHIL PAVELKO,

Claimant,

v.

FINAL ORDER

SOUTHWEST HEATING AND
COOLING, LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Margot Jones (ALJ) dated April 25, 2015, that denied his petition to reopen and also denied the claimant's request for a change of physician. We affirm the ALJ's order.

This matter went to hearing on the claimant's petition to reopen for worsening of condition and request for change of physician. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to his cervical spine as the result of a motor vehicle accident on March 15, 2012. The claimant was treated by Dr. Miranda and Dr. Sacha. Dr. Sacha placed the claimant at maximum medical improvement (MMI) on October 22, 2012, and gave a nine percent whole person rating for his cervical spine. The respondents filed a final admission of liability consistent with this report. The respondents also admitted for ongoing maintenance medical benefits based on Dr. Sacha's recommendations which were that the claimant should be allowed a home exercise program, medications as needed and follow-ups over the next 6-12 months. Dr. Sacha also noted that the claimant may need medial branch radiofrequency if his condition were to flare up. Dr. Sacha continued to treat the claimant after MMI on a maintenance basis.

In a report dated August 2, 2013, Dr. Hughes evaluated the claimant and concluded that he was no longer at MMI because he had sustained a worsening of condition. Dr. Hughes recommended medial branch blocks and facet joint rhizotomy for the cervical spine and also recommended an EMG of the upper extremities. Dr. Hughes also stated that the claimant's lumbar spine was related to the work injury and in his opinion the claimant was not at MMI and required an impairment rating.

Dr. Sacha expressed his disagreement with Dr. Hughes and stated that the claimant was still at MMI but that consideration of the medial branch blocks and radiofrequency of the cervical spine would be reasonable necessary maintenance treatment. Dr. Sacha eventually proceeded with C4-C7 medial branch blocks and radiofrequency. Dr. Sacha testified at hearing that the radiofrequency procedure did not require reopening but did note that the impairment rating could be recalculated based upon the procedure. A new impairment rating has not yet been provided. Dr. Sacha further stated that the claimant experienced a "flare-up" and that the possibility of future "flare-ups did not prevent a finding of MMI and that a flare-up after MMI does not mandate a fall from MMI." Dr. Sacha explained that the flare-ups are expected at MMI and the worsening symptoms and range of motion in the claimant's neck are attributable to pre-existing underlying conditions and not related to the work injury. Dr. Sacha also testified that the claimant's low back condition is not related to the work injury. Moreover, the claimant returned to his regular employment after MMI and has not been restricted from his employment since MMI. The ALJ found Dr. Sacha's opinions and testimony credible and persuasive.

The claimant contended that his work related condition had worsened since MMI and that his complaints of pain in his hands and low back were related to the work injury. The ALJ rejected this testimony. With regard to the request for change of provider, the claimant testified that he received notice of his designated provider choices sent on April 5, 2012. The claimant, now, however, asserts that the respondents did not timely provide the designated provider list pursuant to WCRP 8-2 and, therefore, he is now entitled to a change of physician as a matter of law. The claimant also testified that although Dr. Sacha has done a good job, he would like someone who is better able to tell him what to do for future treatment.

Based on these findings the ALJ concluded that the claimant failed to provide that his work-related condition worsened and denied the claimant's petition to reopen. The ALJ also denied the claimant's request for a change of physician. The ALJ found that the claimant's request for a change was an attempt to dispute the validity of Dr. Sacha's findings regarding MMI and related body parts. The ALJ also determined that even though the designated provider list was given late to the claimant and WCRP 8-2 states

that the right of selection passed to the claimant, the claimant chose to go to Dr. Sacha and received extensive treatment from Dr. Sacha for two years. Thus, the ALJ determined that the claimant exercised his right to choose a physician by going to Dr. Sacha.

On appeal the claimant contends that the weight of the evidence mandates a conclusion that there has been a worsening of the claimant's condition. The claimant also continues to assert that he is entitled to a change of physician as a matter of law pursuant to WCRP 8-2. We note initially that orders which merely resolve a petition to reopen a claim without awarding or denying specific benefits have been held to be interlocutory and not reviewable. *Director of the Division of Labor v. Smith*, 725 P.2d 1161 (Colo. App. 1986); *see also Bishop v. City of Thornton*, W.C No. 4-830-904-02 (August 22, 2014). The order in this case, however, also denied the claimant's request for a change of physician. Unlike an order that grants a request for change of physician without specific medical benefits, the panel has previously held that an order that denies a request for a change of physician to a specific doctor is equivalent to the denial of a specific benefit and, therefore, is final and reviewable. *Vigil v. City Cab Company*, W.C. No. 3-985-493 (May 23, 1995); *Landeros v. CF & I Steel*, W.C. No. 4-395-493 (October 26, 2000). The claimant did not limit the request for change of physician to only admitted maintenance benefits and because the issue is also entwined with the petition to reopen, both issues on appeal are final and subject to review. Section 8-43-301(2), C.R.S.

Additionally the respondents draw attention to the fact that the claimant did not designate a transcript of the hearing in either the petition to review or the amended petition to review. The record however contains a transcript of the January 28, 2015, hearing. Although §8-43-301(2), C.R.S. requires that that a transcript be requested to be prepared at the same time the petition to review is filed, we do not read the statute to preclude consideration of the transcript where the transcript has already been prepared and is in the record transmitted to the panel. Consequently, we have reviewed the transcript in this case.

I.

Section 8-43-303(1), C.R.S., permits a claim to be reopened based on a worsened condition. In order to reopen, the claimant bears the burden of proof to establish the worsening of a physical or mental condition which is causally related to the original industrial injury. *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). In the absence

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of an abuse of discretion, we may not disturb the ALJ's factual determinations. *Id.* The appellate standard on review of an alleged abuse of discretion is whether the ALJ's order exceeds the bounds of reason, as where it is contrary to the applicable law or not supported by substantial evidence in the record. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985). Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Under the substantial evidence test 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). Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). 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).

Moreover, whether the claimant's condition is due to the natural progression of the pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Further, whether the claimant proved a worsened condition and whether the worsening was causally related to the industrial injury, are factual in nature. *Id.*

Here, there is ample evidence in the record to support the ALJ's finding that the claimant did not sustain a worsening of condition. The ALJ explicitly credited the testimony and opinions of Dr. Sacha. Dr. Sacha stated that the claimant's complaints of arm pain and low back pain were not related to his work injury. Respondents' Exhibit A at 45 and Dr. Sacha depo. at 9-12. Dr. Sacha also stated that reversal of maximum medical improvement was not necessary and that the treatment the claimant was receiving was maintenance care. Respondents Exhibit A at 33, 52-53. Furthermore, even though Dr. Sacha stated that the claimant's impairment rating may need to be recalculated as a result of the procedure, the claimant has conceded that a new impairment rating has not been provided to date. Dr. Sacha depo. at 28. As was her sole prerogative, the ALJ weighed the medical evidence concerning the cause of the claimant's current condition and need for medical treatment. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The ALJ found in favor of the respondents' evidence. Because the ALJ's findings are supported by substantial evidence and those

findings, in turn, support the ALJ's denial of the petition to reopen, we cannot say the ALJ abused her discretion in denying the claimant's request to reopen based on worsening or change of condition. Section 8-43-301(8), C.R.S.

II.

We also reject the claimant's argument that he is entitled to a change of physician pursuant to WCRP 8-2 as a matter of law due to the respondents' failure to timely provide him with the designated provider list.

Section 8-43-404(5)(a)(I)(A), C.R.S., requires the employer or insurer to "provide a list of at least two physicians, ... in the first instance, from which list an injured employee may select the physician who attends said injured employee." WCRP 8-2(A), provides a framework for providing the required list of physician and similarly states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list" WCRP 8-2(D) further provides that if the employer fails to comply with this Rule 8-2, the injured worker may select an authorized treating physician of the workers' choosing.

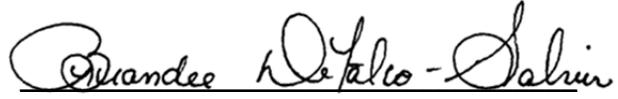
Here, the claimant sustained an injury on March 15, 2012, and the designated provider list was not sent until April 5, 2012. Because the designated provider list was not timely provided to the claimant, the plain language of the WCRP 8-2 dictates that the right of selection passed to the claimant. *See*, 8-43-404(5)(a)(I)(A). However, we agree with the ALJ that the claimant exercised his right of selection when he chose to see Dr. Sacha and received treatment for the next two years. *Miller v. Rescare, Inc.*, W.C. No. 4-761-223 (September 16, 2009) *aff'd Rescare Inc. v. Industrial Claim Appeals Office*, Colo. App No. 09CA2048 (Colo. App. June 3, 2010) (NSOP). We therefore disagree with the claimant's contention that he is entitled to a change of physician as a matter of law pursuant to WCRP 8-2. Once the right of section is exercised, the claimant may not change physicians without permission from the insurer or the ALJ. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

Although the ALJ also denied the claimant's request for a change of physician under §8-43-404(5)(a)(VI), C.R.S., the claimant does not dispute this determination on appeal and consequently, we do not address here.

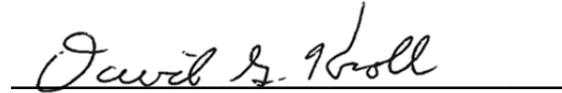
IT IS THEREFORE ORDERED that the ALJ's order dated April 25, 2015, is affirmed.

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INDUSTRIAL CLAIM APPEALS PANEL

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Brandee DeFalco-Galvin

Handwritten signature of David G. Kroll in cursive script, written above a horizontal line.

David G. Kroll

PHIL PAVELKO
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CERTIFICATE OF MAILING

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

_____ 9/4/2015 _____ by _____ RP _____ .

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LAW OFFICE OF JONATHAN M. WARD, Attn: JONATHAN M. WARD, ESQ., 1825 YORK
STREET, DENVER, CO, 80206 (For Claimant)
RUEGGSEGGER SIMONS SMITH & STERN, LLC, Attn: KATHERINE H.R. MACKAY,
ESQ., 1401 SEVENTEENTH STREET, SUITE 900, DENVER, CO 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-556-02

IN THE MATTER OF THE CLAIM OF
ALEJANDRO PAYAN,

Claimant,

v.

FINAL ORDER

VICTOR PAYAN d/b/a
PAYAN CONSTRUCTION,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated February 9, 2015, that dismissed the claim as not compensable and denied the request for medical benefits. We affirm the ALJ's order.

The claimant had moved from Brighton to temporarily live with his uncle, Victor Payan, the named respondent employer, in Denver. Victor Payan operated a construction business out of his home. Victor Payan testified the claimant had moved to Denver in mid-February and originally slept in his truck. Because it was cold, Victor Payan then allowed the claimant to stay in his basement. During the next month, the claimant worked for two days on jobs for Victor Payan's company. The claimant was paid \$50 per day for each of these two days. On Sunday, March 10, 2013, Victor Payan and his father were installing a ladder rack onto a truck. A backhoe was being used to lift the rack. The claimant came out in his pajamas and offered to help. In the process, one of the backhoe blades hit the claimant in his left thigh, causing a laceration and injury to his thigh muscle. He was treated at Denver Health Medical Center and at Salud Family Health Center.

The ALJ determined the claimant was not an employee of Victor Payan at the time of his injury on March 10. The ALJ noted the evidence was not convincing that Victor Payan intended to hire the claimant to perform any work on March 10, or even in the near future. He found the claimant was acting as a volunteer when he sought to assist Victor

Payan to place the ladder rack on his truck. Because the parties did not intend to form a contract of hire, and the claimant therefore was not an employee of Victor Payan, the claimant's injury was determined by the ALJ to not have occurred in the course and scope of employment. The claimant's claim, which included his request for the payment of his medical bills, was denied.

To be entitled to workers' compensation benefits, a person must qualify as an employee under the statutory definition. *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 595, 307 P.2d 805, 811 (1957); Section 8-40-202(1)(b) C.R.S. 2008. The burden is on the claimant to prove that he was an employee when he was injured. See *Hall v. State Compensation Ins. Fund*, 154 Colo. 47, 50, 387 P.2d 899, 901 (1963); *Younger v. City and County of Denver* 810 P.2d 647 (Colo. 1991). Moreover, if there is substantial evidence in support of the ALJ's factual determination that there was no contract of employment between claimant and Victor Payan at the time of the claimant's injury, that determination is binding on review. Section 8-43-301(8) C.R.S. 2008; see generally *I.M.A. Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882 (Colo. 1986) (whether parties have entered into a contract is a factual determination); see also *Denver Truck Exchange v. Perryman, supra*; *Rohring v. Jim and Adrienne Brink dba Wilderness Trailobo, Inc.*, W.C. 3-046-691 (March 20, 1987).

On appeal, the claimant contends the evidence does establish the claimant was an employee, albeit a casual or sporadic employee. In addition, the claimant argues his injury then occurred while he was performing a useful function for Victor Payan's business which would lead to the conclusion he was injured in the course and scope of employment.

The claimant argues he was an employee because the undisputed evidence revealed the claimant had worked on two separate days for Victor Payan's construction company, was paid \$100, and also worked a couple of other days doing some clean up work for the construction company. In addition, he notes that Victor Payan testified there may have been some tasks in the future for which he may have hired the claimant. The rack on the pickup truck was noted by the claimant to represent a device which would be used in the conduct of Victor Payan's construction business. Based on this testimony, the claimant asserts the ALJ was in error in finding the claimant was not an employee of Victor Payan when he was injured.

For purposes of the Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S. 2009; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). The essential elements of a

contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. See *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. 1957); *Anna Kay Tressell Deceased, John Tressell Claimant v. Alpha Therapy Services, LLC.*, W. C. No. 4-322-755 (December 15, 1999).

In *Aspen Highlands Skiing Corp. v. Apostolou*, 854 P.2d 1357 (Colo. App 1992), aff'd, 866 P.2d 1384 (Colo. 1994), the court, citing *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), noted that if the services are volunteered without any expectation of compensation in return, the fact that the alleged employer may provide some benefit on a gratuitous basis will not convert a volunteer into an employee. Here, the ALJ specifically found that the claimant volunteered certain services for Victor Payan, but was not acting as an employee under a contract of hire, either express or implied. On the issue of the existence of a contract of hire, the ALJ found the testimony of Victor Payan to be more credible and persuasive than that of the claimant.

The panel has determined that where the parties ascribe different meanings to a material term of the contract and that term is ambiguous, the parties have not “manifested mutual assent” and there has been no “meeting of the minds” and no valid contract exists. *Dell v. Jaz Con, LLC*, W.C. No. 4-777-941 (November 4, 2009); *Westerman v. Manitou and Pikes Peak Railway and/or High Bridge Saloon*, W. C. Nos. 3-903-645, 4-407-473 (November 17, 2000). See *Sunshine v. M.R. Mansfield Realty, Inc.*, 575 P.2d 847 (Colo. 1978). Therefore, in our view, the ALJ did not err in observing there was no “meeting of the minds” so as to conclude a contract for hire had not been established.

The claimant contends that substantial evidence does not exist to justify the finding the claimant was not an employee. He argues that the fact of several days employment in the previous month as well as the possibility there could be additional opportunities for employment in the coming week is sufficient to require the contrary determination that there was an employment contract.

Because the existence of a contract for hire is generally a question of fact for the ALJ, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Tuttle v. ANR Freight System, Inc.*, 797 P.2d 825 (Colo. App. 1990); *Cassidy v. Rocky Mountain Communications*, W. C. Nos. 4-597-715 and 4-597-716 (March 18, 2005); *Pfuhl v. Prime, Inc.*, W.C. No. 4-215-435 (February 16, 1995). In applying this standard, we are obliged to view the evidence in the light most favorable to the prevailing party and defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences which he drew from

the evidence. *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The ALJ found the testimony of Victor Payan to be more credible or persuasive than that of the claimant. However, there was little conflict in regard to most of the facts. We may not set aside a credibility finding unless the testimony of a particular witness, although direct and unequivocal, is “so overwhelmingly rebutted by hard, certain evidence directly contrary” that a fact finder would err as a matter of law in believing the witness. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Here, we do not perceive extreme circumstances which would require us to set aside the ALJ’s credibility determination. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000).

The ALJ made the following findings of fact with record support. The claimant was not asked by Victor Payan to move to his home in order to work for him. He provided lodging for the claimant as a family courtesy. On March 10, the claimant was relaxing in his pajamas when Victor Payan and his father worked to place the ladder rack on the truck. They did not request the claimant’s assistance. The claimant volunteered. There was no agreement to pay the claimant on March 10. The claimant worked very sporadically and occasionally for Victor Payan. The claimant’s belief that he may work in the future for Victor Payan was premised on a vague belief that there could be future jobs for him. The placement of the ladder rack on the pickup truck was to allow Victor Payan assistance in running personal errands and only occasionally for business use. He had no specific job in mind for which he might use the ladder rack.

The claimant’s arguments notwithstanding, there is substantial evidence in the testimony of Victor Payan and the claimant to support the ALJ’s finding that the claimant failed to sustain his burden to prove he was an employee or there was a contract of hire with Victor Payan at the time of the alleged injury. Consequently, the existence in the record of conflicting testimony or of evidence that would support a contrary result does not provide a basis for setting aside the ALJ’s order. *See Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999) (the existence of conflicting evidence does not lessen the import of substantial evidence in support of a finding).

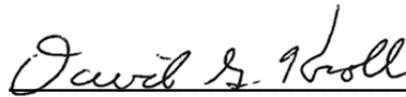
In our view the above findings constitute substantial evidence supporting the ALJ’s determination that the claimant was not an employee of Victor Payan at the time of his injury. Consequently, we perceive no basis upon which to set aside the ALJ’s order.

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Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002); §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued February 9, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

ALEJANDRO PAYAN
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CERTIFICATE OF MAILING

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

_____ 8/17/2015 _____ by _____ RP _____ .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-903-810-04

IN THE MATTER OF THE CLAIM OF

WILLIAM BENTON,

Claimant,

v.

LOWE ENTERPRISES, INC.,

Employer,

and

FEDERAL INSURANCE COMPANY,

Insurer,
Respondents.

REMAND ORDER

The claimant seeks review of an order of Administrative Law Judge Margot Jones (ALJ) dated May 7, 2015, that denied the claimant's request that he be allowed to continue treating with Dr. Nystrom after Dr. Nystrom moved from one facility to another, pursuant to § 8-43-404(5)(a)(V) C.R.S. (claimant may continue care when physician moves to new medical facility location). We set aside the ALJ's order and remand the matter for additional findings.

The claimant injured his low back at work for the respondent employer on November 1, 2012. The claimant began treating at the Concentra Clinic in Thornton. He was followed by Dr. Robert Nystrom at that facility. The claimant was treated with physical therapy and other conservative measures. The claimant was referred to Dr. Castro for a single level lumbar fusion surgery which was completed on October 31, 2013. In approximately December, 2013, Dr. Nystrom moved his practice to the Concentra clinic in Greeley, and then to the Concentra clinic in Ft. Collins. When Dr. Nystrom relocated, the claimant was referred to other Concentra doctors in the Denver area for treatment, including Dr. Hattem. Dr. Hattem first saw the claimant on March 14, 2014. He prescribed physical therapy, pool therapy, an epidural injection and pain medications. Dr. Hattem referred the claimant back to Dr. Castro for a recommended surgical follow up visit. On August 18, 2014, Dr. Hattem saw the claimant and remarked that the claimant was nearing maximum medical improvement (MMI).

The claimant filed an application for a hearing on September 24, 2014, in regard to the issue of a change of physician. Dr. Hattem determined the claimant was at MMI on October 6, 2014, and assigned a permanent impairment rating of 22% whole person. The doctor suggested post MMI maintenance treatment consisting of the refill of prescriptions for ibuprofen and a follow up appointment with Dr. Castro. Dr. Hattem testified in his deposition that he was willing to see and treat the claimant in regard to these post MMI recommendations. However, the claimant did not arrange any further appointments with Dr. Hattem. The respondents submitted a Final Admission of Liability and the claimant requested a Division Independent Medical Exam (DIME). The DIME appointment was still pending at the time of the March 17, 2015, hearing.

At the hearing, claimant's counsel argued the claimant was not seeking a change to a physician of his selection pursuant to § 8-43-404(5)(a)(VI). Instead, he asserted the respondents should be ordered by the ALJ to pay for the claimant to treat with Dr. Nystrom in his current location as provided by § 8-43-404(5)(a)(V). That subsection specifies:

(V) If the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician, ...

The respondents contended the claimant was simply requesting a change of physician as referenced in § 8-43-404(5)(a)(VI). They presented evidence to establish that the claimant did not have sufficient grounds to justify such a change.

The ALJ found the claimant was originally treated by Dr. Nystrom who then moved to Greeley in December, 2013. However, the ALJ determined the claimant never requested an appointment with Dr. Nystrom after that date until September 24, 2014, when he filed his application for a hearing. The ALJ concluded the claimant had not made a proper showing to support a change of physician pursuant to § 8-43-404(5)(a)(VI).¹ The ALJ noted the claimant had received a comprehensive course of treatment from Dr. Hattem and Dr. Castro that included diagnostic procedures, injections, prescription medication, surgery and physical therapy. The ALJ did not find adequate

¹ The ALJ inadvertently cites to § 8-43-404(5)(a)(III) as the basis for a request to change physicians. However, that section only applies to requests made within 90 days of the injury. The ALJ's reference to *Hoefner v. Russell Stover Candies*, W.C. No. 4-541-518 (June 3, 2003), indicates she was actually applying § 8-43-404(5)(a)(VI) [formerly designated § 8-43-404(5)(a)].

evidence of any breakdown in the therapeutic relationship with Dr. Hattem and there was no other reason the claimant was unable to recover from his injury under the care of Dr. Hattem.

The claimant appeals the ALJ's decision, contending these findings are inapplicable to his request for treatment with Dr. Nystrom pursuant to § 8-43-404(5)(a)(V) and that he has established the conditions under which that section is applicable. He asserts the ALJ has no further discretion to deny his request.

I.

Initially, the respondents contend the ALJ's order is not reviewable as an order that grants or denies a benefit or a penalty as required by § 8-43-301(2). Unlike an order that grants a request for change of physician without specific medical benefits, the panel has previously held that an order that denies a request for a change of physician to a specific doctor is equivalent to the denial of a specific benefit and, therefore, is final and reviewable. *Vigil v. City Cab Company*, W.C. No. 3-985-493 (May 23, 1995); *Landeros v. CF & I Steel*, W.C. No. 4-395-493 (October 26, 2000); *Pavelco v. Southwest Heating*, W.C. No. 4-897-489 (September 4, 2015).

II.

The claimant argues § 8-43-404(5)(a)(V) allows him to follow Dr. Nystrom to the Ft. Collins Concentra clinic solely upon a showing the doctor has changed facilities by moving his practice to that new location.

Section 8-43-404(5)(a)(V) is part of an extensive amendment to § 8-43-404(5)(a) accomplished in 2008 with the passage of H.B. 07-1176. The amendment sought to provide an injured employee some choice in the selection of his treating physician while, at the same time, maintaining the employer's ability to have some control over that choice. The amendment required the employer to provide the employee a list of designated corporate medical providers or physicians. Originally, the list required two choices but was amended in 2014 to require four. (There are exceptions for smaller communities featuring fewer doctors). While the list may contain a combination of corporate medical providers and physicians, at least one must be at a distinct address and feature separate ownership. From this list, the injured employee "may select the physician who attends the injured employee." A corporate medical provider includes a medical organization in business as a sole proprietorship, professional corporation or partnership. § 8-43-404(5)(a)(I)(A).

The 2008 amendment also allowed the employee to change his authorized treating physician selected from the employer's list to another physician from the list, on one occasion, to occur within 90 days of the date of injury. The employee need not provide any reason for his desire to change his authorized treating physician. Section 8-43-404(5)(a)(III). In addition, the amendment contained § 8-43-404(5)(a)(V), quoted above, allowing an employee to follow a treating physician moving his practice. The statute retained § 8-43-404(5)(a)(VI) [formerly § 8-43-404(5)(a)] allowing for the director or an ALJ to authorize a physician of the employee's selection to treat the employee upon a "proper showing" by the employee.

A review of the 2008 amendment convinces us the claimant has not correctly interpreted § 8-43-404(5)(a)(V). That section requires that in order for the claimant to enjoy continued care with the physician moving his practice, the record must show the physician was (1) authorized, (2) that the physician moved his practice to another facility or another corporate medical provider, and (3) the physician was "the" authorized treating physician. The legislature, in drafting this paragraph, is concerned that the claimant not have his choice of physician abrogated due to the move of that physician while at the same time seeking to maintain the integrity of the employer's choice of providers represented by its initial list provided to the claimant at the time of the injury. It is significant then, that § 8-43-404(5)(a)(V) does not refer to "an" authorized treating physician, but rather, to a single authorized treating physician or to "the" authorized treating physician.. The claimant may be treating with a number of physicians. However, this subsection does not allow the claimant to switch his treatment from one facility or corporate provider to another simply on the basis that one physician out of the galaxy of treaters has moved his practice. The difficulty with the ALJ's findings is that they do not attempt to resolve this issue as to whether Dr. Nystrom is to be seen as 'the' authorized treating physician.

The legislature's use of the article "the" before "authorized physician" in § 8-43-404(5)(a)(V), as opposed to that of "an" authorized physician has been the subject of previous decisions of the Court of Appeals. In *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997), the claimant contested the cessation of his temporary benefits when he was provided a return to regular work release by one of his providers pursuant to § 8-42-105(3)(c). That section allowed the termination of temporary benefits when "the attending physician" gives the employee a release to return to regular employment. The claimant had received authorized treatment by a group of doctors at a clinic. One of the doctors referred the claimant to a chiropractor for several sessions of treatment. At the point that the chiropractor finished the prescribed treatment, he issued a return to work release. When the employer stopped paying temporary benefits as a result,

the claimant contended the chiropractor did not qualify as “the” attending physician. The court agreed. It was pointed out there can be more than one attending physician. The court found the statutes’ use of the word “treating” or “attending” served an interchangeable function in this respect. This phrase was noted to refer to a doctor “who takes care of a claimant” or “minister to: a nurse attending a patient.” The Court concluded “... the statute does not provide for a release by ‘any attending physician.’ Consequently, the author of an effective release for return to employment must be the health care provider identified as ‘the attending physician.’”*Id.* at 681. The Court remanded the matter to the ALJ to determine who was the attending physician, the chiropractor or one of the doctors at the clinic at which he treated. Similarly, in *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999), the claimant treated with an osteopathic doctor. The D.O. authored a return to work release. The claimant then treated with an orthopedic surgeon and also with a chiropractor. Those subsequent providers did not agree with the return to work opinion of the D.O. The ALJ considered the medical evidence pertinent to the return to work issue and determined the authorized treating physician did not provide a return to work release. This finding was upheld by the Court.

In contrast, the Court in *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002), construed § 8-42-107(8)(b)(I) which provides that “an authorized treating physician shall make a determination” as to the achievement of MMI. The claimant had been treating with a physician who then referred the claimant to a specialist for a surgical opinion. The specialist saw the claimant on one occasion and, several months later, completed a form stating the claimant was at MMI. The Court held that because the statute had been amended recently to alter a reference from “the authorized treating physician” to “an” authorized treating physician, an MMI determination by any of the treating physicians was sufficient to support a determination of MMI. Finding that the specialist was seen by the claimant for the purpose of possible treatment, the Court noted the specialist was an authorized treating physician and his opinion that the claimant was at MMI, despite the absence of any agreement on that point from the claimant’s other treating physician, would be adequate under the statutory language to support the application of MMI, subject to a later DIME review.

The analysis in *Popke*, *Bestway Concrete*, and *Town of Ignacio* are instructive here. Section 8-43-404 uses the phrase “an authorized treating physician” at one point, *see* § 8-43-404(7), when it refers to the need for treatment to be prescribed by “an” authorized treating physician in order that it be characterized as authorized. However, § 8-43-404(5)(a)(V) specifically refers to “the authorized treating physician” when it allows a claimant to continue care with a physician that has moved his practice. As in

Popke, the ALJ must determine if Dr. Nystrom is to be considered the authorized treating physician, in order to allow the claimant to continue treating with him pursuant to § 8-43-404(5)(a)(V).

Here, the record shows the claimant had been treating for a period of 10 months with Dr. Hattem and Dr. Castro subsequent to his last treatment with Dr. Nystrom. This circumstance presents the same challenge as that faced in *Popke* and in *Bestway Concrete* wherein a treating physician at one point in the history of the claimant's care offered an opinion regarding a return to work yet the claimant continued to receive care from other doctors who did not share that opinion. In enacting § 8-43-404(5)(a)(V) the legislature would be concerned about the claimant's ability to shop around among facilities and corporate providers based upon the movement of a doctor who had long since ceased providing care. This circumstance would result in diluting the effect of the employer's listing of specified physician providers without simultaneously providing a beneficial continuation of the claimant's care with the doctor he had initially selected.

Section 8-43-404(5)(a)(V) is concerned with the ability of the claimant to "continue care" with the authorized treating physician. It is necessary to remand this matter to the ALJ to allow her to make findings as to whether Dr. Nystrom can be properly construed as 'the' authorized treating physician with whom it is most necessary for the claimant to 'continue' his care. We contemplate this analysis will require an examination of the evidence in the record to note what type of care is required in the future, to what extent Dr. Nystrom has been involved in the care to be continued, and to what degree the claimant's care will be compromised by his inability to continue treatment with Dr. Nystrom. While the statute does not impose any time limitation on the point at which a claimant must request or assert his desire to follow the treating physician to a new facility, as argued by the claimant, it is relevant for the ALJ to note the proximity of such a request to the doctor's change of facility and to compare it to the progress or frequency of continued medical treatment as a factor to be weighed. Here, the ALJ found the claimant not persuasive when he testified he did make a request to see Dr. Nystrom in December, 2012.

III.

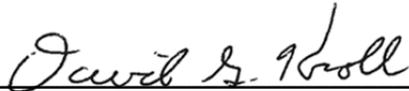
The ALJ made findings in regard to whether the claimant had made a proper showing pursuant to § 8-43-404(5)(a)(VI) to have a physician of the claimant's selection treat the claimant. In the context of this record the ALJ was in error to apply that section. As discussed above, § 8-43-404(5)(a)(V) specifically provides that in the circumstance where an authorized treating physician has moved from one facility or corporate medical

provider to another, that section is pertinent. Due to this more explicit description in § 8-43-404(5)(a)(V) of the circumstances to which it applies, the legislature intended that section to control when those conditions are present. Here, it is undisputed Dr. Nystrom was authorized to treat and did treat the claimant. It is also undisputed that Dr. Nystrom moved from one Concentra facility to another. In that case, the ability of the claimant to continue care with Dr. Nystrom is controlled by § 8-43-404(5)(a)(V) and not by subsection (VI).

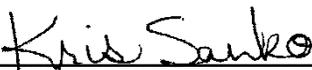
Accordingly, we set aside the May 7, 2015, decision of the ALJ and remand the matter for additional findings pursuant to our discussion in section II above. At the ALJ's discretion, she may conduct additional evidentiary proceedings to assist in those findings.

IT IS THEREFORE ORDERED that the ALJ's order issued May 7, 2015, is set aside and remanded for additional findings.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

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_____ 9/14/2015 _____ by _____ RP _____ .

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ESQ., 3801 E. FLORIDA AVE., SUITE 210, DENVER, CO, 80210 (For Respondents)
ALJ MARGOT W. JONES, ESQ., % OFFICE OF ADMINISTRATIVE COURTS, ATTN:
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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-878-425-06

IN THE MATTER OF THE CLAIM OF

DAVID WEIBEL,

Claimant,

v.

FINAL ORDER

THE KROGER COMPANY,

Employer,

and

SEDGWICK CMS,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Margot Jones (ALJ) dated March 30, 2015, that rejected the respondents' assertion that the claimant's claim for permanent total disability benefits was barred by the doctrine of claim preclusion. We set aside the ALJ's order.

This matter went to hearing on the issue of permanent total disability benefits and offset of pension benefits. The respondents asserted at hearing that the claimant's claim for permanent total disability benefits was barred by the doctrine of claim preclusion. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on January 26, 2012, while working as an industrial refrigeration technician. On this date the claimant injured his right and left shoulders when he slipped down a ladder through a manhole, resulting in his arms being forcefully abducted over his head. The claimant received treatment for both shoulders and was eventually placed at maximum medical improvement (MMI) on January 8, 2013, and given a 13 percent extremity rating for each shoulder.

The respondents filed a final admission of liability admitting for permanent partial disability benefits and ongoing maintenance medical treatment. The claimant objected to the final admission and requested a Division Independent Medical Examination (DIME) which was performed by Dr. Gellrick. The DIME physician agreed with the treating physician's MMI date but assigned a 33 percent whole person rating for the claimant's

shoulders and damage to the cervical spine. The respondents filed an application for hearing on November 19, 2013, to overcome the DIME physician's impairment rating and also listing the issue of maintenance medical benefits. The claimant filed a response on November 21, 2013 listing the issues of compensability, medical benefits, disfigurement, temporary total disability benefits, whole person conversion, and termination of employment in addition to the issues listed by the respondents. The ALJ also found that the claimant filed another response on November 27, 2013, listing safety rule violation in addition to the earlier issues. On February 27, 2014, a hearing was held on the issues of permanent partial disability, overcoming the DIME, conversion to whole person and safety rule violation. By order dated April 11, 2014, an ALJ determined that the respondents failed to overcome the DIME physician's impairment rating. The ALJ also determined that the claimant's rating should be converted to a whole person rating and denied the imposition of a safety rule violation. On April 28, 2014, the respondents filed a final admission of liability consistent with the ALJ's order.

The claimant timely objected to the final admission and then applied for a hearing on the issue of permanent total disability. The respondents argued at the outset of the hearing that the claim for permanent total disability was barred by the doctrine of claim preclusion. The ALJ rejected the respondents' contention. The ALJ determined that although the elements necessary to apply claim preclusion of finality, identity of the parties and subject matter were met; the identity of claims for relief did not exist. The ALJ then credited the claimant's testimony regarding his inability to work and rejected the respondents' vocational counselor's testimony that the claimant was capable of earning a wage and determined that the claimant was entitled to permanent total disability benefits subject to certain offsets.

On appeal, the respondents do not contest the ALJ's determination of permanent total disability or offset. The respondents assert that the claim for permanent total disability benefits is barred by claim preclusion because the claimant failed to endorse the issue of permanent total disability benefits when he filed his November 21, 2014, response to the respondents' application for hearing on the issue of permanent disability. We agree with the respondents that the relevant statute and case law mandate this result and we, therefore, set aside the ALJ's award of permanent total disability benefits.

In *Holnam Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006), the court of appeals noted that claim preclusion works to bar the re-litigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not. Claim preclusion protects "litigants from the burden of re-litigating an identical issue with the same party or his privy and ... promote[s] judicial

economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003)(quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L.Ed.2d 552 (1979)). For a claim in a second proceeding to be precluded by a previous judgment, there must exist: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity of or privity between parties to the actions. *Holnam v. Industrial Claim Appeals Office*, *supra*; *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo.1999).

As to the first requirement for finality, the ALJ found that there is no dispute that the ALJ's April 11, 2014, order is a final order. The claimant on appeal now denies the finality of the April 11, 2014, order on permanent partial disability. We agree with the ALJ. Neither party appealed the April 11, 2014, order and thus, the order became final. Section 8-43-301(10), C.R.S. When the April 11, 2014, order became a final order, the adjudicatory process was completed. *See Smeal v. Oldenettel*, 814 P.2d 904 (Colo. 1991) (claim preclusion requires a final judgment that completes the trial court's adjudicatory process.)

The parties do not dispute that the second element necessary to invoke claim preclusion is met because both proceedings involve the scope of the employer's liability for the injuries that the claimant asserts arose out of the industrial injury. *See Holnam, Inc. v. Industrial Claims Appeals Office*, *supra*. The fourth element is also not in dispute, as the parties in both proceedings are the same.

The limited issue addressed by the ALJ was whether there was identity in the claims for relief. The ALJ found that the claimant's claim for permanent total disability is not the same as the claim for permanent partial disability benefits resolved in the April 11, 2014 order. Citing to §8-43-203(2)(b)(II), the ALJ held that the issue of permanent total disability did not become ripe until the respondents filed the final admission of liability after the April 11, 2014, order. We disagree with this interpretation of the statute and pertinent case law.

Initially, we note that the claimant contends that the respondents did not raise the issues of ripeness or waiver before the ALJ and may not do so now on appeal. It is true that failure to raise an issue before the ALJ in a workers' compensation proceeding will preclude consideration of such issue by the panel on review. *See Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995). We disagree, however, that the issues were not raised here. In the October 7, 2014, response to the application for hearing, the respondents listed as other issues to be heard, "offsets claim preclusion issue preclusion claim closed." The respondents made an oral motion at the outset of the hearing citing to

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§8-43-203(2)(b)(II), C.R.S. and the same case law they now rely on for appeal. The majority of the respondents' argument to the ALJ was based on the relevant statute and case law addressing ripeness and waiver and therefore, the issues were raised and are now properly before us on appeal. See *Sneath v. Express Messenger Serv.*, 931 P.2d 565 (Colo. App. 1996).

In setting forth the argument that there was an identity in the claims for relief, the respondents point the ALJ to the well-settled principle that permanent partial disability and permanent total disability benefits both compensate for loss of future earning capacity. *Waymire v. City of Las Animas*, 924 P.2d 1168 (Colo. App. 1996). Therefore, when a final admission of liability takes a position on permanent partial disability and a claimant fails to timely object, the issue of permanent total disability is closed. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). In *Olivas-Soto*, the claimant was placed at MMI and then underwent a DIME. The employer filed a final admission of liability admitting for the DIME physician's MMI and impairment rating. The claimant filed an application for hearing listing several issues, including MMI, but did not endorse permanent total disability. The claimant filed additional applications for hearing listing the same issues but in his fourth application for hearing he also listed the issue of permanent total disability and maintenance medical benefits. Relying on §8-43-203(2)(b)(II), the court of appeals concluded that by admitting for permanent partial disability benefits, the respondents necessarily denied liability for permanent total disability benefits in the final admission of liability and the issue of permanent total disability was legally ripe for adjudication when the claimant filed his first application for hearing. Accordingly, the court determined that the issue of permanent total disability was closed and not subject to further litigation absent reopening.

The situation in the present case is in a different procedural posture because here, the respondents are contending that the claimant is precluded from pursuing permanent total disability because of the claimant's failure to endorse the issue on the response to hearing when the respondents were seeking to overcome the DIME. Section 8-43-203(2)(b)(II), C.R.S., specifically addresses this situation as well. Where the respondents seek to overcome a DIME, the statute requires the claimant to file a response within 20 days on any disputed issues that are ripe. The statute provides, in pertinent part:

The respondents have twenty days after the date of mailing of the notice from the division of the receipt of the IME's report to file an admission or to file an application for hearing. The claimant has thirty days after the date respondents file the admission or application for hearing to file an

application for hearing, *or a response to the respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing.* §8-43-203(2)(b)(II), C.R.S. 2015 (Emphasis added).¹

Here, the respondents filed an application for hearing to challenge the DIME on November 19, 2013. The issue of permanent total disability was ripe when the respondents filed the application for hearing to address permanency because the DIME placing the claimant at MMI removed any legal impediment to a determination of his eligibility for permanent total disability benefits. *See Olivas-Soto v. Industrial Claim Appeals Office supra.*

Consistent with this language in §8-43-203(2)(b)(II), C.R.S. and *Olivas-Soto*, the panel in *Talboys v. The Greenhouse Restaurant*, W.C. No. 4-597-998 (September 25, 2015), stated that the ALJ's determination of the appropriate permanent partial disability rating "is a concomitant denial of PT benefits." In *Talboys*, the panel stated *Olivas-Soto* was authority to deem the issue of permanent total disability closed if a party failed to endorse permanent total disability benefits as an issue at the time a response was due. Moreover, the fact that respondents filed a final admission of liability after the matter went to hearing does not change the result. *Drinkhouse v. Mountain Board of Cooperative Education Services*, W.C. No. 4-368-354 (February 7, 2003), *aff'd Drinkhouse v. ICAO*, (Colo. App. No. 03CA0438, March 4, 2004) (not selected for publication)(claimant's failure to object to disputed issues on first final admission closed the issues and claimant's objection to a revised admission was immaterial); *Compare Leeway v. industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007)(second admission superseded first admission when filed before expiration of objection period of prior admission).

We, therefore, conclude that the ALJ's order is a misapplication of the law. Section 8-43-203(2)(b)(II), C.R.S., statutorily closed the issue of permanent total disability benefits. Thus issue of permanent total disability is not subject to further litigation absent reopening pursuant to §8-43-303, C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated March 30, 2015, is set aside.

¹ Section 8-43-203(2)(b)(II), C.R.S., was amended in 2013 by SB 13-249 with minor language changes. Regardless of which version applies, the critical language relied upon in this case was not substantively altered by the amendment.

INDUSTRIAL CLAIM APPEALS PANEL



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