# BROWN BAG SEMINAR

**Thursday, October 17, 2013**

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

633 17th Street

**Conference Room 12 A**
**(*note different meeting place*)**

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation
**Free**

This outline covers ICAP decisions issued from

September 14, 2013 through October 11, 2013

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# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-846-625

IN THE MATTER OF THE CLAIM OF

BOBBY DORSEY,

Claimant,

v.

MORGAN DIESEL SERVICES,

Employer,

and

COLORADO CASUALTY INSURANCE COMPANY,

Insurer,
Respondents.

ORDER

The claimant seeks review of multiple orders of the Director of the Division of Workers' Compensation (Director). We dismiss the claimant's petitions to review the Director's orders dated December 14, 2012, February 25, 2013, February 28, 2013 and March 13, 2013, because the orders were not timely appealed. We otherwise dismiss, without prejudice, the claimant's petitions to review the Director's April 9, 2013, April 29, 2013, May 23, 2013 and June 19, 2013, orders because these orders are not final orders.

The Director made the following findings which do not appear to be in dispute. The claimant sustained an admitted injury on January 17, 2011. The respondents filed a final admission of liability on December 13, 2011. The claimant timely objected and sought a Division Independent Medical Examination (DIME). A DIME physician was selected on April 5, 2012. No further action occurred until October 16, 2012, when the respondent filed a Motion to Close for failure to prosecute. The claimant filed an application for hearing on October 19, 2012, endorsing average weekly wage and the respondents' Motion to Close. The Director issued an Order to Show Cause on October 29, 2012, requiring the claimant to show good and sufficient cause why the claim should not be closed. The claimant responded on November 28, 2012, and indicated that an application for hearing had been filed. The hearing was set for February 1, 2013.

The Director issued an Extension of Time to Show Cause on December 14, 2012. The order stated that the respondents' Motion to Close for failure to prosecute was

granted unless the claimant showed good cause for keeping the claim open, filed an application for hearing, set a hearing date and attended the set hearing.

The Director entered an order dated February 25, 2013, which ordered the claimant to pay a DIME cancellation fee of $250.00.

After determining that the hearing scheduled for February 1, 2013, had not been held, the Director entered an order dated February 28, 2013, granting the respondents' Motion to Close.

The claimant filed a Motion for Corrected Director's 2/28/13 Order/Petition to review, arguing that closure was inappropriate. The Director issued a Supplemental Order dated March 25, 2013, which stayed the February 28, 2013, order and gave the claimant an additional ten days to state how he complied with the requirements of the February 12, 2013, Extension of Time to Show Cause. The claimant timely responded to the order and stated that he understood that all issues for hearing were resolved by agreement. The Director then determined that because the issues for hearing had been resolved, closure was now appropriate and on April 9, 2013, entered an order stating that the claim was closed effective February 28, 2013.

On April 23, 2013, the claimant filed a Motion for Reconsideration/Petition to Review of the April 9, 2013 order, asserting that the order closing the claim was issued as a result of bias against counsel. In an order dated April 29, 2013, the Director dismissed the claimant's petition to review because the April 9, 2013, order was interlocutory.

On May 17, 2013, the claimant filed a petition to review the Director's April 29, 2013, order as well as the earlier orders dated December 14, 2012, February 25, 2013, February 28, 2013, March 25, 2013 and April 9, 2013. The claimant renewed his assertion that the Director erred in closing the claim as a result of bias against claimant's counsel.

On May 23, 2013, the Director issued an order and briefing schedule. In this order the Director dismissed the claimant's petitions to review the orders of December 14, 2012, February 25, 2013, February 28, 2013 and March 25, 2013, because the petitions to review were not timely filed pursuant to §8-43-301(2), C.R.S. The Director also issued a briefing schedule for the claimant's petition to review the April 9, 2013 order, as part of this order. On June 12, 2013, the claimant filed another petition to review of the Director's May 23, 2013, order asserting that the Director erred in dismissing the petition to review of the earlier orders for being untimely and reasserting his contention that the Director erred in closing his claim.

The Director issued a Supplemental Order on June 19, 2013, summarizing the orders and appeals to date. The Director consolidated the claimant's petitions to review and issued a briefing schedule. The Director also vacated a February 25, 2013, order to show cause regarding penalties for failure to timely pay the DIME doctor.

In his brief the claimant again alleges that the Director abused his discretion and erred as a matter of law in dismissing the claimant's petitions to review the earlier orders and in summarily closing the claimant's worker' claim for non-prosecution. The claimant reasserts general allegations that he was denied due process and that the Director closed the claim because of bias towards the claimant's counsel.

We agree with the Director that the claimant's appeal of the orders dated December 14, 2012, February 12, 2013, February 28, 2013 and March 25, 2013, were untimely. Section 8-43-301(2), C.R.S., provides that a Director's order is final unless the dissatisfied party files a petition for review within twenty days of the certificate of mailing of the order. The claimant does not appear to dispute that the petitions to review of the ALJ's December 14, 2012, February 12, 2013, February 28, 2013 and March 25, 2013 orders were not filed within twenty days of the date of the certificates of mailing of those orders. The statutory time limits governing appellate review of workers' compensation decisions are jurisdictional. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 24 P.3d 1 (Colo. App. 2000). Thus, absent the filing of a timely petition to review we lack jurisdiction to review the Director's order. *See Schneider Nat'l Carriers, Inc. v. Industrial Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998); *Buschmann v. Gallegos Masonry, Inc.* 805 P.2d 1193 (Colo. App. 1991).

With regard to the claimant's petitions to review the Directors' April 9, 2013, April 29, 2013, May 23, 2013 and June 19, 2013, insofar as those orders grant the respondents' motion to close, we conclude that these orders are interlocutory and not subject to review.

Section 8-43-301(2), C.R.S., provides that a party dissatisfied with an order "which requires any party to pay a penalty or benefits or denies a claimant a benefit or penalty," may file a petition to review. Orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to review. The legislative purpose underlying the restrictions on appellate review is to avoid piecemeal litigation. *BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997).

Here, the claimant repeatedly has stated that the issues listed on the October 19, 2012, application for hearing have been resolved and there are no disputed issues. Claimant's Brief in Support at 6. Because the claimant was not seeking any benefits, the

Director's orders closing the claim did not deny the claimant a benefit. *See Scott v. Exempla Health Care*, W.C. No. 4-753-124 (March 4, 2009). The determination of closure was not necessary to the resolution of any issues regarding benefits, compensation, or penalties before the Director. It appears that the claimant is advancing his argument concerning closure so as to use the legal effect of this finding in some future litigation wherein he may actually have need of some benefits. Because the effect of the finding in future litigation, however, is both hypothetical and speculative, we have no authority to address the argument. Section 8-43-301(2), C.R.S.

Consequently, the Director's orders closing the claimant's claim do not deny the claimant any benefits or penalties, nor do they require the respondents to pay any benefits or penalties. Additionally, pursuant to W.C. Rule of Procedure 7-1 (C), claims that are closed are subject to the reopening provisions of §8-43-303, C.R.S. It therefore follows that the Director's orders addressing closure are not final and reviewable. *Cf. Director of Division of Labor v. Smith*, 725 P.2d 1161 (Colo. App. 1986)(order not requiring or denying payment of benefits or penalties is interlocutory). As such, we dismiss the claimant's petitions to review in this regard, without prejudice, for lack of final reviewable orders. *Jorgensen v. Dairy Specialists*, W.C. No. 4-746-585 (July 19, 2012).

**IT IS THEREFORE ORDERED** that the claimant's petitions to review the Director's orders dated December 14, 2012, February 12, 2013, February 28, 2013 and March 25, 2012, are dismissed as untimely.

It is further ordered that the claimant's petitions to review the Director's closure orders dated April 9, 2013, April 29, 2013, May 25, 2013 and June 19, 2013, are dismissed, without prejudice, for lack of a final order.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

10/3/2013 by RP .

BOBBY DORSEY, 2509 15TH AVE CT, GREELEY, CO, 80631 (Claimant)
MORGAN DIESEL SERVICES, 1212 E BURLINGTON AVE, FORT MORGAN, CO, 80701 (Employer)
COLORADO CASUALTY INSURANCE COMPANY, P O BOX 5150, DENVER, CO, 80217 (Insurer)
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUNDELL, ESQ., 1233 EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)
LAW OFFICE OF CHAD A. ATKINS, Attn: NICOLE A. CARRERA, ESQ., 5670 GREENWOOD PLAZA BLVD., SUITE 400, GREENWOOD VILLAGE, CO, 80111 (For Respondents)
DIVISION OF WORKERS' COMPENSATION, Attn: PAUL TAURIELLO, 633 17TH STREET, 4TH FLOOR, DENVER, CO, 80202 (Other Party)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-754-838-01

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| IN THE MATTER OF THE CLAIM OF<br><br>SCOTTY DUNN,<br><br>Claimant,<br><br>v.<br><br>ST. MARY CORWIN HOSPITAL,<br><br>Employer,<br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br><br>Insurer,<br>Respondents. | FINAL ORDER |

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated April 25, 2013, that ordered them to pay for continued pain treatment provided by Dr. Kedlaya. We affirm the ALJ's order.

A hearing was held on the issue of maintenance medical benefits provided by Dr. Kedlaya. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained non-industrial, pre-existing injuries requiring surgery to his right ankle. On March 6, 2008, the claimant sustained an admitted work injury to his right ankle when approximately 30 pounds of tray bases fell approximately four feet onto his right foot and ankle. The claimant was treated by Dr. Nanes who referred the claimant to Dr. De Groote. Dr. De Groote performed a re-fusion and then referred the claimant back to Dr. Nanes who placed the claimant at maximum medical improvement (MMI) with a 48 percent extremity rating. Dr. Nanes recommended Oxycontin and Percocet prescriptions for one year. The respondents filed a final admission of liability on February 13, 2003, admitting for permanent partial disability (PPD) benefits based on Dr. Nanes' report and also admitting for ongoing maintenance medical benefits.

The claimant returned to work as a cashier, for Pueblo Diversified Industrial, standing on his feet for 10 hours a day. The claimant subsequently suffered increased ankle plain when he fell down the stairs at his home. Dr. Nanes reexamined the claimant

noting no changes in his condition but also noting that the claimant was entitled to five more months of pain control treatment and referred him to Dr. Kedlaya for that pain control. On November 16, 2009, Dr. Kedlaya assumed treatment of the claimant for his pain control and continued his prescriptions for Oxycontin, Percocet and Relafen. On September 16, 2010, the claimant reported the onset of low back pain and leg pain.

On February 13, 2013, Dr. O'Brien performed an IME for the respondents. Dr. O'Brien concluded that the claimant had suffered only a minor ankle contusion in the admitted work injury and that none of the subsequent treatment, including the April, 2008, re-fusion and the ongoing pain control, was related to the admitted work injury. Dr. Hall, in contrast, performed an IME for the claimant. Dr. Hall concluded that the work injury aggravated the claimant's pre-existing condition, causing the onset of pain symptoms in the claimant's right ankle.

The ALJ placed the burden of proof on the respondents to demonstrate that the Dr. Kedlaya's treatment was not reasonable, necessary or related to the admitted injury. The ALJ reasoned that although the respondents contended that they were merely disputing the relatedness of Dr. Kedlaya's current pain treatment and that they were not seeking to terminate all maintenance medical benefits, the effect of the respondents' argument was that they were no longer liable for ongoing maintenance medical benefits which was contrary to the final admission of liability in which they had admitted for maintenance medical benefits. The ALJ, therefore, determined that under §8-43-201(1), C.R.S., the burden of proof was properly placed on the respondents. The ALJ concluded that the respondents failed to "prove by a preponderance of the evidence that none of the treatment by Dr. Kedlaya is reasonably necessary to cure or relieve the effects of the work injury." The ALJ further concluded that the respondents did, however, prove that the treatment for the low back pain is not reasonable and necessary to cure or relive the effects of the admitted right ankle injury.

On appeal, the respondents contend that the ALJ misapplied the burden of proof. The respondents again state that they were not seeking to modify the final admission for maintenance benefits but, instead, were disputing specific medical benefits being provided by Dr. Kedlaya. We are not persuaded the ALJ committed reversible error.

It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), the respondents are not precluded from later contesting their liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably

necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission, supra; Snyder v. Industrial Claim Appeals Office, supra.*

Where, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.
>
> (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs.

At the outset of the hearing the ALJ discussed the burden of proof with the parties. Tr. at 7-9. The respondents contended that they were only contesting the specific treatment provided by Dr. Kedlaya and the claimant contended that the respondents were attempting to terminate all maintenance medical benefits. Tr. at 7. The ALJ initially stated that the burden should be placed on the Claimant. Tr. at 9. "In the order,

however, the ALJ appears to have placed the burden on the respondents because he determined that the respondents were actually arguing that the claimant's current conditions were not related to the industrial injury. The ALJ reasoned that the effect of this argument would be to terminate all maintenance medical treatment which was contrary to the respondents' final admission of liability admitting for maintenance medical treatment.

As the parties recognize, the panel previously held in *Salisbury v. Prowers County School District*, *supra*, that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related. Contrary to the respondents' contention, we see no principled distinction between the facts of *Salisbury*, where the respondents were effectively arguing to terminate maintenance medical benefits because the claimant was at "baseline" and the facts of this case where the ALJ determined the respondents were effectively arguing to terminate all medical benefits based on the assertion that none of the claimant's current pain symptoms were due to the work-related injury.

In any event, although the ALJ's order discusses the burden being placed on the respondents, the burden of proof here made no difference in the outcome. The burden of proof only makes a difference when there is an absence of evidence regarding an issue, or, in the case of a "preponderance," where there is a tie. Here, the ALJ also found in the order that "the preponderance of the evidence is that the re-fusion surgery in April 2008, increased the subtabular joint arthritis, which is a likely source for the claimant's chronic right ankle pain. ALJ Order at 5 ¶ 27; Claimant Exhibit 8 at 227. The ALJ also specifically noted that the respondents were not trying to dispute that the re-fusion surgery was due to the work injury. Id. The ALJ's finding that a preponderance of the evidence shows that the treatment is work-related means the same result would have been reached even if the burden had been placed on the claimant. Thus, even if the claimant did have the burden of proof, the ALJ's findings demonstrate that the claimant would have met the burden to show that the pain treatment with Dr. Kedlaya was related to the surgery which was performed in conjunction with the admitted industrial injury. Because the burden of proof did not play a role in the ALJ's resolution of the critical factual determinations, the outcome of the case would not be different if the burden had been assigned to claimant as argued by the respondents. Under these circumstances, the error, if any, was harmless, and we may disregard it. See §8-43-310, C.R.S. [1]

[1] It is not completely clear that medical benefits were actually awarded. After stating the respondents shall pay for the pain treatment, the ALJ refers back to the parties the determination as to which treatment is due to the ankle and which stems from the back. If there is no agreement, the parties are to apply for another hearing.

Although the respondents do not dispute the ALJ's findings, we nevertheless conclude that substantial evidence supports the ALJ's findings in this regard. According to Dr. Hall, the claimant's work injury precipitated the claimant's current pain symptoms that Dr. Kedlaya is currently trying to manage with medications. Claimant's Exhibit at 8 at 227. Dr. Hall testified that the work injury traumatized the claimant's ankle leading to increased motion and pain. Dr. Eskestrand also concluded that the claimant suffered residual pain from the fusion and mid-foot arthritis. Claimant's Exhibit 7. Because the ALJ's findings are supported by substantial evidence we must uphold them on review. Section 8-43-301(8), C.R.S.

In our view the ALJ's order is supported by applicable law and substantial evidence and, therefore, we see no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated April 25, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

David G. Kroll

David G. Kroll

CERTIFICATE OF MAILING

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

10/1/2013 by RP .

SCOTTY DUNN, 211 SOUTH BAYFIELD AVENUE, PUEBLO WEST, CO, 81007 (Claimant)
ST. MARY CORWIN HOSPITAL, Attn: DEBI STOREY, 1008 MINNEQUA AVE., PUEBLO, CO, 81004 (Employer)
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Attn: CONNIE CRIDLEBAUGH, C/O: SEDGWICK CMS, P O BOX 14493, LEXINGTON, KY, 40512 (Insurer)
MCDIVITT LAW FIRM, Attn: AARON S. KENNEDY, ESQ., 19 EAST CIMARRON STREET, COLORADO SPRINGS, CO, 80903 (For Claimant)
RITSEMA & LYON, P.C., Attn: SUSAN REEVES, ESQ., 111 SOUTH TEJON STREET, SUITE 700, COLORADO SPRINGS, CO, 80903 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

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

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| IN THE MATTER OF THE CLAIM OF<br><br>HERNAN HERNANDEZ,<br><br>Claimant,<br><br>v.<br><br>MDR ROOFING, INC.,<br>ALLIANCE CONSTRUCTION & RESTORATION, INC.,<br>NORMA PATRICIA HOFF<br>Employers,<br>and<br><br>PINNACOL ASSURANCE,<br><br>Insurer,<br>Respondents. | FINAL ORDER |

The respondents, Norma Patricia Hoff (Hoff) and MDR Roofing, Inc. (MDR), seek review of an order of Administrative Law Judge Friend (ALJ) dated April 23, 2013, that ordered Hoff, MDR, and Alliance Construction & Restoration, Inc. (Alliance), to pay for the claimant's medical and temporary disability benefits. We affirm.

This case previously was before us. The claimant was employed by MDR as a roofer. On March 10, 2011, the claimant sustained serious injuries when he fell off of a ladder as he was coming down from roofing a house. MDR and the claimant were replacing the roof on a residential rental house owned by Hoff.

Hoff had retained Alliance to replace the roof on her residential rental house. Alliance then entered into a verbal contract with MDR to perform the roofing work on the property. Hoff, Alliance, and MDR were not insured for workers' compensation liability at the time of the claimant's fall.

A hearing was held on July 9, 2012, on the issues of compensability, insurance coverage, statutory employer, medical benefits, safety rule, average weekly wage, and temporary disability benefits. After the hearing, the ALJ concluded that the claimant sustained a compensable injury on March 10, 2011, requiring medical treatment and resulting in disability. The ALJ concluded that prior to the claimant's fall, Pinnacol Assurance (Pinnacol) properly canceled MDR's workers' compensation insurance policy

pursuant to §8-44-110, C.R.S., for nonpayment of premium by sending the cancellation notice certified mail to MDR's address of record. The ALJ also determined that Pinnacol substantially complied with the requirement of §8-44-110, C.R.S. by notifying the Bradley Insurance Group (Bradley), the company through which MDR had applied for workers' compensation insurance, by sending the cancellation notice through regular mail. Therefore, the ALJ concluded that effective March 3, 2011, MDR's workers' compensation policy with Pinnacol was cancelled.

The ALJ further concluded that Pinnacol's reinstatement of MDR's workers' compensation insurance policy to the date it had been cancelled was void *ab initio*. The ALJ found that in reinstating MDR's policy, Pinnacol relied on a statement made by MDR's owner, Daniel Medina (a/k/a Daniel Amaya), certifying that there were no "...losses, accidents or circumstances that might give rise to a claim under the insurance policy," during the period of cancellation, March 3, 2011, through March 11, 2011. The ALJ found that this was a material misrepresentation and there could be no meeting of the minds for reinstatement of the policy. Consequently, the ALJ determined that Pinnacol was not liable for compensation on this claim.

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

Hoff appealed the ALJ's determination that she was the liable employer. In her petition to review, Hoff argued that the ALJ erred in finding that she was "the sole employer liable for benefits" under the Workers' Compensation Act. Hoff further argued in her brief in support that the ALJ erred in his application of "statutory employer issues." Hoff also argued that she and Alliance relied upon the representations of Bradley that insurance coverage existed for the work being performed by MDR and the claimant. Hoff further argued that since Medina spoke Spanish and had limited English ability, Bradley gave him a no loss letter of which he had no knowledge. Since Bradley accepted Medina's signature on the no loss letter, Hoff argued that Pinnacol should be estopped from denying coverage for MDR.

In an order dated February 27, 2013, we set aside that portion of the ALJ's order placing sole liability on Hoff. We concluded that although the ALJ determined that Hoff

was not a statutory employer under §8-41-401, C.R.S., he did not make findings as to whether Alliance was the statutory employer under §8-41-401, C.R.S. We held that on remand, it was necessary for the ALJ to determine whether Alliance was a general contractor pursuant to §8-41-401, C.R.S. We further explained that we were not aware of any authority which relieves an uninsured immediate employer of liability where the statutory employer also is uninsured. To the contrary, where all entities are uninsured, we concluded that *Sechler v. Pastore*, 103 Colo. 139, 84 P.2d 61 (1938), implies that there is joint liability. We therefore remanded for the ALJ to determine the identity of the general contractor, if any. We further explained that this chain of liability was independent of that set forth in §8-41-402, C.R.S. *Coffey v. Curry Graham d/b/a Affordable Roofing*, W.C. No. 3-909-714 (January 24, 1991). We therefore ordered that liability for the benefits due shall be the joint responsibility of the general contractor, together with Hoff and MDR. We also held that Hoff did not have standing to appeal the ALJ's order concerning the status of MDR's insurance policy with Pinnacol. In all other regards, we affirmed the ALJ's order.

On remand, the ALJ requested position statements from the parties, which Hoff and MDR filed. After remand, the ALJ entered his order finding that Alliance assumed the duty of a general contractor. The ALJ found that the contract between Hoff and Alliance was silent as to the work being performed by others or the use of subcontractors. The ALJ then concluded that Hoff, Alliance, and MDR shall pay for the claimant's medical and temporary disability benefits. The ALJ ordered each of the non-insured employers to post bond in the amount of $50,000.

Hoff and MDR have filed petitions to review. Alliance has not filed a petition to review. Hoff has filed a brief in support of her petition to review. While MDR states in a "response" to Hoff's brief in support that it is awaiting a briefing schedule, one was issued on June 12, 2013, for MDR's petition to review. MDR, however, has not filed a brief in support of its petition to review.

I.

On review, Hoff argues that she has standing to appeal the ALJ's order concerning the status of MDR's insurance policy with Pinnacol. Hoff contends that her claim for promissory estoppel is not based on a statutorily created claim but, rather, is based on principles of contract law and equity. As such, she asserts that she has stated a claim for injury to a legally protected interest. Hoff's arguments do not persuade us to disturb the ALJ's order.

A.

To the extent Hoff asserts that Pinnacol's cancellation of MDR's workers' compensation insurance policy under §8–44–110, C.R.S. was ineffective since Bradley issued certificates of insurance to Alliance that never were cancelled, we conclude she lacks standing to make such an argument.

In *First Comp Insurance v. Industrial Claim Appeals Office*, 252 P.3d 1221 (Colo. App. 2011), the Colorado Court of Appeals addressed the issue of standing where an insurer challenged another insurer's cancellation of a workers' compensation insurance policy. In that case, First Comp Insurance (First Comp), sought review of the Panel's final order which affirmed the ALJ's order finding First Comp liable for funeral expenses arising out of a workplace fatality. First Comp, which insured the decedent's statutory employer, contended that because Pinnacol, the insurer for the decedent's direct employer, failed to properly cancel the direct employer's workers' compensation insurance in accordance with section §8–44–110, C.R.S., Pinnacol was responsible for the decedent's funeral expenses. The Court, however, concluded that First Comp did not have standing to raise this issue and, therefore, dismissed First Comp's appeal.

The Court explained that to establish standing, a plaintiff must demonstrate the following: (1) that it suffered injury in fact; and, (2) that the injury was to a legally protected interest. The Court held that whether a plaintiff's alleged injury is to a legally protected interest "is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Id.* at 1223 (quoting *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008)). The Court explained that another way of viewing this rule of law is that "the court must determine whether the particular . . . provision underlying the claim creates a right or interest in the plaintiff that has been arguably abridged by the challenged . . . action." *Id.* (quoting *State Bd. for Community Colleges v. Olson*, 687 P.2d 429, 435 (Colo. 1984)). The Court held that any injury that First Comp suffered as a result of Pinnacol's alleged failure to comply with the policy cancellation requirements of section §8–44–110, C.R.S., was not to a legally protected interest. The Court reasoned that it perceived nothing in the language of the statute or the legislative scheme that conferred on First Comp a legal right to challenge Pinnacol's compliance with the statute. *See also Chevron Oil Co. v. Industrial Commission*, 169 Colo. 336, 456 P.2d 735 (1969).

Here, as mentioned above, Hoff argues that Pinnacol's cancellation of MDR's workers' compensation insurance policy under §8–44–110, C.R.S. was ineffective since Bradley issued certificates of insurance to Alliance that never were canceled. As such, Hoff argues that Pinnacol is estopped from denying workers' compensation insurance coverage to MDR for the claimant's injuries. We conclude, however, that Hoff lacks standing to make such an argument. As held by the Court in *First Comp*, any injury that Hoff suffered as a result of Pinnacol's alleged ineffective cancellation of the policy under

§8–44–110, C.R.S. was not to a legally protected interest of Hoff's. As stated by the Court in *First Comp*, nothing in the language of this statute or the legislative scheme confers on Hoff a legal right to challenge Pinnacol's compliance with the statute.

Similarly, to the extent Hoff alleges that she has standing under §8-41-404, C.R.S. to challenge Pinnacol's cancellation of MDR's insurance policy, we again are not persuaded. Section 8-41-404(1)(a), C.R.S. specifically pertains to persons who have "direct contracts" with other persons to perform construction work on a construction site. That section provides that "every person performing construction work on a construction site shall be covered by workers' compensation insurance, and a person who contracts for the performance of construction work on a construction site shall either provide. . . workers' compensation coverage for, or require proof of workers' compensation coverage from, every person *with whom he or she has a direct contract* to perform construction work on the construction site." (emphasis added) Here, as found by the ALJ, Hoff did not have a direct contract with MDR to perform the reroofing on her rental property. Rather, the ALJ found, with record support, that Hoff entered into a contract with Alliance to re-roof her rental house. Findings of Fact at 5 ¶26, Order dated August 14, 2012; Ex. A. Further, the ALJ found that Alliance, not Hoff, requested a certificate of insurance from MDR, which Bradley provided. Findings of Fact at 3-4 ¶15, Order dated August 14, 2012. Consequently, since there was no "direct contract" between Hoff and MDR, we conclude that §8-41-404(1)(a), C.R.S. has no bearing on whether Hoff has standing to challenge Pinnacol's cancellation of MDR's insurance policy.

B.

To the extent Hoff asserts her claim of promissory estoppel provides her with standing to challenge Pinnacol's cancellation of MDR's insurance policy, we are not persuaded to disturb the ALJ's order on this ground.

In *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 905 (Colo.1982), the Colorado Supreme Court adopted the definition of promissory estoppel found in the Restatement (Second) of Contracts § 90 (1981). As stated by the Colorado Court of Appeals in *Patzer v. City of Loveland*, 80 P.3d 908, 912 (Colo. App. 2003), "[p]romissory estoppel is an extension of the basic contract principle that one who makes a promise must be required to keep it."

Promissory estoppel exists where the following criteria are met: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee**;** (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *See Nelson v. Elway*, 908 P.2d 102, 110 (Colo. 1995); *Patzer v. City of Loveland, supra*.

The element of reliance can be shown where a party alters his or her position as a consequence of another's conduct. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 77 n. 72 (Colo. 1996). Reasonable reliance is generally conduct or action that would be reasonable for a prudent person to do or take under the circumstances. *See Nelson v. Elway*, 908 P.2d at 110.

Additionally, equitable estoppel exists where the following criteria are met: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely upon the other party's conduct. *See Johnson v. Industrial Commission*, 761 P.2d 1140, 1146 (Colo. 1988).

Initially, to the extent Pinnacol argues that Hoff waived any consideration of the issue of estoppel since neither Hoff nor any other party advised the ALJ that such an issue was endorsed for hearing, we are not persuaded. Prior to the hearing, Hoff filed a response to the claimant's application for hearing raising the issue of estoppel. Further, in their case information sheets, both Hoff and MDR raised the issue of estoppel. Moreover, at the hearing, Hoff introduced exhibits of the pertinent certificates of insurance, which Hoff alleges substantiate her claim for estoppel. Exs. L, M, N. Further, during the hearing, testimony was introduced regarding the certificates of insurance issued by Bradley pertaining to MDR's workers' compensation insurance policy with Pinnacol. Tr. at 82, 86, 126-127, 130-132, 151-153. *See Munoz v. Industrial Claim Appeals Office*, 271 P.3d 547 (Colo. App. 2011); *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996)(estoppel can be pled without using term "estoppel").

Next, in her brief in support, Hoff argues the evidence establishes that Alliance relied upon the certificates of insurance issued by Bradley which showed that MDR had workers' compensation insurance coverage. Hoff asserts that she, in turn, relied upon Alliance "in making sure the job was done properly and according to law." Hoff contends that since she and Alliance reasonably relied upon Bradley in stating there was a policy of insurance in effect, Pinnacol therefore is estopped from denying coverage. Brief In Support at 10. At no time in her brief in support, however, does Hoff ever allege that she was issued a certificate of insurance from Pinnacol or Bradley, on behalf of Pinnacol, regarding MDR's workers' compensation insurance coverage. Additionally, in her brief in support, Hoff does not cite to any such evidence. Our review of the record also does not reveal any evidence demonstrating that either Pinnacol or Bradley, on behalf of Pinnacol, issued a certificate of insurance to Hoff regarding MDR's workers' compensation insurance coverage. Further, during the hearing, no evidence was introduced substantiating Hoff's insinuation that she relied upon a certificate of insurance issued by Pinnacol regarding MDR's insurance coverage. In his order, the ALJ instead found that a certificate of insurance was requested by, and provided to, the general

contractor, Alliance, from Bradley. Findings of Fact at 3-4 ¶15, Order dated August 14, 2012. The ALJ made no finding that a certificate of insurance was requested by Hoff from Pinnacol or that one was issued to Hoff from Pinnacol or from Bradley, on behalf of Pinnacol. In fact, during the hearing, Hoff testified she never had heard of MDR prior to the claimant's fall. Hoff testified she had no idea that Alliance was not going to perform the actual roofing work on her rental home but, rather, she thought Alliance would be doing the work. Tr. at 211-212.

As noted above, both promissory estoppel and equitable estoppel require proof of a reasonable and detrimental reliance by one party on a representation by another party which was made with the intent of inducing action or forbearance. Since Hoff does not allege, and there is no evidence demonstrating, that a certificate of insurance was issued to Hoff by Pinnacol or by Bradley, on behalf of Pinnacol, then the elements of reliance and promise can not be shown. As such, Hoff's promissory estoppel and equitable estoppel arguments must fail as a matter of law. *See Nelson v. Elway, supra.*

Additionally, while the doctrine of equitable estoppel may apply in certain instances to preclude an insurer from denying coverage, the Colorado Court of Appeals has held that a certificate of insurance is subject to the terms of the policy and does not constitute a binder or contract of insurance and does not create a duty to inform a certificate holder of changes in circumstances. *Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264 (Colo. App. 1990); *Lopez-Najera v. Black Roofing, Inc.*, W.C. No. 4-565-863 (September 13, 2004). Under these circumstances, therefore, we reject Hoff's assertion that the certificates of insurance issued in this case estopped Pinnacol from denying coverage.

II.

In its petition to review, MDR asserts that the ALJ erred in finding MDR jointly liable for the claimant's loss. MDR contends that this relief was not raised by the claimant at hearing or on appeal.

We reject MDR's argument that since the issue of joint liability allegedly was not raised by the claimant at hearing or on appeal, then the ALJ and the Panel exceeded their authority in holding MDR, Alliance, and Hoff jointly liable for the claimant's losses. MDR's argument notwithstanding, in the claimant's application for hearing, he listed "Statutory Employer Determination As To Respondents" as one of the issues to be heard. Then, at the commencement of the hearing, the claimant stated that the issues were "compensability, average weekly wage, insurance coverage issues and statutory employers . . ." Tr. at 7-8. The record also is clear that Hoff adequately raised this issue in her petition to review, and in her brief in support. In her first petition to review, Hoff alleged that "[t]he finding of the ALJ that Norma Patricia Hoff is the sole employer liable for benefits under the act is not supported by the evidence or by applicable law." Further, in her first brief in support to the Panel, Hoff alleged that the ALJ erred in addressing the

statutory employer issues since Pinnacol was estopped from denying coverage to MDR. Brief In Support at 12.

The Panel's statutory review includes determining whether the ALJ's award or denial of benefits is supported by applicable law. Section 8-43-301(8), C.R.S. Again, in his original order, the ALJ found and concluded that Hoff was the "employer" for purposes of § 8-41-402(1), C.R.S., as a "person owning real property" and ordered Hoff solely liable to pay certain medical and temporary disability benefits increased by 50 percent for the failure of the employer to have workers' compensation insurance. Since Hoff appealed the ALJ's order finding her responsible, and the law did not support the ALJ's order of sole liability, we disagree with MDR that we and the ALJ exceeded our statutory authority in concluding that MDR, Alliance, and Hoff are jointly liable for the claimant's losses. *Coffey v. Curry Graham d/b/a Affordable Roofing, supra; see also Sechler v. Pastore, supra.*

**IT IS THEREFORE ORDERED** that the ALJ's order dated April 23, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on
9/20/2013 by RP .

HERNAN HERNANDEZ, 20263 E. BUCHANON DRIVE, AURORA, CO, 80011 (Claimant)
MDR ROOFING, INC., Attn: DANIEL AMAYA MEDINA, 6250 N. FEDERAL BLVD., LOT #7, DENVER, CO, 80221 (Employer)
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY BLVD., DENVER, CO, 80230 (Insurer)
F. LEE MAES, Attn: F. LEE MAES, ESQ., 1100 SOUTH SHOSHONE STREET, DENVER, CO, 80223 (For Claimant)
SCOTT A. MEIKLEJOHN, LLC, Attn: SCOTT A. MEIKLEJOHN, ESQ., 1626 WASHINGTON STREET, DENVER, CO, 80203 (For Respondents)
RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: FRANK M. CAVANAUGH, ESQ., 1401 17TH STREET, SUITE 900, DENVER, CO, 80202 (Other Party)
ALLIANCE CONSTRUCTION & RESTORATION, INC., Attn: CORY GARZA/ANGELA ISHAM, 5413 SEAFARER COURT, RALEIGH, NC, 27613-4586 (Other Party 2)
NORMA PATRICIA HOFF, 9971 STONEGLEN TRAIL, LONE TREE, CO 80124

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-749-411-02

IN THE MATTER OF THE CLAIM OF

PATRICK JOHNSON,

Claimant,

v.

SAFEWAY,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated April 16, 2013, that denied the claimant an award of permanent total disability benefits. We affirm.

The claimant worked as a meat cutter for the respondent. On October 4, 2007, he slipped and fell inside a walk in refrigerator at work. The fall injured the claimant's low back. He underwent a hemi-laminectomy on April 23, 2008. After further conservative treatment, the claimant was placed at maximum medical improvement (MMI) by his treating physician, Dr. Quick, on December 2, 2008. Dr. Quick assigned a permanent impairment rating of 28% and recommended work restrictions of no lifting over 20 pounds with limited bending at the waist. The respondent filed a Final Admission of Liability on December 17, 2008, accepting the date of MMI and the impairment rating provided by Dr. Quick. The Final Admission contained a general admission for future medical benefits after MMI. The claimant filed an application for hearing on January 2, 2009, endorsing for hearing the issues of the average weekly wage, medical benefits, permanent total disability benefits and disfigurement benefits. The claimant did not request a review of the MMI finding or the impairment rating by a Division selected Independent Medical Examiner. In September, 2009, the claimant filed a request for the lump sum payment of the remainder of the permanent partial disability benefit award pursuant to W.C. Rule of Procedure 5-10(B)(1), 7 Code Colo. Reg. 1101-3. The lump sum was then calculated and paid.

The claimant's application for hearing led to the scheduling of a hearing on several different dates, but a hearing was never actually conducted. The claimant filed a

Petition to Reopen on November 9, 2010, and a second Petition to Reopen on September 9, 2011. The respondent subsequently filed a Petition to Close for Failure to Prosecute on May 23, 2012, and a second Petition to Close on June 21, 2012. Because the claimant filed another application for hearing, the Petitions to Close were not approved.

The claimant returned to work for the employer in approximately June of 2009. He worked as a customer service clerk, which involved primarily operating a cash register at the respondent's gas station situated next to its super market. The claimant was also being trained to perform bookkeeping functions while working in customer service. The job required the claimant to work four to five hours per day for five days per week. The claimant was notified on September 27, 2010, that he was awarded Social Security disability benefits. The claimant continued to work for the respondent until June 8, 2012. At that time the claimant was discharged for cashing a payroll check presented by a customer without verifying it as acceptable through the respondent's security system. The check was then returned as uncollectable since the checking account had been closed. The claimant received a few weeks of unemployment compensation benefits but has not worked anywhere since his discharge.

The claimant filed a second application for a hearing on August 2, 2012. The issues selected for hearing encompassed average weekly wage, disfigurement, permanent total benefits, petition to reopen and MMI. A hearing was convened before the ALJ on January 18, 2013. The ALJ submitted an order on April 16, 2013. The ALJ reasoned the case had never actually closed such that a petition to reopen was not required. A review of the medical records convinced the ALJ the claimant's condition had worsened after he was put at MMI on December 2, 2008. The ALJ ruled the claimant was no longer at MMI as of August 9, 2011. The ALJ made several adjustments in the average weekly wage for periods between January 1, 2009 and June 30, 2012. Finally, the ALJ determined the claimant was able to earn wages as of the date of MMI in December, 2008, and therefore denied the claimant's request for permanent total disability benefits.

On appeal, the claimant contends the ALJ was mistaken in denying his request for permanent total disability benefits. He argues the job he performed for the respondent employer was a sheltered position and therefore could not be considered as evidence of the ability to earn wages. The claimant also asserts the finding by the ALJ that he was terminated for cause was outside the issues endorsed for hearing. He claims that issue was not endorsed by the respondent prior to hearing and its consideration therefore denied him the right to adequate notice and procedural due process.

Initially, we note the ALJ was mistaken in concluding that reopening was not a pertinent issue. Section 8-42-107.2(2)(b) provides that should a claimant fail to file a notice and proposal for a Division IME review of a finding by the treating physician that

the claimant has reached MMI and sustained permanent impairment within 30 days of the filing of a Final Admission, the treating physician's findings are binding on all parties and on the Division. In addition, the claimant's request for the payment of a lump sum pursuant to W.C. Rule of Procedure 5-10(B)(1) waived his right to contest the impairment rating, the date of MMI and the permanent partial benefits award. However, in the context of this proceeding, this determination by the ALJ constitutes harmless error. The claimant did file petitions to reopen, endorsed the issue for hearing, and the ALJ, in fact, made findings of a change in the claimant's condition sufficient to justify a reopening of the MMI issue. The issue of permanent total benefits did not close. The claimant did file an application for a hearing endorsing that issue for hearing within 30 days of the filing of the Final Admission as required by § 8-43-203(2)(b)(II). *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P. 3d 1178 (Colo. App. 2006).

The ALJ makes few evidentiary findings in regard to the issue of permanent total disability benefits. The order does however, find "the claimant demonstrated he was able to sustain and maintain employment for over 3 years until he was terminated for cause effective June 8, 2012." This led to the ALJ's conclusion "the claimant has failed to establish by a preponderance of the evidence that he was permanently and totally disabled at any time prior to his worsening of condition on August 9, 2011". (Findings of Fact ¶ 46 & 47).

A claimant is permanently and totally disabled if he is "unable to earn any wages in the same or other employment." Section 8-40-201(16.5), C.R.S. The determination of whether the claimant is incapable of earning wages in the same or other employment may be based upon the ALJ's consideration of a number of "human factors." *Christie v. Coors Transportation Co.* , 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education and the availability of work the claimant can perform. The claimant bears the burden of proof to establish permanent total disability. Section 8-40-201(16.5)(a), C.R.S.

Additionally, a worker's ability to secure sheltered, or occasional employment under rare or unusual circumstances, does not preclude a determination of permanent total disability. *New Jersey Zinc Co. v. Industrial Commission*, 165 Colo. 482, 440 P.2d 284 (1968). If the evidence shows that the claimant is not physically able to sustain post injury employment, or that such employment is "unlikely to become available to a claimant again in view of the particular circumstances, the ALJ need not find that the claimant is capable of earning wages." *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P. 3d 866, 868 ( Colo. App. 2001). Thus, in *Joslins*, an award of PTD benefits was upheld despite the fact the claimant was working at the time of the hearing, six years after the injury. The evidence in that case showed the claimant was "protected" by a supervisor and received assistance from students when

performing her job as a food service worker. A vocational expert testified the claimant's job did not constitute employment because of the limited hours and because the job was not generally available to the public. The *Joslins* court found the evidence supported the ALJ's implicit determination that the job did not constitute "bona fide" employment. *See also Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Epp v. Penske Distribution Systems*, W.C. No. 3-999-840 (Feb. 12, 2002).

However, the record in this case was not so compelling that the ALJ was required to find the claimant worked in sheltered employment for the respondent employer. The claimant testified he would from time to time request another clerk to assist in lifting heavier items. He stated that was, in fact, one of the duties of the courtesy clerks from which he sought assistance. Katie Montoya testified as a vocational expert. She stated the claimant was able to successfully perform his job for the respondent employer. She also offered that she had past experience with the respondent in the context of vocational rehabilitation research. Ms. Montoya testified the respondent did not provide modified duty jobs. She observed that when the claimant was able to keep his job with the respondent for three years it was because he was successfully performing the functions of the job. Her opinion was that the claimant was not performing sheltered employment for the respondent. Ms. Montoya reviewed the respondent's employment records for the claimant. They were explained to show the claimant was given good performance scores throughout the three years he worked for the respondent after his date of MMI. She noted his termination was not based on the claimant's physical inability to perform his job. The employer records were submitted into evidence. These included the respondent employer's description of the basis for the claimant's termination in June, 2012. The description revealed the termination was due to the claimant's cashing of a payroll check without following the required security procedures. The records did not refer to any problems the claimant displayed in physically performing his job. There was therefore, substantial evidence in the record to support the findings of the ALJ that the claimant was not performing sheltered employment. Section 8-43-301(8), C.R.S.

These issues regarding the nature of the claimant's work as sheltered, and the ability of the claimant to earn wages are factual in nature and we are bound by the ALJ's findings of fact that are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we must defer to the ALJ's credibility determinations, his resolution of conflicts in the evidence, and the plausible inferences the ALJ drew from the record. *Cordova v. Industrial Claims Appeals Office* , 55 P.3d 186 (Colo. App. 2002). We see no basis to question the ALJ's findings the claimant was able to earn wages as of the date he was placed at MMI.

The complaint of the claimant alleging inadequate notice of the issue of termination for cause is misplaced. The claimant's eligibility for temporary benefits was

not an issue considered by the ALJ. As such, it was not necessary that the effect of § 8-42-105(4)(a) be weighed by the parties. That section does provide that where the claimant "is responsible for termination of employment" he is precluded from receipt of temporary benefits. Here, the ALJ only had occasion to mention "terminated for cause" insofar as he concluded the claimant did not lose his job for reasons of his physical disability. The claimant does not assert he was unaware of the respondent's position he was ineligible for permanent total benefits because he successfully worked for a period of time after his date of MMI. The fact the claimant was said to be terminated for cause is not a defense to a claim for permanent total benefits. It is instead, only a piece of evidence which may support the ALJ's finding the claimant was able to earn wages despite his physical work restrictions. The claimant discussed his termination from work with both Ms. Montoya and with his retained vocational expert, Michael Fitzgibbons. His counsel submitted a copy of Mr. Fitzgibbons' report describing the circumstances of his termination into evidence. The record does not establish how the claimant was unaware of this particular aspect of the evidence or how he was prejudiced by the ALJ's consideration of that evidence. The ALJ's reliance on evidence the claimant himself submitted, is an effective waiver of the claimant's objection to the ALJ's consideration of that evidence.

In its response brief, the respondent argues the ALJ committed error in regard to his determination of the average weekly wage. The respondent however, did not submit a petition to review the ALJ's order. In addition, the ALJ's denial of the claimant's request for permanent total disability benefits, coupled with the absence of any request for temporary benefits, renders the calculation of the AWW for periods subsequent to the December 2, 2008, date of MMI as advisory. Our authority on review, § 8-43-301(2), is limited to orders which require a party to pay a penalty or benefit or deny a benefit or penalty to a claimant. The ALJ's order regarding the AWW satisfies neither of these conditions. That issue then, is not properly before us.

**IT IS THEREFORE ORDERED** that the ALJ's order issued April 16, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

David G. Kroll

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

10/11/2013 by RP .

PATRICK JOHNSON, 5198 LAUREL WREATH DR, COLORADO SPRINGS, CO, 80916-4361 (Claimant)
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THOMAS, POLLART & MILLER, LLC, Attn: STACY TARLER, ESQ., 5600 S QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-883-479-02

IN THE MATTER OF THE CLAIM OF

ALEXIS MIGUEL MATOS PEREZ,

Claimant,

v.

BRAND ENERGY SOLUTIONS,

Employer,

and

ACE AMERICAN INSURANCE,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Harr (ALJ) dated April 11, 2013, that ordered the assessment of a penalty for a safety rule violation. We affirm.

The claimant initiated a hearing to challenge the respondents application of a safety rule violation which reduced the claimant's temporary disability benefits by 50% pursuant to § 8-42-112(1)(a) and (b). Based on the evidence produced at the March 19, 2013, hearing, the ALJ derived several findings of fact. It was determined the claimant was working on scaffolding inside a power plant boiler. He was nearing the end of a night shift on March 27, 2012, and was working on the third level of the scaffolding his crew was constructing. The claimant fell from that level, hit his left shoulder and fractured his left arm. The employer had in place a safety policy which required the claimant to be tied off through the use of a harness at all times. The claimant was wearing his harness but he was not tied off. The ALJ found the claimant had been informed of the policy at the time of his hire a year previously. The employer had also conducted safety review meetings routinely during his employment. The employer had conducted another safety session at the beginning of the claimant's shift prior to his fall. The topic of tying off and anchoring workers' harnesses had been discussed at that meeting. The claimant testified he did not know why he neglected to anchor his harness. He offered that he may have been tired due to the long shift. The ALJ found that whereas the claimant was not actually at the point in the scaffolding he had been assigned to work, the situation was not such that he was pressured to hurry in order to complete the job more quickly. The ALJ placed weight on the testimony of employer representatives

affirming there were several nearby structures available to the claimant to tie off and anchor his harness. If he had done so, the claimant would not have been injured. The ALJ concluded the claimant committed a willful violation of a safety rule justifying a penalty as specified in §8-42-112(1)(a) and (b).

Section 8-42-112(1), C.R.S., provides for a 50 percent reduction in benefits if the employee is injured due to a willful violation of a safety rule. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). However, the respondents are not required to present direct evidence concerning the claimant's state of mind or prove the claimant had the rule "in mind" when he did the prohibited act. Rather, a "willful" violation may be inferred from evidence the claimant knew the safety rule and did the prohibited act. *Bennett Properties Co. v. Industrial Commission, supra*.

The respondents bore the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondents carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Thus, we are required to uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2007. In applying this standard, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). This standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

On appeal, the claimant contends the evidence does not show he acted willfully to violate the employer's safety rule. The claimant asserts he did not act intentionally, or make a deliberate decision to move to an unprotected area without tying off his harness. He states the accident was simply due to forgetfulness on his part.

In our opinion, there is substantial evidence and reasonable inferences drawn from this evidence that would support a finding the claimant knew of the safety rule and did

the prohibited act. Here, the ALJ found with record support that the employer had written rules by which employees were to have in place fall protection 100% of the time. The claimant was first advised of this rule when he was hired in March of 2011 (exhibit A) (tr. pg. 12). He had also been reminded of the rule at the start of his shift the evening of March 26, and then again when the shift resumed work after its lunch break in the early morning of March 27. (tr. pg. 13)(tr. pg. 55). At both meetings the rule regarding tying off and 100% fall protection were discussed. The employer's area safety manager testified the periodic safety meetings included video demonstrations and training sessions to ensure the fall protection regime was applied. The ALJ concluded the claimant was aware of the tie off rule, he acknowledged he should have been tied off at the time of his fall, and he intentionally failed to follow the rule. The ALJ noted the claimant failed to offer a plausible reason for his failure to comply with the tie off rule. Accordingly, the ALJ ordered that his indemnity benefits would be reduced by half. We perceive no reversible error in the ALJ's finding claimant's violation was willful. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order issued April 11, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

David G. Kroll

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 9/26/2013 _____ by _____ KG _____ .

ALEXIS MIGUEL MATOS PEREZ, 4701 ANDERSON RD. LOT 252, HOUSTON, TX, 77053 (Claimant)
BRAND ENERGY SOLUTIONS, Attn: MARTIN HERNANDEZ, SR., 6000 E. 58TH AVENUE, COMMERCE CITY, CO, 80022 (Employer)
ACE AMERICAN INSURANCE, Attn: DEBORAH J. HEISLER, C/O: BROADSPIRE, P O BOX 5347, DENVER, CO, 80217 (Insurer)
CASTANEDA LAW OFFICE, Attn: JANIE CASTANEDA, ESQ., 1180 LINCOLN STREET, SUITE 703, DENVER, CO, 80203 (For Claimant)
THOMAS POLLART & MILLER LLC, Attn: ERIC J. POLLART, ESQ., 5600 S. QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-792-073-03

| | |
|---|---|
| IN THE MATTER OF THE CLAIM OF<br><br>ERASMO ORDONEZ,<br><br>Claimant,<br><br>v.<br><br>SPACECON SPECIALTY CONTRACTORS, LLC,<br><br>Employer,<br>and<br><br>RISK ENTERPRISE MANAGEMENT,<br><br>Insurer,<br>Respondents. | FINAL ORDER |

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated April 1, 2013, that determined the claimant was permanently and totally disabled. We affirm the ALJ's order.

Hearings were held on the issue of permanent total disability. 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 low back on December 28, 2008, while carrying a door frame for the employer. The claimant's pain progressed to a chronic pain disorder going down his leg and into his right big toe. The pain disorder is also accompanied by psychological factors and the claimant has been diagnosed with single episode major depression categorized as mild which progressed to severe.

The claimant was placed at maximum medical improvement (MMI) on August 14, 2010, and continued to receive medical maintenance benefits, most notably from Dr. Torres. According to Dr. Torres, the claimant is unable to get out of bed two to three days a week because of his psychological problems. In Dr. Torres' opinion the claimant is incapable of sustained work due to his psychological problems and being unreliable in the eye of an employer. The Division Independent Medical Examination physician in the case, Dr. Mason, expressly deferred to Dr. Torres' opinion regarding psychological impairment. The ALJ found the opinion of Dr. Torres to be credible and persuasive.

Vocational reports show that prior to the injury, the claimant had a very steady physically demanding work history for over 20 years in the United States. The claimant worked construction, primarily as a framer and roofer. After a period of restricted duty, the claimant was let go by the employer on April 4, 2009, when he could no longer do the work because of his injury. The claimant has not worked anywhere since being let go by the employer.

The claimant received an education in Mexico through the 9th grade. His first language is Spanish in which he can read, write and speak. Over his 24 years in the United States, the claimant has learned some English. During the cross examination of the claimant, counsel for the respondents inquired about the claimant's immigration status. On the advice of his counsel the claimant invoked his Fifth Amendment right and declined to answer on the grounds that any answer may tend to incriminate him. The parties stipulated, and the ALJ found, that the claimant did not apply for federal Social Security Disability (SSDI) benefits because he believed that he may not be eligible for the benefits. The ALJ found that there is no affirmative proof of the claimant's immigration status and that even if the claimant was not a permanent resident, he could be covered by the "guest worker" status and "guest workers are not eligible for SSDI benefits."

The respondents obtained the opinion of vocational counselor, Lawrence Montoya. The ALJ found that Montoya was of the opinion that the claimant was unemployable due to a "legal disability" based on Montoya's conclusion that the claimant was an undocumented alien. Montoya based this on the claimant purportedly saying to Montoya that he did not have "legal papers." In Montoya's opinion the claimant is actually capable of employment, including jobs in a cafeteria, fast food, small part assembly, electrical assembly, dishwashing and parking lot attendant.

The claimant's vocational expert, Doris Shriver, testified, in contrast, that the claimant was not employable in the jobs identified by Montoya, for lack of physical capabilities and other more general disabilities of the claimant. The ALJ credited the opinions of Shriver over that of Montoya noting that Montoya failed to consider the opinion of Dr. Torres in his evaluation whereas Shriver specifically considered it in her analysis. Moreover, the ALJ found that Montoya conceded that the claimant was probably not employable if Dr. Torres' opinion was correct and he further testified that there was no reason for him to not accept Dr. Torres' opinion.

Specifically relying on the opinions of Dr. Torres and Shriver, the ALJ determined that the claimant was permanently and totally disabled. The ALJ further concluded that the claimant's immigration status was irrelevant to this determination.

On appeal the respondents do not contest the ALJ's findings but instead contend that the ALJ erred in his determination that the claimant's immigration status was irrelevant. The respondents also argue that the ALJ erred in allowing the claimant to invoke the Fifth Amendment and in declining to draw an adverse inference due to the claimant's assertion of his Fifth Amendment right. We find no reversible error.

A claimant is entitled to permanent total disability benefits if the claimant is "unable to earn wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. Under the statute the claimant carries the burden of proof to establish permanent total disability by a preponderance of the evidence. The overall objective is to determine whether employment is reasonably available to the claimant under their particular circumstances. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). In making this determination the ALJ may consider the effects of the industrial injury in light of the claimant's "human factors" including the claimant's general physical and mental condition, work history, age and education. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). The effects of the industrial injury must be significant in that it must bear a direct causal relationship between the precipitating event and the resulting disability. *Seifried v. Industrial Comm'n.*, 736 P.2d 1262 (1986). Ultimately, the existence of permanent total disability is an issue of fact for resolution by the ALJ. *Weld County School District, RE-12 v. Bymer*, *supra*; *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

Here, vocational rehabilitation expert, Montoya, identified some jobs that in his opinion the claimant was capable of performing. According to Montoya, the primary reason keeping the claimant from being able to earn any wages was his immigration status. March 11, 2013, Tr. at 16. The ALJ rejected Montoya's opinions in favor of the opinions of Dr. Torres and Shriver. Dr. Torres testified that the claimant's psychological condition has deteriorated into severe, major depression. December 3, 2012, Tr. at 80. Dr. Torres further testified that the claimant was unemployable because of the combination of the claimant's pain, impairment and depression. December 3, 2012, Tr. at 81. Shriver was also of the opinion that the claimant is unemployable because of his injury. Claimant's Exhibit 5 at 82-96. Shriver disagreed with Montoya that the jobs Montoya had identified were within the claimant's physical restrictions. March 11, 2013, Tr. at 55. Shriver testified that she took Dr. Torres' opinions into account when considering the claimant's employability, in contrast to Montoya, who did not. March 11, 2013, Tr. at 65. The ALJ found the opinions of Dr. Torres and Shriver more credible and persuasive.

It was the ALJ's sole prerogative to determine the weight and sufficiency of the evidence. The ALJ's credibility determinations are binding unless rebutted by hard, certain evidence to the contrary. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo.

1986); *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). Therefore, we may not interfere with an ALJ's credibility determinations except in extreme circumstances. Although there is evidence from which the ALJ could have drawn contrary inferences, there are no extreme circumstances here which would warrant our disturbing the ALJ's credibility determinations. The ALJ expressly credited Dr. Torres' opinions as persuasive and, in conjunction with that of the claimant's vocational rehabilitation expert, Shriver, there is ample support in the record for the ALJ's findings. Those findings in turn support the conclusion that the claimant is permanently and totally disabled and we perceive no basis on which to interfere with the ALJ's order.

We have considered the respondents' contentions concerning the claimant's immigration status and are not persuaded to disturb the ALJ's order on these grounds. As we understand the ALJ's order, he found the claimant's work related injury to be the significant causative factor in the claimant's resulting disability and specifically rejected the assertion from Montoya that the claimant's inability to earn wages was due to his immigration status. Thus, the fact that the claimant may or may not have been an illegal immigrant was irrelevant in light of the ALJ's other findings. ALJ Order at 10 ¶47 and at 13 ¶d. *See Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997)(undocumented workers do not have a "legal disability").

It is evident from the ALJ's order that regardless of the claimant's immigration status, the ALJ weighed the expert vocational rehabilitation and medical evidence and concluded from that evidence that the claimant was permanently and totally disabled because of his physical restrictions. Furthermore, the ALJ correctly described the legal standard applicable to a determination of the issue of permanent total disability, noting that the proper analysis requires consideration of the various "human factors" applicable to the claimant's ability to earn wages. These factors can include the claimant's ability to obtain and maintain employment within his physical abilities. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). However, if the evidence shows the claimant is not physically able to sustain employment, the ALJ need not find the claimant is capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

The ALJ here determined that in light of the probative medical and vocational evidence before him, the claimant's immigration status was "irrelevant" because the medical and vocational evidence indicated that the claimant was physically unable to sustain any employment. We agree with the ALJ's determination in this regard.

It follows, therefore, that the discussions concerning the claimant's use of the Fifth Amendment and its consequences are immaterial to the ALJ's resolution of permanent

total disability. However, insofar as the respondents' arguments concerning the Fifth Amendment are pertinent and were not waived by the stipulation of the parties (December 3, 2012 Tr. at 49), we reject the respondents' remaining contentions. The Fifth Amendment protects a person from having to make statements that could, directly or indirectly, subject him to criminal liability. A person may invoke the privilege against compelled self incrimination in criminal or civil proceedings. *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135 (Colo. 2004). Contrary to the respondents' assertion, Fifth Amendment protection is not limited only to potential crimes punishable by a year or more in prison. *See In re Marriage of Alverson*, 98 P.2d 1123 (Colo. App. 1999)(Fifth Amendment protection available in a civil contempt proceeding with potential for six month sentence). The respondents concede that if the claimant was working without proper authorization and was not a citizen, he faced the possibility of fines or imprisonment of not more than six months. We perceive no reversible error.

Moreover, although the ALJ was permitted to draw an adverse inference from the claimant invoking the Fifth Amendment, the ALJ was not required to and we may not compel him to do so. *See Selvage v. Terrace Gardens*, W.C. No. 4-486-812 (September 23, 2002). The ALJ here invoked his discretion to not draw an adverse interest. In any event, the ALJ expressly considered and rejected Montoya's testimony concerning the claimant's immigration status and we fail to see how an adverse inference from the claimant's use of the Fifth Amendment would alter this result. Under the circumstances of this case we cannot say that the ALJ erred in that decision.

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

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

10/10/2013 by RP .

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RISK ENTERPRISE MANAGEMENT, Attn: PAM MORRISON, P O BOX 6500, ENGLEWOOD, CO, 80155 (Insurer)
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RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: FRANK M. CAVANAUGH, ESQ., 1401 SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)
IREX CORPORATION, Attn: LORRAINE MAXWELL, P O BOX 1268, LANCASTER, PA, 17608-1268 (Other Party)
ERASMO ORDONEZ, 334 BUCKLEY DRIVE, LONGMONT, CO, 80501 (Other Party 2)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-815-042-04

IN THE MATTER OF THE CLAIM OF

JUSTIN R. RAINWATER,

Claimant,

v.

JOHN SUTPHIN,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

ORDER OF REMAND

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated May 7, 2013, that determined the Division Independent Medical Examination (DIME) physician's opinions on maximum medical improvement (MMI) and permanent impairment had been overcome by clear and convincing evidence. We set aside the ALJ's order and remand for further findings and a new order.

On January 20, 2010, the claimant suffered a cervical spine injury in a work-related motor vehicle accident. Dr. Seinfeld performed a C5-6 anterior cervical diskectomy and arthrodesis.

The claimant was transferred to authorized treating provider Dr. Castrejon due to issues involving an unusually high level of pain. On October 27, 2010, the claimant underwent an electromyogram, which was negative for cervical radiculopathy. On November 8, 2010, Dr. Castrejon noted that the claimant had not reported any radicular complaints.

On January 6, 2011, the claimant was evaluated by Dr. Hattem, who opined that the claimant had reached maximum medical improvement (MMI) with a 23% cervical spine impairment rating, which consisted of a 10% rating per Table 53 of the Guides and a 14% rating for range of motion loss. Dr. Castrejon opined that he agreed with Dr. Hattem's opinions concerning MMI and permanent impairment.

The respondents filed a final admission of liability. The respondents admitted for TTD benefits from January 21, 2010, through January 5, 2011, and a 22% whole person permanent partial disability (PPD) rating.

On September 8, 2011, the claimant underwent a DIME with Dr. Hall. Dr. Hall opined that the claimant had not reached MMI. Dr. Hall performed a follow-up DIME on December 14, 2011, and opined that the claimant had reached MMI that same day with a 37% permanent impairment rating.

A hearing was held on the issues of overcoming the DIME physician's opinions on causation, MMI, and permanent impairment disfigurement benefits. Other issues included temporary total and temporary partial disability benefits, and PPD benefits.

A hearing ultimately was held, after which the ALJ entered his order. In his order, the ALJ held that the respondents initially had the burden to overcome the DIME physician's opinions regarding MMI and permanent impairment by clear and convincing evidence. The ALJ also held, however, that if a DIME physician issues conflicting or ambiguous opinions, it is the ALJ's province to determine the DIME physician's true opinions as a matter of fact. The ALJ held that after he determines the DIME physician's true opinions, then the party seeking to overcome such opinions bears the burden of proof by clear and convincing evidence. Finding the DIME physician's true opinions to be that the claimant reached MMI on January 6, 2011, with a 23% cervical spine impairment rating, the ALJ concluded that the claimant failed to carry his burden to overcome these opinions. Nevertheless, the ALJ also concluded that the respondents had overcome the DIME physician's opinions by clear and convincing evidence since the evidence demonstrated it was highly probable his opinions were incorrect. The ALJ found Dr. Hattem's and Dr. Castrejon's opinions regarding MMI and permanent impairment to be credible.

As pertinent here, the ALJ also found the hearing testimony of the respondents' lay witness, Hannah Henson, to be credible as well. The ALJ found that Ms. Henson testified the claimant began performing general labor for Blackhawk Maintenance in the fall of 2011 and installed a sign for Mary Jo Brockshus in July 2011. The ALJ found that Blackhawk Maintenance issued checks to Ms. Henson for the wages the claimant earned. The ALJ also found that Ms. Henson testified that she attended medical appointments with the claimant, and that his presentation during such appointments was inconsistent with his presentation outside of appointments. Based on Ms. Henson's testimony, the ALJ found that the claimant took on a robot-like quality and restricted his movements during medical appointments. Further, the ALJ found that Ms. Henson testified that the claimant drove to medical appointments, but sometimes would switch places with her once they were close to the doctor's office to make it appear that Ms. Henson had driven.

The ALJ also found that Ms. Henson testified she provided inaccurate testimony during her previous deposition because she was fearful of the claimant, and he had threatened to kill her and her family if she jeopardized his claim. The ALJ found Ms. Henson's explanation for why her previous deposition testimony was inaccurate to be credible. The ALJ also found the claimant not credible. The ALJ denied and dismissed the claimant's requests for additional temporary total and temporary partial disability benefits, and PPD benefits.

I.

On review, the claimant argues that the ALJ erred in admitting and considering testimony from Ms. Henson. The claimant argues that Ms. Henson was the claimant's common law spouse, and the ALJ erred in failing to make any ruling as to whether Ms. Henson's testimony was admissible based upon the spousal privilege, §13-90-107(1), C.R.S. The claimant also argues that Ms. Henson could not be examined for or against the claimant without the consent of the claimant. We set aside the ALJ's order and remand for further findings and a new order.

Section 13-90-107(1)(a), C.R.S. sets forth the marital privileges:

> (a) (I) Except as otherwise provided in section 14-13-310 (4), C.R.S., a husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent; nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage. However, this exception shall not attach if the otherwise privileged information is communicated after the marriage.

Section 13-90-107(1)(a)(I), C.R.S. creates two distinct privileges with regard to spousal testimony. The first privilege is referred to as the rule of spousal disqualification and prohibits one spouse from testifying against the other without the other's consent. *See In re Marriage of Bozarth*, 779 P.2d 1346, 1349 (Colo.1989); *People v. Lucero*, 747 P.2d 660, 666 (Colo.1987). The second privilege prohibits the disclosure of a spousal communication made by one spouse to the other during the marriage. *In re Marriage of Bozarth*, 779 P.2d at 1349; *People v. Lucero*, 747 P.2d at 666. The marital privileges extend to in-court testimony, as well as to depositions, interrogatories, requests for admissions, and other forms of testimonial discovery. *Petro-Lewis Corp. v. District Court*, 727 P.2d 41 (Colo. 1986).

Under the rule of spousal disqualification, there must be a valid marriage at the time of the testimony. *See People v. Lucero*, 747 P.2d at 666. Under the marital communication privilege, there must be a valid marriage at the time of the communication. *See In re Marriage of Bozarth*, 779 P.2d at 1349.

Colorado is one of several states which continue to recognize common law marriages. *See In re Marriage of J.M.H. and Rouse*, 143 P.3d 1116 (Colo. App. 2006). A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. *People v. Lucero, supra*. The determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the province of the finder of fact. *Id.; compare Matter of Estate of Wires*, 765 P.2d 618 (Colo. App. 1988)(finding that individual was not decedent's common-law spouse was supported by evidence, including that decedent and alleged common-law spouse filed separate income tax returns as single individuals). The marital privilege applies to common-law marriages. *People v. Lucero, supra*.

Importantly, the Tenth Circuit Court of Appeals previously has held that the marital communication privilege extends only to words or acts intended as a communication and will not prevent a witness from testifying as to observations of his or her spouse's non-communicative actions or activities. *See United States v. Kapnison*, 743 F.2d 1450, 1454-55 (10th Cir. 1984)(district court instructed criminal defendant's wife she could testify as to defendant's acts without breaching defendant's marital communication privilege); *see also* §13-90-107(1)(a), C.R.S. In determining whether proposed testimony concerns a "communication," the courts focus on the source of the witness's knowledge, rather than on the nature of that knowledge. *See Blau v. United States*, 340 U.S. 332 (1951).

Additionally, the marital privilege can be waived. In *Burlington Northern R.R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990), for instance, the Colorado Supreme Court held that when the plaintiff called his wife as a witness at trial and elicited testimony from her regarding his amnesia, the plaintiff waived the rule of spousal disqualification embodied in §13-90-107(1)(a)(I), C.R.S. Additionally, counsel for the privilege holder also may waive the marital privilege by failing to object to the testimony of the adverse spouse. *Id*. (citing *United States v. Figueroa–Paz*, 468 F.2d 1055, 1057 (9th Cir.1972)).

Here, we conclude that it is necessary to set aside the ALJ's order and remand for further findings and a new order. In his order, the ALJ did not make any finding as to whether the claimant and Ms. Henson were married, or whether the spousal disqualification privilege applied or was waived. Further, the ALJ did not make any

findings as to whether various objectionable testimony given by Ms. Henson was inadmissible based upon the marital communication privilege. We recognize that the ALJ made findings regarding the credibility of the claimant and the credibility of Ms. Henson's hearing testimony. Nevertheless, based on these credibility findings, we cannot presume that the ALJ found Ms. Henson and the claimant not to be married, as is argued by the respondents. Consequently, on remand it is necessary for the ALJ to make specific findings on whether the claimant and Ms. Henson are common-law married. If the ALJ finds the claimant and Ms. Henson to be common-law married, then the ALJ must make additional findings on whether the spousal disqualification privilege applies, whether the objectionable testimony given by Ms. Henson involves a communication as opposed to observations of the claimant's non-communicative actions or activities, and whether the marital communication privilege may be applied to the objectionable testimony. Section 8-43-301(8), C.R.S. (remand when findings of fact not sufficient to permit appellate review).

II.

Since we are remanding the matter for further findings and a new order regarding marital privileges, it also is necessary to address another argument raised by the claimant on review. The claimant asserts that substantial evidence does not exist to support the ALJ's shifting the burden to the claimant to overcome the DIME physician's opinions on MMI and impairment. We remand for additional findings on this issue.

Section 8-42-107(8), C.R.S., provides that the DIME physician's findings of MMI and medical impairment are binding unless overcome by clear and convincing evidence. "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (1995).

As recognized by the ALJ in his order, where the DIME physician's opinions are internally inconsistent, it is the ALJ's sole prerogative as the fact finder to resolve the conflict and determine the nature of the DIME physician's true opinions. *See Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). Once the ALJ determines the DIME physician's opinion, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. *Clark v. Hudick Excavating, Inc.*, W. C. No. 4-524-162 (November 5, 2004). The ALJ's resolution is binding if supported by substantial evidence and the applicable law. *Id.*; §8-43-301(8), C.R.S.

Section 8-43-301(8), C.R.S. provides, however, that we may set aside an order where the findings of fact are not sufficient to permit appellate review, where conflicts in

the evidence are not resolved in the record, where the findings of fact are not supported by the evidence, where the findings of fact do not support the order, or where the award or denial of benefits is not supported by applicable law.

Here, it is true, as the claimant argues, that the ALJ shifted the burden of proof to him to overcome the DIME physician's opinions on MMI and permanent impairment. The ALJ shifted the burden based upon his finding that the DIME physician's "true opinions" were that the claimant reached MMI on January 6, 2011, with a 23% cervical spine impairment rating. In his order, however, the ALJ made no findings as to how or why the DIME physician's opinions were conflicting, ambiguous, or internally inconsistent. Presumably, the ALJ's finding is based upon the post-hearing deposition testimony of Dr. Hall, where the respondents posed the following hypothetical questions to Dr. Hall:

> Q . . . [I]f you take Ms. [Henson's] testimony as true concerning the driving activities and robotic-like actions. Would that affect your opinions concerning maximum medical improvement or permanent partial disability rating?
>
> A Yes.
>
> Q How would it affect your opinions?
>
> A If what she's saying is true in that he is exaggerating his issues during appointments, you know, as I say in my reports, her input was important in some of the decision-making that I've done. If we can't take him at his word, which is basically what she's saying, then that would change my thoughts, because a good bit of this has to do with subjective issues.
>
> Q If her testimony were taken as true, would you then agree with the date of maximum medical improvement and impairment rating that was assigned by the treating physician in the case?
>
> A You'll have to remind me. That was when? I don't recall it.
>
> Q Sure. I believe that Dr. Castrejon placed the claimant at maximum medical improvement as of January 6, 2011, and assigned him a 22 percent whole-person impairment rating where the range of motion measurements were less restricted. If Ms. Hansen's testimony were taken as true, would you agree with those opinions?

* * * *

> Q . . . Okay. So let me break up the questions a little bit better for you. If Ms. Hansen's testimony were taken as true about the issues we discussed before, would you agree with the date of maximum medical improvement that the authorized treating provider assigned of January 6, 2011?
>
> A Yes.
>
> Q If Ms. Hansen's testimony were taken as true, would you agree with the permanent impairment rating that was assigned by Dr. Hattem and then adopted by Dr. Castrejon?
>
> A Yes. Depo. of Dr. Hall (March 1, 2013) at 43-47.

Since the ALJ made no findings regarding how or why the DIME physician's opinions were conflicting, ambiguous, or internally inconsistent thereby giving the ALJ the prerogative to determine the DIME physician's true opinions, we necessarily remand for further findings on this issue. We recognize the ALJ also found that regardless of whether the burden shifted or regardless of the DIME physician's "true opinions," the respondents nevertheless overcame the DIME opinions by clear and convincing evidence. It is unclear, however, whether the ALJ considered Ms. Henson's objectionable testimony when making this determination. Consequently, on remand, to the extent the ALJ continues to find the DIME physician's opinions to be conflicting, ambiguous, or internally inconsistent, then it is necessary for the ALJ to make sufficient findings in support of such a determination. If, however, the ALJ finds that the DIME physician's opinions are not conflicting, ambiguous, or internally inconsistent, then the ALJ must make findings as to whether the respondents overcame such opinions by clear and convincing evidence. Section 8-43-301(8), C.R.S. (remand where findings are not sufficient to permit appellate review or findings of fact do not support order).

In reaching our results, we do not hold that the ALJ must find the claimant and Ms. Henson to be married, that the marital privileges apply or do not apply, that the marital privileges were waived, that the DIME physician's opinions were or were not internally inconsistent, or that the DIME physician's opinions were or were not overcome by clear and convincing evidence. We merely conclude that the ALJ's findings, as presently constituted, are insufficient for appellate review or do not support the order. Section 8-43-301(8), C.R.S. Moreover, we should not be understood as expressing any opinion concerning the weight and credibility of any evidence in this case.

**IT IS THEREFORE ORDERED** that the ALJ's order dated May 7, 2013, is set aside, and the matter is remanded to the ALJ for further findings and a new order consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Brandee DeFalco-Galvin

Kris Sanko

Kris Sanko

CERTIFICATE OF MAILING

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

_____10/11/2013_____ by _____RP_____ .

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**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-820-840-01

| | |
|---|---|
| IN THE MATTER OF THE CLAIM OF<br><br>STEVEN SHAPIRO,<br><br>Claimant,<br><br>v.<br><br>ASPEN SKI COMPANY,<br><br>Employer,<br>and<br><br>CCMSI,<br><br>Insurer,<br>Respondents. | ORDER |

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated May 1, 2013, that determined the respondents had failed to overcome the Division Independent Medical Examination (DIME) physician's finding that the claimant was not at maximum medical improvement (MMI). We dismiss the respondents' petition to review without prejudice for lack of a final order.

The claimant suffered a compensable injury to his right knee on November 26, 2009, while in the course and scope of his employment with the respondent employer. The claimant was operating as a ski instructor and leading a class of children when he turned around to ski backwards, hit a wash, and was thrown forward. After his industrial injury, the claimant underwent various medical treatments for his right knee, including two surgeries.

The claimant had a history of prior issues with his knees dating back to at least 2001.

Dr. Purnell ultimately recommended that the claimant undergo total knee replacement surgery. Dr. Purnell opined that since all of the claimant's current problems were related to his pre-existing degenerative changes, there was no permanent impairment. The respondents filed a final admission of liability (FAL) based on Dr. Purnell's report.

The claimant objected and requested a DIME. The claimant subsequently underwent a DIME with Dr. Yamamoto. Dr. Yamamoto noted that prior to his

November 26, 2009, injury, the claimant was asymptomatic. Dr. Yamamoto opined that while the claimant clearly had pre-existing degenerative changes, the industrial injury was the proximate cause of his ongoing problems. Dr. Yamamoto opined that the claimant was not at MMI because of the recommendation for a total knee replacement surgery, and also opined that the surgery should be covered under the workers' compensation injury. Dr. Yamamoto also provided a provisional impairment rating of 27% of the lower extremity.

The respondents filed an application for hearing listing the following issues to be heard: medical benefits, reasonably necessary and related, offsets including SSDI/ pension and retirement, as per statute, and "Respondent timely objects to the DIME report of Dr. Yamamoto dated October 10, 2012. Appropriate MMI date is 6-26-12; claimant released without impairment. The proximate cause of the surgery proposed by the DIME physician is not the admitted work-related aggravation of longstanding underlying degeneration."

In response to the application for hearing, the claimant listed medical benefits, authorized provider, reasonably necessary, average weekly wage, and permanent total disability (PTD) benefits as issues to be heard.

A hearing ultimately was held on March 7, 2013. At the commencement of the hearing, the ALJ inquired as to what issues were to be heard at the hearing. The respondents stated that the issue was the causal relationship between an admitted lateral meniscus tear and a requested total knee replacement. The respondents stated that it was a causation issue which followed a DIME, and asserted that the applicable standard was preponderance of the evidence. The respondents further stated that the issue is medical causation, not MMI. The respondents explained that the claimant was claiming a total knee replacement which would require the ALJ to find that certain body parts to be included in the case which allegedly were not to be included. So, the respondents reiterated that medical causation was the issue for the ALJ to determine prior to determining MMI. Conversely, the claimant stated that the respondents were seeking to overcome a DIME's finding that the claimant was not at MMI. The claimant stated that the applicable standard was clear and convincing. Tr. at 3-4, 12-13, 15.

After the hearing, the respondents submitted their position statement as well as their proposed findings of fact. In their position statement, the respondents requested that the ALJ deny and dismiss the claimant's claim for medical benefits. Similarly, in their proposed findings of fact, the respondents ordered the claimant's claim for medical benefits, which included total knee replacement surgery, denied and dismissed. Conversely, in his proposed findings of fact, the claimant requested that the DIME be upheld so that he could obtain the necessary medical treatment.

The ALJ subsequently entered his findings of fact, conclusions of law, and order finding that the respondents had failed to overcome the DIME physician's opinion that the claimant was not at MMI by clear and convincing evidence. The ALJ therefore denied and dismissed the respondents' request to find the claimant at MMI. The ALJ ordered that all other matters not determined were "reserved for future determination."

The respondents have petitioned to review the ALJ's order. The respondents argue that the ALJ erred in applying the clear and convincing evidence burden of proof as opposed to that of a preponderance of the evidence.

Section 8-43-301(2), C.R.S., provides that a party may petition to review any order which "requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty." Orders which do not award or deny benefits or penalties are interlocutory and not subject to immediate review. *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Further, an order must determine the amount of benefits to be awarded before it is considered final and appealable. *United Parcel Service, Inc. v. Industrial Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999).

In light of these principles we have held that orders containing a general determination of liability for medical benefits without awarding specific medical treatment are interlocutory. *See Cheney v. Coca Cola*, W.C. Nos. 4-854-583, 4-873-873, (July 9, 2012); *Mallow v. Catholic Health Initiatives*, W. C. No. 4-776-395 (November 25, 2011).

Here, the ALJ addressed the limited issue of whether the respondents were able to overcome the DIME physician's determination that the claimant was not at MMI. Although the ALJ concluded that the respondents did not overcome the DIME physician's finding that the claimant is not at MMI, the order does not require the respondents to pay any particular medical or temporary benefits as a result of that determination. Under these circumstances, the ALJ's order is not final and reviewable, and the respondents' petition to review must be dismissed without prejudice. *McNeley v. AMS Staffing*, W.C. No. 4-511-838 (October 14, 2004); *Thomas v. Four Corners Health*, W.C. No. 4-484-220 (December 17, 2002); *Canales v. City and County of Denver*, W.C. No. W. C. Nos. 4-476-907, 4-476-906 & 4-356-910 (July 10, 2002). We recognize that our order results in additional delay for resolution of this case. Nevertheless, we are constrained by our statutory authority which only allows us to review an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty, which are not present here. Section 8-43-301(2), C.R.S.

**IT IS THEREFORE ORDERED** that the respondents' petition to review the ALJ's May 1, 2013, order is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

_____9/30/13_____ by _____RP_____ .

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CCMSI, Attn: LAURA DANIELS, 7600 ORCHARD ROAD #360N, GREENWOOD VILLAGE, CO, 80111 (Insurer)
DONALD J. KAUFMAN, ATTORNEY AT LAW, Attn: DONALD J. KAUFMAN, ESQ., 2520 S. GRAND #110, GLENWOOD SPRINGS, CO, 81601 (For Claimant)
KARP NEU HANLON, PC, Attn: GREG S. RUSSI, ESQ., 201 14TH ST., STE 200 P O DRAWER 2030, GLENWOOD SPRINGS, CO, 81602 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-597-998

IN THE MATTER OF THE CLAIM OF

MELANIE TALBOYS,

Claimant,

v.

THE GREENHOUSE RESTAURANT,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,
Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated September 28, 2012, that ordered payment of permanent total disability benefits. We affirm.

Pursuant to hearings held in October and November, 2010, the ALJ determined the claimant had established eligibility for permanent total disability benefits. The respondents argue in their appeal that the issue of permanent total benefits was not ripe for determination. They contend the ALJ was required first to resolve the respondents' challenge to the findings of the physician performing the Division Independent Medical Examination (DIME) regarding which parts of the claimant's body were affected by her work injury. The respondents also argue the record does not contain substantial evidence to support the permanent total (PT) award.

The claimant was injured on July 14, 2003, when she fell at work. The claimant worked as a bartender and waitress at the employer's restaurant. The claimant continued to work for the employer several months after her injury. Her treating doctor assigned light duty restrictions in November, 2003. Shortly thereafter, the employer's restaurant closed. The claimant treated with Dr. Silva. The claimant was treated with conservative care as well as SI joint injections and facet injections. Dr. Silva concluded the claimant was at maximum medical improvement (MMI) on June 1, 2006. He diagnosed the claimant as suffering from a soft tissue injury across the central low back, SI joint pain, L5-S1 facet pain and chronic pain syndrome. In regard to work restrictions, the doctor recommended work in the sedentary to light work category. The respondents filed a Final Admission of Liability for the 14% impairment rating calculated by Dr. Silva.

The claimant requested a DIME review. This was provided by Dr. Krebs on July 26, 2006. Dr. Krebs felt the claimant was not at MMI. He observed the claimant also sustained an injury to her cervical spine due to her fall at work. Dr. Krebs suggested further diagnostic studies, including for the neck, trigger point injections and acupuncture.

The respondents resumed paying temporary total benefits. The claimant received additional medical treatment. Nonetheless, her symptoms continued to worsen. Dr. Silva concluded she was again at MMI on November 12, 2009. He suggested work restrictions featuring a maximum lift of 12 pounds, and the need to recline frequently through an eight hour work day. He limited the claimant's ability to stand to 30 minutes at a time for up to 4 hours per day and the ability to sit also for 30 minutes continuously for three to four hours in a day. Dr. Krebs completed a repeat DIME on March 17, 2010. He assigned an impairment rating of 52% based on ratings of the cervical, thoracic and lumbar spine. The date of MMI was said to be March 16, 2010.

The respondents applied for a hearing to challenge the DIME impairment rating. Specifically, the respondents contended the work accident did not include injury to the thoracic or cervical spine. The respondents also argued the date of MMI was November 12, 2009. In her response, the claimant added the issue of PT benefits.

The claimant undertook to participate in a functional capacity exam. The results of that FCE showed the claimant could not meet the standards for a full sedentary level of work. The claimant was also evaluated by vocational rehabilitation experts. Bob Van Iderstine was retained by the claimant. He came to the opinion the claimant could not participate in competitive employment. He relied on the restrictions provided by Dr. Silva and the FCE. He performed labor market research in the vicinity of the claimant's home in Pagosa Springs. He also reviewed the claimant's past education and work experience. The respondents arranged for Torrey Beil to evaluate the claimant. Ms. Beil reviewed the same restrictions and background information. She concluded there were jobs available in the claimant's vicinity. She listed four particular jobs she had uncovered. The claimant testified she did not believe she could perform the jobs identified by Ms. Beil.

The respondents presented the testimony of Dr. Aschberger at the hearing. He reviewed the report of permanent impairment authored by Dr. Krebs. Dr. Aschberger was of the opinion the claimant's symptoms located in the cervical spine and thoracic spine were not caused by the claimant's work injury. The effects of the claimant's injury, in Dr. Aschberger's analysis, were limited to the lumbar spine. The doctor viewed surveillance video of the claimant bending her back and at her waist in a normal range.

Based on his review and research, Dr. Aschberber assigned on impairment rating of 5%, for a documented injury to the lumbar spine.

The ALJ made several findings. It was determined the respondents had failed to overcome either the DIME physician's conclusion regarding the date of MMI or his decision pertaining to the permanent impairment rating. The ALJ then determined the claimant was unable to earn any wages and was awarded permanent total benefits.

Because an award of permanent partial disability benefits compensate for the same loss of future earning capacity as PT benefits, it is improper to award contemporaneous permanent partial and permanent total disability benefits. *Waymire v. Industrial Claim Appeals Office*, 924 P.2d 1168 (Colo.App.1996). Accordingly, the ALJ's finding of eligibility for PT benefits served to make his findings in regard to the permanent impairment rating no more than advisory.

Nonetheless, the respondents argue findings pertinent to the impairment rating are significant in this case. Because the DIME physician's determination regarding which body parts constitute the claimant's work injury, and are therefore to be included in the impairment rating, the approval or rejection of those body part determinations by the ALJ would also serve to influence his finding as to the severity of the claimant's work disability. The argument implies a reference to *Qual-Med Inc. v. Industrial Claim Appeals Office*, 961 P.2d 80 (Colo. App. 1998) (DIME physician's opinion concerning cause of particular component of claimant's overall impairment must be overcome by clear and convincing evidence). That calculation, in turn, would affect the analysis as to the ability of the claimant to earn wages and qualify for PT benefits. The respondents argue the issue of PT benefits was not ripe for determination in this matter because the scope of the body parts to be assigned an impairment rating had not yet been determined.

The respondents' argument fails for several reasons. Once the claimant was placed at MMI, it is appropriate to consider the issue of permanent disability. This includes both permanent partial and permanent total disability. In fact, should a party fail to endorse PT benefits as an issue at that juncture, the issue could very well be seen as waived. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). For the reason that both categories of benefits compensate for loss of future earning capacity, an award of permanent partial benefits is also a denial of permanent total benefits. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). Accordingly, the ALJ's determination of the appropriate permanent impairment rating that would lead to an award of permanent partial benefits, is a concomitant denial of PT benefits. The issue then, of PT eligibility was ripe for consideration by the ALJ.

However, the opinion of a DIME physician carries no extraordinary weight in regard to issues not assigned by statute to a DIME determination. Those determinations are limited to MMI and the permanent impairment rating, § 8-42-107(8)(b)(II) & (c). The opinions of a DIME physician have only been given presumptive effect when expressly required by the statute. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002), (DIME opinion not given deference regarding the right to reopen), *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). (DIME opinion concerning causation need not be overcome by clear and convincing evidence where dispute involved the "threshold requirement" that the claimant establish a compensable injury); *Story v. Indus. Claim Appeals Office*, 910 P.2d 80 (Colo.App.1995)(DIME determination of MMI did not preclude change of physician order where only "Grover" medical benefits sought). The determination then, by the ALJ that the claimant is entitled to PT benefits, is to be made by considering the preponderance of the evidence. The determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury can be considered, but they are not entitled to additional weight by the statute. The ALJ may consider them on the same basis as other expert opinions regarding work limitations. There is no procedural reason that a hearing cannot feature simultaneous arguments over both the DIME physician determinations and eligibility for PT benefits.

Here, the ALJ's findings ultimately make the respondents' argument of little consequence. The ALJ resolved that the most appropriate statement of work restrictions was provided by Dr. Silva, on November 12, 2009, and by the FCE. The ALJ stated "the basis for these restrictions are Claimant's admitted industrial injury …". (¶ 31, Findings of Fact). The respondents filed a Final Admission in 2006. This FA accepted the 14% impairment rating assigned by Dr. Silva. That rating was said to be premised on an injury to the lumbar spine, a soft tissue injury across the central low back, and chronic pain syndrome. The ALJ then, did not rely on any work restrictions attributed to the body parts involved in the respondents' dispute with the rating of the DIME physician, i.e. the cervical spine and thoracic outlet syndrome. The resolution of that dispute turned out to have a minimal impact on the issue of PT benefits.

As a result, the respondents' contention that the outcome of the dispute pertaining to the DIME physician's rating was a prerequisite to the question of PT eligibility is not persuasive.

The ALJ did hold that even when some work restrictions may be attributable to other conditions "the claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages." (¶ 7, Conclusions of Law). Reference is made to *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Although the claimant is not required to establish that an industrial injury is the sole cause of her

inability to earn wages, the claimant must nonetheless demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried supra*. This means the claimant must establish a "direct causal relationship" between the industrial injury and the permanent total disability. *Id; Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995),*reversed on other grounds, Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Under this test, the ALJ must determine the residual impairment caused by the industrial injury, and determine whether it was sufficient to result in permanent total disability without regard to the effects of subsequent intervening events or preexisting conditions. Resolution of the causation issue is one of fact for the ALJ. In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

As we read the ALJ's order, the effects of the industrial injury were significant and bore a direct causal relationship between the precipitating event and the resulting disability. This is consistent with *Seifried* and we perceive no basis to disturb the ALJ's order on appeal. The claimant testified she experienced pain in her low back whenever she was required to sit for even a short period of time. She felt similar back pain when she was required to stand for very long. It was to relieve pain in her low back which led her to recline several times every day. It was also to relieve pain in her back that required her to use a 'zero gravity' chair regularly. The record shows the lift restrictions recommended for her were directed, not only at pain in her arms, but to mitigate the pain in her low back. The record contains substantial evidence to support the ALJ's findings the functional restrictions implicated in the claimant's inability to earn wages were directly related to the 'admitted' lumbar spine injury.

The ALJ also referenced the vocational report, testimony and opinion of Mr. Van Iderstine. That opinion cast doubt on the ability of the claimant to successfully maintain any of the jobs located by Ms. Biel. He considered the claimant's educational background and her educational attainments. Mr. Van Iderstine gave his expert opinion the claimant was unable to earn any wages in the same or other employment. We cannot say the ALJ's reliance on that report was misplaced.

The final issue raised by the respondents on appeal pertains to the date of MMI. While it is not clear what practical difference is presented by the choice between

November 3, 2009, (Dr. Silva) and March 16, 2010 (DIME), there is substantial evidence to support the ALJ's conclusion that the date of MMI is March 16, 2010. The respondents were required to establish by clear and convincing evidence that this date of MMI was incorrect. Unlike the permanent impairment rating, the standard governing this determination is not the AMA Guides, but rather, the statutory definition of MMI, § 8-40-201(11.5) C.R.S. The finding by the ALJ that the claimant's condition became stable and no further medical treatment was likely to improve that condition after that date is supported by the DIME report. We cannot state there is error in that determination.

**IT IS THEREFORE ORDERED** that the ALJ's order issued September 28, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_____9/25/2013_____ by _____KG_____ .

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