

BROWN BAG SEMINAR

Thursday, September 15, 2016

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

**2nd Floor Conference Room
(use elevator near Starbucks)**

1 CLE (including .4 ethics)

Presented by

Craig Eley

Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued through
September 9, 2016

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-INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-975-033-02

IN THE MATTER OF THE CLAIM OF:

BRIAN ITEN,

Claimant,

v.

FINAL ORDER

MEADOW MOUNTAIN PLUMBING &
HEATING SERVICE,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated March 16, 2016, that denied their request to terminate temporary disability benefits due to the claimant's responsibility for the loss of his job. We affirm the decision of the ALJ.

The claimant injured his low back at work on February 11, 2015. The claimant worked for the employer as a plumber. The job required that he drive a company van to each of his designated job sites. As a result of his work injury, the claimant's physicians recommended work restrictions which prevented the claimant from returning to his job. The respondents filed a General Admission of Liability on February 24, 2015, admitting liability for temporary total disability benefits beginning February 12 and continuing. On February 25, 2015, while driving his personal car, the claimant was arrested for driving under the influence of alcohol (DUI). The claimant contested the charge. On August 6, 2015, after negotiating a plea agreement, the claimant admitted to a charge of Driving While Ability Impaired (DWAI). As a result, the claimant never lost his driver's license at any point prior to the February 26, 2016, hearing in the matter.

The respondent employer asserted the claimant was discharged on February 26, 2015, the day following the DUI charge, on the basis that the claimant had violated a personnel policy of the employer. The employer's written policy provided:

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An employee who may operate a motor vehicle in connection with his/her duties must have and maintain a satisfactory driving record. ... Should an employee incur multiple moving violations, the Company's liability insurance carrier may refuse to cover the employee. If the employee is excluded from liability coverage, he/she must be terminated or reassigned to a different position.

The employer's bookkeeper, Franny Sanchez, testified at the hearing she called a representative of the employer's liability insurance carrier and was advised that in the event the claimant was charged with a DUI, the carrier would not insure him. The employer's owner, Fred Espinosa, testified he discharged the claimant on February 26. Mr. Espinosa described how the claimant had become uninsurable due to his DUI charge. The claimant testified he was never notified he had been terminated until approximately June 30, 2015, when the respondent insurance carrier filed a Petition to Modify, Terminate or Suspend Compensation which alleged the claimant was responsible for his termination from employment because he had lost his driver's license. The Petition asked that his temporary benefits cease pursuant to § 8-42-105(4) (a). The claimant's father, Dale Iten, who was also the employer's office manager, testified he was never informed the claimant had been discharged. The employer went out of business on approximately March 6, 2015.

On June 19, 2015, Ms. Sanchez wrote a letter on the employer's letterhead, identifying herself as the employer's office manager and stating 'to whom it may concern' that the claimant was terminated from his job with the employer on February 26, for the reason that: "Mr. Iten lost his driver's license and was not [sic] longer able to perform the driving duties of his current job. Meadow Mountain Plumbing and Heating, requires all employees to have a valid driver's license to work with this company." Ms. Sanchez testified at the February 2, 2016, hearing that she was the office manager for Fred's Plumbing and Heating, which was a company established by Mr. Espinosa as a successor to the respondent employer. Mr. Espinosa testified he did not direct Ms. Sanchez to write this letter.

The ALJ did not find credible the testimony of Ms. Sanchez and Mr. Espinosa that the claimant was discharged for becoming uninsurable. The ALJ concluded instead, based on the June 30 Petition to Terminate Compensation and the June 19 letter of Ms. Sanchez, that the claimant was terminated because the employer's policy required he be fired if he lost his license and the employer mistakenly believed he had. The ALJ deemed the testimony that the claimant was discharged because he had become an uninsurable

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driver to be unpersuasive and this was not the reason for which he was fired. The ALJ surmised the employer's written policy would not have provided the claimant notice as to any grounds for his termination upon his citation for a DUI. The ALJ characterized the testimony of Ms. Sanchez that an unnamed insurance agent told her the claimant was not insurable as testimony based on a hearsay statement which the ALJ did not find was entitled to significant weight. The ALJ found that when the claimant was able to maintain his driver's license he could reasonably believe he had complied with the employer's driving policy and therefore did not commit a volitional act making him responsible for the loss of his job. Accordingly, the respondent's request to cease the payment of temporary benefits as of February 26, 2015, was denied.

On appeal, the respondents contend the claimant did commit a volitional act when he drove under the influence of alcohol, and a reasonable person in that circumstance would understand his job driving for an employer would be jeopardized. The respondents argue the ALJ committed error by discounting the testimony of Ms. Sanchez and Mr. Espinoza due to a reliance on hearsay evidence. The respondents assert there was no contemporaneous objection by the claimant to receipt of the evidence and it was admitted into the record. The respondents maintain the hearsay was not evidence submitted to prove the truth of the matter asserted by the hearsay statement. Finally, the respondents argue a copy of the petition to modify, terminate or suspend compensation was erroneously admitted into evidence.

The findings of the ALJ reveal he did not exclude the testimony of Ms. Sanchez from the record for the reason that it included a hearsay statement from an insurance agent that the claimant had become uninsurable. The ALJ cited the hearsay nature of the statement as a reason the ALJ did not find it particularly reliable. The absence of an objection from the claimant turned on the peculiar testimony of Ms. Sanchez. In direct examination, Ms. Sanchez testified she told the insurance agent to remove the claimant from the group of insured employees on February 26. Tr. at 25. Only on cross examination did Ms. Sanchez amend her testimony to then state that she told the insurance agent the claimant 'had' a DUI and inquired if that made the claimant uninsurable. Tr. at 35. She then changed this version upon examination by the ALJ to state she actually asked the agent if an employee 'charged' with a DUI was insurable. Tr. at 36. The hearsay statement then, was actually procured by the ALJ. The claimant would not have been aware Ms. Sanchez would answer the ALJ's question with a hearsay statement and the respondents did not submit the hearsay statement for something other than the truth of the matter because the respondents did not submit the hearsay testimony at all.

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Given that at the close of direct examination, Ms. Sanchez had testified only that she had notified the insurance carrier and requested that the claimant be removed from the list of individuals covered by the insurance policy, her testimony would have been inadequate to indicate the claimant was considered uninsurable by the carrier. It was not until she was subject to cross examination that she noted she did inquire of the carrier as to whether the claimant was uninsurable. As a result, if the ALJ had excluded Ms. Sanchez' testimony pertinent to a statement in response from the insurance agent, her testimony would have stood as it did upon the conclusion of direct testimony, which did not include any information to show the claimant actually was uninsurable. Therefore, the respondents' argument the ALJ erred to the extent he characterized the agent's response to be hearsay is only describing a harmless error because without the hearsay statement on cross exam the respondents' failed to provide any evidence of uninsurability through Ms. Sanchez' testimony.

Mr. Espinoza testified he did not check with the insurance carrier to determine if the claimant was uninsurable. Tr. at 16. When asked if he had previously put a similar question to the insurance agent, claimant's counsel did make a contemporaneous objection as to hearsay. Tr. at 17. The ALJ sustained the objection and the respondents did not disagree.

Accordingly, we reject the respondents' contention that the ALJ erred in referencing hearsay with regard to the testimony of Ms. Sanchez or of Mr. Espinoza.

The copy of the respondents' Petition to Modify, Terminate or Suspend Compensation was subject to admission at the hearing pursuant to W.C. Rule of Procedure 9-4 (renumbered 9-10 as of April 15, 2016). The respondents objected to its admission on the basis of relevance. Tr. at 16. The ALJ overruled the objection noting the pleading was relevant to the issue of the respondents' reason for discharging the claimant. That was a legitimate issue to be addressed at the hearing and we do not view the pleading's admission as error on the part of the ALJ.

The ALJ noted the employer's assertion the claimant was discharged when he violated the employer's policy requiring a 'satisfactory' driving record. However, the ALJ found that the employer's definition of satisfactory appeared to shift. Ms. Sanchez initially contended the claimant was discharged when his driving record became unsatisfactory due to the claimant's loss of his license. However, when the employer learned the claimant had not lost his driver's license, the ALJ deduced that the employer then contended the claimant violated the policy solely because he had received a DUI charge regardless of the absence of a conviction. At that point the respondents withdrew

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their June 30 Petition to Terminate Compensation which asserted the claimant had lost his license. Mr. Espinoza then testified the claimant was terminated because simply being accused of a DUI made him uninsurable. He indicated he knew this because Mr. Espinoza himself had previously been charged with a DUI and was notified by the liability insurance carrier that he was uninsurable. However, Mr. Espinoza stated that he pled guilty to the DUI and actually lost his license for a period of time. Tr. at 17-18. Mr. Espinoza stated he had not inquired with the insurance carrier in respect to the claimant. Tr. at 16. He was asked if a representative of the insurance carrier had discussed the circumstance of a driver solely being accused of a DUI. However, a hearsay objection from the claimant precluded a response. Tr. at 17. Based on this record, the ALJ then ruled the claimant had not committed a volitional act which constituted a violation of the employer's driving policy.

The ALJ stated in his ultimate findings that the respondents failed to prove the claimant was discharged due to a breach of the employer's policy. The ALJ observed the substantial absence of evidence to establish that the charge of a DUI, without a conviction or the loss of the claimant's driver's license, would make the claimant uninsurable. The ALJ found the claimant would not have been aware that as long as he could maintain his driver's license he would be subjected to discharge due to being uninsurable.

Sections 8-42-105(4), and 8-42-103(1)(g), C.R.S. (the termination statutes), contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P. 3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. In that context "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1985). That determination must be based upon an examination of the totality of circumstances. *Id.*

The question of whether the respondent has shown the claimant was "responsible" for the termination is a factual issue for resolution by the ALJ. *Jeppsen v. Huerfano Medical Center*, W.C. No. 4-440-444 (January 27, 2003). Consequently, we must uphold

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the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.. This standard of review requires us to view 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. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The ALJ is not required to credit evidence even if it is unrebutted. *Cary v. Chevron, U.S.A.*, 867 P.2d 117 (Colo. App. 1993). Further, the ALJ is not held to a standard of absolute clarity in expressing findings of fact, and evidence or inferences not discussed in the order were presumably rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In a case not unlike this matter, *Brinsfield v. Excel Corp.* W.C. No. 4-551-844 (July 18, 2003), the employer stated in a "Personnel Action Record" dated September 19 the injured claimant was "terminated for unsatisfactory probation period" when given a modified duty job. A "Turnover Investigation" report dated September 20, 2002, signed by the claimant's supervisor, states the claimant was terminated because he "was never at his work station" and "always walking off the job." At the hearing the supervisor testified the claimant was terminated because he used foul language to a lead person and because he was absent from his work station. The ALJ noted the claimant had responded to the complaint that he was sometimes absent from his work station by explaining he was in the restroom. Finding that the need to use the restroom did not qualify as a volitional act, the ALJ ruled the claimant was not responsible for his discharge. On review, the respondents contended the undisputed evidence demonstrated the claimant was terminated not because he failed to meet the employer's expectations regarding presence at his work station, but because he used foul language to the lead person. However, the record revealed a contrast between the reasons stated for termination in earlier documents as compared to those in later documents. We noted it was within the ALJ's authority to make findings as to the actual reason for the claimant's firing:

It is also possible to interpret the record as establishing that employer was simply not satisfied with the claimant's overall performance during the probationary period and decided to discharge him for its own convenience. It was only *after* the discharge for "unsatisfactory probation period" occurred that the employer, and specifically the supervisor, began to recall and document incidents which, viewed in isolation, might persuade an ALJ that the claimant was responsible for the termination. The ALJ was persuaded by this later interpretation and concluded the respondents failed

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to carry the burden of proof to establish a volitional act by the claimant which was the cause of the termination. We may not interfere with the plausible inference which the ALJ drew from this record merely because other inferences were possible. *May D&F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988).

A similar issue is present in this case. The ALJ noted the earlier cause for termination advanced by the employer which asserted the claimant had lost his license. The ALJ observed the employer manufactured the later cause for discharge, alleging the claimant's non-insurability, and deemed it not legitimate. Thus, the ALJ could reasonably infer the claimant was discharged for the convenience of the employer, not because of some identifiable failure to comply with the employer's driving policy. While the evidence might have been interpreted differently, we may not substitute our judgment for that of the ALJ concerning the weight of the evidence and the inferences to be drawn. *Wilson v. Industrial Claim Appeals Office, supra*. Accordingly, we find no compelling reason to assign error to the decision of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's order issued March 16, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

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

_____ August 15, 2016 _____ by _____ TT _____ .

PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING, ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)

THE SAWAYA LAW FIRM, Attn: KATIE MCCLURE, ESQ, 1600 OGDEN STREET, DENVER, CO, 80218 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, Attn: JEFF STAUDENMAYER, 1401 SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-972-365-01

IN THE MATTER OF THE CLAIM OF

CAROL LOPEZ,

Claimant,

v.

FINAL ORDER

THE EVANGELICAL LUTHERAN
GOOD SAMARITAN SOCIETY,

Employer,

and

SENTRY INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated April 6, 2016, that found the respondents had overcome the decision of the physician conducting the Division Independent Medical Exam (DIME) that the claimant had sustained permanent impairment. We set aside the decision of the ALJ.

The claimant worked for the respondent employer as a Certified Nursing Assistant (CNA). On September 3, 2013, the claimant injured her low back while preventing a patient from falling. The claimant elected to treat with Dr. Thurston at the Workwell Occupational Medicine clinic. On September 11, 2013, Dr. Thurston concluded the claimant suffered from myofascial syndrome due to work activities. The doctor restricted the claimant from lifting more than 25 pounds and prescribed six sessions of physical therapy over the following two weeks. Upon the claimant's return visit to Dr. Thurston on October 1, 2013, the claimant advised the doctor that she was 80% improved. Dr. Thurston released the claimant to regular duty without restrictions, noted that she had reached maximum medical improvement (MMI) and had sustained no permanent impairment.

The claimant returned to her job as a CNA and worked without issues until November 30, 2014. The claimant reported increased back pain she attributed to lifting at work. The claimant returned to the Workwell clinic and saw Dr. Dupper on December 11, 2014. She informed the doctor she felt this was a worsening of her September 3,

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2013, work injury. Dr. Dupper diagnosed myalgia and myositis. He recommended not lifting over 15 pounds and ordered an MRI study. Dr. Biggs reviewed the claimant's December 27 MRI and observed disc degeneration and disc herniation at the L4-5 level. The doctor recommended an epidural steroid injection and physical therapy. Dr. Dupper administered an injection at the L4-5 level on April 13, 2015. When the claimant returned to see Dr. Dupper on June 2, 2015, she reported her symptoms had resolved and she was working within her restrictions. Dr. Dupper determined the claimant had achieved MMI on June 2. His final diagnosis was myalgia and leg radiculitis. He found the problem was related to work activities and that she may need an additional epidural steroid injection. The doctor noted no permanent impairment and no activity restrictions.

The respondents arranged for the claimant to be seen by Dr. Olsen on June 11, 2015. Dr. Olsen wrote that on September 3, 2013, when the claimant was first injured, she showed no signs of disc extrusions or disc herniation. The claimant also did not describe any injury at work subsequent to September 3 that could cause those conditions. Dr. Olsen concluded the claimant's disc deterioration represented a process of aging and was not associated with work activity. He expressed agreement with Dr. Thurston's finding of MMI as of October 1, 2013, with no resulting impairment.

The Respondents filed a Final Admission of Liability on June 26, 2015, admitting for a few days of temporary partial disability benefits but relying on Dr. Dupper's MMI date of June 2, 2015 and denying any permanent impairment benefits. The claimant requested a DIME to review the determination of MMI and impairment. Dr. Hall was selected to perform the DIME which was completed on October 26, 2015.

Dr. Hall deemed the claimant's spine condition to be related to the September 3, 2013, accident at work. The claimant related to Dr. Hall that during the interval between October 1, 2013, and November 30, 2014, her back pain never completely resolved. Dr. Hall concluded the radiculopathy and herniated disc documented in her December, 2014, MRI involved the natural progression of the claimant's September 3, 2013, back injury. He found it implausible that her disc degeneration could have occurred without the intervention of a work injury. Dr. Hall agreed with the MMI date of October 1, 2013, reasoning that steroid injections served as a maintenance treatment. To the extent the claimant receives future periodic injections, Dr. Hall felt she could continue to avoid recurring pain symptoms. The doctor assigned an 8% impairment rating pursuant to Table 53, section 2C and 2F of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) due to the diagnosis of disc herniation and nerve impingement, and another 8% based upon the claimant's range of motion deficits. Combined, the permanent impairment rating was determined by Dr. Hall to be 15%.

The respondents requested a hearing to challenge the impairment rating assigned by Dr. Hall. A hearing was convened on February 26, 2016. No transcript of the hearing was provided for the purpose of appeal.

The ALJ stated in his findings that Dr. Olsen did testify at the hearing. The ALJ summarized the testimony of Dr. Olsen to include the doctor's impression that Dr. Hall's impairment rating was not in compliance with the AMA Guides and with the Director's Impairment Rating Tips. Dr. Olsen noted the instructions for calculating lumbar spine impairment in part 3.3a, of the AMA Guides, pg. 79, require reference to Table 53 to derive a diagnosis based rating. The examiner is then directed to obtain range of motion measurements and to use Table 60 to assign a rating based on the deficits measured. Table 53 II states it applies where there are "intervertebral disc or other soft tissue lesions." Where there is no surgery involved, any rating must be preceded by a finding of at least "six months of medically documented pain and rigidity."

Accordingly, Dr. Olsen pointed out that Table 53 (II) of the AMA Guides is only to be used when there is present a "medically documented injury and a minimum of six months of medically documented pain and rigidity." At the time of MMI on October 1, 2013, the claimant had only been diagnosed with myofascial pain syndrome without any signs of discogenic pathology or radiculopathy. Dr. Olsen noted this diagnosis did not qualify for an impairment rating pursuant to table 53 (II)(B). The doctor also observed that the impairment rating tips specify that a rating for spinal range of motion impairment may be "applied to the impairment rating only when a corresponding Table 53 diagnosis has been established." Dr. Olsen explained that Dr. Hall's rating was inconsistent with these requirements. He noted Dr. Hall was not able to conclude the claimant had a specific spine disorder on the date of MMI. Instead, Dr. Hall pointed to a radiculopathy which developed one year following the date of MMI. The date of MMI was also less than six months from the date of injury. Dr. Olsen reasoned it was then impossible to document six months of pain and rigidity as of the date of MMI. Therefore, Dr. Olsen surmised Dr. Hall could not assign a rating for a specific diagnosis pursuant to Table 53 (II), which meant he necessarily could not calculate a rating for any range of motion deficit according to Section 3.3e and Table 60 of the AMA Guides.

The ALJ found the testimony of Dr. Olsen to be persuasive pertinent to the impairment rating derived by Dr. Hall. The ALJ characterized Dr. Olsen's analysis as unmistakable evidence that it was highly probable Dr. Hall's 15% impairment rating was erroneous and did not comply with the AMA Guides. The ALJ ruled the DIME determination of permanent impairment had been overcome by the respondents through

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clear and convincing evidence. The ALJ found instead, that the claimant suffered a 0% permanent impairment rating as a result of her September 3, 2013, work injury. The ALJ rejected Dr. Hall's impairment rating due to a failure to comply with the AMA Guides. The ALJ ruled:

He specifically violated Table 53 II (B) of the AMA Guides by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Claimant did not have an "Intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. She simply did not exhibit any evidence of a disc protrusion on October 1, 2013. Finally, Claimant also did not demonstrate six months of medically-documented pain and rigidity as specified in Table 53 II (B). Accordingly, Respondents have provided unmistakable evidence that is it highly probable that Dr. Hall's 15% whole person impairment rating was incorrect. Conclusions of Law, ¶ 10.

On appeal, the claimant argues the ALJ committed error by making a legal determination that the portion of an impairment rating derived from Table 53 of the AMA Guides must necessarily be limited to the claimant's condition as of the date of MMI and not the date of the DIME review. We agree with this contention.

This issue was addressed in *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (1999). In *McLane* the claimant injured her low back approximately five months before she was determined to be at MMI. Her treating physician therefore determined she had no ratable impairment. However, the DIME doctor saw her a few months later and documented her complaints of low back pain and rigidity which was then in excess of six months duration. He therefore provided a 5% rating pursuant to Table 53 II, and an additional 4% for range of motion deficits. The respondents argued that because six months of pain had not have been experienced by the claimant prior to attaining MMI, Table 53, as a matter of law, was not available as a source for an impairment rating. The *McLane* decision rejected this argument and approved of the DIME's rating.

Once a disability has become permanent, the resulting physical impairment must be determined in accordance with the AMA Guides. See § 8-42-101(3.7). But, contrary to

employer's contention, the AMA Guides do not require that the documented pain occur prior to MMI. 996 P.2d at 265.

The court observed that to hold otherwise would mean the AMA Guides could allow an impairment rating for one worker but deny a rating to another worker with the same injury depending solely on the speed with which either one of them reached MMI. The court also distinguished the determination in *Golden Animal Hospital v. Horton*, 897 P.2d 833 (Colo. 1995), that MMI was the time for the determination of permanency because that decision was not construing Table 53, but rather § 8-42-102(4) dealing with permanent disability for minors.

We have made identical interpretations of Table 53 in *Martinez v. MCI Communications*, W.C. No. 4-207-987 (July 24, 1996); *Jackson v. RBM Precisions Metal Products*, W.C. No. 4-377-460 (May 15, 2000) and *Lopez v. Cargill Meat Solutions*, W.C. No. 4-757-408 (September 9, 2010).

Here, the ALJ applied Table 53 to preclude an impairment rating for the reason that six months had not passed between the claimant's date of injury and the date of MMI. Therefore, it was impossible to document six months of pain or rigidity prior to MMI so as to satisfy Table 53 II (B). This finding is contrary to the case law represented by *McLane* which held the date of MMI was not relevant to the calculation of the six months. The ALJ also found that because the claimant did not have an "intervertebral disc or other soft tissue lesion" at the point of MMI, table 53 II would not justify a rating. Dr. Hall found the claimant's disc herniation documented more than a year later by an MRI was the natural progression of her September 3, 2013, work injury. Our analysis in *Martinez v. MCI Communications, supra*, applies equally to the delay in the verification of the intervertebral disc condition as it would to the delay in measuring six months of pain or rigidity.

Section 8-40-201(13.5)(a), C.R.S. (1995 Cum. Supp.) defines MMI as the date when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." (Emphasis added). However, the statute also provides that physical impairment must be determined in accordance with the AMA Guides. Section 8-42-101(3.7) C.R.S.(1995 Cum. Supp.). Thus, it is possible that an injury may produce some determinable and

stable medical impairment, yet the injury is not fully rateable under the AMA Guides because insufficient time has passed.

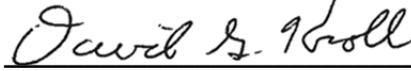
In this matter the injury similarly did not become completely rateable until an MRI was obtained and a disc herniation observed a year subsequent to MMI. However, Table 53 is not designed to prohibit such medical evidence from being applied so as to obtain a more accurate permanent impairment rating. The instructions in section 3.3a of the AMA Guides pertinent to measurements of the spine specify the impairment evaluation is not to be attempted until the patient's condition "has become static and well stabilized ..." That is, subsequent to MMI. However, there is no limit as to how long after that point the impairment examination may occur, W.C. Rule of Procedure 11-2 (E) and (F), pertinent to DIME reviews, requires the DIME physician to perform the examination, measurements and testing personally, and not simply to rely on past tests documented in the medical records. Due to the applicable time periods allowed for the selection and commencement of a DIME examination, see § 8-42-107.2(2)(b); (3)(a) and W.C. Rule 11-2(A), a DIME examination, including the measurements and testing, will not occur for at least three months following the determination of MMI, and often much later. Accordingly, the DIME review is implicitly required to evaluate the claimant's condition as of the date of the DIME exam and not as of the date of MMI. The fact then, that there is delay in obtaining documentation of the scope of an injury does not serve to prevent its consideration when indicated by the AMA Guides.

The ALJ's decision reflects no other basis for determining that the DIME physician's opinion on cervical impairment was overcome by the required enhanced burden of proof. Therefore, the DIME physician's opinion must be given presumptive effect. See *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); See also *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005) ("DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect . . . [and] are binding unless overcome by clear and convincing evidence.").

IT IS THEREFORE ORDERED that the ALJ's order dated April 6, 2016 is set aside and reversed insofar as it denied the claimant's request for permanent partial disability benefits. The order is modified to reflect that the employer shall pay the claimant permanent partial disability benefits based upon the DIME physician's rating of 15 percent of the whole person.

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INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

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CERTIFICATE OF MAILING

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

_____ August 16, 2016 _____ by _____ TT _____ .

RING & ASSOCIATES, Attn: BOB L RING, ESQ, 2550 STOVER STREET BUILDING C,
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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-705-926-02

IN THE MATTER OF THE CLAIM OF

ANTHONY J. LUCERO,

Claimant,

v.

FINAL ORDER

WYNDHAM HOTEL & RESORTS,

Employer,

and

ZURICH NORTH AMERICA INSURANCE,

Insurer,
Respondents.

The *pro se* claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated April 5, 2016, that dismissed, as untimely, his Petition to Review of an order entered by ALJ Walsh which granted the respondents' summary judgment motion and denied the claimant's summary judgment motion. The claimant also seeks review of an order of ALJ Lamphere dated April 26, 2016, which denied his Motion for Reconsideration of the order denying his Request for Extension of Time to File Petition to Review. The claimant also seeks review of an order of ALJ Walsh dated February 24, 2016, that granted the respondents' summary judgment motion and that denied the claimant's summary judgment motion. We reverse ALJ Lamphere's order dismissing the claimant's Petition to Review as untimely, but we affirm ALJ Walsh's order granting the respondents' summary judgment motion and denying the claimant's summary judgment motion.

The claimant was injured on November 18, 2006. The claimant's authorized treating physician, Dr. Caughfield, placed the claimant at maximum medical improvement (MMI) on April 17, 2008, and subsequently provided an impairment rating for the claimant's left knee. The respondents filed a Final Admission of Liability consistent with Dr. Caughfield's left knee rating and admitted for post-MMI medical maintenance benefits. The claimant, who was represented by counsel at the time, timely objected and filed for a Division-sponsored Independent Medical Examination (DIME). Dr. Campbell was selected to perform the DIME.

In the fall of 2008, prior to the DIME, the claimant requested treatment for his right knee as post-MMI medical maintenance benefits. The respondents denied the request as not work related. The claimant's authorized treating orthopedic surgeon, Dr. Davis, later was deposed on whether the claimant's need for treatment to his right knee was causally related to the workers' compensation injury on November 18, 2006. Then, on March 19, 2009, the claimant's attorney wrote to Dr. Davis and requested that he provide a written opinion regarding whether the claimant's right knee symptoms were not related to the workers' compensation claim. Dr. Davis opined that the claimant's right knee symptoms were not related to his workers' compensation claim.

On November 29, 2008, a prehearing conference was held with Prehearing ALJ (PALJ) Fitzgerald. The respondents requested an order allowing them to send the DIME physician surveillance DVDs of the claimant. PALJ Fitzgerald denied the respondents' request.

The DIME with Dr. Campbell was scheduled to take place on March 26, 2009. However, the DIME later was cancelled.

Thereafter, on April 29, 2009, the claimant and the respondents executed a settlement agreement of the claimant's workers' compensation claim. The settlement agreement provides that the claimant's right lower extremity condition is unrelated to the workers' compensation injury. The settlement also contains the following sentence: "The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact." The settlement agreement was approved on April 30, 2009.

Many years later, on February 28, 2015, the claimant filed a Petition to Reopen the Settlement, based on a change of condition and fraud. The claimant also filed an Application for Hearing on Reopening. The respondents sent the claimant interrogatories, requesting he set forth the specific bases for his allegations of fraud. In response, the claimant stated that "falsified medical documents" were submitted to "Colorado State Workers' Compensation." Essentially, the claimant alleged that Dr. Davis' opinion on the issue of his right knee was fraudulent, which he claimed entitled him to reopen the settlement. The claimant also alleged he was entitled to reopen the settlement on the basis that the respondents violated PALJ Fitzgerald's order, which denied their request to send surveillance DVDs to Dr. Campbell.

The respondents filed a summary judgment motion, arguing that they were entitled to the benefit of the settlement agreement. The respondents contended that the claimant waived his right to reopen based on change of condition. The respondents also asserted that the claimant's allegations of fraud had no basis in fact, were factually inaccurate, and were insufficient to show fraud. The claimant subsequently filed his summary judgment motion. In his motion, the claimant alleged that his case must be reopened based on fraud.

On February 24, 2016, ALJ Walsh entered his order granting the respondents' summary judgment motion and denying the claimant's summary judgment motion. ALJ Walsh ruled that there is no evidence demonstrating that the respondents sent Dr. Campbell the surveillance DVDs, or that the respondents violated any order. Further, ALJ Walsh ruled that there is no evidence that Dr. Davis' opinion is "false" or that the respondents played any role in obtaining that opinion. ALJ Walsh's order notified the claimant that he had 20 days after mailing or service of his Order to file his Petition to review. In his order, ALJ Walsh referenced both §8-43-301(2), C.R.S. and Office of Administrative Court Rule of Procedure 26, which provides in pertinent part as follows:

You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-401(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

The certificate of mailing for the ALJ's order reflects that the court clerk mailed a copy of the order to the claimant on February 25, 2016. Thus, the deadline for filing the claimant's Petition to Review was March 16, 2016.

Thereafter, on March 15, 2016, the claimant filed an (Opposed) Request for Extension of Time to File a Petition to Review. The claimant's Request For Extension of Time was filed with the Office of Administrative Courts in Denver. In his Request, the claimant stated that pursuant to OAC Rule 26, he will be filing a Petition to Review the order of ALJ Walsh which was issued on February 24, 2016. The claimant alleged that in

the respondents' summary judgment motion and in ALJ Walsh's order a number of cases had been referenced, but he was unable to review them. The claimant further alleged that his case was very complicated, many documents had been filed by both parties, and he intended on addressing the evidence, court rules, case law, statutes, and evidence in order to "redress" the harm that had been done to him. The claimant requested an additional seven days, pursuant to OAC Rule 26(C) and C.R.C.P. 6(b) within which to file his Petition to Review.

On March 22, 2016, the claimant filed his Petition to Review of ALJ Walsh's order which granted the respondents' summary judgment motion and denied his summary judgment motion. In his Petition, the claimant details the fraud that allegedly was committed by the respondents and that constitutes grounds for reopening his settlement agreement.

Citing *Speier v. Industrial Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008), PALJ Eley denied the claimant's request for an extension of time. PALJ Eley held that the Court did not have authority to extend jurisdictional time limits, including the 20-day time limit provided for in §8-43-301(2), C.R.S. in which to file a Petition to Review. PALJ Eley's order was entered on March 31, 2016.

ALJ Lamphere subsequently entered his order dismissing the claimant's Petition to Review. ALJ Lamphere ruled that while the claimant properly served the Petition to Review on the Office of Administrative Courts, it nevertheless was untimely since its Certificate of Service was dated March 22, 2016, or six days past the time limit. ALJ Lamphere ruled that pursuant to §8-43-301(2), C.R.S., the claimant's Petition to Review was required to be filed within 20 days after the date of the certificate of mailing of ALJ Walsh's Order. Since the claimant filed his Petition to Review six days beyond the jurisdictional deadline, ALJ Lamphere dismissed the claimant's Petition to Review.

The claimant then filed a Motion for Reconsideration of the Order Denying his Request for Extension of Time to File a Petition to Review. The claimant also filed his Motion to Rescind the Order Dismissing his Petition to Review. On April 26, 2016, ALJ Lamphere entered an Order denying the claimant's Motion for Reconsideration.

I.

The claimant seeks review of ALJ Lamphere's Order that dismissed his Petition to Review as untimely. The claimant also seeks review of ALJ Lamphere's Order that denied his Motion for Reconsideration. The claimant argues that the "Workers'

Compensation (WC) courts have never lost jurisdiction of this case at bar.” In support of his argument, the claimant relies on Office of Administrative Court Rule 26(C), which he argues allowed him to request an extension of time to file his Petition to Review.

We initially address the conflict between OAC Rule 26(C) and §8-43-301(2), C.R.S. We conclude that OAC Rule 26(C) is contrary to or inconsistent with §8-43-301(2), C.R.S., which is the statute that OAC Rule 26 was enacted to enforce. As such, we must apply §8-43-301(2), C.R.S. rather than OAC Rule 26(C). We also conclude that pursuant to §8-43-301(2), C.R.S., the claimant timely appealed ALJ Walsh’s order.

A.

OAC Rule 26, the Rule that addresses petitions to review, provides in pertinent part as follows:

C. A request for an extension of time to file a Petition to Review or a Petition to Review and Transcript Request may only be granted if the request is filed within the time limit for filing a Petition to Review.

* * * *

F. The judge may dismiss a Petition to Review or a Petition to Review and Transcript Request without prior notice to the parties if it appears that the petition is not timely filed. A party may file a motion requesting reconsideration of such an order within twenty days of the date of mailing of the order. A denial of a motion for reconsideration is subject to a Petition to Review.

Thus, OAC Rule 26(C) clearly provides that a party may request and extension of time to file a petition to review as long as the request is filed within the time limit for filing a petition to review.

Section 8-43-301(2), C.R.S., however, provides that if a petition to review is not filed within 20 days after the date of the certificate of mailing of the ALJ’s or Director’s order, then the order shall be final. Section 8-43-301(2), C.R.S. provides in pertinent part as follows:

(2) Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review with the division, if the order was entered by the director, or at the Denver office of the office of administrative courts in the department of personnel, if the order was entered by an administrative law

judge, and serve the same by mail on all the parties. *The petition shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be final.* The petition to review may be filed by mail, and shall be deemed filed upon the date of mailing, as determined by the certificate of mailing, if the certificate of mailing indicates that the petition to review was mailed to the division or to the Denver office of the office of administrative courts in the department of personnel, as appropriate. The petition to review shall be in writing and shall set forth in detail the particular errors and objections of the petitioner. . . . (emphasis added)

Thus, §8-43-301(2), C.R.S. provides that a petition to review must be filed within 20 days of the date of the certificate of mailing of the ALJ's or Director's order. This provision is jurisdictional and strictly enforced. *Industrial Commission v. Plains Utils. Co.*, 127 Colo. 506, 259 P.2d 282 (1953); *Youngs v. Industrial Claim Appeals Office*, 316 P.3d 50 (Colo. App. 2013); *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007); *Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991). Accordingly, where a claimant fails to deliver a petition for review to the office designated in the order of the administrative law judge, and such failure results in an untimely filing, the petition to review is jurisdictionally defective and a review of the claim on the merits is barred. *Buschmann v. Gallegos Masonry, Inc., supra.*¹

An administrative rule is not the equivalent of a statute. As such, rules promulgated by the Office of Administrative Courts may not expand, enlarge or modify the underlying statute the rule is intended to enforce. *See Cornerstone Partners v. Industrial Claim Appeals Office*, 830 P.2d 1148 (Colo. App. 1992). Thus, any regulation that is contrary to or inconsistent with the regulatory authorizing statute is void. *Monfort Transp. v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997); *see also Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997)(we must, where possible, construe the rule consistent with the enabling statute). We are unable to construe OAC Rule 26(C) consistently with §8-43-301(2), C.R.S. Rather, OAC Rule

¹ We previously had arrived at conclusions to the contrary. *See Notz v. Notz Masonry, Inc.*, W.C. No. 4-158-043 (Sept. 7, 1999); *Devore v. Public Service Co.*, W.C. 3-981-302 (March 3, 1993). These decisions construed § 8-43-207(1)(I), C.R.S. as providing authority for an ALJ to extend the time for filing a petition to review. However, in 2008, the Colorado Court of Appeals held in *Speir* that §8-43-207(1)(I), C.R.S. does not allow such an extension of time in light of the specific 20 day filing requirement announced in §8-43-301(2), C.R.S.

26(C) is contrary to or inconsistent with §8-43-301(2), C.R.S. OAC Rule 26(C) provides the appealing party an opportunity to file an extension of time to file a petition to review. Yet, §8-43-301(2), C.R.S. provides that if a petition to review is not filed within 20 days after the date of the certificate of mailing of the ALJ's order, then the order shall be final. Consequently, we are unable to apply OAC Rule 26(C) and instead conclude that §8-43-301(2), C.R.S. sets forth the governing law here regarding the time for filing a petition to review. Pursuant to §8-43-301(2), C.R.S., therefore, the claimant was required to file his Petition to Review of ALJ Walsh's order within 20 days after the date of the certificate of mailing of the order, or by March 16, 2016. We therefore next address whether the claimant satisfied the time requirements of §8-43-301(2), C.R.S.

B.

The Colorado appellate courts consistently have held that a pleading or court document should not stand or fall on the title it is given by a litigant. Rather, it is the substance of a document that should control and not the title by which it is denominated. *Hutchinson v. Hutchinson*, 149 Colo. 38, 367 P.2d 594 (1962); *Brown v. Central City Opera House Ass'n*, 36 Colo. App. 334, 542 P.2d 86 (1975). Consistent with this rule of law, the Panel previously has held that a petition to review need not take any particular form nor be captioned in any particular fashion. *Lassiter v. Trojan Labor*, W.C. No. 4-741-836 (June 23, 2010); *Tanner v. Synthes USA*, W.C. Nos. 4-714-037 & 4-717-509 (Oct. 27, 2008); *Miller v. Source One*, W.C. No. 4-418-173 (Dec. 19, 2003). For instance, a written letter setting forth counsel's specific objections to a particular order has been held sufficient to constitute a petition to review if timely filed. *Miller v. Industrial Commission*, 28 Colo. App. 462, 474 P.2d 177 (1970), *disapproved on other grounds*, 682 P.2d 1185 at 1188; *see also Ward v. Azotea Contractors*, 748 P.2d 338, 340 at n. 3 (Colo. 1987). Similarly, the Panel previously has held that a claimant's pleading titled "Motion for Extension of Time in Which to File Brief in Support of Petition to Review the Adverse Findings of Fact, Conclusions of Law and Order of July 1, 1999, (Not Mailed Until July 6, 1999) Until Thirty Days After the Transcript of the Hearing is Filed," was sufficient to indicate the claimant's disagreement with the ALJ's order, and her intent to seek review of the order. The Panel therefore considered the document sufficient to constitute a petition to review under §8-43-301(2), C.R.S. *Woltering v. St. Anthony Hospital*, W.C. No. 4-398-818 (March 14, 2000).

Here, the claimant's Request For an Extension of Time to File a Petition to Review, was filed on March 15, 2016, or within 20 days of the certificate of mailing of ALJ Walsh's order. The Request conveyed to ALJ Walsh and the respondents that the claimant was dissatisfied with at least one aspect of the ALJ's order. The claimant stated that his case was very complicated and that many documents had been filed by both

parties. He explained that he needed to review the evidence, court rules, case law, and statutes in order to “redress” the harm that had been done to him. The fact that the claimant did not caption the Request as a "Petition to Review" does not negate its effectiveness as such. Consequently, we conclude that the claimant timely filed what amounts to a petition to review for purposes of §8-43-301(2), C.R.S. *See Rendon v. United Airlines*, 881 P.2d 482, 484 (Colo. App. 1994) (cover letter sufficed as certificate of mailing); *Woltering v. St. Anthony Hospital, supra*; *Cook v. TLC Staff Builders Inc.*, W.C. No. 4-277-752 (May 6, 1998)(respondents' letter to ALJ stating their "intention" to file a petition to review was sufficient to toll statutory time limit even though the petition to review itself was not filed until after the time limit ran). Therefore, we reverse ALJ Lamphere’s order which dismissed the claimant’s Petition to Review as untimely.

We further note that we have considered the “unique circumstances” exception with regard to the timeliness of the claimant’s Petition to Review. In *Heotis v. Colo. Dep't of Educ.*, 2016 COA 6 (Jan. 14, 2016), the Colorado Court of Appeals held that the "unique circumstances" doctrine extends jurisdiction to cases in which a party has missed a jurisdictional filing deadline, but the party has relied and acted upon an erroneous or misleading statement or ruling by a trial court regarding the time for filing post-trial motions. The Court explained, however, that the doctrine's exception to jurisdictional rules is narrow, and is applied only to extreme situations or those cases involving fundamental liberties. For example, in *P.H. v. People in Interest of S.H.*, 814 P.2d 909 (Colo. 1991), the Colorado Supreme Court applied the unique circumstances exception in a termination of parental rights case. The Court concluded that the case involved "fundamental values," and that the appellant had relied on a trial court's order that had erroneously extended the time in which the appellant could file a notice of appeal. *See also In Interest of C.A.B.L.*, 221 P.3d 433 (Colo. App. 2009)(majority applied “unique circumstances” doctrine to extend deadline for filing notice of appeal in a kinship adoption proceeding, where appellant had not filed a timely notice of appeal and had relied or acted on erroneous or misleading statement or ruling by district court); *People in Interest of A.J.H.*, 134 P.3d 528 (Colo. App. 2006)(“unique circumstances” doctrine applied where trial court misled appellant's counsel in a termination of parental rights case, and counsel mistakenly thought court had granted his motion to withdraw and that it would appoint a substitute attorney for the purposes of appeal). However, since we have concluded that the claimant here has met the time requirements of §8-43-301(2), C.R.S. for filing a petition to review, we need not apply the unique circumstances doctrine. We therefore next address the arguments of error that the claimant has raised in his Petition to Review and in his Brief In Support regarding ALJ Walsh’s order.²

² We conclude that ALJ Lamphere’s order, which dismissed the claimant’s Petition to

II.

The claimant argues that ALJ Walsh erred in granting the respondents' summary judgment motion and in denying his summary judgment motion. The claimant contends that he demonstrated fraud so that his settlement agreement should be reopened. We disagree.

Office of Administrative Courts Rule of Procedure Rule 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. Moreover, to the extent that it does not conflict with OAC Rule 17, C.R.C.P 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). We review the ALJ's legal conclusions de novo in the context of summary judgment. *See A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005).

A.

The claimant argues that he has demonstrated the respondents engaged in fraudulent misrepresentation, workers' compensation attorney fraud, adjuster fraud, and disobeying workers' compensation rules. The claimant asserts that not only did the respondents violate PALJ Fitzgerald's order by sending the surveillance DVDs to the DIME physicians, but they also edited the surveillance DVDs. The claimant argues that this conduct of the respondents amounts to fraud. The claimant contends that since the respondents' fraud pervaded everything about his settlement agreement, he asserts that ALJ Walsh erred in denying his summary judgment motion and granting the respondents' summary judgment motion on the issue of fraud.

Review, and ALJ Walsh's order, which granted the respondents' summary judgment motion and denied the claimant's summary judgment motion, have denied the claimant benefits. Consequently, we have jurisdiction to review both orders pursuant to §8-43-301(2), C.R.S. *See Speier v. Knight Mfg.*, W.C. No. 4-324-437 (March 10, 2007).

Section 8-43-303, C.R.S., provides that a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. The party seeking to reopen an award bears the burden of proof to establish the appropriate grounds to reopen. The determination to reopen is left to the sound discretion of the ALJ and we may not interfere with the ALJ's decision unless an abuse of discretion is shown. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Renz v. Larimer County School District R-1*, 924 P.2d 1177 (Colo. App. 1996). An abuse of discretion does not exist unless the order is beyond the bounds of reason, as where it is contrary to law or not supported by substantial evidence in the record. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). To reopen the claim on grounds of "fraud," the claimant must prove that the respondent made false representations which the claimant relied upon to settle the claim. Section 8-43-303(1), C.R.S.; *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (Colo. 1937); *see also Allee v. King Soopers*, W.C. No. 3-640-815, 3-729-182, 3-703-172 (May 10, 2002), *aff'd*, Colo. App. No. 02CA1078 (July 24, 2003).³

Initially, to the extent the claimant argues ALJ Walsh erred since his order copies verbatim the statements and conclusions that the respondents submitted in their response to the claimant's summary judgment motion, we disagree. The Colorado appellate courts repeatedly have declined to reverse orders merely because they were originally drafted by one of the parties. Rather, if the ALJ's findings are otherwise sufficient, which they are here, they are not weakened or discredited because they were originally drafted by one of the parties. *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982); *Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 420 P.2d 232 (1966).

³ Additionally, we conclude that the Colorado Court of Appeals' recent decision in *Amerigas Propane & Indem. Ins. Co. of N. Am. v. Industrial Claim Appeals Office*, 2016 COA 65 (April 21, 2016), is inapplicable here. In that case, the Court held that where the claimant had entered into a final settlement for his shoulder injury, but later discovered a stress fracture in his scapula caused by the placement of a screw during one of his shoulder surgeries, the settlement could not be reopened based on the plain language of the agreement. The Court explained that although there was a mutual mistake of fact as to the existence of the fracture, the agreement provided that the claimant had forever waived his right to compensation for unknown injuries that arose as a consequence of or resulted from the original injury, and that the unknown injuries referenced in the agreement were excluded from the scope of the phrase "mutual mistake of material fact." Conversely, here, the claimant alleges that as a result of the respondents' alleged fraud he entered into the settlement agreement.

Next, we agree with ALJ Walsh that the claimant failed to satisfy his burden of proving that the respondents acted fraudulently thereby warranting the reopening of his settlement agreement. In his Petition to Review and Brief In Support, the claimant argues that the respondents violated PALJ Fitzgerald's prior order, which denied the respondents' request to send the surveillance DVDs to the DIME physician, Dr. Campbell. However, in his Petition and Brief, the claimant has contended that the respondents improperly sent the surveillance DVDs to, and improperly communicated with, Dr. Caughfield, Dr. Lesnak, and Dr. Davis. None of these physicians, however, is the DIME physician in this action. Rather, Dr. Caughfield is an authorized treating provider, Dr. Lesnak is the respondents' independent medical examiner, and Dr. Davis is the claimant's authorized orthopedic surgeon. Dr. Campbell is the DIME physician in this action. While all of these physicians may be identified by the Office of Administrative Courts as being able to conduct DIMEs, as the claimant argues, they did not do so in this action. Nevertheless, the claimant has failed to set forth proof demonstrating that the respondents violated PALJ Fitzgerald's prior order by sending the surveillance DVDs to Dr. Campbell. Consequently, the claimant's claim of fraud in this regard must fail. Similarly, to the extent the claimant argues that the respondents caused Dr. Davis to give a false opinion regarding his right lower extremity, there also is no evidence substantiating this claim. Section 8-43-301(8), C.R.S.

Additionally, the claimant contends that the respondents committed fraud by editing the surveillance DVDs. The claimant argues that the respondents' actions in this regard amount to spoliation. We conclude that ALJ Walsh implicitly rejected the claimant's argument in this regard. However, once again, the claimant has failed to set forth evidence demonstrating that the respondents' fraudulently revised the surveillance video. It is well settled that conclusory statements made without supporting documentation or testimony, such as those made here by the claimant, are insufficient to create an issue of material fact. OAC Rule 17; *Suncor Energy (USA), Inc. v. Aspen Petroleum Prods., Inc.*, 178 P.3d 1263, 1269 (Colo. App. 2007); *see also People in Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990)("A genuine issue of fact cannot be raised simply by means of argument by counsel."); *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007)("Mere conclusory statements are not sufficient to raise genuine factual issues."). Consequently, we affirm ALJ Walsh's order granting the respondents' summary judgment motion and denying the claimant's summary judgment motion.

Finally, we note that the claimant has filed a Reply Brief, and the respondents have moved to strike it. It does not appear that the respondents' motion was ruled upon prior to the Office of Administrative Court's transmission of the appeal to the Panel.

However, we have authority to adjudicate the motion. *See* §8-43-301(9), C.R.S. (panel has authority to issue procedural orders, including those concerning “filing of briefs”). Since the claimant’s Petition to Review and Brief In Support are lengthy and have fully set forth his arguments on appeal and is largely repetitive, we decline to consider the claimant’s Reply Brief.

We are not otherwise persuaded by the remaining contentions raised by the claimant in his Petition to Review or Briefs In Support.

IT IS THEREFORE ORDERED that ALJ Lamphere’s order dated May 5, 2016, which dismissed the claimant’s Petition to Review as untimely, is reversed;

IT IS FURTHER ORDERED that ALJ Walsh’s order dated February 24, 2016, which granted the respondents’ summary judgment motion and denied the claimant’s summary judgment motion, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

ANTHONY J. LUCERO
W. C. No. 4-705-926-02
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CERTIFICATE OF MAILING

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

_____ August 30, 2016 _____ by _____ TT _____ .

ANTHONY J LUCERO, 2226 HARVEY PLACE, PUEBLO, CO, 81006 (Claimant)
MCREA & BUCK LLC, Attn: JAMES B. BUCK, ESQ, 600 GRANT STREET SUITE 825,
DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-726-134-07
& 4-712-263-11

IN THE MATTER OF THE CLAIM OF

JECKONIAS MURAGARA,

Claimant,

v.

FINAL ORDER

SEARS HOLDINGS d/b/a SEARS
ROEBUCK & COMPANY,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,
Respondents.

The claimant and respondents seek review of an order of Administrative Law Judge Margot Jones (ALJ) dated May 16, 2016, that denied the claimant's request for penalties and denied the compensability of W.C. No. 4-712-263. We affirm the order of the ALJ.

On June 8, 2007, the claimant asserted he injured his left hip when he was hit by a clothes cart at work. This claim was assigned W.C. No. 4-726-134. In an order of December 19, 2007, following a hearing, ALJ Walsh determined the claimant did not sustain an injury at work on that date as alleged. The claim was dismissed. The ALJ's order was affirmed by the Industrial Claim Appeals Office and by the Court of Appeals.

The claimant had submitted a prior claim involving a work injury to his right shoulder on October 29, 2006. This claim was denominated W.C. No. 4-712-263. The respondents filed a Final Admission of Liability (FAL) in the claim on March 20, 2007, admitting for no temporary or permanent disability benefits. The FAL recited that the claimant had failed to appear at two appointments scheduled with the authorized doctor and had not responded to a 30 day letter. On March 29, 2007, the Claims Management Unit of the Division of Workers' Compensation rejected the FAL stating in a letter that it was not accompanied by sufficient documentation to support the termination of temporary benefits pursuant to Workers' Compensation Rule of Procedure 6-1. The letter

JECKONIAS MURAGARA

W. C. No. 4-726-134-07 & W.C. No. 4-712-263-11

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advised that if the requested documentation was not provided within 10 days “the director will consider an order to reinstate benefits.” The letter did not reference W.C. Rule 7-1 pertinent to the closure of a claim when temporary benefits are not involved.

On December 3, 2014, the claimant filed an application for a hearing requesting an assessment of penalties against the respondents in W.C. No. 4-726-134. The claim for penalties charged that the respondents’ attorneys had been sent an order from the Division of Workers’ Compensation with which they did not comply. Attached to the application was the March 29, 2007, letter from the Claims Management Unit. The application for hearing also requested authorization for a surgery. Attached to the application was a November 1, 2006, medical report interpreting an MRI study of the claimant’s right shoulder.

Prehearing ALJ (PALJ) McBride granted the respondents’ motion to strike the application for a hearing on January 7, 2015. The PALJ ruled W.C. No. 4-726-134 was closed due to the December 19, 2007, decision of ALJ Walsh dismissing the claim. The claimant disputed PALJ McBride’s order and the matter was referred to the Director’s office. Acting Director Eley affirmed the order of the PALJ. The Acting Director noted the claimant had previous applications for a hearing stricken due to his failure to abide by discovery orders. He also agreed with PALJ McBride that W.C. No. 4-726-134 had been previously litigated and dismissed by ALJ Walsh. On April 1, 2015, the Acting Director submitted an order affirming PALJ McBride’s order. The claimant appealed that order to the Industrial Claim Appeals Office. In an order of September 8, 2015, we set aside the order of the Acting Director.

In our September 8, 2015, order we determined the request for an assessment of penalties was not barred by the dismissal of the claim for benefits by ALJ Walsh and was not subject to issue preclusion for the reason that ALJ Walsh did not have the penalty claim before him and therefore did not rule on that matter. The remand order also ruled a PALJ and an ALJ did not possess the general jurisdiction necessary to prevent a pro se party from filing pleadings without the assistance of an attorney. Instead, a party seeking such a restriction would need to obtain it from the District Court. We remanded the claim for further proceedings pertinent to the claimant’s application for hearing regarding the penalty claim.

Following the order of remand the claimant filed a new application for a hearing in both claims on October 8, 2015, requesting a finding of compensability, penalties, medical benefits, temporary benefits and permanent disability benefits. A prehearing was held before PALJ Harr on December 11, 2015. PALJ Harr ruled that pursuant to the

JECKONIAS MURAGARA

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direction for a remand, the claimant could proceed to hearing in regard to the limited issue of penalties.

ALJ Jones held two hearings in the claim. On February 17, 2016, the ALJ ruled in favor of the respondents' motion for a directed verdict at the close of the claimant's case. However, the ALJ then withdrew that order on February 18 and directed a second hearing be conducted. The February 18, 2016, order noted the claimant's assertion that he had recently lost his home and access to his storage unit. For that reason, the claimant explained he did not have additional documentary evidence to present. ALJ Jones ordered the respondents to submit their documentary evidence to the claimant prior to a second hearing and, in addition, ruled that the claims for benefits pertinent to the claimant's shoulder injury in W.C. No. 4-712-263 would be considered. A second hearing was convened on April 15, 2016.

Following the April 15 hearing, the ALJ submitted an order on May 16. The ALJ resolved the claimant failed to establish the grounds for the assessment of a penalty pursuant to § 8-43-304(1). The claimant submitted the letter dated March 29, 2007, from the Claims Management Unit of the Division of Workers' Compensation pertinent to W.C. No. 4-712-263. The ALJ noted the claimant argued the Panel's remand order of September 8, 2015, by itself, required that penalties be assessed against the respondents' attorneys pursuant to § 8-43-304(1). The claimant offered no additional evidence or argument in regard to the penalty.

The ALJ concluded the claimant did not present any evidence pertinent to an order that was disregarded by the respondents in W.C. No. 4-726-134. However, the ALJ observed the claimant did produce as evidence the March 29, 2007, letter from the Claims Management Unit in W.C. No. 4-712-263. The ALJ found the March 29 letter could not be construed as a "lawful order made by the Director or Panel" as required by § 8-43-304(1). The letter was printed on Division of Worker's Compensation letterhead but was left unsigned except to the extent it was attributed to the Claims Management Unit. Because there was no evidence the Director had issued an order, the ALJ denied and dismissed the claimant's request for a penalty.

The ALJ found the claimant did not present any testimony or argument at the hearing in regard to his request for benefits pertinent to the right shoulder injury in W.C. No. 4-712-263. The only evidence pertinent to that injury consisted of the November 1, 2006, MRI report. The ALJ ruled that if the shoulder claim was before the ALJ, no persuasive evidence was presented to support a claim for benefits for the claimant's right shoulder. Accordingly, the ALJ denied and dismissed W.C. No. 4-712-263.

On appeal, the claimant submits a long, but not very helpful, list of issues. Among other contentions the claimant asserts the respondents' attorneys should be subject to penalties for questioning his immigration status, for bad faith in handling his claims, for not paying the benefits he requested, for violating an order of the Director, for not providing the respondents' evidence prior to the hearing, and for directing medical care. In addition, he complains that the respondents' attorneys should be jailed, that the Office of Administrative Courts never provided him a copy of ALJ Walsh's order, that the Panel's Order of Remand requires the assessment of penalties, that the respondent employer fired him without cause and that an assessment of general damages should be made against the respondents' attorneys.

No transcript of the April 15, 2016, hearing was provided for purposes of the appeal. Section 8-43-213 (2) (party must order a transcript and it must be filed with the office of administrative courts within 25 days of the order). Therefore, the effectiveness of our review is severely limited, and we must presume that the ALJ's factual findings are supported by the record. *Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). We do not see that any of the above issues, save for the penalty claim involving the March 29, 2007, letter from the Claims Management Unit, and the claim for compensability and benefits in W.C. No. 4-712-263, were endorsed for hearing by the claimant. We therefore may not address them on appeal. *Pacheco v. Roaring Fork Aggregates*, 897 P.2d 872 (Colo. App. 1995) (party may not raise issues on appeal which were not first raised before ALJ).

The respondents appeal by asserting the Panel was in error when it ruled in the September 8, 2015, Order of Remand that the claimant's request for a penalty was not barred by the application of claim preclusion in W.C. No. 4-726-134.

In regard to the May 16, 2016, order of the ALJ, we first note that the claimant's October 8, 2015, application for hearing did reference both claims, W.C. No. 4-726-134 and W.C. No. 4-712-263, and endorsed for determination the issues of compensability, medical benefits, temporary and permanent disability benefits, in addition to the penalty claim. Our September 8, 2015, order of remand was issued in regard to a previous application for hearing dated December 3, 2014, and the Director's order striking the application as a sanction for discovery abuses, due to issue preclusion and because the claimant was proceeding without an attorney in contravention of orders preventing him from doing so. Following the remand, the claimant elected not to request another hearing pursuant to that application. Instead, he filed a new application for hearing on October 8. While our Order of Remand had implications for a hearing pertinent to the October 8

application, that application had the effect of placing before the ALJ several additional issues which were not represented in the appeal regarding the earlier December 3, 2014, application for a hearing. The ALJ found that the Order of Remand did not have the effect of precluding the claimant from requesting a determination of issues in W.C. No. 4-712-263 and advised the parties on February 18, 2016, that those issues were subject to being addressed in a subsequent hearing. Accordingly, the ALJ made findings and rulings on both the penalty claim and on the compensability and benefits issues in W.C. No. 4-712-263.

We agree with the ALJ's finding that the claimant failed to establish grounds for a penalty pursuant to § 8-43-304(1). The claimant's allegation was that the respondents, and their attorneys, failed to abide by an order of the Director issued on March 29, 2007, rejecting the respondents' FAL of March 20, 2007, for the reason it did not have attached documentation required by Workers' Compensation Rule of Procedure 6-1. The ALJ found that letter did not represent an 'order' of the Director. This finding is consistent with the determination in *Holliday v. Bestop*, 23 P3d 700 (Colo. 2001). In *Holliday* the Court determined notes taken by a PALJ during a settlement conference did not constitute an order because the notes did not reflect a decision by the PALJ and did not direct the parties to perform or refrain from any activity. The same analysis applies in this case. The March 29 letter does not reveal a direction by the Director, as it was an unsigned form letter sent to the parties. In addition, it only advised the respondents the Division would not accept the FAL they filed unless it was refiled with additional documentation attached. The letter did warn that temporary benefits could be ordered reinstated. However, that statement clearly did not apply to the claim because no temporary benefits had ever been paid so a 'reinstatement' was a misnomer. The claimant's argument notwithstanding, our September 8, 2015, Order of Remand did not adjudicate the penalty claim. It ruled only that the claimant was entitled to a hearing in which he could submit evidence to prove the penalty claim. The ALJ provided that hearing opportunity. The ALJ then properly denied the claim for a penalty.

We conclude the ALJ also properly denied the compensability of the claimant's shoulder injury in W.C. No. 4-712-263. The respondents had argued that claim was previously closed by the November 5, 2009, order of PALJ DeMarino. That order was issued in response to complaints that the claimant had failed to respond to discovery requests despite having been ordered to do so. PALJ DeMarino cited to several past orders in that regard, including an order issued by ALJ Stuber on May 11, 2009. PALJ DeMarino noted that ALJ Stuber's order warned the claimant that failure to comply with discovery orders could lead to the dismissal of his claim pursuant to § 8-43-207(1)(e), OAC Rule 2.B, Workers' Compensation Rule 9-1 and Colo. Rule of Civil Procedure

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37(B)(2). While ALJ Stuber could cite those sources as authority, due to his status as an ALJ, none of those sections apply to a PALJ. While § 8-43-207.5(2) allows a PALJ to strike an application for a hearing as a sanction to enforce discovery obligations, a PALJ is not given authority to dismiss an entire claim. PALJ McBride in his orders did not purport to dismiss W.C. No. 4-712-263. The Acting Director in his order of April 1, 2015, was reviewing the order of PALJ McBride and not that of PALJ DeMarino. Therefore, the November 5, 2009, order of PALJ DeMarino did not serve to close W.C. No. 4-712-263. Nor did the FAL filed by the Respondents on March 20, 2007. The Supreme Court in *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), held that claims which do not feature liability for temporary or permanent indemnity benefits cannot be closed through any procedure which applies a finding of MMI. This would include a FAL. See *Thibault v. Ronnie's Automotive*, W.C. No. 4-970-099 (August 2, 2016). The compensability of W.C. No. 4-712-263 was therefore properly before the ALJ for determination at the April 15, 2016, hearing.

The ALJ found the claimant did not present persuasive evidence to establish he sustained an injury arising out of his work on October 29, 2006. The record on appeal contains only the MRI report of November 1, 2006. The claimant did not secure a transcript of the hearing testimony to assist in his appeal. We do not find cause to disagree with the ALJ's finding the evidence was insufficient to satisfy the claimant's burden of proof to show a compensable injury in W.C. No. 4-712-263.

The respondents appeal our finding in the September 8, 2015, Order of Remand that W.C. No. 4-726-134 did not support a defense of issue preclusion in regard to the claimant's penalty claim. The respondents argue that PALJ McBride had ruled that issue was barred by both issue and 'claim' preclusion. We did not discuss claim preclusion because the Acting Director in his order, which was the subject of the appeal, did not rely on claim preclusion. However, penalty claims are often not subject to claim preclusion for the reason that they do not arise out of the claimant's injury and it is not necessary for a claimant to be successful in regard to the compensability of his injury to have incurred a legitimate case for a penalty. This occurs because the most frequent basis for a penalty claim involves the violation of a procedure involved in substantiating the injury claim. The parties to a penalty are also not always the parties to a claim. See *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003) (penalty claim against a respondent's attorney); *Barnes v. Colorado Department of Human Resources*, W.C. No. 4-632-352 (August 17, 2005) (penalty claim against a medical provider). The claims for relief are therefore, not sufficiently identical. In this case, the exhibits introduced at the April 15, 2016, hearing also revealed the claimant's penalty claim had no connection with W.C. No. 4-726-134. Instead, that penalty related to an FAL filed by the

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respondents in W.C. No. 4-712-263. As noted above, W.C. No. 4-712-263 was not closed prior to the April 15 hearing. Accordingly, the respondents' contention that the closure of W.C. No. 4-726-134 served to bar the hearing of a penalty allegation in that matter does not apply to the ALJ's May 16, 2016, order for the reason that the penalty addressed in that order arose out of W.C. No. 4-712-263 instead.

Accordingly we find no compelling reason to disagree with the decision of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's order issued May 16, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

JECKONIAS MURAGARA

W. C. No. 4-726-134-07 & W.C. No. 4-712-263-11

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CERTIFICATE OF MAILING

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

_____ August 30, 2016 _____ by _____ TT _____ .

JECKONIAS MURAGARA, C/O: PAYA SUMUNI, 563 HUMBOLDT PARKWAY,
BUFFALO, NY, 14208-0702 (Claimant)

THOMAS POLLART & MILLER LLC, Attn: ERIC J POLLART, ESQ., C/O: TINA R
OSTREICH, ESQ, 5600 S QUEBEC ST STE 220-A, GREENWOOD VILLAGE, CO, 80111
(For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-975-288-02

IN THE MATTER OF THE CLAIM OF
MITCH SALGADO,

Claimant,

v.

FINAL ORDER

THE HOME DEPOT,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated June 26, 2016, that denied the claimant's request for temporary total disability benefits (TTD) from March 19, 2015, until October 1, 2015, and temporary partial benefits after that date. We set aside and reverse the decision of the ALJ in regard to the denial of temporary benefits.

The claimant asserted he injured his low back at work on January 4, 2015, while lifting a five gallon bucket of flooring mortar weighing 50 to 60 pounds. The claimant worked in the employer's home improvement store in the lumbar materials department. He was responsible for sawing lumber, loading lumber, concrete and mortar mixes and performing special cuts for plywood. After his injury the claimant saw his personal chiropractor and then the authorized treating physician, Dr. Miller, on January 28. The claimant was diagnosed with a lumbar strain. Dr. Miller recommended work restrictions involving lifting or carrying of not over 25 pounds and the need to change positions frequently. The claimant advised his supervisors of his restrictions and was instructed to avoid performing the aspects of his job in excess of those limits.

Prior to the claimant's injury he had been given warnings in regard to his work attendance. The employer maintained a progressive attendance policy. In the event an employee is absent or late arriving at work on seven occasions within a six month period, the employee is provided a final warning. One additional attendance violation will result

in job termination. Any absence or tardy not approved in advance, or covered by available sick leave, is counted as a violation regardless of the reason. The claimant had received a final warning in December, 2014, prior to his injury. The employer, and the ALJ, noted the claimant was absent or late on twelve occasions between the date of his injury and March 17, 2015. The ALJ determined all of these attendance episodes were caused by the claimant's back injury. On March 17, the claimant was late to work by 10-25 minutes because his car would not start. The employer discharged the claimant the next day due to this late arrival. The claimant subsequently secured part time employment at a golf course on October 1, 2015.

The ALJ denied the claimant's request for TTD benefits after March 18. The ALJ observed in her conclusions of law:

... with respect to the claimant's termination from employment with Employer, the claimant violated known and well communicated attendance policies for reasons other than his work injury. The claimant's employment was terminated as result of these violations and he is not entitled to temporary disability benefits since the claimant failed to prove his wage loss was due to disability resulting from the work injury. Because the clamant failed to establish that he is entitled to temporary total and temporary partial disability benefits, the remaining issue of responsible for termination is moot.

We disagree. The issue of the claimant's responsibility for his termination is quite viable and the failure of the respondents to carry their burden of proof on that issue entitles the claimant to an award of temporary benefits.

On appeal, the claimant contends the ALJ committed error by requiring he show wage loss due to his injury prior to his termination, by denying the significance of his wage loss incurred after the termination, by shifting the burden of proof to the claimant to establish he was not responsible for the termination and for failing to order temporary benefits in the face of an absence of substantial evidence indicating he was responsible for the loss of his job.

The respondents counter by asserting the burden of proof was correctly placed on the claimant to show his eligibility for temporary benefits. The respondents argue the ALJ was correct to require him to show actual wage loss prior to the termination rather than just a disability caused by his injury. They contend the reasons for the claimant's

discharge from his job are not material because the claimant did not establish a link between his work injury and his wage loss.

The termination statutes, § 8-42-103(g) and § 8-42-105(4) (a) C.R.S., provide:

(4)(a). In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

In regard to the termination statutes, the employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

The ALJ found the testimony of Dr. Miller at the December 17, 2015, hearing sufficient to establish as fact that the claimant was provided work restrictions from January through March 18 which limited lifting and carrying to 25 pounds. The ALJ also found the testimony and opinions of Dr. Miller to be credible and persuasive as to the work related cause of the claimant's back injury. It was noted by the ALJ that Dr. Miller testified the claimant was always limited to modified duty work. The ALJ concluded Dr. Miller's opinions as to the progression and treatment of the claimant's injury to be reliable and persuasive. The ALJ found the claimant's description of the mechanism of his injury, i.e. he was lifting a 50-60 pound can of mortar, to be credible. The claimant testified he continued to work within his restrictions of 25 pounds lifting as allowed by his supervisors (albeit with some supervisory resistance) until his March 18 termination. The respondents presented as a witness only their medical expert.

In her conclusions of law, the ALJ references two decisions of the Colorado Supreme Court which set forth the claimant's obligation to establish a prima facie case for temporary benefits. Relying on *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995), the ALJ notes the criteria to establish 'disability' as a prerequisite to an award of temporary benefits "requires a claimant to establish a causal connection between a work related injury and a subsequent wage loss in order to obtain temporary disability benefits." The ALJ then notes that, more recently, in *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999), the Court described the standard for 'disability' to include: "(1) Medical incapacity evidenced by a loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work."

Both of these decisions were rendered prior to the addition of § 8-42-105(4) (a) to the statute. For the purpose of construing that section, the standard used in *Culver* is the more applicable. Section 8-42-105(4) (a) refers to a claimant that is “temporarily disabled” who is ‘terminated’ from employment. A temporarily ‘disabled’ employee has a restricted bodily function coupled with an inability to resume his prior work as in *Culver*. However, unlike in *PDM Molding*, the employee is still working in modified duty. If he were not, then there would be no ‘termination’ event to which § 8-42-105(4) (a) would apply.

When that circumstance of termination occurs, a finding that the claimant is ‘responsible’ for the termination renders the wage loss unrelated to the work injury. The ‘wage loss’ in question is the loss following the termination. Here, the ALJ reasoned the claimant failed to prove a wage loss, prior to the termination, as a result of the injury. The ALJ reached this conclusion by noting:

In this case, the Claimant ... failed to prove that he suffered a wage loss as a result of that injury. Prior to the termination of his employment the claimant was working under lifting, pushing and pulling restrictions imposed by Dr. Miller ... as of January 22, 2015. However, there was not substantial evidence that the claimant suffered any wage loss until March 18, 2015, the day following the termination of the claimant’s employment with employer.

By requiring the claimant to show wage loss prior to his termination, the ALJ has added a condition not contemplated by the General Assembly. The enactment of § 8-42-105(4)(a) was intended to legislatively overrule the Supreme Court’s ruling in *PDM Molding*. See, *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002). In that decision the Court ruled that when a claimant is discharged following a work injury, he is eligible for temporary disability benefits regardless of the reason for the termination, insofar as the work injury “contributed to some degree to his subsequent wage loss.” *PDM Molding, supra*, 898 P.2d at 549. In response, § 8-42-105(4)(a) was aimed at disqualifying the claimant from temporary benefits entirely when the employer could show the claimant was at fault for the loss of his job. The denial of benefits would be unaffected by any continuing disability due to the work injury. If the ALJ concludes that § 8-42-105(4)(a) does not apply in the case where a claimant has not sustained a wage loss prior to the event of his job termination, then the ALJ is required to apply the requirement set forth in *PDM Molding* to award temporary

disability benefits when the claimant's injury "to some degree" contributes to his wage loss. Here, the ALJ declined to make any findings in that regard.

However, the *PDM Molding* decision notwithstanding, § 8-42-105(4)(a) does not require that a claimant first be shown to have wage loss prior to the job termination in order for that section to apply. In most cases, a claimant who is offered work modified to accommodate his work restrictions will have avoided wage loss. His first wage loss then, would occur at the point he is terminated by the employer. However, pursuant to the ALJ's analysis, should an employer assert the claimant is being terminated for a reason ostensibly unconnected to the injury, no matter how arbitrary or unjustified, the claimant would be denied temporary disability benefits. Application of the definition of 'disability' from *Culver*, which only demanded the claimant show an "inability to resume his prior work", to the statute's "temporarily disabled employee", indicates it is unnecessary for either party to prove the claimant had wage loss prior to the termination. The ALJ is in error to the extent she deemed "the remaining issue of responsible for termination is moot."

The respondents point to our prior decision in *Warttman v. City of Colorado Springs*, W.C. No. 4-580-205 (April 2, 2004), as support for their contention the claimant failed to sustain his burden of proof in regard to his eligibility for temporary benefits. However, in *Warttman* the claimant had returned after his injury to his regular job and was performing that job without accommodations. In the present case, the evidence and the ALJ's findings are that the claimant labored under work restrictions which did not allow him to perform his regular job without adjustment. Therefore, *Warttman* does not illuminate the issue in this matter.

Here, the evidence was undisputed that the claimant was assigned work restrictions that prevented him from performing his preinjury job without modifications. The ALJ found Dr. Miller's recommendations for the work restrictions were made necessary by the progress of the claimant's work injury. The ALJ also ruled the work restrictions were in place throughout the period prior to the claimant's termination on March 18. These findings indicate the claimant sustained his burden of proof to establish he was a 'temporarily disabled employee' pursuant to his work injury as referenced in § 8-42-105(4)(a). The burden of proof pertinent to the claimant's responsibility for the termination was thereby shifted to the respondents.

The ALJ made a distinction between the claimant's absences following his January 4 work accident which were due to that injury and the March 17 late arrival at work which occurred when the claimant's car failed to start. The ALJ found the former

could not be used by the employer to justify a termination pursuant to the employer's attendance policy. Findings of Fact ¶ 24. The ALJ noted the only evidence introduced into the record pertinent to the reason for the claimant's tardy arrival at work on March 17. The claimant testified he was 10-25 minutes late "due to car trouble and his car would not start." The ALJ observed the claimant was discharged by the employer due to a violation of the employer's attendance policy which was a reason "other than his work injury."

However, the attendance policy was a largely a no fault rule. It did not take into account the reason an employee was absent or late. If an employee was ill, but had exhausted his allotment of sick time, any resulting absence was a violation of the attendance policy. However, illness is most often a circumstance beyond the control of the employee. Therefore, while the employee may be fired through application of the attendance policy, it would be unlikely in that case that the employee would be found 'responsible' for the termination.

The ALJ did not find the claimant was at fault, or responsible, for the violation of the employer's attendance policy. The Court of Appeals, in *Colorado Springs Disposal v. Industrial Claim Appeals Office, supra*, construed the addition of § 8-42-105(4)(a) "to introduce into the Act the limited concept of 'fault' used in termination cases before the supreme court's decision in *PDM*." In *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994), the court advised that: "Fault so construed is not necessarily related to culpability, but requires a volitional act or the exercise of some control in light of the totality of the circumstances. See *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987)." The decision in *Gonzales* also involved a termination premised on the violation of an employer's attendance policy. However, the court found in the case of a no fault accumulation of absences it was insufficient solely to note the employee's violation of the policy.

Gonzales was dismissed solely because he had received five disciplines in [the employer's] five-step disciplinary program. Two of those disciplinary steps, including the fifth one that precipitated his dismissal, were imposed under a 'no-fault' policy that by its very definition prohibits any consideration of whether the absences were *justified or unavoidable*. (Emphasis supplied).

Gonzales v. Industrial Commission, 740 P.2d 999 (Colo. 1987). In explaining the application of this standard, the Supreme Court stated in *Gonzales* that even when a

specified number of absences from work would lead to discharge, regardless of the reason for the absence, the employee may still qualify for benefits if the reason for one or more of the absences were not under the control of the employee such that he is not at fault. Therefore, the determination of whether tardiness or absenteeism is the responsibility, or fault, of the claimant cannot be limited to the specific number of incidents or to the employer's attendance policy. Rather, consideration under the totality of the circumstances is required, including whether the claimant acted volitionally or whether the tardiness or absenteeism was otherwise justified. In this regard, it is clear from the Court's decision that although the employer decided not to consider whether the absences in that case were justified or unavoidable, those are relevant factors that must be considered when determining entitlement to temporary benefits.

In this case, the respondents did not submit evidence relative to the claimant's tardy arrival at work on March 17, to establish his car's failure to start was a circumstance under his control. In addition, the respondents did not submit evidence in regard to any of the claimant's absences or late arrivals prior to his work injury. Pursuant to *Gonzales*, the respondents did not fulfill their burden of proof to show the violation of the attendance policy was due to circumstances under the control of the claimant or that he was responsible for his termination from employment. Accordingly, we reverse the decision of the ALJ denying the claimant an award of temporary total and partial benefits.

IT IS THEREFORE ORDERED that the ALJ's order issued June 28, 2016, is set aside and reversed insofar as it denied the claimant temporary disability benefits following his termination from employment on March 18, 2015.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

MITCH SALGADO
W. C. No. 4-975-288-02
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CERTIFICATE OF MAILING

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

_____ August 23, 2016 _____ by _____ TT _____ .

LAW OFFICE OF DAVID LICHTENSTEIN, LLC, Attn: MATT MOLINARO, ESQ, C/O:
DAVID LICHTENSTEIN, ESQ, 1556 WILLIAMS STREET SUITE 100, DENVER, CO,
80218-1661 (For Claimant)

LEE & KINDER, LLC, Attn: KELSEY BOWERS, ESQ, C/O: SHEILA TOBORG, ESQ, 3801
E FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

15CA2134 Defrece v ICAO 09-01-2016

COLORADO COURT OF APPEALS

DATE FILED: September 1, 2016
CASE NUMBER: 2015CA2134

Court of Appeals No. 15CA2134
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-920-455

Shannon Defrece,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; 20/20 Theatrical, LLC,
d/b/a ProSight Global, Inc.; and ProSight Specialty Insurance,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE TERRY
Hawthorne and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 1, 2016

Michael W. Seckar, P.C., Lawrence D. Saunders, Pueblo, Colorado, for
Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Thomas Pollart & Miller LLC, Eric J. Pollart, Alissa M. Peashka, Greenwood
Village, Colorado, for Respondents 20/20 Theatrical, LLC, d/b/a ProSight
Global, Inc.; and ProSight Specialty Insurance

In this workers' compensation action, claimant, Shannon Defrece, seeks review of a final order of the Industrial Claim Appeals Office (Panel), affirming the decision of an administrative law judge (ALJ) denying his request to reopen his claim. We affirm.

I. Background

Employer, 20/20 Theatrical, LLC, specializes in theater construction and renovation projects around the country. In 2013, employer embarked on a project to install an automated rigging system in a theater in Colorado Springs. On April 8, 2013, employer hired claimant as a rigger for the project, which was expected to last four to six weeks. Claimant earned \$3186.00 between the date he was hired and May 3, 2013. During the week of April 28 to May 4, 2013, however, employer could not do any work at the theater because another contractor was working in the theater space to complete its HVAC project. Consequently, claimant did not earn any wages that week.

Employer resumed its work on the project on May 7, 2013, and asked claimant to return to the job that day. Shortly after claimant started work that day, he severely lacerated his left thumb with a pocket knife he had used to cut a zip-tie off a bundle of wire.

Claimant immediately sought medical care for his thumb, and an authorized treating physician sutured and splinted the wound. Claimant later underwent surgical repair of the thumb and was taken off work to recuperate.

Employer admitted liability for the injury and began paying claimant temporary total disability (TTD) benefits of \$531.03 per week, based on its calculated average weekly wage (AWW) for claimant of \$796.50. Employer calculated claimant's AWW by dividing his total earnings of \$3186.00 earned over the four week period by four, even though claimant had only earned wages during three of those four weeks. Claimant received \$531.03 in TTD benefits every week until July 7, 2014. However, claimant's TTD benefits should have ceased on March 18, 2014, when his authorized treating provider placed him at maximum medical improvement (MMI). *See* § 8-42-105(3)(a), C.R.S. 2015.

After discovering that it had erroneously continued paying TTD after claimant reached MMI, employer filed a final admission of liability (FAL) claiming an overpayment of \$8420.62, which was the amount of TTD benefits employer paid to claimant after he reached MMI. Employer also admitted that claimant had sustained a

permanent injury to his thumb, rated at twenty percent of the thumb at the proximal joint.

Claimant filed an application for hearing in August 2014 in response to employer's July 7, 2014, FAL, endorsing the issues of disfigurement, permanent partial disability (PPD) benefits, and post-MMI medical maintenance benefits. The application did not endorse AWW. However, claimant canceled the hearing. A second FAL, filed by employer in October 2014, reiterated the AWW and overpayment calculations set out in the July 2014 FAL. Although claimant filed an application for hearing in response to this second FAL, he never set a hearing. Because no hearings were held on claimant's applications for hearing, the admissions contained in employer's FAL, including employer's calculation of AWW, became final.

In December 2014, employer filed its own application for hearing, endorsing the issue of overpayments. In response to the application, claimant endorsed the issues of disfigurement and AWW, and petitioned to reopen his claim based on an alleged mistake in employer's AWW calculation.

After a hearing on these issues, the ALJ determined that employer had established its entitlement to a total overpayment of \$8420.62. But the ALJ denied claimant's request to reopen the claim for a recalculation of AWW. Adopting the impairment rating admitted by employer in its FAL, the ALJ awarded claimant PPD benefits based on an impairment rating of twenty percent for the thumb at the proximal joint. The full amount of this PPD award was \$1868.86. In addition, the ALJ awarded claimant \$2000 for disfigurement to his thumb. When the ALJ subtracted the PPD award and the disfigurement award from the overpayment, the net amount awarded to employer for the overpayment was \$4551.76.

On review, the Panel affirmed the ALJ's decision.

II. Reopening Standards

Claimant does not dispute that the issue of AWW closed because he did not fully contest it after employer's July and October 2014 FALs. Once a claim is closed, it is not subject to further litigation unless it is reopened under section 8-43-303, C.R.S. 2015. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005).

To reopen a claim, a claimant must show error, mistake, or change in condition. § 8-43-303(1); *Berg*, 128 P.3d at 272; *Koch Indus., Inc. v. Pena*, 910 P.2d 77, 79 (Colo. App. 1995). “The ground of ‘mistake’ as used in [section 8-43-303] means any mistake, whether of law or fact.” *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 42 (quoting *Ward v. Azotea Contractors*, 748 P.2d 338, 341 (Colo. 1987)); see also *Renz v. Larimer Cty. Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1180 (Colo. App. 1996).

Requests to reopen based on a mistake of law or fact require a two-step analysis: first, the ALJ must determine whether a mistake was made; and second, if there was a mistake, the ALJ must assess whether that mistake justifies reopening the closed claim. See *Travelers Ins. Co. v. Indus. Comm’n*, 646 P.2d 399, 400 (Colo. App. 1981). “[W]hether a mistake was made, and if so, whether it was the type of mistake which justifies reopening a case,” is a question of fact to be determined by the ALJ. *Id.*

A claimant bears the burden to demonstrate that a mistake was made that would justify reopening. See § 8-43-303(4); *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002).

The reopening provisions of section 8-43-303 are “permissive, not mandatory, and the decision as to whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ.” *Renz*, 924 P.2d at 1181; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002). An ALJ’s decision to grant or deny a petition to reopen may therefore “be reversed only for fraud or clear abuse of discretion.” *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) (“In the absence of fraud or clear abuse of discretion, the ALJ’s decision concerning reopening is binding on appeal.”).

III. ALJ’s Alleged Misunderstanding of the Law

Claimant contends that the ALJ misunderstood and misapplied the law governing reopening. He argues that the ALJ erred when he found that claimant’s “assertion that the respondent-insurer was mistaken in [its] calculation is not the kind of mistake for which the issue of AWW can be reopened.” According to claimant, this language from the ALJ’s order shows a mistaken belief that the ALJ “could not even reach the issue [of mistake in how the AWW was calculated] because the [c]laimant was not

alleging a mistake based on a statutory offset or healthcare provision.” Claimant argues that the Panel compounded the ALJ’s error by failing to recognize the ALJ’s misunderstanding as an error, and by affirming the ruling.

We conclude that claimant did not establish an error that requires reversal of the Panel’s decision.

According to claimant, the AWW calculation was based on a purely mathematical error, which the ALJ could have, and should have, corrected. This asserted error is based on the number of days claimant asserts should have been included in the calculation. But claimant’s argument seems to skirt the real issue: the propriety of the statutory method chosen to calculate AWW.

His thesis relies on application of the default provision, codified at section 8-42-102(2), which states that AWW “shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury.” He ignores section 8-42-102(3), C.R.S. 2015, which allows calculation of AWW based on a discretionary exception. *See Loofbourrow v. Indus. Claims Appeals Office*, 321 P.3d 548, 554 (Colo. App. 2011) (when calculating AWW, an ALJ

“may choose either of two methods” described in section 8-42-102), *aff’d sub nom. Harman-Bergstedt, Inc. v. Loofbourrow*, 2014 CO 5. “[T]he ‘discretionary exception’ applies when the default provision ‘will not fairly compute the [employee’s AWW].’” *Loofbourrow*, 321 P.3d at 555 (quoting § 8-42-102(3)).

The ALJ determined that because of the temporary nature of claimant’s employment and the missed week of work, employer appropriately used the discretionary exception to calculate claimant’s AWW. This finding was within the ALJ’s discretion to make.

Given that the ALJ had discretion to accept the employer’s AWW calculation based on section 8-42-102(3)’s discretionary exception, claimant cannot establish that he was prejudiced by any error in the ALJ’s application of the reopening standards. Simply put, there was no AWW error for the ALJ to correct, even if he had granted reopening.

IV. Panel’s AWW Calculation

Claimant also contends that the Panel incorrectly calculated AWW based on thirty days’ work, referencing a period from April 8 to May 7, 2013. The Panel noted that dividing claimant’s total pay

by thirty days “lead[s] to an AWW somewhat lower than the admitted \$796.50.” Claimant contends that because the Panel’s calculation “does not support an affirmation of the ALJ’s decision,” its order should be set aside. We are not persuaded.

Claimant does not explain how the Panel’s alleged error harmed him. The Panel’s calculation played no role in the final order it entered, and therefore, any error in its calculation was harmless.

V. Conclusion

We conclude that the ALJ did not err in finding that no mistake had occurred in calculating claimant’s AWW. Given that finding, we discern no fraud or clear abuse of discretion in the ALJ’s conclusion that claimant had not met his burden of establishing a basis for reopening his claim or in his denial of claimant’s petition to reopen. *See Heinicke*, 197 P.3d at 222. Accordingly, we conclude that the Panel did not err in upholding the ALJ’s order.

The order is affirmed.

JUDGE HAWTHORNE and JUDGE FOX concur.