

BROWN BAG SEMINAR

Thursday, September 17, 2015

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation
Free

This outline covers ICAP and appellate decisions issued from
August 14, 2015 to September 11, 2015

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-962-847-01

IN THE MATTER OF THE CLAIM OF

JUAN J PUENTE,

Claimant,

v.

ORDER OF REMAND

POPCO ENTERPRISES LLC,

Employer,

and

NON-INSURED,

Respondent.

The respondent seeks review of an order of Administrative Law Judge Canicci (ALJ) dated March 13, 2015, that determined the claimant sustained a compensable injury and ordered the respondent to pay for specific medical benefits. We set aside the ALJ's order and remand for further proceedings.

This matter went to hearing on the issues of compensability and medical benefits. The ALJ found that the *pro se* claimant worked for the employer at a Popeye's restaurant in Northglenn, Colorado. On April 15, 2014, the claimant opened a freezer door and the partially broken door came off and struck him on the head causing bumps and bruises on his cheek and forehead. At the recommendation of the employer's store manager, the claimant visited a hospital for emergency treatment. The record reflects a total charge of \$2,114.26 and an estimated balance of \$317.14, from HealthOne for this emergency visit.

The respondent did not appear at hearing. The record demonstrates that Popco Enterprises (Popco) received notice of the February 11, 2015, hearing. Nick Amirian, a representative from Popco, sent the Office of Administrative Courts (OAC) a letter on December 17, 2014, stating that Popco has been inactive in Colorado since September 9, 2013, and was not the correct employer for the claim. Amirian contacted OAC again the day before the hearing asking if the claim had been dismissed. OAC replied on the day of the hearing and stated that the hearing proceeded that morning in front of ALJ Canicci and that Popco had until February 18th to submit evidence in support of its position. The employer responded that day and sent in an executed transfer document showing that

Popco Enterprises was sold on September 9, 2013, and the franchise was taken over by HZ Foods, LLC.

The ALJ credited the claimant's testimony to determine that the claimant sustained a compensable accident on April 15, 2014. The ALJ recognized that the documents submitted by the employer purportedly reflected that it ceased doing business in Colorado on September 9, 2013, but determined that these documents did not nullify the claimant's credible testimony that he suffered injuries while working at a Popeye's restaurant in Northglenn, Colorado. The ALJ, therefore, determined that Popco was liable for the claimant's medical benefits, specifically the \$2,114.26 medical bill from HealthOne.

Popco appeals and again asserts that the claim has been filed against the wrong employer because all Popeye's stores operated by Popco were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013, and therefore, HZ Foods is the appropriate party. Although Popco attached documents to the petition to review, we cannot consider these documents because they were not presented to the ALJ. Our review is restricted to the record before the ALJ, and the exhibits and factual assertions made on appeal by Popco may not substitute for evidence which is not in the record. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995)(appellate review limited to the record before the ALJ); *Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988). We do, however, agree with Popco that there remains a conflict in the evidence as to the identity of the employer and we therefore remand the matter for further findings on this issue.

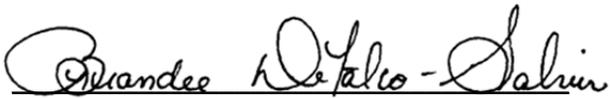
In order to prove a compensable injury the claimant bears the burden to establish that the injury arose out of and in the course of employment. Section 8-41-301(1), C.R.S. The identity of the liable employer in a workers' compensation case is a question of fact for the ALJ to determine, and depends on the totality of the circumstances. *See Melnick v. Industrial Commission*, 656 P.2d 1318 (Colo. App. 1982). Where the ALJ's factual findings are supported by substantial evidence we have no basis to disturb those findings on review. However, pursuant to § 8-43-301(8), C.R.S., we have authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

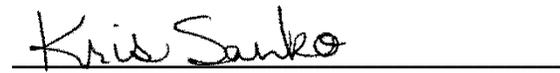
The parties here do not dispute that the claimant was employed at a Popeye's restaurant when he sustained an injury on April 14, 2014. However, Popco contends the ALJ erred in finding the claimant was its employee because it no longer operates the Popeye's stores. Popco submitted documentation to the ALJ showing the sale and transfer of the Popeye's stores to HZ Foods. Although this evidence did not persuade the ALJ that the claimant did not sustain a compensable injury, the evidence does raise a conflict in the evidence as to the identity of the liable entity that was not resolved. We also note that the Division of Workers' Compensation website for insurance coverage verification (<https://www.colorado.gov/pacific/cdle/node/20371>) indicates that HZ Foods, LLC had workers' compensation coverage in place for various Popeye's locations as of the date of the claimant's injury. See C.R.E. 201(b)(2), which permits an ALJ to take administrative notice of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *In Re Interrogatory by Governor Romer*, 814 P.2d 875 (Colo. 1991)(this rule generally permits judicial officers to notice matters of public record).

Because the ALJ's findings do not resolve the conflicts in the evidence regarding the correct employer, we remand the matter for further proceedings to resolve these conflicts. The record shows that this matter was initiated by a workers' claim for compensation against "Popeye's 4903." It does not appear that a claim has been initiated against HZ Foods, LLC. The parties are advised to contact the Division of Worker's Compensation in order to start the claim process against HZ Foods, LLC and to ensure that HZ Foods is provided with proper notice of the proceedings. Section 8-43-211(1) C.R.S.; See *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990). In remanding the matter we should not be understood as expressing any position on the ALJ's resolution of the pertinent factual issues.

IT IS THEREFORE ORDERED that the ALJ's order dated March 13, 2015, is set aside and remanded for further proceedings consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


Kris Sanko

JUAN J PUENTE
W. C. No. 4-962-847-01
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CERTIFICATE OF MAILING

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

_____ 7/17/2015 _____ by _____ RP _____ .

JUAN J PUENTE, 8290 FEDERAL BLVD APT 113, WESTMINSTER, CO, 80031 (Claimant)
POPCO ENTERPRISES LLC, Attn: ATTN: NICK AMIRIAN, 1451 CORDOVA AVENUE,
GLENDALE, CA, 91207 (Employer)
ALJ CANNICI, % OFFICE OF ADMIJNISTRATIVE COURTS, ATTN: RONDA
MCGOVERN, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-952-153-01

IN THE MATTER OF THE CLAIM OF
KEITH SANCHEZ,

Claimant,

v.

FINAL ORDER

HONNEN EQUIPMENT COMPANY,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated February 9, 2015, that denied and dismissed his claim for benefits. We affirm.

The matter went to hearing on the issues of compensability of the claimant's right knee injury, medical benefits, and temporary partial disability (TPD) benefits. After the hearing, the ALJ found that the claimant worked for the employer as a crane technician. The claimant's job duties involve general maintenance and repair of large, hydraulic crane mechanisms.

On May 13, 2014, the claimant was repairing the hydraulic suspension struts on a crane. He had been working on the same piece of equipment for approximately one week. The claimant repeatedly crawled underneath the crane to align the bolts that attach the struts. He was kneeling and standing during the repair. While the claimant was down on both knees, he tried to stand up and his right knee popped. As he attempted to walk it off, his knee continued popping and grinding. The claimant reported his injury to the service manager, and he was directed to seek medical treatment.

The claimant subsequently was examined by Dr. Ladwig. X-rays revealed no acute findings in the claimant's right knee. Dr. Ladwig diagnosed the claimant with a right knee strain and determined there was a greater than 51% probability that his strain was a work-related injury or condition.

Thereafter, the claimant underwent a right knee MRI. The MRI revealed multiple ligament strains and a mostly horizontal tear of the medial meniscus.

The claimant then was examined by Dr. Failinger. Dr. Failinger diagnosed the claimant with a “right knee, complex tear of the medial meniscus, posterior horn.” Based on the claimant’s presentation, pain symptoms, and MRI findings, Dr. Failinger recommended right knee surgery.

Dr. Hattem subsequently performed a physician advisor review. He determined that the claimant merely “stood up” from a seated position and injured his right knee. Dr. Hattem opined that the mere act of standing up would not be expected to cause a meniscus tear. He concluded that the claimant did not suffer a work-related injury to his right knee.

At the request of the respondents, Dr. Lindberg performed an independent medical examination of the claimant. Dr. Lindberg agreed with Dr. Hattem that standing up and feeling a right knee pop would not likely have caused the claimant’s meniscus tear. Dr. Lindberg testified that the specific tear sustained by the claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather, he opined that the claimant exhibited a horizontal, internal tear, also known as a shear tear, which as a general rule, is chronic and not acute. Further, the symptoms from a shear tear manifest as popping and grinding when the patient is using the knee for walking, standing, kneeling, or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. Further, Dr. Lindberg commented that there was a 0% chance that the claimant’s right knee strains revealed on the MRI were caused by standing from a kneeling position. Dr. Lindberg also testified that the claimant’s description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. According to Dr. Lindberg, there simply was no mechanism of injury described in the medical records that accounted for the claimant’s injuries. Dr. Lindberg also summarized that there was no evidence that the claimant sustained an acute aggravation of the meniscus tear or any other condition in the right knee that caused or accelerated his need for medical treatment.

The ALJ ultimately determined that the claimant failed to establish he sustained a compensable right knee injury on May 13, 2014, during the course and scope of his employment. Crediting the opinions of Dr. Lindberg, the ALJ found that there was no mechanism of injury described in the medical records that accounted for the claimant’s injuries, and that the claimant’s description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. The ALJ also found that “Dr.

Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis." The ALJ therefore denied and dismissed the claimant's request for medical and TPD benefits.

I.

On appeal, the claimant argues that the ALJ erred in allowing the respondents to question him during the hearing regarding a prior felony conviction. The claimant contends that his felony conviction occurred more than five years before he gave his testimony. The claimant further argues that the admission of this evidence improperly impacted the ALJ's credibility determinations. In support of his contention, the claimant attaches an Exhibit to his Brief that he contends substantiates his argument and requests us to take judicial notice of the document under CRE 201. We cannot consider the Exhibit attached to the claimant's Brief since it was not presented to the ALJ for his consideration during the hearing. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995)(appellate review limited to the record before the ALJ). Nonetheless, we conclude that no reversible error occurred here regarding the claimant's prior felony conviction.

Section 13-90-101, the statutory provision governing admissibility of felony convictions, provides in pertinent part as follows:

In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony. *Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible in evidence in any civil action.* (emphasis added)

Thus, §13-90-101, C.R.S. permits a party to introduce evidence of a felony conviction "for the purpose of affecting the credibility of such witness." This inquiry, however, is typically limited to the name of the offense and a brief recital of the circumstances. *People v. Clark*, 214 P.3d 531, 539 (Colo. App. 2009), *aff'd*, 232 P.3d 1287 (Colo. 2010); *see also People v. Lane*, 343 P.3d 1019 (Colo. App. 2014); *see also Whitlock v. Leon Walker*, W. C. No. 4-254-861 (Dec. 29, 1998). But, the statute also

prohibits introduction of evidence of a felony conviction which occurred "five years prior to the time when the witness testifies" in any civil action. The language of the statute is mandatory and not discretionary. *See Havens v. Hardesty*, 43 Colo. App. 162, 600 P.2d 116, 119 (1979); *see also Fisher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 57 (Colo. App. 2015).

Here, during the hearing, the following colloquy occurred during the respondents' cross-examination of the claimant:

Q Have you been convicted of any felony crimes in the last five years?

[CLAIMANT'S COUNSEL]: Objection as to relevance and – well, objection to relevance.

[RESPONDENTS' COUNSEL]: It's a credibility issue, Your Honor. We're absolutely allowed to ask about felony convictions.

THE COURT: Well, certainly has (sic) long as [respondents' counsel] has a good faith basis for this, which I assume she has, she's certainly allowed to inquire about felony convictions if they exist. They are used in evaluating credibility.

And so, [respondents' counsel] you pay (sic) proceed.

Q [By respondents' counsel] So have you had any felony convictions in the last five years?

A Yes.

Q Okay. And what were those for?

A Drugs.

[CLAIMANT'S COUNSEL]: So object to relevance, Judge.

[THE COURT]: Okay. It's noted for the record. But felony convictions are – can be used to evaluate credibility.

Q [By respondents' counsel] How many convictions did you have for drugs? How many felony convictions did you have –

A Three.

[CLAIMANT'S COUNSEL] Same objection, Judge.

THE COURT: Okay. I'll note a continuing objection, [claimant's counsel].

Q [By respondents' counsel] And did you have any felony convictions that were not drug related crimes?

A No.

Q Okay.

A Actually, I'm trying to think if I've had any convictions in the last five years. What is this, 2014? So the last one I had was 2008.

Q Okay.

A So that's six years.

Q Now you testified that you recognized your handwriting on the form that you filled out at Dr. Falinger's office, that's in the Claimant's exhibit packet, correct?

Tr. at 28-29.

Evidence of the claimant's prior felony conviction that occurred six years prior to the time he testified was inadmissible under §13-90-101, C.R.S.¹ However, the respondents' counsel only inquired whether the claimant had any felony convictions in the past five years, which was consistent with the requirements of §13-90-101, C.R.S. Further, the ALJ is presumed to have considered and applied the relevant legal principles including those under §13-90-101, C.R.S., and, as such, we deduce this was his basis for stating that the claimant's prior felony convictions in the past five years were admissible for credibility. *See Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office*, 85 P.3d 619 (Colo. App. 2003). Despite this question by the respondents' counsel, the claimant himself provided the testimony regarding his felony conviction that occurred more than five years prior to the time he testified. In *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002), the Colorado Supreme Court explained that "a cardinal rule of appellate review applied to a wide range of conduct" is invited error. Under this doctrine, "a party may not complain on appeal of an error that he has invited or injected into the case; he must abide by the consequences of his acts." *Id.* Since the claimant voluntarily offered testimony regarding his 2008 felony conviction, despite the fact that defense counsel did not inquire about such a felony conviction, the claimant is precluded from now complaining on appeal of the error he invited. Consequently, we will not set aside the ALJ's order on this ground.

II.

Next, the claimant argues that the ALJ erred in finding and concluding that Dr. Failinger did not express a causation opinion when, in fact, he specifically identified the meniscal tear as a work-related injury. We are not persuaded to disturb the ALJ's order on this ground.

The weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The ALJ may accept all, part, or none of the testimony of a

¹ During the hearing, the respondents did not dispute the claimant's testimony that his prior felony conviction occurred six years prior to the hearing. Tr. at 28-29.

medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Moreover, the existence of evidence in the record, which if credited, might support a contrary result does not establish grounds for appellate relief. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Here, to the extent there is a misstatement in the ALJ's order regarding Dr. Failinger's opinion on work-relatedness, we perceive no reversible error. Specifically, the ALJ found that "Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis." Findings of Fact at 4, 5 ¶¶14, ¶17; Conclusions of Law at 8. While Dr. Lindberg testified that Dr. Failinger did not address whether the claimant's condition was work-related, Exhibits admitted by the claimant during the hearing indicate that Dr. Failinger summarily concluded that the injury was work-related without any analysis. Tr. at 40; Ex. 3 at 1, 6, 8. Our review of the ALJ's order convinces us, however, that any misstatement regarding Dr. Failinger's opinion on work-relatedness does not amount to prejudicial error. *See* §8-43-310, C.R.S. This is so because the ALJ's other findings reflect that the evidence complained of on appeal was not dispositive to the result the ALJ reached. Specifically, in determining that the claimant's injuries were not compensable, the ALJ relied primarily on other opinions asserted by Dr. Lindberg. As detailed above, the ALJ specifically credited Dr. Lindberg's opinion that the claimant has a horizontal, internal tear and that, as a general rule, such a tear arises as a result of chronic and not acute conduct. He further credited Dr. Lindberg's opinion that there simply was no mechanism of injury described in the medical records that would account for the claimant's injuries, and that the claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. Findings of Fact at 5 ¶17. Under these circumstances, therefore, we are not persuaded to disturb the ALJ's order.

III.

Last, the claimant argues that the ALJ applied the wrong legal standard when determining compensability. Relying on the Colorado Supreme Court's opinion in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014), the claimant asserts that he has proven a compensable work injury as a matter of law. The claimant reasons that under *City of Brighton*, his type of injury involves employment or neutral risks. He contends that under either employment or neutral risks, his injury is compensable because it resulted from engaging in employment related functions. Alternatively, the claimant contends that the ALJ's findings and conclusions are insufficient to permit appellate

review on compensability since he did not identify the precipitating cause of the claimant's meniscal tear. We do not agree with the claimant's arguments.

To establish that an injury arose out of an employee's employment, there must be a "causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is generally one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). We must therefore uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. *Metro Moving v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Thus, the scope of our review is "exceedingly narrow." *Id.*

Additionally, in *City of Brighton*, the Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of Colorado's Workers' Compensation Act, §8-41-301(1)(c), C.R.S., and is thus compensable as a work-related injury. In that case, the Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. The Court held that the first category of risks encompass risks inherent to the work environment and are compensable, while the second category was not, unless an exception applies. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. Therefore, but for the requirements of the job, no one would have been struck by the lightning. The Court also further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are said to be "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. The Court also concluded that the but-for test does not relieve the employee of the burden of proving causation, nor does it suggest that all injuries which occur at work are compensable. *Id.* at 505.

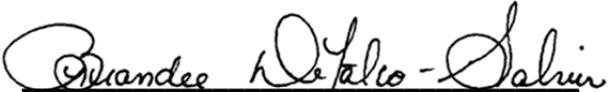
Initially, we conclude that the ALJ's findings and conclusions are sufficient to permit appellate review on compensability, and that the ALJ applied the correct legal standard when determining compensability. In his order, the ALJ held that the claimant had the burden to prove he suffered a disability that was proximately caused by an injury arising out of and in the course of the claimant's employment. Section 8-41-301(1)(c), C.R.S. Conclusions of Law at 6. To the extent the holding in *City of Brighton* applies in this action, as argued by the claimant, our review of the ALJ's order convinces us that he essentially classified the claimant's injury as falling within the second category of risks, or those injuries which result from inherently private or personal risks, and not those injuries that result from employment or neutral risks. Again, the ALJ credited Dr. Lindberg's opinion that the claimant's right knee condition was not caused by his work activities. The ALJ found that after Dr. Lindberg considered the claimant's description of the mechanism of injury- or standing up when he felt a pop in his right knee- and he opined that this would not constitute a sufficient amount of stress or force to cause the injuries to his right knee. In this regard, Dr. Lindberg testified that there would have to be a significant lateral force to the knee or a major stress medially – from lateral to medial of the knee, to cause the findings on the MRI. Tr. at 38-39. The Court in *City of Brighton* has concluded that inherently personal injuries, such as those which the claimant appears to have suffered, generally are not compensable, absent an exception.

Further, merely because the ALJ did not identify the exact precipitating cause of the claimant's meniscal tear once he determined it did not result from his work-related functions, or that the claimant had no pre-existing symptoms or prior treatment for his right knee, does not require us to set aside the order. As noted by the ALJ in his order, simply because an employee experiences symptoms after performing a job function does not necessarily create a causal connection based on temporal proximity. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *see also Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957)(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). The burden of proof remains on the claimant who must show a direct causal relationship between his employment and his injury, which the ALJ found that the claimant failed to do here. *See City of Brighton v. Rodriguez, supra* (recognizing the central holding in *Finn* -- that an injury due to a "mysterious innerbody malfunction" does not "arise out of" employment merely because that injury occurs at work -- is consistent with the Court's precedent regarding the non-compensability of idiopathic injuries); *see also Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (Oct. 27, 2008). Since substantial evidence supports the ALJ's order, we may not disturb it. Section 8-43-301(8), C.R.S.

KEITH SANCHEZ
W. C. No. 4-952-153-01
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IT IS THEREFORE ORDERED that the ALJ's order dated February 9, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

KEITH SANCHEZ
W. C. No. 4-952-153-01
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CERTIFICATE OF MAILING

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

_____ 8/10/2015 _____ by _____ RP _____ .

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

THE ELLIOTT LAW OFFICES, P.C., Attn: MARK D. ELLIOTT, ESQ., 7884 RALSTON
ROAD, ARVADA, CO, 80002-2434 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: LYNDA S. NEWBOLD, ESQ., 1401
17TH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-872-758-02

IN THE MATTER OF THE CLAIM OF

ROBERTA ZWANZIGER,

Claimant,

v.

FINAL ORDER

KING SOOPERS,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The claimant appeals the January 21, 2015, order entered by Administrative Law Judge (ALJ) Keith Mottram, which granted the respondent's motion for summary judgment and determined that the respondent was entitled to offset the claimant's receipt of social security widow's survivor benefits received due to age against temporary disability benefits. We set aside the ALJ's order.

The following facts are not disputed. The claimant began working for the respondent in 1997. The claimant's husband passed away in 2009. The claimant was awarded social security widow's benefits beginning in July 2009, pursuant to the "Old Age, Survivors and Disability Insurance Amendments of 1966, 42 U.S.C. §402 (e)." The claimant did not receive the social security widow's benefits on account of a disability. The claimant was born on December 25, 1944, and was 64 years old at the time she began receiving social security benefits.

The claimant sustained a compensable injury while working for the respondent on November 30, 2011, and began receiving temporary disability benefits. In 2013, the respondent found out that the claimant was receiving social security widow's benefits. On January 31, 2014, the respondent filed a final admission of liability identifying an overpayment of temporary disability benefits due to the claimant's receipt of social security benefits and taking credit for the overpayment against admitted permanent

partial disability benefits. The respondent argued that pursuant to *Hillery v. Three Aces, LLC*, W.C. No. 4-755-808 (January 14, 2011) and §8-42-103 (1)(c)(I), C.R.S. (Cum. Supp. 2011), the widow's benefits should be offset against temporary and permanent disability benefits. The ALJ agreed and granted the respondent's motion for summary judgment and held that the respondent was entitled to take the offset.

On appeal the claimant argues that the ALJ erred in his application of the offset statute and also contends that if the offset is appropriate, the amount of the resulting overpayment of temporary disability benefits was not clearly stated in the ALJ's Order. We agree with the claimant, that in the circumstances of this case, §8-42-103(1)(c)(I) does not provide for temporary disability benefits to be offset against the claimant's receipt of widow's survivor benefits that were not the result of a disability. We, therefore, set aside the ALJ's order. Section 8-43-301(8), C.R.S.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See* Office of Administrative Courts Rule of Procedure (OACRP) 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). In the context of summary judgment we review the ALJ's legal conclusions de novo. *See* A.C. *Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). Pursuant to § 8-43-301(8), C.R.S., we have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

Section 8-42-103(1)(c)(I), C.R.S. (Cum. Supp. 2011)(subsection (I)), allows the offset of "periodic disability benefits" against temporary and permanent disability benefits. Subsection (I) provides, in pertinent part:

(I) In cases where it is determined that "*periodic disability benefits*" granted by the federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965", Pub.L. 89-97, are payable to an individual and the individual's dependents, the aggregate benefits payable for temporary total

disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half the federal periodic benefit ... (*emphasis added*).

Section 8-42-103(1)(c)(II), C.R.S. (Cum. Supp. 2011) (subsection (II)), in contrast, allows for only permanent total disability benefits to be offset by “periodic benefits.” Subsection (II) provides, in pertinent part:

(II) In cases where it is determined that “*periodic benefits*” granted by the federal old-age, survivors, and disability insurance act or employer-paid retirement benefits are payable to an individual and the individual's dependents, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero...

The claimant contends that the use of the word “disability” in the first sentence of subsection (I) indicates the General Assembly’s intent to only allow an offset for federal “disability” benefits against temporary and permanent disability benefits. This is in contrast to subsection (II) which allows “periodic benefits” to be offset against only permanent total disability. The ALJ relied on the panel final order in *Hillery v. Three Aces, supra*, to conclude that subsection (I) allows for an offset in this case, regardless of whether the claimant received widow’s benefits as a result of a disability. In our view, the ALJ’s reliance on *Hillery* was misplaced and ignores the plain statutory language that makes a distinction in the types of federal benefits that may be offset against the different types of workers’ compensation benefits available.

In construing a statute we must determine and give effect to the intent of the General Assembly. We first resort to the statutory language, giving effect to the plain and ordinary meaning of the words used, and, as part of that task, we refrain from reading nonexistent provisions into it. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270, 273 (Colo. App. 2005). As the claimant argues, the General Assembly included the word “disability” in subsection (I) and omitted it in subsection (II). The purpose of the offset provision in subsection (I) is to prevent double awards “resulting when the payment” of the full amount of social security and workers’ compensation are for disabilities. See *Engelbrecht v. Hartford Accident and Indemnity Co.*, 680 P.2d 231, 233 (Colo. 1984)(cost of living increases to federal social security are not “periodic disability benefits” subject to offset). Neither the plain meaning of the statute, nor its underlying purpose, would be served if an offset under subsection (I) is permitted for widow’s benefits which are not payable on account of disability. Doing so would render the

General Assembly's use of the word "disability" in subsection (I) meaningless. *See also People v. Drennon*, 860 P.2d 589 (Colo. App. 1993)(it is presumed that the General Assembly intended every part of a statute to be effective); *Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350 (Colo. App. 1996)(it is presumed that every clause and sentence has a purpose and a use that cannot be ignored, and a construction that renders any provision unnecessary or insignificant should be avoided). We therefore do not think the reference to "periodic disability benefits" in subsection (I) was intended to refer to widow's benefits that were not received due to a disability. *Cf.* Section 8-42-103(1)(c)(II), C.R.S.

In *Olson v. Community Bank of Parker*, W.C. No. 4-173-012 (September 29, 1997), the panel addressed the issue of whether the claimant's receipt of widow's benefits due to her disability, could be offset against permanent total disability benefits under subsection (I). The claimant in *Olson* was awarded permanent total disability benefits in connection with a 1992 industrial back injury and also received "disabled widow's benefits" under 402 (e) of the Federal Old-Age, Survivors and Disability Insurance Act. The panel affirmed the ALJ's determination that subsection (I) allowed the respondents to take an offset in this circumstance. The panel noted that the claimant conceded that she was granted periodic benefits under the Act, thus, the issue became whether the widow's benefits were a "disability" benefit within the meaning of subsection (I). The panel concluded in *Olson* that the widow's benefits in that case were "disability" benefits.

The panel reasoned:

42 U.S.C.A. §402(e) of the Act ... provides that the surviving or divorced wife of an individual who died fully insured is entitled to "widow's insurance benefits" if the widow is at least 60 years old. A widow who is between age 50 and 60 may only receive "widow's benefits" if she is "under a disability" as defined by section 423(d).

Section 423(d) defines the term "disability" for purposes of social security disability insurance (SSDI) benefits. Further it is well established that SSDI benefits are a "periodic disability benefit" within the meaning of §8-42-103(1)(c)(I). *See Ihnen v. Western Forge, supra; Cody v. Industrial Claim Appeals Office*, 940 P.2d 1042 (Colo. App. 1996). It follows that, insofar as a "widow" is granted periodic social security benefits on account of a "disability" as defined by 423(d), the widow is receiving "periodic disability benefits" within the meaning of §8-42-103(1)(c)(I).

In the present case, as opposed to the claimant in *Olson*, the parties do not dispute that the claimant was 64 years old and did not receive widow's benefits due to a disability. The claimant in this case, therefore, is not receiving "periodic disability benefits" for purposes of subsection (I) and her temporary disability benefits are not subject to an offset.

In reaching a different result, the ALJ was persuaded by the respondent's contention that *Hillery v. Three Aces*, *supra*, was controlling. In our view, however, *Hillery* is not authority to the contrary and the reliance on that case in these particular circumstances is misplaced.

In *Hillery*, the respondents sought to offset the claimant's receipt of widow's benefits against permanent total disability benefits pursuant to subsection (II) of §8-42-103(I)(c), C.R.S. The panel specifically concluded that under subsection (II) the claimant's receipt of widow's benefits could be offset against permanent total disability benefits as a "periodic benefit." Although the panel went on to discuss subsection (I) in its opinion, stating that whether the claimant was disabled did not matter in *Hillery* because, "even if we agreed with the ALJ that the offset provisions under 42-103(1)(c)(I), (*sic*) disability statute are inapplicable to the present case, the respondents would still be entitled to an offset of §8-42-103(1)(c)(II)." The panel noted that it only discussed the offset provisions in §8-42-103(1)(c)(1) and §8-42-114, C.R.S. because the parties also referenced those provisions. The respondents in *Hillery* were seeking an offset pursuant only to subsection (II) and the panel's resolution of the issue was based on subsection (II) as evidenced by the statement that, "[i]n our opinion the provisions of §8-42-103(1)(c)(II) apply to the present case and entitle the respondents to an offset." The panel's discussion of subsection (I) in *Hillery* was addressed in conjunction with the claimant's argument that an offset under (II) could not be allowed when the claimant had not received disability benefits under subsection (I). However, as the panel recognized, the court of appeals rejected this argument in *Stolworthy v. Clark*, 952 P.2d 1198 (Colo. App. 1997).

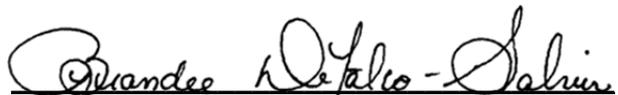
As we understand the *Hillery* opinion, the panel did not determine the outcome for the offset provision for section §8-42-103(1)(c)(I), and any mention of subsection (I) in this regard is, at best, dicta. See *Maryland Casualty Co. v. Messina*, 874 P.2d 1058 (Colo. 1994)(dicta is a determination not integral to the resolution of the issues before the court). We consequently disagree with the ALJ's and respondent's suggestion that the *Hillery* opinion expanded the scope of *Olson* and altered the plain language requirement

in the statute that the claimant be receiving “periodic disability benefits” in order to take an offset in subsection (I).

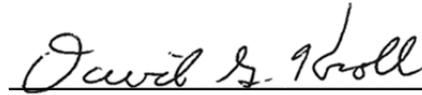
We, therefore, conclude that the ALJ misapplied the offset provision to the facts of this case and the order is set aside. Section 8-43-301(8), C.R.S. The respondent may not offset the claimant’s widow benefits, received due to age alone, against her entitlement to temporary disability benefits.

IT IS THEREFORE ORDERED that the ALJ’s order January 21, 2015, is set aside.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

ROBERTA ZWANZIGER
W. C. No. 4-872-758-02
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CERTIFICATE OF MAILING

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

_____ 5/14/2015 _____ by _____ RP _____ .

THE LAW OFFICE OF BARBARA J. FURUTANI, P.C., Attn: PENNY M. MERKEL, ESQ.,
1732 RACE STREET, DENVER, CO, 80206 (For Claimant)
THOMAS POLLART MILLER LLC, Attn: MARGARET KECK, ESQ., 5600 S. QUEBEC
STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-885-762-02

IN THE MATTER OF THE CLAIM OF
ELIZABETH CHAVEZ DE MEZA,

Claimant,

v.

FINAL ORDER

ST. ANTHONY HOSPITAL,

Employer,

and

INDEMNITY INSURANCE CO OF
NORTH AMERICA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated May 6, 2015, that granted the claimant's summary judgment motion and determined the respondents had waived their right to contest the right knee replacement surgery recommended by the claimant's authorized treating physician. We affirm.

The claimant sustained admitted bilateral injuries to her knees on January 16, 2012. The respondents' General Admission of Liability, which admitted for medical benefits and temporary total disability benefits, remains in force.

On October 10, 2014, the respondents filed an Application for Hearing, endorsing the following issue:

Respondents seek the entry of an order concerning the appropriateness, reasonableness, relatedness and necessity of surgery [a right knee replacement] proposed by Dr. Bagley.

On January 27, 2015, the parties entered into an agreement entitled "Stipulated Motion to Withdraw Hearing Application Without Prejudice." The Stipulation described the pending Application for Hearing as having endorsed the respondents' challenge to a recommendation for bilateral knee replacement surgeries. It stated that the left knee replacement surgery had been authorized and was to take place shortly before the

scheduled hearing. It also stated that the parties agreed to the withdrawal without prejudice of the respondents' Application for Hearing to contest the recommended right knee replacement surgery. The parties agreed that the issues would be held in abeyance until March 15, 2015. The parties' Stipulation was approved and made an Order of the Office of Administrative Courts.

Thereafter, on April 1, 2015, the respondents re-filed their Application for Hearing, endorsing the following issue:

Respondents seek the entry of an order concerning the appropriateness, reasonableness, relatedness and necessity of right knee replacement surgery proposed by Dr. Bagley.

The claimant then moved for summary judgment, arguing that it was undisputed that the respondents did not timely file their Application for Hearing to contest the right knee replacement surgery. The claimant contended that pursuant to the Stipulation, the respondents waived their right to challenge authorization of a right knee replacement surgery since they did not file their Application for Hearing by March 15, 2015.

In response, the respondents contended that equitable tolling should apply thereby preventing summary judgment from being entered in favor of the claimant. The respondents reasoned that they consistently and timely challenged the reasonableness and relatedness of the right knee surgery in accordance with statutes and rules, the request to continue the hearing was initiated by the claimant to permit the claimant sufficient time to heal, the initially agreed upon April 1, 2015, date for re-filing was moved to March 15, 2015, to accommodate the claimant's counsel's summer schedule, and the respondents filed their Application by the originally agreed upon April 1, 2015, deadline.

The ALJ subsequently issued his order granting the claimant's summary judgment motion. The ALJ found that there was no genuine issue of disputed fact with respect to the respondents' waiver of their right to contest the recommended right knee replacement surgery if they did not re-file their Application for Hearing on or before March 15, 2015. The ALJ found it was undisputed that the respondents did not re-file their Application for Hearing until April 1, 2015. The ALJ also concluded that the respondents' equitable argument was not well taken. The ALJ therefore concluded that the respondents' waived their right to contest the right knee replacement surgery and were liable to pay the costs of it.

The respondents have appealed, arguing that the ALJ failed to resolve factual issues in their favor. They assert that in ruling on the summary judgment motion, the ALJ was required, but failed, to resolve the following facts in their favor:

1. The ALJ improperly found that moving the re-filing date for the respondents' Application for Hearing from April 1 to March 15 was an "alleged" accommodation for the claimant's counsel's summer schedule; and
2. The ALJ improperly found that the March 15 re-filing date was "based on consideration flowing to Respondents and the Claimant."

The respondents further argue that the ALJ failed to address the following material facts raised in their response to the claimant's summary judgment motion:

1. The respondents contested the claimant's right knee surgery on multiple occasions in accordance with Rule 16;
2. The request to continue the hearing was initiated by the claimant's counsel to provide the claimant sufficient time to heal;
3. The Stipulation set a re-filing date to avoid indefinite delay of the hearing;
4. The initially agreed upon date for re-filing was April 1;
5. The April 1 date was pushed to an earlier date to accommodate the claimant's counsel's summer schedule;
6. The April 1 date was changed four days after the initial agreement was forwarded to the claimant.

The respondents further argue that each of these facts directly support their equitable argument. They also assert that due to a scheduling error, "the arbitrarily imposed deadline to refile the Application for Hearing was not changed on [counsel's] calendar." Brief at 2 ¶10. We perceive no reversible error.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See*

Office of Administrative Courts Rule of Procedure 17. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *See Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *see also 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). In the context of summary judgment, we review the ALJ's legal conclusions de novo. *See A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005).

It has long been held that 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). Further, pursuant to § 8-43-301(8), C.R.S., we have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

Here, it is true, as the respondents argue, that in his order, the ALJ stated that the respondents “admit that a previous deadline of April 1, 2015 was moved back to March 15, 2015 to *allegedly* accommodate the Claimant’s counsel,” and that the March 15 re-filing date was based on “consideration flowing to both parties.” (emphasis added) Order at 3, 5 ¶¶9, d. However, in his order, and consistent with well settled law, the ALJ expressly held that “[a]ll inferences are resolved against the Claimant and in favor of the Respondents.” Order at 3 ¶8. *Kaiser Foundation Health Plan v. Sharp, supra*. The ALJ is not held to a crystalline standard in expressing findings of fact and conclusions of law. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Regardless, our review of the ALJ’s order convinces us that in reaching his determination that the respondents were bound by the March 15 re-file date and failed to file their Application for Hearing by this date, the ALJ did not rely on these misstatements. Instead, in his order, the ALJ heavily relied on the language of the parties’ Stipulation, the Office of Administrative Courts’ approval of the Stipulation, the law governing stipulations and summary judgment motions, and the lack of disputed facts regarding the respondents’ waiver of their right to contest the right knee replacement since they did not re-file their Application on or before March 15, 2015. Order at 3, 4, 5 ¶¶15, 7, b, d. *Compare Godoy v. Custom Made Meals Corporation*, W.C. No. 4-915-606

(July 9, 2015)(summary order set aside where stipulation to hold hearing in “abeyance” not made part of the record and parties disputed when or if application for hearing required to be filed or whether issue was pending pursuant to §8-43-203, C.R.S.).

We similarly are not persuaded to disturb the ALJ’s order on the basis that the ALJ “failed to address material facts raised in [the respondents’] response” to the claimant’s summary judgment motion. Rather, we discern no disputed issue of material fact raised by the respondents in their Brief in Support and conclude that the ALJ properly applied the law governing stipulations and summary judgment motions when granting the claimant’s motion. It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *See Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). “A party’s participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein.” *USI Properties East, Inc. v. Simpson*, 938 P.2d at 173. Courts should give effect to stipulations, but “if there is a sound reason in law or equity for avoiding or repudiating a stipulation, a party is entitled to be relieved from its requirements upon timely application.” *Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co.*, 698 P.2d 1340, 1346 (Colo. 1985). Whether to relieve a party of a stipulation is within the discretion of the fact-finder. *Id.*

Here, as explained above, in his order, the ALJ focused on the language of the parties’ Stipulation, the Office of Administrative Courts’ approval of the Stipulation, and the law governing Stipulations and summary judgment motions, and found and concluded there were no disputed facts with respect to the respondents’ waiver of their right to contest the right knee replacement since they did not re-file their Application on or before March 15, 2015. Order at 3, 4, 5 ¶¶5, 7, b, d. We do not perceive any of the facts raised by the respondents in their Brief In Support as being material to whether they waived their right to re-file their Application. Rather, the following facts have no bearing on the respondents’ failure to timely re-file their Application for Hearing by March 15: (1) the respondents previously contested the claimant’s right knee surgery on multiple occasions; (2) the request to continue the hearing was initiated by the claimant’s counsel to provide the claimant sufficient time to heal; (3) the Stipulation to set a re-filing date avoided indefinite delay of the hearing; (4) the initially agreed upon re-filing date was April 1; (5) the March 15 date accommodated the claimant’s counsel’s summer schedule; and (6) the April 1 date was changed four days after the initial agreement was forwarded to the claimant. Instead, we are satisfied that the ALJ applied the correct law, the claimant met her initial burden of showing the lack of a genuine issue of material fact with respect to the respondents’ waiver of their right to timely re-file their Application by March 15 to

contest the right knee surgery, and the respondents failed to respond with facts sufficient to demonstrate the existence of a genuine issue of material fact.

To the extent the respondents rely on these omitted facts to argue that the ALJ erred in failing to apply the doctrine of equitable tolling, we are not persuaded there is any error. The Colorado Supreme Court has held that the equitable tolling of a statute of limitations is limited to situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts. *See Brodeur v. American Home Assur. Co.*, 169 P.3d 139, 149 (Colo. 2007); *see also Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo. 1996); *Garrett v. Arrowhead Improv. Ass'n*, 826 P.2d 850, 853 (Colo. 1992)(tolling statute of limitations period where employer failed to provide employee with report needed to file petition for workers' compensation); *First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197 (Colo. 1987) (holding statute of limitations period subject to equitable tolling for fraudulent concealment of facts underlying wrong); *Strader v. Beneficial Finance Co.*, 191 Colo. 206, 551 P.2d 720 (1976) (tolling statute of limitations where defendant-lender knowingly withheld statutorily required disclosure of true interest rate to plaintiff-borrower); *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968) (applying equitable tolling where plaintiff's mental incapacity, resulting from defendant's assault and battery, prevented timely filing of assault and battery charges). The Court has explained that the principle underlying equitable tolling is that a person should not be permitted to benefit from his or her own wrongdoing. *Dean Witter Reynolds, Inc. v. Hartman, supra*. In *Garrett*, for example, the Court applied the doctrine of equitable tolling in a workers' compensation claim where the claimant detrimentally relied on the respondent's misrepresentation or failure to provide information that the respondent was legally obligated to disclose.

Even assuming that the doctrine of equitable tolling could be applied to the parties' Stipulation here, the respondents have failed to allege any misrepresentation, or failure to provide information, or wrongful conduct on the part of the claimant or her counsel to warrant application of the doctrine. Neither the claimant nor extraordinary circumstances prevented the respondents from re-filing their Application for Hearing within the time set forth in the Stipulation. *See Sharp Bros. Contracting Co. v. Westvaco Corp.*, 878 P.2d 38, 44 (Colo. App. 1994) (rejecting equitable tolling where opposing party did not engage in any conduct which adversely affected the filing of defendant's claims); *Samples-Ehrlich v. Simon*, 876 P.2d 108, 110 (Colo. App. 1994) (equitable tolling inapplicable absent evidence to demonstrate that defendant's conduct adversely affected the filing of plaintiff's claim); *Overheiser v. Safeway Stores, Inc.*, 814 P.2d 12, 13-14 (Colo. App. 1991) (recognizing doctrine but holding it inapplicable to the facts).

ELIZABETH CHAVEZ DE MEZA

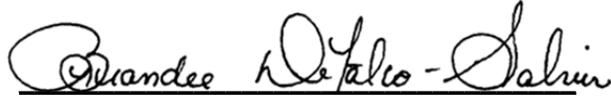
W. C. No. 4-885-762-02

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Rather, as conceded by the respondents in their Brief in Support, based on incorrect calendaring of the due date for re-filing the Application, this resulted in the respondents' waiver to contest the right knee surgery. In these circumstances, therefore, we are unable to say that the ALJ abused his discretion in failing to apply the equitable tolling doctrine or that there is any sound reason in law or equity for repudiating the Stipulation or to relieve the respondents of their requirements.

IT IS THEREFORE ORDERED that the ALJ's order dated May 6, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

ELIZABETH CHAVEZ DE MEZA
W. C. No. 4-885-762-02
Page 9

CERTIFICATE OF MAILING

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

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

ERICA WEST ATTORNEY AT LAW, Attn: ERICA WEST, ESQ., 837 EAST 17TH
AVENUE, SUITE 102, DENVER, CO, 80218 (For Claimant)
NATHAN DUMM & MAYER P.C., Attn: TIMOTHY R. FIENE, ESQ., 7900 EAST UNION
AVENUE, SUITE 600, DENVER, CO, 80237 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

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

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

Claimant,

v.

FINAL ORDER

JOSE ENRIQUEZ and JACK
SCHNEIDER FARMS, LLC,

Employer,

and

NON-INSURED and
PINNACOL ASSURANCE,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OACRP 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See* OACRP 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987).

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

I.

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

CERTIFICATE OF MAILING

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

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

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

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

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

PATTIE RAGLAND, P.C., Attn: PATTIE J. RAGLAND, ESQ., 105 E. MORENO AVENUE, P O BOX 2940, COLORADO SPRINGS, CO, 80901 (Other Party)

SENDER GOLDFARB & RICE, LLC, Attn: WILLIAM M. STERCK, ESQ., 3900 E. MEXICO AVENUE, SUITE 700, DENVER, CO, 80210 (Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF

AMY GORDON,

Claimant,

v.

FINAL ORDER

ROSS STORES INC.,

Employer,

and

ARCH INSURANCE COMPANY,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF

FELICIA JUSTINIANO,

Claimant,

v.

FINAL ORDER

FRIENDS TRADING COMPANY, INC.,

Employer,

and

PROPERTY & CASUALTY INS.
COMPANY OF HARTFORD,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TFCC tear. Active.

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

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

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

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

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

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

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

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

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

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

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

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

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

LAW OFFICE OF O'TOOLE AND SBARBARO, P.C., Attn: NEIL D. O'TOOLE, ESQ., 226
WEST 12TH AVENUE, DENVER, CO, 80204-3625 (For Claimant)

LAW OFFICES OF SCOTT TESSMER, Attn: MATTHEW C. HAILEY, ESQ., 6430 S.
FIDDLERS GREEN CIRCLE, SUITE 410, GREENWOOD VILLAGE, CO, 80111 (For
Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF
JECKONIAS MURAGARA,

Claimant,

v.

ORDER OF REMAND

SEARS ROEBUCK & CO,

Employer,

and

INDEMNITY INS CO OF NORTH
AMERICA,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JECKONIAS MURAGARA

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

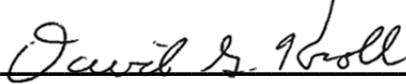
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Comm'rs v. Howard, 640 P.2d 1128, 1129 (Colo. 1982), the Colorado Supreme Court held that where necessary to stop an abuse of the judicial process, the Colorado Supreme Court has the power to enjoin a person from proceeding *pro se* in any litigation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

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

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

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

JECKONIAS MURAGARA

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

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CERTIFICATE OF MAILING

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

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

JECKONIAS MURAGARA, P O BOX 150702, DENVER, CO, 80215 (Claimant)

THOMAS POLLART & MILLER LLC, Attn: ERIC POLLART, ESQ., 5600 S QUEBEC ST
STE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

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

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF
PHIL PAVELKO,

Claimant,

v.

SOUTHWEST HEATING AND
COOLING, LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

FINAL ORDER

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

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

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

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

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

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

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

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

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

I.

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

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of an abuse of discretion, we may not disturb the ALJ's factual determinations. *Id.* The appellate standard on review of an alleged abuse of discretion is whether the ALJ's order exceeds the bounds of reason, as where it is contrary to the applicable law or not supported by substantial evidence in the record. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985). Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Under the substantial evidence test it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). The existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

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

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

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

II.

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

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

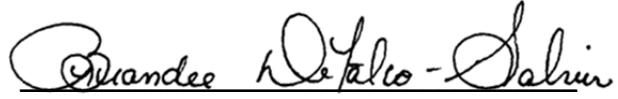
Here, the claimant sustained an injury on March 15, 2012, and the designated provider list was not sent until April 5, 2012. Because the designated provider list was not timely provided to the claimant, the plain language of the WCRP 8-2 dictates that the right of selection passed to the claimant. *See*,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

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

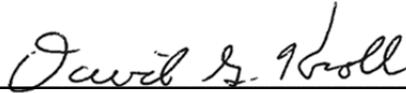
IT IS THEREFORE ORDERED that the ALJ's order dated April 25, 2015, is affirmed.

PHIL PAVELKO
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INDUSTRIAL CLAIM APPEALS PANEL

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Brandee DeFalco-Galvin

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

David G. Kroll

PHIL PAVELKO
W. C. No. 4-897-489-02
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CERTIFICATE OF MAILING

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

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

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY
BLVD., DENVER, CO 80230 (Insurer)
LAW OFFICE OF JONATHAN M. WARD, Attn: JONATHAN M. WARD, ESQ., 1825 YORK
STREET, DENVER, CO, 80206 (For Claimant)
RUEGGSEGGER SIMONS SMITH & STERN, LLC, Attn: KATHERINE H.R. MACKAY,
ESQ., 1401 SEVENTEENTH STREET, SUITE 900, DENVER, CO 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF
ALEJANDRO PAYAN,

Claimant,

v.

FINAL ORDER

VICTOR PAYAN d/b/a
PAYAN CONSTRUCTION,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

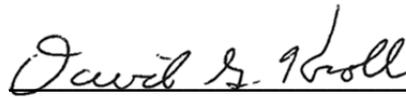
In our view the above findings constitute substantial evidence supporting the ALJ’s determination that the claimant was not an employee of Victor Payan at the time of his injury. Consequently, we perceive no basis upon which to set aside the ALJ’s order.

ALEJANDRO PAYAN
W. C. No. 4-920-556-02
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Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002); §8-43-301(8), C.R.S.

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

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

ALEJANDRO PAYAN
W. C. No. 4-920-556-02
Page 7

CERTIFICATE OF MAILING

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

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

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E LOWRY
BLVD, DENVER, CO, 80230 (Insurer)
JAMES E. FREEMYER, P.C., Attn: JAMES E. FREEMYER, ESQ., 1575 RACE ST,
DENVER, CO, 80206 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: H. ANDREW RZEPIENNIK, ESQ,
1401 17TH ST STE 900, DENVER, CO, 80202 (For Respondents)

15CA0086 Savidge v ICAO 06-11-2015

COLORADO COURT OF APPEALS

DATE FILED: June 11, 2015
CASE NUMBER: 2015CA86

Court of Appeals No. 15CA0086
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-620-669-14

Kathleen Savidge,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Air Wisconsin Airlines,
Inc.; and Insurance Company of the State of Pennsylvania,

Respondents.

ORDER AFFIRMED

Division III
Opinion by CHIEF JUDGE LOEB
Márquez* and Roy*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced June 11, 2015

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado, for
Petitioner

No Appearance for Respondents

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

In this workers' compensation action, claimant, Kathleen Savidge, seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel affirmed the order of an administrative law judge (ALJ) who declined to rule on the parties' dispute. The Panel also ruled that claimant's appeal was moot. We affirm.

I. Background

Claimant sustained an admitted, work-related injury to her arm in 2004. She reached maximum medical improvement (MMI) in 2005, but required ongoing medical maintenance care which employer, Air Wisconsin Airlines, Inc., provided. Claimant also suffers from several non-work-related ailments and receives Medicare and social security benefits for those conditions.

In 2011, the parties entered a settlement agreement by which employer agreed to pay claimant \$85,000 in exchange for claimant's settlement of her workers' compensation claim and waiver of all future benefits. The parties also agreed that employer would fund a Medicare Set-Aside Account (MSA) — a fund to pay for any future medical expenses arising out of claimant's work-related injury which Medicare, by statute, cannot cover. The agreement stated

that “[t]he MSA is to be administered by the Claimant.” Thirteen months later, the Centers for Medicare & Medicaid Services approved the proposed set-aside amount of \$101,785.

By then, however, claimant’s condition had worsened and she no longer felt capable of administering the MSA. She therefore asked employer to retain a third party administrator to manage the MSA. Employer refused and instead filed an application for hearing seeking to enforce the agreement.

The ALJ concluded, though, that issues concerning the MSA were “not within the purview of the ALJ’s jurisdiction.” He further noted that the provision was included in a portion of the settlement agreement, paragraph 9(B) that, by regulation, is separate from a workers’ compensation settlement agreement and is not subject to approval by the division of workers’ compensation (DOWC). *See* Dep’t of Labor & Emp’t Rule 7-2(A)(1), 7 Code Colo. Regs. 1101-3. Therefore, he denied and dismissed the parties’ request for relief under the MSA.

Both parties petitioned for review. But, after the petitions for review had been filed, employer agreed to “have the MSA professionally administered as requested by Claimant at the

hearing before the Court.” Employer therefore noted that the dispute concerning the administration of the MSA had become moot and withdrew its petition to review. Claimant, however, refused to withdraw her petition to review.

On review, the Panel held that the ALJ had correctly determined that he lacked jurisdiction to address the parties’ dispute over administration of the MSA. The Panel also held that because claimant “no longer has an injury in fact[, she] has no standing to maintain her appeal.” The Panel therefore “left undisturbed” the ALJ’s order.

II. Analysis

On appeal, claimant contends that the ALJ erred in concluding that he lacked jurisdiction to address the parties’ dispute over administration of the MSA. She argues that the agreement concerning the fund should be considered part of the parties’ settlement agreement, even though workers’ compensation rule of procedure 7-2(A)(1) expressly states that such agreements are not subject to DOWC approval. In addition, she urges this court to disregard an earlier Panel decision, *Pankratz v. Hancock*

Fabrics, W.C. No. 4-653-869 (March 25, 2011), that also concluded an ALJ lacked jurisdiction to approve or amend an MSA agreement.

We need not reach these arguments, however, because we agree with the Panel that the issue is moot. “A question is moot if its resolution cannot have any effect upon an existing controversy.”

Duran v. Indus. Claim Appeals Office, 883 P.2d 477, 485 (Colo. 1994); see also *In re Marriage of Wiggins*, 2012 CO 44, ¶ 16; *Reserve Life Ins. Co. v. Frankfather*, 123 Colo. 77, 79, 225 P.2d 1035, 1036 (1950).

Claimant does not dispute that the issue she raises is moot. Rather, she contends that the issue is one of great public importance which should be addressed regardless of its mootness here. Mootness has been disregarded if a controversy raises a matter that greatly impacts the public. See *Forbes v. Poudre Sch. Dist. R-1*, 791 P.2d 675, 676 n.2 (Colo. 1990) (“Because the question of the scope of the Board’s authority to order probation under the Teacher Tenure Act is a matter of great public importance and the exercise of that authority may occur on other occasions, we reject this argument.”).

We are not persuaded that the issue raised here rises to the level of great public importance meriting disregard of its mootness. Claimant argues that if she “submits her medical bills to the U.S. Social Security Administration (SSA) for payment when it is actually [employer’s] obligation to pay those bills, then this matter may end up in federal court with the SSA questioning why claimant is seeking to defraud the SSA.” She reasons that if the question of an ALJ’s jurisdiction over such disputes is not resolved, “it may trigger a severe and unintended consequence for claimants well beyond this workers’ compensation proceeding.”

However, the dispute between the parties concerned *by whom*, not *whether*, the MSA would be administered. The intent of administering the MSA, as we understand it, is specifically to ensure bills pertaining to claimant’s workers’ compensation injury are *not* submitted to SSA. Here, as claimant requested, employer agreed to have the MSA professionally administered. Any risk of the SSA bringing a fraud claim at this time is speculative.

Accordingly, the substantive issue raised in the application for hearing has been resolved. There being no dispute in controversy

to address, resolution of claimant's question will "have no effect on this legal controversy." *Duran*, 883 P.2d at 485.

The order is affirmed.

JUDGE MÁRQUEZ and JUDGE ROY concur.

14CA2023 McMeekin v ICAO 06-18-2015

COLORADO COURT OF APPEALS

DATE FILED: June 18, 2015
CASE NUMBER: 2014CA2023

Court of Appeals No. 14CA2023
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-384-910

Jane McMeekin,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Memorial Gardens,
and Reliance National Indemnity,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE GRAHAM
Webb and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced June 18, 2015

Steve U. Mullens, PC, Steven U. Mullens, Colorado Springs, Colorado, for
Petitioner

No Appearance for Industrial Claim Appeals Office

Thomas Pollart & Miller LLC, Brad J. Miller, Greenwood Village, Colorado, for
Respondents Memorial Gardens and Reliance National Indemnity

In this workers' compensation action, Jane McMeekin (claimant) seeks review of the order of the Industrial Claim Appeals Office (Panel) setting aside an order of an Administrative Law Judge (ALJ) awarding attorney fees to her. The ALJ assessed \$1323.10 in attorney fees against Memorial Gardens, and its insurer, Reliance National Indemnity (collectively employer) after finding that it endorsed an unripe issue on its hearing application in violation of former section 8-43-211(2)(d), Ch. 219, sec. 29, 1991 Colo. Sess. Laws 1319.¹ A Panel majority determined that the issue was ripe when employer endorsed it for hearing. We agree with that determination, and accordingly affirm.

I. Background

Claimant sustained an admitted work injury in 1997. Employer admitted liability for permanent partial disability benefits and medical maintenance benefits. Ongoing or future medical benefits after maximum medical improvement (MMI) (Grover

¹ The statute has since been renumbered and amended. See § 8-43-211(3), C.R.S. 2014. In its current form, the statute makes the sanction of attorney fees discretionary and only after the requesting party proves it first attempted to have the unripe issue stricken. It also excludes pro se parties from its application and expressly limits the reasonable attorney fees and costs to only those directly caused by the listing of the unripe issue.

medical benefits) may be awarded to relieve the injured worker from the effects of the work-related injury and to keep the worker at MMI. *See Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988).

In a prior appeal, a division of this court affirmed the denial of employer's 2011 request to end claimant's medical maintenance treatment. *See Memorial Gardens & Reliance Nat'l Indem. v. Indus. Claim Appeals Office*, (Colo. App. No. 12CA0951, Dec. 26, 2013) (not published pursuant to C.A.R. 35(f)). The division also affirmed the dismissal of several issues related to attorney fees, finding such issues interlocutory and not reviewable because the ALJ had not determined the fee amount to be awarded.

On remand, the ALJ entered an award of fees in the amount of \$2646.20. The ALJ previously determined that employer had endorsed two unripe issues for hearing, entitling claimant to her attorney fees and costs under former section 8-43-211(2)(d). The issues concerned apportionment² and authorized provider.³

² Employer denied liability for claimant's medical maintenance treatment on the grounds that it was necessitated by conditions other than the industrial injury. *See Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 866 (Colo. App. 2003) (ALJ may order payment for future medical treatment if there is substantial evidence in the record that such treatment is reasonably necessary to relieve the

On review of that order, the Panel determined that only the authorized provider issue was unripe and would support an attorney fee award. It, therefore, remanded the case to the ALJ to determine the amount of attorney fees to be awarded for that single unripe issue.

On further remand, the ALJ rejected claimant's request for \$26,462 in attorney fees. That amount included all fees and costs claimant incurred in preparing for and participating in the hearing that adjudicated employer's request to terminate medical maintenance benefits. The ALJ determined that the crux of the earlier case revolved around the ripe medical benefit issue. The ALJ noted that the issue of authorized treating physician and its ripeness represented a subsidiary issue discussed in only a single paragraph of four sentences in claimant's ten-page post-hearing

claimant from the effects of the industrial injury).

³ The term "authorized provider" refers not only to those providers to whom an employer directly refers a claimant, but also those providers referred by the authorized provider. *See Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515-16 (Colo. App. 2002). Further, under the Workers' Compensation Act, only treatment given by an authorized provider is compensable. *See Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277, 1280 Colo. App. 2008).

position statement and consequently found that claimant established no entitlement to the attorney fees and costs that were related to the ripe issues resolved. As a result, the ALJ awarded claimant only five percent of the attorney fees and costs she had requested, which totaled \$1323.10.

Employer and claimant petitioned for review by the Panel. Employer argued that the ALJ erred both in determining that the issue of authorized treating provider was unripe and awarding any attorney fees and costs. Claimant argued that she was entitled to the entire amount of attorney fees and costs she incurred in litigating her medical maintenance benefits even though only one endorsed issue was unripe. A majority of Panel members revised their previous analysis and reversed their determination that the authorized treating physician issue was unripe. Consequently, the Panel majority set aside the attorney fees and costs awarded to claimant and did not reach the issue related to the appropriate amount of fees and costs to be awarded.

Claimant appeals on both the ripeness issue and her claim to an award of the total attorney fees and costs she incurred in defending her medical maintenance benefits.

II. Ripeness

Claimant first contends that the Panel majority erred in determining that the issue of authorized provider was ripe for adjudication at the time employer endorsed it on its hearing application. Because we are persuaded by the Panel majority's analysis, we reject this contention.

Ripeness presents a legal question we review de novo. *Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 16.

Former section 8-43-211(2)(d) required the assessment of reasonable attorney fees and costs against any party requesting a hearing, or filing a notice to set, on issues which were not ripe for adjudication at the time of the request or filing. The statute authorized an award of only the reasonable attorney fees and costs incurred by the opposing party in preparation for such hearing or setting.

“Generally, ripeness tests whether an issue is real, immediate and fit for adjudication. . . . [A]djudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur.” *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). The existence of any

legal impediment to a determination of an issue renders an issue not legally ripe for adjudication. *Id.*

The ripeness inquiry weighs “whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all,” against the hardship posed by the withholding of court consideration. 13B Charles Alan Wright et al., *Federal Practice & Procedure* § 3532, at 365, 369 (3d ed. 2008). In the workers’ compensation realm, ripeness and groundlessness involve different considerations.⁴ As the Panel concluded, issues lacking merit do not necessarily lack ripeness, and a frivolous or meritless claim may nonetheless be ripe for adjudication.

Claimant urges that even if the Panel majority correctly found no legal impediment to resolving the authorized provider issue, that issue implicated only uncertain or speculative contingent matters and presented no real dispute at the time employer endorsed it for hearing. In support, she denies any inextricable connection

⁴ The Workers’ Compensation Act no longer authorizes an award of attorney fees and costs for the defense of a frivolous or meritless claim in proceedings before the ALJ. See Ch. 219, sec. 32, § 8-43-216, 1991 Colo. Sess. Laws 1321 (repealed effective March 1, 1996, as provided in subsection (3) of the statute).

between the authorized provider issue and the ripe issue of medical benefits and maintains that the Panel's reliance on hypothetical scenarios highlights both the distinct and uncertain nature of that issue. She contends that tying the authorized provider issue to the ongoing medical benefits issue, as employer has done, fails to establish its ripeness. Rather, she posits that employer's bootstrapping frustrates the Act's goal of delivering benefits quickly and efficiently at a reasonable cost and without the need to litigate, *see* section 8-40-102(1), C.R.S. 2014, because it neutralizes section 8-43-211(2)(d) as a sanction and allows an employer contesting causation to raise the authorized provider issue without any concern as to ripeness.

Instead, we agree with the Panel majority that the issue of authorized provider can include not only whether a specific provider falls within the chain of referral, but also whether the scope of the referral covers a particular treatment. *See Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008) (scope of referral limited to a trial treatment run and care provided beyond trial was unauthorized). In its hearing application, employer stated that it was challenging medical maintenance benefits on the ground

that claimant's current condition did not require the narcotic medications her authorized treating physician prescribed.

Employer requested that "everything be cut off based on the causation defense and based on the fact that it's not reasonable and necessary." Consistent with the Panel majority's analysis, we conclude that employer's challenge to claimant's medication regime encompassed the issue of whether claimant's treating physician had exceeded the scope of his authorization by treating symptoms not caused by the work injury. Employer's endorsement of the apportionment issue, which the Panel ultimately found to be ripe, buttresses this interpretation of employer's hearing application.

Unlike issues that are not ripe, the authorized provider issue here would not become more certain or less speculative with time. *See Olivas-Soto*, 143 P.3d at 1180; *BCW Enters., Ltd. v. Indus. Claim Appeals Office*, 964 P.2d 533, 538-39 (Colo. App. 1997) (insurer entitled to attorney fees under former section 8-43-211(2)(d) where claimant sought penalties for bad faith failure to pay benefits while appeal of issue was still pending; hence bad-faith issue was not yet ripe). On the contrary, the parties acknowledge that no impediment to adjudication of that issue existed when it was endorsed. But, in

addition, the factual circumstances concerning the issue, which claimant characterizes as speculative and contingent, would not become more certain or definite with time.

The dissenting opinion notwithstanding, we believe that the issue of authorized provider could not have been more ripe for hearing. *Franz v. Indus. Claim Appeals Office*, 250 P.3d 1284 (Colo. App. 2010), is instructive. There, a division of this court concluded that the issue for hearing involving the selection of a new authorized treating physician was ripe and would not support an attorney fee award even though an appeal of an order authorizing a change of physician was pending. *Id.* at 1289. The division based its conclusion on the fact that the medical utilization review process giving rise to the change of physician order was final and complete upon the selection of a new physician. *Id.* at 1288. It determined, therefore, that the issue of selecting a replacement physician following the first replacement's refusal to treat the claimant was ripe for adjudication regardless of the possibility the change of physician order could be reversed. *Id.*

In contrast to *Franz*, the facts here involve no contingency, even one so remote as the appeal pending in that case. Moreover,

employer risked waiving the authorized provider issue if it did not endorse it in its hearing application. *See Kuziel v. Pet Fair, Inc.*, 948 P.2d 103, 105 (Colo. App. 1997) (issue not asserted before the ALJ or included in the application for hearing was waived).

We also agree with the Panel majority that the more plausible conclusion to be drawn from the record is that employer presented the authorized provider issue as part of its case concerning the work relatedness of claimant's medical maintenance regime. But even if employer abandoned the issue, that action did not establish the absence of a real and immediate controversy at the time of the hearing application. The Panel majority correctly observes that former section 8-43-211(2)(d) limits its temporal focus to the date of the hearing application and does not apply to issues at any other stage in the hearing process. Relying on the statutory changes that eliminated attorney fees as a sanction for frivolous and groundless issues, it also correctly recognized that an issue supported by little or no evidence was beyond the scope of former section 8-43-211(2)(d).

As a result, we conclude that any failure to pursue the authorized provider issue for adjudication indicated at most only a

strategic decision. Even the Panel's dissenting member recognized that the authorized treating provider issue became significant only if employer succeeded on its claim that the medical maintenance treatment was unrelated to the work injury. Therefore, contrary to the dissent's analysis, any decision to abandon the issue, whether based on a reassessment of the likelihood of success on the merits, time constraints, or an absence of evidentiary support, did not measure ripeness for purposes of former section 8-43-211(2)(d).

III. Amount of Attorney Fees Recoverable

Claimant next contends that she was entitled to an award of all the attorney fees and costs she reasonably incurred in responding to the hearing in which unripe issues were endorsed. Because we have affirmed the Panel majority's order determining that employer endorsed no unripe issues for hearing, we do not need to decide this issue. For the same reasons, we need not decide whether former section 8-43-211(2)(d) authorizes an award of appellate attorney fees and costs.

The order is affirmed.

JUDGE WEBB and JUDGE TERRY concur.

14CA2045 Day v ICAO 08-06-2015

COLORADO COURT OF APPEALS

DATE FILED: August 6, 2015
CASE NUMBER: 2014CA2045

Court of Appeals No. 14CA2045
Industrial Claim Appeals Office of the State of Colorado
W.C. No. 4-916-749

Chad Day,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Yuma County,
Colorado; and County Technical Services, Inc.,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE FOX
Dailey and Lichtenstein, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 6, 2015

Bisset Law Firm, Jennifer Bisset, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claims Appeals Office

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., Cameron J.
Richards, Denver, Colorado, for Respondents Yuma County, Colorado and
County Technical Services, Inc.

In this workers' compensation action, claimant, Chad Day, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the denial of his request for medical benefits. An administrative law judge (ALJ) determined that the medical benefits claimant sought were unrelated to his admitted work injury. We affirm.

I. Background

Claimant is the elected sheriff of Yuma County, Colorado. In August 2012, he sustained an admitted injury to his lower back when a trained dog latched onto a dog sleeve claimant was wearing and swung him around, straining his back. Employer, Yuma County, and its insurer, County Technical Services, Inc. (collectively employer), sent claimant for treatment with an authorized treating physician (ATP). By November 2012, claimant's physical therapist reported that his pain was "less extreme than it ever has been" and that he had "reached the plateau in treatment."

Approximately three months later, however, claimant experienced a significant increase in pain. He described the incident as follows:

On the 5th of February [, 2013] I had gotten

up to -- again to go to my normal workouts. I was -- at that time I was working out five days a week at 6 in the morning. And I had basically just gotten out of bed and I grabbed a pair of shorts to put on to go to my workout. And as I lifted my left leg to put it in the left leg of the shorts, there was just a lightning bolt [and] it felt like that shot down my leg, my left leg. And it was severe enough that, you know, it caused me to kind of have to catch my breath. And from that point on I mean I couldn't -- it wasn't even a question about trying to put my other leg in the shorts. It was -- I mean it was just a constant lightning bolt it felt like running down my leg.

Claimant saw the ATP after the onset of pain, but she advised him that it was “doubtful this is related to his work injury, as he was having no radicular type symptoms since the initial injury.” An MRI showed disc degeneration at L4-5 and L5-S1, an annular tear at L4-5, and “a broad-based disc protrusion with a small central disc herniation.” Another MRI study revealed a central herniation at L4-5 and a left-sided L4-5 disc extrusion. A surgeon performed an L4-5 left-sided hemilaminotomy and discectomy about six weeks after the onset of claimant’s extreme pain. Claimant felt “significant improvement pain wise” immediately after the surgery.

Because the ATP determined the February onset of pain was unrelated to claimant’s work injury, claimant submitted the bills for

his surgery and treatment for his disc herniation to his personal insurance. Claimant paid the insurance co-pays and deductibles.

He later applied for a hearing on the issue of medical benefits. He argued that the disc herniation stemmed from his August 2012 work-related injury and therefore his ensuing medical treatment, including the hemilaminotomy and discectomy, should have been covered by workers' compensation. However, the ATP and an expert in physical medicine retained by employer opined that the treatment was more likely caused by claimant's "very high intensity" workouts, and consequently was unrelated to the August 2012 injury. In particular, employer's expert testified that claimant's August 2012 injury likely resolved by November 2012, and that the February 2013 onset of pain represented a new injury. Relying on these opinions, the ALJ determined that claimant's treatment for disc herniation, including the surgery, was unrelated to his work injury. She therefore denied and dismissed his claim for medical benefits. The Panel affirmed and this appeal followed.

II. Analysis

Claimant contends here, as he did before the Panel, that the ALJ lacked jurisdiction to conduct the hearing because a division-

sponsored independent medical examination (DIME) had not been performed. He argues that without a DIME, section 8-42-107(8)(b), C.R.S. 2014, prohibited the ALJ from hearing his claim for medical benefits. We disagree.

A. Governing Law

Under section 8-42-107(8)(b), hearings concerning disputes over maximum medical improvement (MMI) and permanent medical impairment “shall not take place until the finding of the independent medical examiner has been filed with the division.” § 8-42-107(8)(b)(III). “A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician’s finding of MMI[.]” *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515 (Colo. App. 2002). This requirement extends to constructive challenges to MMI, as well. *See Story v. Indus. Claim Appeals Office*, 910 P.2d 80, 82 (Colo. App. 1995) (claimant’s request for new physician was constructive challenge to MMI necessitating DIME before hearing could be held).

Not all disputes require a DIME before they may be heard by an ALJ. If MMI is not at issue, as when a claimant seeks a change in physicians before being placed at MMI, no DIME is required

before a hearing can be held. *See Ames v. Indus. Claim Appeals Office*, 89 P.3d 477, 479 (Colo. App. 2003). In addition, scheduled injuries may be heard in the absence of a DIME. *See Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000) (DIME is not “a prerequisite to hearing in cases that clearly involve only scheduled injuries”); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) (“Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. The question of causation is generally one of fact for determination by the ALJ.”). Nor is a DIME necessary to determine if a claimant’s condition has worsened warranting additional treatment. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002).

More importantly for our purposes, a dispute limited to threshold causation does not require a pre-hearing DIME. *See Faulkner*, 12 P.3d at 846 (no DIME needed and no presumptive weight granted DIME opinion where dispute concerned “the threshold question whether claimant had sustained any compensable injury arising out of and in the course of her

employment”). “Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. The question of causation is generally one of fact for determination by the ALJ.” *Id.* Even after an admission is filed, an employer can challenge whether a claimant has met his or her threshold burden. In such cases, an ALJ retains the authority to decide whether medical benefits are reasonable and causally related to a work injury. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997).

B. MMI Not in Dispute at Hearing

Claimant does not dispute that a DIME is unnecessary when MMI is not in dispute. Rather, he contends that employer raised a constructive challenge to MMI by challenging his need for additional surgery. As we understand claimant’s argument, he asserts that once the ATP placed claimant at MMI, a DIME was a prerequisite to any subsequent hearing addressing medical benefits. He points out that the ATP and employer’s retained physician reached conflicting opinions about when he reached MMI. This discrepancy, too, he suggests, necessitated a DIME before a hearing could commence. Claimant contends that by resolving the “conflicts in the evidence”

between the doctors' MMI opinions, the ALJ made a "constructive finding of MMI."

But, there is no discussion addressing MMI in the ALJ's order. The ALJ instead credited the opinion expressed by employer's retained medical expert that the symptoms claimant experienced in February 2013 were unrelated to his work injury, that his need for surgery was not causally connected to the work injury, and that his February 2013 disc herniation "was a result of his gym activities or natural degenerative process." MMI did not factor into the decision. We therefore disagree with claimant's characterization of the issue as a constructive challenge to MMI.

Moreover, the only issue claimant endorsed in his hearing application was medical benefits. At the hearing, the parties made clear that the sole issue to be decided was whether claimant's hemilaminotomy and discectomy were related to his work injury. Although MMI may have been discussed, whether and when claimant reached MMI was not an issue at the hearing. A DIME is unnecessary in such circumstances. *See Faulkner*, 12 P.3d at 846.

Accordingly, we agree with the Panel that the ALJ had authority to decide claimant's medical benefits issue. *See Ames*, 89

P.3d at 479; *Faulkner*, 12 P.3d at 846; *Snyder*, 942 P.2d at 1339.

The order is affirmed.

JUDGE DAILEY and JUDGE LICHTENSTEIN concur.