

# **BROWN BAG SEMINAR**

**Thursday, September 18, 2014**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

Sponsored by the Division of Workers' Compensation

**Free**

This outline covers ICAP and appellate decisions issued from

August 16 through September 8, 2014

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## INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-830-904-02

IN THE MATTER OF THE CLAIM OF  
STEPHANIE BISHOP,

Claimant,

v.

FINAL ORDER

CITY OF THORNTON,

Employer,

and

SELF-INSURED,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 26, 2014, that denied the claimant's petition to reopen. We dismiss the appeal, without prejudice, for lack of a final order.

The claimant worked for the respondent as a police officer. On July 3, 2010, she was injured while acting to apprehend a suspect. As a result, she sustained injuries to her head, right arm and right knee. The claimant was treated for symptoms of headaches, blurred vision and dizziness. Her treating physician, Dr. Raschbacher, determined the claimant was at maximum medical improvement (MMI) on January 3, 2011. He released her at that time to return to full duty employment. Dr. Raschbacher concluded the claimant had no permanent impairment and no need for maintenance medical care after MMI. A Final Admission of Liability was submitted by the respondent on January 13, 2011. No objection to the Final Admission was made by the claimant and the claim closed.

The claimant returned for treatment for her headaches and right arm injuries in April, 2011. The claimant treated with several physicians through 2013 for these injuries. The claimant made an application for medical retirement benefits from the Fire Police Pension Association (FPPA) in 2012. In support of her application, the claimant was required to be examined by three doctors. Dr. Henke, Dr. Murray and Dr. Messenbaugh all determined the claimant was suffering neurological and right arm symptoms due to

her work injury of July 3, 2010. The claimant's FPPA application was approved. In 2013, the claimant filed a petition to reopen her workers' compensation claim on the basis that her condition had changed for the worse since the date of MMI.

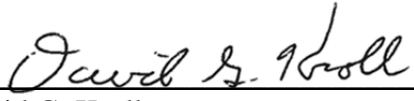
A hearing on the petition to reopen was convened by the ALJ on February 18, 2014. Relying largely on medical reports from Dr. Raschbacher, Dr. Bisgard and Dr. Mason, the ALJ observed that the claimant's symptoms and her disabilities were not related to the July 3, 2010, work injury. Finding that the claimant's condition as it pertained to her compensable work injury had not worsened, the ALJ denied the claimant's petition to reopen. At the outset of the February 18 hearing the parties stipulated that the only issue to be presented to the ALJ was that of reopening. That was also the only issue argued to the ALJ in post hearing position statements. The corresponding appeal to the panel references only the issue of reopening.

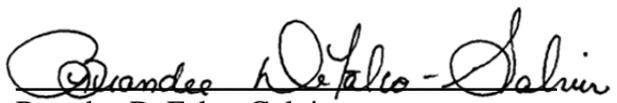
Under § 8-43-301(2), C.R.S., a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty," may file a petition to review. Consequently, orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to review. *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Under this rule, an order granting a petition to reopen which does not determine the claimant's entitlement to benefits is not final and reviewable. *Director of the Division of Labor v. Smith*, 725 P.2d 1161 (Colo. App. 1986). *Chapman v. Dow Chemical*, W.C. No. 4-402-842 (July 9, 1999). Here, the ALJ determined no issue other than that of reopening the claim. As a result, no order that required payment of any benefit, nor the denial of any benefit was entered. Accordingly, we do not have the ability to entertain a review of the ALJ's March 26, 2014, order.

**IT IS THEREFORE ORDERED** that the claimant's petition to review the ALJ's order dated, March 26, 2014, is dismissed without prejudice.

STEPHANIE BISHOP  
W. C. No. 4-830-904-02  
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INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

STEPHANIE BISHOP  
W. C. No. 4-830-904-02  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/22/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

STEPHANIE BISHOP, 5174 S UKRAINE ST, AURORA, CO, 80015 (Claimant)  
CITY OF THORNTON, C/O: CHRISTINE SCHNEIDER, 9500 CIVIC CENTER DRIVE,  
THORNTON, CO, 80128 (Employer)  
BURG SIMPSON ELDREDGE HERSH & JARDINE PC, C/O: NICK D FOGEL ESQ, 40  
INVERNESS DRIVE EAST, ENGLEWOOD, CO, 80112 (For Claimant)  
RITSEMA & LYON PC, C/O: PAUL KRUEGER ESQ, 999 18TH ST STE 3100, DENVER,  
CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-865-310-01

IN THE MATTER OF THE CLAIM OF

SCOTT CHAMBLESS,

Claimant,

v.

**CORRECTED FINAL ORDER**

HAMLIN ELECTRIC COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurer,  
Respondents.

This Corrected Order is entered pursuant to section 8-43-302, C.R.S., to correct an error in the certificate of mailing in our Final Order dated August 19, 2014.

The respondents seek review of an order of Administrative Law Judge (ALJ) Richard Lamphere dated April 3, 2014, that awarded the claimant temporary disability benefits and determined that the claimant was permanently and totally disabled. We affirm the ALJ's order.

A hearing was held on the issues of average weekly wage, temporary disability, permanent total disability, disfigurement and penalties against the respondents for alleged violation of Workers' Compensation Rule of Procedure (WCRP) 16. 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 left foot and ankle on December 28, 2009, when he fell approximately four feet onto this left heel and foot. The claimant was initially seen by Dr. John Reasoner who diagnosed a sprain and released the claimant to regular duty on February 18, 2010, with no permanent restrictions. The claimant was laid off from his job due to a reduction in work force on February 22, 2010, and has not worked since.

The claimant continued to have problems and was seen by Dr. Simpson on July

20, 2011. Dr. Simpson diagnosed “acquired pes planus deformity secondary to posterior tibial tendon dysfunction” which Dr. Simpson stated was caused by the injury and sent the claimant back to Dr. Reasoner to discuss care. Dr. Reasoner saw the claimant on September 28, 2011, and placed him on work restrictions. On November 2, 2011, Dr. Reasoner wrote to the insurer that the claimant continued to suffer from left foot pain and dysfunction and requested that the claim be reopened for surgical correction. The recommended surgery was finally performed on September 18, 2012. The claimant remained restricted from regular duty and was not offered modified employment. The claimant was eventually placed at maximum medical improvement on September 4, 2013, and given a 15 percent lower extremity rating. Based on these findings the ALJ determined that the claimant’s condition worsened as of November 2, 2011, and the claimant was entitled to temporary total disability until September 3, 2013.

The ALJ also found that at the time of hearing the claimant was 64 years old and had previously worked as a ground man and later as a journeyman lineman, installing, maintaining and repairing overhead and underground power lines. This work required the claimant to climb, walk, stand, work on uneven ground, kneel, crawl and lift up to 50 pounds. Dr. Reasoner imposed permanent restrictions which included a 40 pound limit on lifting, a 30 pound limit on carrying and a pushing/pulling limit of 50 pounds. The claimant was restricted from kneeling, climbing ladders and can only occasionally stair-climb, crouch, stoop and walk.

Dr. Hall testified at hearing explaining that the claimant’s surgery caused a disruption of the local anatomy which resulted in poor drainage of the lymphatic fluid from the lower extremity and that this edema causes the claimant pressure and pain. Dr. Hall also reported that the claimant suffers from bone pain with weight bearing and residual pain from the surgery itself. Dr. Hall also testified that the claimant had restrictions similar to those imposed by Dr. Reasoner in addition to the effects of the chronic pain syndrome which resulted in impaired sleep, depressed mood and daytime fatigue and noted that the claimant will require pain medication indefinitely. The ALJ found that Dr. Hall’s testimony was unrefuted and credible and persuasive.

The ALJ further found the claimant’s testimony credible that he must change positions frequently because fluid builds up in the claimant’s leg causing pain, frank deformity and alteration of his gait pattern that has resulted in pain in his left hip and low back. The claimant testified that he currently takes Oxycontin ER every 12 hours and Percocet five times a day to control his nerve pain and the pain caused by his swelling. Four of the claimant’s toes are numb, his foot drags and he has balance problems.

The ALJ also credited the opinion of Rodney Wilson, vocational expert, who concluded that given the claimant's restrictions, the claimant is incapable of earning a wage in competitive employment and is permanently and totally disabled. According to Wilson, the claimant was precluded from even sedentary positions because of his need to elevate his leg while lying down due to his edema and the inability to sit for extended periods of time. Wilson also noted that the claimant is on Oxycontin and Percocet which would preclude a position as a greeter for Wal-Mart as suggested by the respondents' counsel.

The ALJ further rejected the respondents' assertion that the claimant's impairment is related to a 1973 motorcycle accident or his fairly recently diagnosed Parkinson's Disease. The ALJ credited the claimant's testimony that although he suffered injuries in a 1973 motorcycle accident, he was able to work continuously as a lineman for the next 30 plus years until the most recent work-related accident. The ALJ also credited the claimant's testimony that his Parkinson's symptoms are under good control with medication and his most vocationally limited disabilities are related to his ankle injury and not Parkinson's.

Based on these findings the ALJ concluded that the claimant is permanently and totally disabled. The ALJ further concluded that the claimant's industrial injury is a significant causative factor in his inability to earn a wage and that his permanent and total disability flows directly from his work injury and not the 1973 motorcycle accident or his non-work-related Parkinson's Disease. The ALJ also denied and dismissed the claimant's claim for penalties and awarded \$3,500.00 in disfigurement benefits.

On appeal, the respondents renew the contention that the claimant's disability is caused by the claimant's 1973 motor vehicle accident and his Parkinson's Disease rather than his industrial disability and, therefore, the ALJ erred in awarding temporary disability and permanent total disability benefits. The respondents also contend that they were denied due process because of the ALJ's refusal to grant a continuance to allow them to obtain a vocational expert. We are not persuaded the ALJ committed reversible error.

## I.

To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1); *see Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo.

App. 2001). The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that the claimant present evidence of a medical opinion of an attending physician to establish his physical disability. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the claimant's testimony alone could be sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic, supra*. The second element is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete inability to work, or physical restrictions which preclude the claimant from securing employment. *See Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

We agree with the ALJ that the claimant here met his burden to prove both elements. The ALJ expressly credited the restrictions put into place by Dr. Reasoner, the unrefuted testimony of Dr. Hall detailing the claimant's loss of bodily function and restrictions and the claimant's own testimony regarding his ability to work. ALJ Order at 5-6 ¶ 5, 20, 21 and 23. The ALJ's findings in this regard are abundantly supported by the record. The respondents' contention on appeal that the claimant was going to retire or that he was capable of modified duty does not change this result. *cf. El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993) (voluntary retirement when claimant was temporarily partially disabled did not preclude award of temporary total disability benefits where claimant's condition worsened). Because the ALJ's findings are supported by substantial evidence, we have no authority to disturb them on review. Section 8-43-301(8), C.R.S.

## II.

For similar reasons we affirm the ALJ's determination on permanent total disability. Under the applicable law a claimant is permanently and totally disabled if the claimant is unable "to earn any wages in the same or other employment." Section 8-40-201(16.5), C.R.S. In determining whether the claimant has sustained his burden of proof, the ALJ may consider a number of "human factors" which include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" which the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, 955 P.2d at 558.

The industrial injury need not be the sole cause of the claimant's permanent and total disability. This is true because under the "full responsibility rule" an employer takes an injured worker as it finds him, and permanent total disability can be a combination of personal factors, such a pre-existing mental or physical condition and a work-related injury or disease. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (1991); *Casa Bonita Restaurant v. Industrial Commission*, 624 P.2d 1340 (Colo. App. 1981). The only exception to the rule is where the industrial injury is not a significant causative factor in the claimant's disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995). As stated in *Seifried*, the term "significant" means that there is a direct causal relationship between the industrial injury and the permanent total disability.

Whether a claimant is permanently and totally disabled is a factual question. Consequently, we are bound by the ALJ's findings of fact that are supported by substantial evidence in the record. Section 8-3-301(8), C.R.S.; *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994). Furthermore, in applying the substantial evidence test, we must defer to the ALJ's credibility determinations, his resolution of conflicts in the evidence, and the plausible inferences the ALJ drew from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) (Panel must view evidence in light most favorable to prevailing party and defer to plausible inferences drawn by ALJ).

Here, the ALJ credited the restrictions of Dr. Reasoner, Dr. Hall and the opinions of Wilson as a vocational expert. There is ample record support for the ALJ's findings in this regard. The respondents take issue with the fact that Wilson said the claimant's medications precluded him from taking a job as a greeter but did not distinguish whether the medications being taken were due to the industrial injury or due to the claimant's Parkinson's. Contrary to the respondents' assertion, the ALJ found that the claimant currently takes Oxycontin and Percocet because of his industrial injury. ALJ Order at 7 ¶20. Dr. Hall testified that he placed the claimant on Oxycontin and Percocet for his pain from the pressure of the edema and the bone pain with weight bearing. Tr. at 14. Moreover, Wilson specifically testified that the claimant's daily use of Oxycontin and Percocet would cause him to fail a drug test and cause him to be ineligible for a greeter position at Wal-Mart suggested as a possible employment by the respondents. Tr. at 60. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). We perceive no reason to interfere with the ALJ's findings concerning the opinions of Wilson.

Although the respondents presented no evidence of the claimant's 1973 motor vehicle accident or the claimant's Parkinson's Disease other than the questions elicited from Dr. Hall and the claimant on cross examination, the respondents nonetheless assert on appeal that the industrial injury is not the cause of the claimant's permanent disability. The ALJ, however, explicitly addressed the respondents' speculation concerning the 1973 accident and the Parkinson's Disease in his order. When asked about the possibility of the 1973 injury affecting the claimant's current impairment, Dr. Hall stated that it was very unlikely that the 1973 accident created any of the claimant's present impairment that he sees today. Tr. at 24. Thus, it was reasonable for the ALJ to infer that the claimant's ability to work for 30 plus years after the 1973 accident established that the claimant retained earning capacity prior to his industrial injury.

Moreover, the ALJ credited the claimant's testimony that his Parkinson's symptoms are under good control with medication and also reasonably inferred that his most vocationally limited ability are unquestionably related to his industrial injury and not Parkinson's, which primarily affect the claimant's right and left hand coordination. Tr. at 43. The ALJ's findings on these issues support the conclusion that the industrial injury was a significant causative factor in the claimant's permanent and total disability. The respondents, therefore, have failed to establish grounds which afford us a basis to set aside the ALJ's finding of permanent and total disability.

### III.

The respondents also contend that the ALJ erred in refusing to grant their motion to continue the hearing for purposes of obtaining a vocational rehabilitation evaluation. They argue that the ALJ's refusal to grant the motion for a continuance denied them their due process rights to present evidence and rebut the claimant's case concerning permanent disability. We disagree.

The record reveals that the claimant initially applied for hearing in November 2013, and indicated that permanent total disability was an issue. The respondents filed a "Motion for Extension of Time to Complete Hearing" on January 13, 2014, in order to schedule an appointment for a vocational assessment with Patricia Ancil. The claimant objected, contending that the respondents had ample notice of the issues for hearing and failed to present good cause to continue the hearing as required by §8-43-209(2), C.R.S. ALJ Stuber denied the motion to continue on January 27, 2014. The respondents did not request a continuance in front of ALJ Lamphere at hearing.

An ALJ may grant a continuance except upon a showing of good cause. Section 8-43-209(2), C.R.S.; OACRP 14. An ALJ is granted considerable discretion in the conduct of evidentiary proceedings, and we may not interfere with that discretion unless an abuse is shown. *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). The standard on review of an alleged abuse of discretion is whether, under the totality of circumstances, the ALJ's ruling exceeds the bounds of reason. *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985).

The respondents' arguments notwithstanding, it is apparent that ALJ Stuber denied the respondents' motion for failure to provide good cause. The respondents failed to state a good cause for a continuance of the hearing. The respondents had from November through January to schedule an appointment with a vocational counselor and offered no reason for their inability to do so during this time. Moreover, the respondents failed to request a continuance or offer good cause to at the hearing before ALJ Lamphere. Consequently, the respondents failed to preserve this argument for appellate review. *See Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988) (waiver may be established by conduct which evidences a party's intent to relinquish a known right); *Robbolino v. Fischer-White Contractors*, 738 P.2d 70 (Colo. App. 1987) (failure to object was waiver of objection to litigation of issue). Under these circumstances, we cannot say there was an abuse of discretion in denying the continuance.

#### IV.

The claimant requests attorney's fees and costs pursuant to 8-43-301(14), C.R.S. contending that the respondents' appeal was filed despite the lack of any evidence supporting their contentions. Pursuant to § 8-43-301(14), C.R.S., attorney fees and costs may be awarded against an attorney who submits a petition to review or brief in support of a petition which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Although the evidence supporting the respondents' contentions is sparse, we cannot say that the respondents' arguments are so lacking in merit that they may be classified as not well grounded in fact or law. We, therefore, decline to award attorney fees. *See BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997); *Brandon v. Sterling Colorado Beef Co.*, 827 P.2d 559 (Colo. App. 1991) (resort to judicial review is not considered frivolous or in bad faith as long as there is a reasonable basis for party to challenge the ALJ's order).

SCOTT CHAMBLESS  
W. C. No. 4-865-310-01  
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**IT IS THEREFORE ORDERED** that the ALJ's order dated April 3, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

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Brandee DeFalco-Galvin

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Kris Sanko

SCOTT CHAMBLESS  
W. C. No. 4-865-310-01  
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**CORRECTED**  
CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/22/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

SCOTT CHAMBLESS, 2729 ASHGROVE ST, COLORADO SPRINGS, CO, 80906  
(Claimant)

HAMLIN ELECTRIC COMPANY, 1204 EAST BURLINGTON AVE, FORT MORGAN, CO,  
80701 (Employer)

LIBERTY MUTUAL INSURANCE, C/O: TRACI GARDNER, PO BOX 168203, IRVING, TX,  
75016 (Insurer)

LAW OFFICES OF RENEE C OZER, C/O: RENEE C OZER ESQ, 18 EAST MONUMENT  
ST, COLORADO SPRINGS, CO, 80903 (For Claimant)

LEE & KINDER LLC, C/O: FRANK M CAVANAUGH, 3801 E FLORIDA AVE STE 210,  
DENVER, CO, 80210 (For Respondents)

## INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-892-164-04

IN THE MATTER OF THE CLAIM OF

ADAN GAYTAN FLORES,

Claimant,

v.

FINAL ORDER

NEEDHAM ROOFING, INC., RPM X 1000,

Employers,

and

COMMERCE & INDUSTRY INS. CO.,  
TWIN CITY FIRE INSURANCE/THE  
HARTFORD,

Insurers,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated April 28, 2014, that ordered the respondent employer and its insurer Commerce & Industry Insurance Co. to pay benefits to the claimant including temporary total disability benefits from May 19, 2012, and ongoing, and medical benefits to specified emergency medical providers. We affirm the order of the ALJ but for reasons different than those listed in the order.

The employer and its insurer Commerce & Industry Ins. Co. pursue an appeal arguing that the ALJ committed error when he did not attribute liability for workers' compensation benefits to The Hartford. There appears no dispute as to the facts found by the ALJ, but rather, to his legal conclusion that the Hartford was not required to honor a policy of workers' compensation coverage it initially provided to Needham Roofing's subcontractor, RPM X 1000, LLC.

The claimant was injured on May 19, 2012, when he fell 30 feet from a roof at a construction site in Tennessee. The claimant was an employee of RPM X 1000, performing roofing work. RPM X 1000 was a subcontractor of Needham Roofing, the general contractor on the project. Needham Roofing had subcontracted several roofing jobs with RPM X 1000. In August, 2011, Needham Roofing had requested from the RPM X 1000 owner, Raul Dominguez Martinez, proof of workers' compensation

insurance for its workers. Mr. Dominguez Martinez contacted an insurance agent in Texas, Tommy Parker, and applied for insurance coverage from The Hartford. The testimony of Mr. Dominguez Martinez and Mr. Parker diverged significantly as to the information provided in the process of the application. The ALJ found Mr. Parker's version credible and discounted that of Mr. Dominguez Martinez as being unreliable. Mr. Parker was informed RPM X 1000 was in the business of providing language translators for use on construction sites. He was told no employees would work at heights above 15 feet, that RPM X 1000 only had two employees and he was provided other facts about the business and the employees which were not accurate. Based upon this information, Mr. Parker obtained a policy from The Hartford and provided a certificate of insurance to be given to Needham Roofing identifying Needham as the certificate holder. Following the claimant's fall from the roof, The Hartford sent a Notice of Cancellation to RPM X 1000 due to fraud involved in the application for the policy. The Hartford would not have issued a policy for roofing work and its premium was calculated to apply to language interpreters. The Hartford took the position the insurance contract was void *ab initio*, from the point of its inception, and there was therefore, no coverage by The Hartford on the date of the claimant's injury.

A hearing in regard to the claimant's request for benefits was convened on March 17, 2014. The parties did not dispute that Mr. Dominguez Martinez procured a policy from the Hartford through fraud. The parties also did not argue that Needham Roofing was other than a statutory employer due to the ensuing lack of insurance coverage for RPM X 1000 pursuant to § 8-41-401(1) and (2) C.R.S. It was accepted that the claimant had sustained a compensable injury when he fell on May 19, 2012. The dispute in the claim turned on insurance liability. Commerce & Industry Ins. Co. contended the Hartford was bound to honor its certificate of insurance and its coverage policy because its agent, Mr. Parker, was provided apparent authority to issue those documents and thereby bound The Hartford to liability for workers' compensation benefits. The Hartford argues Commerce & Industry Ins. Co. does not have standing to challenge The Hartford's cancellation of its policy.

The ALJ found the claimant's injury compensable and ordered that temporary disability and medical benefits be paid. Liability was assessed to Needham Roofing as the statutory employer. The ALJ adopted the position of The Hartford. He ruled that pursuant to § 8-44-110, Commerce & Industry Ins. Co. did not have standing to challenge the cancellation by The Hartford of its policy with RPM X 1000. The ALJ, in addition, found that the listing of Commerce & Industry Ins. Co. on the certificate of insurance by The Hartford as a certificate holder did not provide Commerce & Industry Ins. Co. with any legal rights. Accordingly, the ALJ reasoned that The Hartford did successfully

cancel its insurance contract *ab initio*, premised as it was on fraud on the part of RPM X 1000. The ALJ ruled Commerce & Industry Ins. Co. was liable for the claimant's benefits as the insurer of the statutory employer.

The ALJ relied upon the authority of *First Comp Insurance v. Industrial Claim Appeals Office*, 252 P.3d 1221 (Colo. App. 2011) to conclude that Commerce & Industry Ins. Co. did not have standing "to contest The Hartford's denial of coverage under this claim." However, *First Comp* is inapposite to this claim. In that case, the insurance carrier for the subcontractor had cancelled its insurance coverage prior to the claimant's date of injury due to the nonpayment of premiums. The carrier for the statutory employer challenged the effectiveness of the cancellation due to a lack of compliance with the notice provisions provided by § 8-44-110. That section required the insurance carrier to provide notice of the cancellation by certified mail to the employer or its agent at least thirty days prior to the cancellation except in certain types of cases. The Court in *First Comp* observed that these notice provisions were solely for the benefit of the cancelled employer and injured workers. The legislation did not confer any benefits or rights on other insurers or employers. As a consequence, the carrier for the statutory employer did not have legislatively established standing to challenge compliance by the subcontractor's carrier with the cancellation procedures. However, in this case, Commerce & Industry Ins. Co. does not challenge the procedure employed by The Hartford to cancel its policy. In fact, it is not clear that Commerce & Industry Ins. Co. is challenging the ability of The Hartford to cancel its policy in any fashion. Nonetheless, to the extent Commerce & Industry Ins. Co. does complain The Hartford's policy cannot appropriately be cancelled for reasons apart from the procedure set forth in § 8-44-110, it would have standing to do so on the basis that it is a party that was injured 'in fact.'

To rule as broadly as the ALJ did here would allow any insurer of a subcontractor to cancel its policy after the fact of an injury on any basis whatsoever. Neither the subcontractor nor the injured employee would have standing to challenge the cancellation. This would be because they sustained no injury 'in fact,' The employee would receive benefits from the statutory employer's carrier and the subcontractor would have no liability at all. If the statutory employer or its carrier were precluded from challenging the justification for the cancellation due to an absence of standing, no party would be able to contest that cancellation and subsection (2) of § 8-41-401, would be rendered ineffectual. That subsection (2) provides that should a subcontractor insure its employees the contractor will not have liability for benefits. However, the routine cancellation of policies by subcontractor insurers would prevent the subsection from ever being applied.

Although Commerce & Industry Ins. Co. may have such standing, we understand its position to be that The Hartford made an agreement with Commerce & Industry Ins. Co. that it would insure RPM X 1000, and thereby relieve Commerce & Industry Ins. Co. of that obligation. Whereas The Hartford may have grounds to cancel its insurance contract due to the fraud of RPM X 1000, it is asserted The Hartford is still bound by the certificate of insurance it provided to Commerce & Industry Ins. Co.. Commerce & Industry Ins. Co. characterizes this obligation as one created by the apparent authority of The Hartford's agent to bind its principal. The argument is not actually one of apparent authority. The Hartford issued a policy of coverage for RPM X 1000. In this case the certificate of insurance does not offer any more assurance than does the policy itself. In *Chevron Oil Co. v. Industrial Commission*, 169 Colo. 336, 456 P.2d 735 (1969), the Supreme Court held that a binder backed up by a policy that had been cancelled due to nonpayment of premiums at the outset of the policy did not provide a contracting employer or its carrier any rights to rely on the binder. The policy was found to have been appropriately cancelled due to the absence of premiums. There was then, no coverage for the subcontractor on the date of the employee's injury. Regardless of the presence of the binder held by the contractor's carrier, the contractor and the carrier were liable as a statutory employer.

The binder having been extinguished by merger with the policy which was issued on July 14, 1965, no binder coverage existed on October 24, 1965; and, the policy having been cancelled "flat" [i.e. void from the inception of the policy] before October, no coverage was afforded by [the subcontractor's insurer] on the accident date. *Chevron Oil Co.*, 456 P.2d 735, at 737.

Commerce & Industry Ins. Co. argues that the certificate of insurance provided by The Hartford's agent served to form a contract between Commerce & Industry Ins. Co. and The Hartford. This is not an argument premised on apparent authority so much as it is an argument asserting there is a promissory estoppel or an equitable estoppel that should prevent The Hartford from escaping liability in this case. We recently dealt with a similar contention in *Hernandez v. MDR Roofing*, W.C. No. 4-850-627 (September 20, 2013). In *Hernandez*, the owner of a rental house, Hoff, arranged with Alliance to have roof work performed. Alliance contracted the work to MDR. A certificate of insurance for MDR was provided to Alliance by Pinnacol Assurance. However, that policy was later cancelled by Pinnacol *ab initio* due to fraud by MDR involved in its issuance. The

cancellation occurred after the date of an MDR employee's injury. After rejecting Hoff's standing to challenge the cancellation procedure employed by Pinnacol, it was acknowledged Hoff may have standing to argue a promissory estoppel. The elements of this concept were found to include:

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

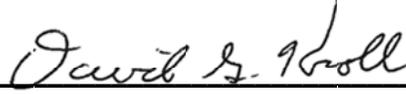
The element of reliance can be shown where a party alters his or her position as a consequence of another's conduct. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 77 n. 72 (Colo. 1996). Reasonable reliance is generally conduct or action that would be reasonable for a prudent person to do or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

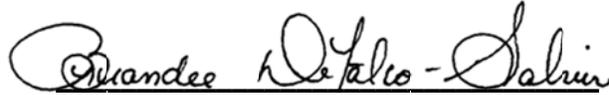
In this case the record contains no evidence to show there was detrimental reliance based upon the certificate of insurance provided by The Hartford. The testimony of Steven Needham, the owner of Needham Roofing, stated only that he told Mr. Dominguez Martinez he was required to have workers' compensation insurance. There was no testimony that RPM X 1000 would not be allowed to work on the Tennessee project if he did not provide a certificate of insurance. There was also no testimony that Needham Roofing failed to obtain its own insurance through Commerce & Industry Ins. Co. due to the presence of The Hartford certificate of insurance. Given this paucity of evidence there is no basis to find Needham altered its position in consequence of the certificate of insurance supplied by The Hartford. As a result, we cannot say that the estoppel assertion by Commerce & Industry Ins. Co. and Needham Roofing applies in this case to make The Hartford liable for the claimant's benefits.

Accordingly, we find no compelling reason to disturb the decision of the ALJ and therefore affirm that decision.

**IT IS THEREFORE ORDERED** that the ALJ's order issued April 28, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/21/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

ADAN GAYTAN FLORES, 14983 E 45TH AVE, DENVER, CO, 80239 (Claimant)  
NEEDHAM ROOFING, INC., RPM X 1000, 1850 N GREENVILLE #154, RICHARDSON,  
TX, 75081 (Employer)

COMMERCE & INDUSTRY INS. CO., Attn: ELIZABETH CONYERS, C/O: TWIN CITY  
FIRE INSURANCE/THE HARTFORD, PO BOX 25971, SHAWNEE MISSION, KS, 66225  
(Insurer)

KAPLAN MORRELL LLC, C/O: BRITTON MORRELL ESQ, PO BOX 1568, GREELEY,  
CO, 80631 (For Claimant)

SENER GOLDFARB & RICE LLC, C/O: WILLIAM M STERCK ESQ, 1700 BROADWAY  
STE 1700, DENVER, CO, 80290 (For Respondents)

HALL & EVANS LLC, 1001 17TH ST STE 300, DENVER, CO, 80202 (Other Party)

RPMX1000 LLC, 396 E SOUTHWEST PKWY NO 623, LEWISVILLE, TX, 75067 (Other  
Party 2)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-842-550-05

IN THE MATTER OF THE CLAIM OF  
LLUVIA GUTIERREZ,

Claimant,

v.

ORDER OF REMAND

STARTEK USA INC,

Employer,

and

WAUSAU UNDERWRITERS INSURANCE/  
LIBERTY MUTUAL,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated March 5, 2014, that awarded attorney fees and costs to the respondents and against the claimant pursuant to §8-43-211(2)(d), C.R.S. for raising an unripe issue in her application for hearing. We set aside ALJ Allegretti's order and remand for further findings and a new order.

It appears to be undisputed that on February 2, 2011, the claimant's authorized treating physician placed her at maximum medical improvement (MMI) with zero impairment. The respondents filed a final admission of liability (FAL) on March 24, 2011, admitting for zero percent impairment and no post-MMI medical benefits. The claimant filed an objection and request for a Division-sponsored independent medical examination (DIME). No DIME was set by the claimant.

ALJ Allegretti found that on September 2, 2011, the claimant instead filed an application for hearing, seeking penalties against two employees of the Division of Workers' Compensation DIME Unit for allegedly violating W.C.R.P. 11-3(N) and 11-10, and moved to add these two employees as parties. In an order dated December 7, 2011, ALJ Friend found that the employees could not have violated these pertinent sections and ruled that the claimant failed to state a claim for relief. ALJ Friend therefore, struck the application for hearing.

ALJ Allegretti also found that the claimant then filed another application for hearing and notice to set on December 19, 2011, listing the sole issue for hearing “[t]o review and reconsider ALJ Friend’s December 7, 2011 Order Striking Hearing Application dated September 2, 2011, in light of contrary binding precedent in *Jesus Munoz v. I.C.A.O.* (Colo. App. May 12, 2011).” The respondents filed a response to the claimant’s application for hearing, asserting that the claimant had waived the DIME process, and requested an order that the claim had closed.

Thereafter, on March 30, 2012, ALJ Friend denied reconsideration of his December 7, 2011, Order. ALJ Friend ruled that it did not appear that his prior December 7, 2011, Order had granted or denied any benefits, but if it had, then the claimant’s sole remedy was to seek review by the Industrial Claim Appeals Office by filing a petition to review. The claimant, however, never filed a petition to review.

ALJ Allegretti found the claimant was dissatisfied with ALJ Friend’s March 30, 2012, Order and, on April 20, 2012, she filed a request for specific findings of fact and conclusions of law, requesting a full order pursuant to §8-43-315, C.R.S. be issued. On April 25, 2012, ALJ Friend denied the claimant’s request for specific findings, ruling that the March 30, 2012, Order was not a summary order, was not subject to a request for specific findings, and the request was not made within seven working days of the date of mailing of the March 30, 2012, Order. He further ruled that his Order did not grant or deny a benefit or penalty and was not subject to a petition to review

Thereafter, on October 30, 2012, the respondents filed a petition to close claim asserting that more than six months had passed without the claimant prosecuting or performing any activity on her case. An order to show cause was filed on November 14, 2012.

ALJ Allegretti found that on December 14, 2012, the claimant filed another application for hearing, and listed the following as an issue to be heard: “To review and reconsider ALJ Friend’s Orders, 4/25/2012, 12/07/2011.” The respondents filed a response seeking penalties pursuant to §8-43-304(1), C.R.S. The respondents requested a penalty of \$1,000 per day from December 14, 2012, to ongoing on the grounds that the claimant filed another application for hearing after having her previous applications struck by the ALJ, and for “not following correct process and now bringing unripe issues.”

On January 11, 2013, the Director of the Division of Workers' Compensation issued an extension of time to show cause since the claimant filed an application for hearing.

On June 25, 2013, ALJ Allegretti entered a "Procedural Order Striking Hearing Application and Assessing Attorney Fees." In her Procedural Order, ALJ Allegretti ruled that the sole issue endorsed by the claimant in her December 14, 2012, application for hearing was merely procedural and not an issue subject to a hearing on the merits. Thus, ALJ Allegretti ruled that the claimant raised a matter that was not fit for adjudication and therefore struck her application for hearing. ALJ Allegretti also awarded attorney fees and costs to the respondents in preparing for the hearing pursuant to §8-43-211(2)(d), C.R.S. ALJ Allegretti ruled that the respondents did not submit an affidavit in support of reasonable attorneys' fees and costs. She therefore ordered the respondents to set a hearing on the matter of determining reasonable fees and costs.

A hearing ultimately was held on August 26, 2013, before ALJ Allegretti. Neither the claimant nor her former counsel appeared at the hearing. On March 5, 2014, ALJ Allegretti entered her order ordering the claimant to pay the respondents' attorney fees and costs pursuant to §8-43-211(2)(d), C.R.S. for raising an unripe issue in her application for hearing. The amount of fees and costs that ALJ Allegretti awarded totaled \$1,334.10.

The claimant has filed a petition to review. Through her new counsel, the claimant has filed a brief in support. In her brief in support, the claimant's new counsel argues that ALJ Allegretti erred in awarding attorney fees and costs against the claimant individually rather than against her former counsel who filed the application for hearing. The claimant also argues that since she did not have notice of the hearing on attorney fees and costs, then attorney fees and costs cannot be awarded against her. The claimant also argues that ALJ Allegretti violated the legislative directive contained in §8-43-201(1), C.R.S., in that she construed the facts liberally in favor of the rights of the employer. Because it is not clear whether ALJ Allegretti imposed fees against the claimant individually or against her former counsel, we remand the matter for further findings and a new order on this issue.

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.

In assessing attorney fees and costs, ALJ Allegretti applied the former version of §8-43-211(2)(d), C.R.S., which provided as follows:

If *any person* requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting. (emphasis added)

Section 8-43-211(2)(d), C.R.S. currently provides that attorney fees and costs may only be assessed against an attorney:

(d) If *an attorney* requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time the request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing or setting. The requesting party must prove its attempt to have an unripe issue stricken by a prehearing administrative law judge to request fees or costs. Requested fees or costs incurred after a prehearing conference may only be awarded if they are directly caused by the listing of the unripe issue. (emphasis added)

Section 8 of chapter 301, Session Laws of Colorado 2013, provides that the act amending subsection (2)(d) applies to claims in existence on or after July 1, 2013.

The former version of §8-43-211(2)(d), C.R.S. has been interpreted to allow for the imposition of attorney fees and costs against the “*person*” who has filed the application for hearing on an issue not ripe for adjudication. (emphasis added) In *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964 (Colo. App. 2012), for example, the Colorado Court of Appeals affirmed an order assessing attorney fees and costs against the claimant’s counsel, individually, because he had requested a hearing on an issue not ripe for adjudication in violation of the former version of §8-43-211(2)(d), C.R.S. See also *BCW Enters., Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997)(remanding matter for determination of attorney fees to be assessed against claimant's counsel pursuant to § 8-43-211(2)(d), C.R.S., which permitted recovery of fees for filing application for hearing on issues not ripe for consideration); see also *Morrow v. J.J. Maintenance*, W. C. No. 4-561-243 (Aug. 12, 2005)(respondents' counsel prematurely resorted to administrative process to resolve contention not legally postured for adjudication and became subject to attorney fees under §8-43-211(2)(d), C.R.S. as a result). Similarly, under the amended version of §8-43-211(2)(d), C.R.S., attorney fees

and costs may only be assessed against an “attorney” who requests a hearing on an issue that is not ripe for adjudication at the time the request is made. (emphasis added) See *Barrera v. v. ABM Industries, Inc.*, W.C. No. 4-865-048-03 (March 28, 2014)(applying amended version of §8-43-211(2)(d), C.R.S. and setting aside ALJ’s order awarding attorney fees and costs against *pro se* claimant for filing application for hearing on issues not ripe for adjudication).

Here, ALJ Allegretti’s findings of fact are not sufficient to permit appellate review. In her order, ALJ Allegretti found that the sole issue endorsed by the claimant in the December 14, 2012, application for hearing and notice to set was merely procedural and not an issue that was ripe for adjudication. While ALJ Allegretti appears to have found that the claimant was the “person” who filed the application for hearing on an unripe issue, the record instead demonstrates that the claimant’s former counsel was the “person” who filed the application. Additionally, in her order, ALJ Allegretti imposed attorney fees and costs against the claimant for violating the former version of §8-43-211(2)(d), C.R.S. ALJ Allegretti’s order, however, does not specifically state that she is imposing attorney fees and costs against the claimant individually, and it also does not state that she is imposing such fees and costs against the claimant’s former counsel. Additionally, in her order, ALJ Allegretti found that the claimant’s former counsel did not withdraw the unripe issue at a prehearing conference and, instead, sought to submit the matter on the briefs and exhibits. See amended version §8-43-211(2)(d), C.R.S. Based on these findings, it is not clear whether ALJ Allegretti assessed attorney fees and costs under §8-43-211(2)(d), C.R.S. against the claimant’s former counsel rather than the claimant individually. We may not make findings initially. Section 8-1-102, C.R.S. Therefore, it is necessary to remand the matter for further findings and a new order consistent with the view expressed herein.

Based on our holding above, we need not address the claimant’s remaining argument that the attorney fees and costs awarded against her individually must be set aside since she did not receive notice of the hearing on attorney fees. Additionally, to the extent the claimant requests that we remand the matter so that she can pursue the DIME, this issue is not properly before us. ALJ Allegretti’s order on review only addressed the issue of attorney fees and costs under §8-43-211(2)(d), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ’s order dated March 5, 2014, is set aside and the matter is remanded for further findings and a new order.

LLUVIA GUTIERREZ  
W. C. No. 4-842-550-05  
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INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

  
\_\_\_\_\_  
Kris Sanko

LLUVIA GUTIERREZ  
W. C. No. 4-842-550-05  
Page 7

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/29/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

LLUVIA GUTIERREZ, 409 E 22ND ST, GREELEY, CO, 80631-9038 (Claimant)  
STARTEK USA INC, C/O: BRAD SORENSON, 1250 H ST, GREELEY, CO, 80631  
(Employer)  
WAUSAU UNDERWRITERS INSURANCE/LIBERTY MUTUAL, C/O: NATOSHA ADGER,  
PO BOX 168208, IRVING, TX, 75016-8208 (Insurer)  
STEVEN U MULLENS PC, C/O: PATTIE J RAGLAND ESQ, PO BOX 2940, COLORADO  
SPRINGS, CO, 80901 (For Claimant)  
LAW OFFICES OF CHAD A ATKINS, C/O: MAUREEN A HARRINGTON ESQ, 5670  
GREENWOOD PLAZA BLVD STE 400, GREENWOOD VILLAGE, CO, 80111 (For  
Respondents)  
RICHARD K BLUNDELL ESQ, 1227 8TH AVE, GREELEY, CO, 80631 (Other Party)  
ALJ ALLEGRETTI, % OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA  
MCGOVERN, 1525 SHERMAN STREET, 4<sup>TH</sup> FLOOR, DENVER, CO 80203

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-917-273-01

IN THE MATTER OF THE CLAIM OF  
JUAN RIVERA,

Claimant,

v.

FINAL ORDER

CONWAY FREIGHT INC,

Employer,

and

INDEMNITY INSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 19, 2014, that denied and dismissed his request for a change of physician. We affirm.

The matter went to hearing on whether the respondents timely objected to the claimant's request for a change of physician pursuant to §8-43-404(5), C.R.S. After the hearing, the ALJ found that the claimant sustained a compensable industrial injury on April 22, 2013. The respondents directed the claimant to Concentra Medical Centers for treatment.

Ms. Krege was the adjuster handling the claim for the third-party administrator, and she wrote the claimant correspondence informing him she would be responsible for managing his claim.

During September and October 2013, the claimant communicated with Ms. Krege regarding his claim, and he also spoke to Nurse James throughout this period of time. The claimant had been pursuing his workers' compensation claim without the assistance of counsel. On September 18, 2013, however, his counsel filed an entry of appearance on behalf of the claimant.

Despite retaining counsel, the claimant continued to communicate directly with Ms. Krege and Nurse James regarding his concerns about returning to work and regarding physicians. The claimant did not advise Ms. Krege or Nurse James that he was represented by counsel.

Thereafter, on October 21, 2013, Ms. Krege received correspondence from the claimant's counsel, dated September 18, 2013, that included his entry of appearance and a power of attorney to receive and negotiate workers' compensation payments. Ms. Krege's claim note dated October 21, 2013, stated that she had received the entry of appearance, added the attorney information to the file, and provided that all further correspondence should be directed to counsel's office. In his correspondence dated September 18, 2013, the claimant's counsel also requested a change of physician to Dr. Orgel. The claim notes reflect that Nurse James began to research and schedule an appointment with Dr. Orgel. Ms. Krege, however, advised Nurse James that the respondents would not agree to a change of physician to Dr. Orgel.

On October 22, 2013, the claimant's counsel sent correspondence to the respondents stating that an appointment had been scheduled with Dr. Orgel for November 1, 2013. Counsel stated that he had requested a change of physician dated September 18, 2013, and that pursuant to §8-43-404(5)(a), C.R.S., the claimant would be visting Dr. Orgel.

Ms. Krege sent correspondence to the claimant's counsel on October 30, 2013, advising him that she had not received his September 18, 2013, letter until October 21, 2013. She also informed the claimant's counsel that the requested change of physician to Dr. Orgel was denied.

The ALJ ultimately entered his order denying the claimant's request to change physicians to Dr. Orgel. The ALJ found that the respondents timely objected to the claimant's request for a change of physician pursuant to §8-43-404(5), C.R.S. The ALJ found that Ms. Krege explained that mail is scanned into the computer on the date it is received. The ALJ found that the claim notes submitted by the claimant and Ms. Krege's testimony both reflect that counsel's entry of appearance and change of physician request letter were not received by Ms. Krege until October 21, 2013. The ALJ found that Ms. Krege advised the claimant's counsel, via correspondence dated October 30, 2013, which was within the 20 day statutory time period enunciated in §8-43-404(5), C.R.S., that the respondents would not agree to a change of physician to Dr. Orgel.

The claimant has appealed the ALJ's order denying his request for a change of physician to Dr. Orgel. The claimant argues that the ALJ erred in failing to address his second argument that the respondents had agreed to the change of physician, and that they should not be allowed to "unilaterally revoke their agreement." We are not persuaded the ALJ erred.

Section 8-43-404(5), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change physicians without permission from the insurer or upon the proper showing to the division. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Further, §8-43-404(5)(a)(VI), C.R.S. allows a claimant to obtain a change of physician by making a written request to the insurer. If the insurer fails to respond to the written request within twenty days, the insurer is deemed to have waived the right to object to the change and the physician selected by the claimant is authorized to treat the injury. *Gianetto Oil Co. v. Industrial Claim Appeals Office, supra*.

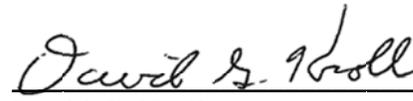
Moreover, an injured employee may engage medical services "if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion, or, with full knowledge over a sustained period of time, has failed to object to claimant's change of physician." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985).

Here, while the claimant contends the ALJ erred in failing to address his argument that the respondents had agreed to the change of physician, it is implicit in the ALJ's order that he rejected this argument. The ALJ was not obligated to specifically discuss and reject every contention that the claimant raised. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000)(ALJ under no obligation to address every issue raised and we may consider findings which are necessarily implied by the ALJ's order); *see also Jefferson County Public Schools v. Drago*, 765 P.2d 636 (Colo. App. 1988)(ALJ not required explicitly to reject unpersuasive arguments). Nevertheless, we conclude that the basis of the ALJ's order is apparent from his findings of fact. *Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992). In his order, the ALJ specifically ruled that the claim notes reflect that Nurse James began to research and schedule an appointment with Dr. Orgel. The ALJ found, however, that Ms. Krege advised Nurse James that the respondents would not agree to a change of physician to Dr. Orgel. Section 8-43-301(8), C.R.S.

In his brief in support, the claimant cites to claim notes from Nurse James in support of his argument that the parties had entered into an agreement for a change of physician. Again, the ALJ's findings demonstrate that he was not persuaded by this contention. The ALJ found, with record support, that the claimant's counsel sent correspondence to the respondents on October 22, 2013, which states that since the respondents had not sent a letter objecting to the claimant's request for a change of physician, that the claimant would be seeing Dr. Orgel pursuant to §8-43-404(5)(a), C.R.S. Ex. B at 2-3. Further, the ALJ found, with record support, that Ms. Krege sent correspondence to the claimant's counsel on October 30, 2013, advising him that she had not received his September 18, 2013, letter until October 21, 2013, and she informed him that the respondents were not authorizing treatment with Dr. Orgel. Ex. 1 at 1; Ex. 2 at 16; Findings of Fact at 6 ¶5. Section 8-43-404(5)(a)(VI), C.R.S. The claimant's argument notwithstanding, the record does not compel the conclusion that the respondents expressly or impliedly conveyed to the claimant the impression that he had authorization to change physicians. Section 8-43-301(8), C.R.S. Thus, we will not disturb the ALJ's order denying the claimant's request for a change of physician.

**IT IS THEREFORE ORDERED** that the ALJ's order dated March 19, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



\_\_\_\_\_  
David G. Kroll



\_\_\_\_\_  
Kris Sanko

JUAN RIVERA  
W. C. No. 4-917-273-01  
Page 6

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/12/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

JUAN RIVERA, 13036 E 106TH AVE, COMMERCE CITY, CO, 80022 (Claimant)  
CONWAY FREIGHT INC, C/O: ANGELA RILEY, 9801 DALLAS ST, HENDERSON, CO,  
80640-8464 (Employer)  
INDEMNITY INSURANCE, C/O: TRAVELERS-CARRIER No. 127-CB-EWU38589-M, PO  
BOX 173762, DENVER, CO, 80217 (Insurer)  
KAPLAN MORRELL PC, C/O: BRITTON MORRELL ESQ, PO BOX 1568, GREELEY, CO,  
80632 (For Claimant)  
RITSEMA & LYON PC, C/O: TAMA L LEVINE ESQ, 999 18TH ST STE 3100, DENVER,  
CO, 80202 (For Respondents)

## INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-929-714-01

IN THE MATTER OF THE CLAIM OF

CORY SAVAGE,

Claimant,

v.

FINAL ORDER

FIRST FLEET INC,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated March 26, 2014, that found the claim compensable and ordered the respondents liable for the medical treatment of the claimant's carbon monoxide poisoning. We set aside the order of the ALJ.

The claimant worked for the respondent employer as an over the road truck driver. The claimant had been driving regularly throughout the week prior to Friday, September 20, 2013. He reported his wife and son had been suffering from stomach flu that week. While driving he developed headaches and came to feel increasingly ill. On September 20, at approximately 7:00 p.m. he parked his truck at a truck stop near Colby, Kansas, adjacent to Interstate 70. He then went to bed in the cab with the truck motor left on as he often did. When he failed to contact his wife that evening by phone, she alerted the employer's dispatcher and informed them that in his last message the claimant stated he was feeling ill. On September 21, the employer located the claimant's truck and requested the highway patrol contact the claimant. The claimant was found by the patrol officer to be incoherent and largely unresponsive with emesis on his clothes. The claimant was transported by ambulance to the emergency room at Citizens Medical Center in Colby. Shortly thereafter, he was flown in a medical flight to Memorial Hospital in Colorado Springs. He was intubated with oxygen during the flight and then again at Memorial Hospital. The claimant was largely unconscious until he was revived at Memorial Hospital. On September 24 he had recovered sufficiently and was released.

CORY SAVAGE

W. C. No. 4-929-714-01

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The medical records from Citizens Medical Center, Memorial Hospital, and CCOM were evaluated by Dr. Tashof Bernton at the request of the respondents. In his report of December 20, 2013, Dr. Bernton noted the measurements of elevated carbon monoxide in the claimant's system when measured at Memorial Hospital. Observing the several hours of intubation with oxygen that had been administered prior to that point, Dr. Bernton concluded the claimant had sustained a high level of exposure to carbon monoxide at the point he was removed from his truck cab. The doctor resolved the medical reports supported a diagnosis of carbon monoxide toxicity: "The information reviewed is consistent with carbon monoxide poisoning, and it would be my assessment, ... that the medically probable cause for the patient's episode is carbon monoxide toxicity, In this situation, that would represent a work related disease." He recommended an examination and testing of the claimant's truck to determine if it featured any leaks of exhaust fumes which would explain the claimant's exposure to high levels of carbon monoxide.

The truck was examined by Garrick Mitchell, a mechanical engineer, and by Brett Engel, and also by an expert retained by the claimant. Mr. Mitchell was hired by the insurance carrier and Mr. Engel was a representative of Volvo, the maker of the truck cab. The truck had been driven from Colby to Fountain, Colorado by another of the employer's drivers, and then segregated at the employer's terminal. It was not used or repaired any further prior to the investigation. Mitchell and Engel tested the truck for several hours on September 30. The truck was left parked and idling for three hours. The air inside the cab was measured during this time with both the air conditioning controls on and off. The truck was moved to face into the wind and then turned around to face the opposite direction. The truck was then driven up and down interstate 25. The exhaust system was manually inspected for cracks and soot marks which might indicate cracks. The exhaust system was partially disassembled to allow examination of the exhaust particulate filter. Mitchell observed the truck was tested while the wind in Fountain was blowing at a 5-10 mph rate. He was aware the wind in Colby was usually even more brisk. The claimant had been pulling a trailer without any motors or air conditioning equipment on September 20 which could have been a source of additional carbon monoxide so the tractor was tested without a trailer. Two different monitors were used to collect air quality information. Mitchell was qualified as an expert in mechanical engineering. He testified the air inside the cab never revealed high levels of carbon monoxide. The highest reading registered was only 20% of the level characterized as dangerous by OSHA, and that level was only of momentary duration. No cracks or leaks were discovered. Once the engine was warmed up it did not show any increase over time in CO levels or accumulation of carbon monoxide in the cab. The truck was relatively new, showing only 64,000 miles of wear. The inspection revealed no source of carbon

monoxide exposure for someone inside the cab for either a brief or an extended period. The claimant submitted no report or testimony from its inspection. Randall Sams, the employer's service manager, testified that after the inspection the tractor was placed back in operation, without any repairs. No drivers reported any subsequent problems with the air inside the truck's tractor.

Dr. Bernton was provided the results of the truck inspection after he authored his December 20 report. Following review of the inspection results, Dr. Bernton prepared a January 8, 2014, addendum to his report. He stated his review of the medical records was consistent with an exposure to excessive levels of carbon monoxide. However, he noted that if the engineering tests revealed no source for such an exposure, then such a diagnosis became questionable. Dr. Bernton concluded by writing:

The best that I can tell you is that if the patient had a reasonable probability of carbon monoxide exposure, his clinical data is consistent with that as the cause for his hospitalization and clinical episode. ... Therefore, the best assessment I can make is that if it does appear probable that exposure occurred, then information does fit with carbon monoxide exposure. If it is not probable that there was exposure, then clearly that cannot be the cause of his condition. ... It would really rely on engineering expertise as to whether or not, given the other data you have, it is probable that the patient had carbon monoxide exposure or whether that is simply something that is not reasonable given the condition of the truck.

At the conclusion of the February 11, 2014, hearing, the ALJ submitted findings and an order. The ALJ surmised "The respondents inability to recreate conditions that may have caused an exhaust leak do not overcome the claimant's testimony, Erin Hassel's testimony [the claimant's wife] and medical records indicating carbon monoxide toxicity as the cause of the claimant's injury." The ALJ then determined "The ALJ finds that based upon the totality of the evidence the claimant has established that carbon monoxide toxicity is more likely than not the cause of his injury. The claimant was in the course of his employment at the time of the injury and the injury arose out of his employment as a truck driver." The ALJ ordered the claim compensable and that the

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respondents were liable for the costs of the claimant's treatment including that from Citizens Medical Center, Memorial Hospital, CCOM and for his air transport from Colby to Colorado Springs.

On appeal, the respondents do not dispute the claimant was injured in the course of his work, but they contend that the evidence does not persuasively show his injury arose out of the conditions of his employment. They do not argue the medical records are in error when they show a diagnosis of carbon monoxide poisoning. Their objection is that the claimant has not proven exposure to toxic levels of carbon monoxide can be linked to his truck. Because this is essential to the claimant's prima facie case, this failure to establish the injury or symptoms disabling the claimant arose out of the employee's employment is fatal to the claim. We agree with the respondents' position.

Pursuant to §8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury . . . arising out of and in the course of the employee's employment." See also §8-41-301(1)( b), C.R.S. As pertinent here, the question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show 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." *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)). Accordingly, we must uphold the ALJ's determination of this issue if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; see *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). This standard of review requires us to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Here, the ALJ points primarily to the reports of Dr. Bernton. The ALJ finds persuasive the medical opinion of Dr. Bernton. He found "Dr. Bernton to be credible and his medical opinion is the most credible medical evidence as to the cause of the claimant's malady." The January 8 addendum from Dr. Bernton is criticized only because it deals with the information from Mitchell's and Engel's tests of the truck. The result of those tests is described by the ALJ as a "... hypothesis not supported by the evidence." The finding by the ALJ that the claimant suffered from carbon monoxide toxicity is supported by substantial evidence in the record, primarily that of Dr. Bernton's review.

However, the ALJ's findings pertinent to the Mitchell and Engel tests does not appear grounded in contrary evidence. The ALJ observed the testers did not recreate the weather conditions extant on September 20, that a trailer was not attached to the tractor, that the test did not require that the truck to be idled for eight hours and that it was tested by individuals that were qualified as experts in mechanical engineering but not on the effects of carbon monoxide exposure. Unfortunately, the ALJ made no findings as to why these circumstances were of any significance. Mitchell explained that he did monitor the weather and wind speed during the test to ensure a viable comparison of weather conditions, but there was no account available of any special weather circumstances. He explained that because the trailer had no motors itself, such as a refrigeration unit, its absence was of no consequence. Mitchell testified that once the engine was warmed up, the measurement showing no increasing accumulation in the tractor of carbon monoxide as the engine ran for three hours established there would be no reason to believe it would accumulate over eight hours either. The ALJ had also found the claimant began suffering symptoms of headaches, nausea and fatigue during the week prior to September 20 when no idling of the truck was involved. The evidence Mitchell was presenting was directed at the issue of whether the tractor leaked carbon monoxide into the cab. There is no explanation as to why the ALJ felt the report was weakened due to Mitchell's lack of medical credentials.

The evidence credited by the ALJ was the testimony of the claimant and his wife, and the medical records. The ALJ found the claimant was unconscious for 14 hours beginning at 7:00 p.m. on September 20 and recalled nothing of the conditions surrounding his illness after that point. The ALJ only noted that the claimant's wife received a phone call from the claimant before he stopped, stating "something was not right." As found, Dr. Bernton summarized the medical records as consistent with carbon monoxide poisoning, but they did not shed light on the source of the carbon monoxide exposure. The ALJ's finding that that Mitchell and Engel made a "... hypothesis not supported by the evidence" is itself supported by scant evidence. In any event, the ALJ cites to no other evidence that does support an inference the truck was the source of a carbon monoxide exposure.

The confounding difficulty with the record in this claim occurs because there is significant evidence to support a finding the claimant suffered from symptoms of CO toxicity, but there is a mystery as to how that exposure came about. There is considerable evidence represented by the September 20 investigation of Mitchell and Engel showing the truck driven by the claimant featured no leak of carbon monoxide. There is a paucity of evidence to the contrary. The claimant's theory appears to be that carbon monoxide

symptoms are ipso facto evidence of exposure from his truck. However, the mere fact that a claimant develops an injury during the course of his employment does not relieve him of the duty to establish the injury arose out of that employment.

The Supreme Court addressed this issue most recently in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). In *City of Brighton*, the court identified three categories of injuries. These are (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 first category was observed to be compensable, while the second category was not. 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 question posed by the record in this case involves whether the claimant’s injuries have moved from the category of personal risk, and not compensable, to either a risk tied directly to work or one that is a neutral risk, and thereby compensable. Without evidence of a malfunction in the employer’s truck, there is absent a link to the work itself. Additionally, the record contains not only the result of the inspection by Mitchell and Engels, but also the un rebutted testimony of Randall Sams that neither the driver returning the truck from Colby to Fountain after the claimant’s illness, nor any driver operating the truck subsequent to its return to duty has suffered symptoms similar to those experienced by the claimant. The *but for* test applied here is not established by this record to show another employee in the same circumstances encountered by the claimant did sustain a similar injury. There is then, also absent evidence of a neutral risk.

The claimant has presented evidence of an injury he contends is not personal to him. He testified he did not ever experience his symptoms of headache, fatigue and eventually unconsciousness in the past. The claimant then points to his recovery after his removal from the truck and the subsequent absence of similar symptoms since September 21. He submits Dr. Bernton’s report which concludes that this episode was most likely caused by carbon monoxide exposure. However, Dr. Bernton points out that his review is limited to a review of the medical records and he is not qualified to locate the

mechanical source of the exposure, nor could he determine from the medical records alone the identify of that source.

This record is similar to that described in *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). *Finn* involved an employee with a head injury found lying unconscious on the floor at work. The evidence was incapable of establishing the reason for the lack of consciousness or the head injury other than by reference to “some mysterious innerbody malfunction.” The court in *Finn* rejected the argument that the doctrine of *res ipsa loquitur* applied. The court ruled the claimant’s burden of proof required him to show a “causal relationship between his employment and his injury.” In *City of Brighton*, the court affirmed and explained the analysis of the *Finn* opinion.

Thus. While *Finn’s* rationale is not a model of clarity, its central holding - that an injury due to a “mysterious innerbody malfunction” does not “arise out of” employment merely because that injury occurs at work - is entirely consistent with this court’s precedent regarding the non-compensability of idiopathic injuries. (318 P.3d at 506-07).

Due to the absence of evidence to show a direct tie to the work itself, or evidence to show that *but for* the requirement of work an employee in similar conditions would also suffer these symptoms, the claimant’s injury falls into the category of a personal risk due to its idiopathic nature. That category of injury is not compensable. The claimant’s failure to present substantial evidence to directly tie his symptoms of carbon monoxide exposure to the work itself must result in a denial of his claim.

Accordingly, we conclude the ALJ’s order of compensability must be set aside and the claim dismissed.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued March 26, 2014, is reversed and set aside.

INDUSTRIAL CLAIM APPEALS PANEL

A handwritten signature in cursive script that reads "David G. Kroll".

\_\_\_\_\_  
David G. Kroll

A handwritten signature in cursive script that reads "Brandee DeFalco-Galvin".

\_\_\_\_\_  
Brandee DeFalco-Galvin

CORY SAVAGE  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/5/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

CORY SAVAGE, 2625 FRAZIER LANE, COLORADO SPRINGS, CO, 80922 (Claimant)  
FIRST FLEET INC, C/O: SHERITTA GOODRICH, 202 HERITAGE PARK DR,  
MURFREESBORO, TN, 37128 (Employer)

TRAVELERS INDEMNITY COMPANY, C/O: KRISTINE CLYNES, PO BOX 173762,  
DENVER, CO, 80217 (Insurer)

THE LAW OFFICE OF KIRK ANDERSON LLC & WINSTON LAW FIRM PC, C/O: KIRK  
ANDERSON ESQ & JOSEPH R WINSTON ESQ, 1009 SOUTH TEJON ST, COLORADO  
SPRINGS, CO, 80903 (For Claimant)

RAY LEGO & ASSOCIATES, C/O: GREGORY W PLANK ESQ, 6060 S WILLOW DR STE  
100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-920-458-01

IN THE MATTER OF THE CLAIM OF

MICHAEL SMITH,

Claimant,

v.

TELLER COUNTY,

Employer,

and

TELLER COUNTY WC POOL,

Insurer,  
Respondents.

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated April 3, 2014, that found the claimant was injured while engaged in training as a volunteer member of Teller County Search and Rescue and ordered the respondents to pay temporary disability benefits. We affirm the order of the ALJ.

The claimant served as president and incident commander for the Teller County Search and Rescue organization (TCSAR). The members of the TCSAR, including the claimant, are volunteers. At the command of the Teller County sheriff, the TCSAR provides rescue duties in situations of natural disasters. As president of the TCSAR, the claimant had several administrative duties. The ALJ found he served as the representative to the sheriff's office, to the county commissioners pertinent to the County Emergency Operation Plan, to the Colorado Search and Rescue Board, to the Medical Multiagency Coordination and to the County Fire Chief's monthly meetings.

On May 10, 2013, the claimant left his home to drive to Divide, Colorado, to attend the County Fire Chief's meeting. He contacted the sheriff's dispatch as he left his home and informed them he was "marked in service" to attend the meeting. Shortly thereafter, he was hit by an oncoming car that crossed into his lane. The claimant sustained numerous injuries to his right foot, hand, shoulder, left hip and knee. His treatment involved several surgeries and other therapies.

The respondents denied the claimant was eligible for workers' compensation benefits pursuant to § 8-40-202(1)(a)(I)(A) C.R.S. That section provides that volunteers serving with legally organized search and rescue teams, and other volunteer disaster relief organizations (i.e. ambulance crews, fire protection groups, and the civil air patrol) are covered employees of a county, city or special district while "performing duties" as members of such volunteer groups or while engaged "in organized drills, practice, or training necessary or proper for the performance of such duties." The respondents asserted the claimant was traveling to the Fire Chief's meeting of his own volition and that he was not obligated to attend that meeting to perform his duties and he was not engaged in any organized training when he attended those meetings. The respondents also took the position the claimant was injured while he was traveling to or from work, that being the Fire Chief's meeting, at the time he was injured such that his injuries did not arise out of his work functions.

The ALJ determined that as the TCSAR president, the claimant served a critical planning and coordination function for the TCSAR and for the county when he attended meetings comprised of other disaster relief providers. The ALJ found the claimant's duties included activities by the claimant to coordinate the TSCAR efforts with those of other groups and thereby "preparing the search and rescue organization to competently engage in search and rescue operations." These activities of planning and preparation were characterized by the ALJ as engaging in organized training. The claimant's injuries were deemed compensable and the respondents were ordered to begin paying temporary disability benefits.

On appeal, the respondents contend again that it was not necessary for the claimant to have attended the Fire Chief's meeting. They assert other representatives from the sheriff's department attend that meeting and can pass along to the TCSAR president any useful information. They also argue that after the claimant's injuries limited his ability to drive and he missed some of the Fire Chief's meetings, he was not sanctioned by the sheriff's department for his absences and the TCSAR did not suffer as a result. The respondents rely on the testimony at the January 29, 2014, hearing by sheriff's department commander Charles Bright. The Commander was the current representative of the sheriff's department to the TSCAR. Commander Bright stated he did not order the claimant, or any TCSAR president, to attend the Fire Chief's meeting and Commander Bright did not believe it was necessary for the functioning of the TCSAR to require the president to be present at those meetings because Commander Bright was usually in attendance.

MICHAEL SMITH

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The claimant testified at the hearing that his attendance at the Fire Chief's meetings, as well as other types of sessions featuring coordination discussions among first responders were critical to allowing these groups to function effectively. The claimant also stated he had been directed by a prior representative from the sheriff's office, Greg Griswold, to send a representative from TSCAR to the Fire Chief's meeting. That direction had never been revised. (Tr. pg. 44-45, 55, 61). The claimant also testified the attendees at the Fire Chief's meeting did engage in training at the meeting. (Tr. pg. 59).

The respondents acknowledge the dearth of case law pertaining to the application of § 8-40-202(1)(a)(I)(A) in the context of volunteers. In *Northwest Conejos Fire Protection District v. Industrial Commission*, 39 Colo. App. 367, 566 P.2d 717 (1977), the claimant was injured when he was hit by a motorcycle while serving as the flagman for an Independence Day motorcycle race. The claimant was a volunteer firefighter and had been assigned by the fire chief to help with the race. The fire department had performed this function for many years on the Fourth of July and it served a good will and public relations function for the department. The respondents had argued the claimant was not engaging in any of the statutory duties assigned a volunteer to a fire district when injured. The Court responded by holding that as "a result of custom and practice" other activities could be added to the duties of a fire department "such as participation in patriotic celebrations." The evidence of the fire department's sponsorship of the motorcycle race over several years brought that activity within the scope of a volunteer fireman's employment.

The respondents seek to distinguish *Northwest Conejos* from the present case by indicating the claimant was not actually participating in the Fire Chief's meeting when injured, he was not ordered to go to the meeting by Commander Bright, and participation in the meeting did not serve to benefit the Teller County sheriff's office. We do not find these contentions persuasive. The claimant was injured while on his way to the meeting which was necessary to allow his participation. The claimant testified that Commander Bright's predecessor as the TSCAR contact at the sheriff's department had advised the claimant to attend the Fire Chief's meeting. Commander Bright did not testify he ever countermanded that direction. The ALJ cited several county documents which provided for TSCAR to be an integral part of the county's disaster response plan. To implement that plan, the ALJ concluded it was necessary for the president of TSCAR to attend meetings featuring a theme of coordination between the various disaster response organizations. There is substantial evidence in the record to support the ALJ's inference in that regard. Certainly the several years' participation of the TSCAR president in these coordination meetings is a custom and practice similar to that in *Northwest Conejos*

sufficient to bring attendance in these meetings within the course and scope of the president's duties. The analysis in *Northwest Conejos*, applied in the present case, supports the ALJ's conclusion that the claimant's injuries are compensable.

The respondents also rely on the decision in *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999), to declaim that the claimant was only involved in travel to work. The going and coming to work exclusion set forth in *Madden* is said to apply here and precludes the claimant from having a compensable injury. In *Madden* the court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable because they are not seen as arising out of employment. The *Madden* opinion however, acknowledged the facts of any particular case may justify an exception to this general rule. The decision set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

The *Madden* opinion observed that many of the exceptions to the going and coming rule recognized in previous cases were pertinent to the third exception asking if "the travel was contemplated by the employment contract." The court then listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer, (b) the travel was at the express or implied request of the employer and conferred a benefit beyond the employee's arrival at work, and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer.

In *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194 (Colo. App. 1983), two volunteer members of the Civil Air Patrol were injured when the plane they were flying to Air Patrol training crashed. The court noted that covered activity may be involved when the employer implicitly agrees the employment relation continues during the coming and going to a training event. The court observed: "Thus, when a claimant, at the time of his injury, is performing a duty with which he is charged as a part of his contract for service, or under the express or implied direction of his employer, he is within the course of his employment under the Workmen's Compensation Act." The claimant was deemed to have injuries arising out of his employment. Here, the testimony of the claimant was that a prior representative from the sheriff's office, Greg Griswold, directed

him to attend meetings of the county Fire Chiefs. That attendance logically furthers the county's interest in the coordination of its disaster response teams. Travel at the express direction of the employer and which is aimed at the performance of a duty the claimant is charged to perform, is an exception to the *Madden* prohibition on the compensability of injuries occurring on the way to and from work. It qualifies as part of the third possible exception to the going and coming rule, i.e. whether the travel was contemplated by the employment contract. *Madden* recognized travel could be seen as part of the employment contract when "(b) the travel was at the express or implied request of the employer." The record supports the ALJ's inference in this matter that injuries sustained by the claimant while traveling to the Fire Chief's meeting were at the direction of the employer. As in *Hagans*, injuries encountered during such travel for training are compensable. We find then, no error in the ALJ's determination that the claimant's injuries and his eligibility for temporary benefits were due to his engagement as a volunteer in "training necessary and proper for the performance" of his duties.

We must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claims Appeals Office*, 989 P.2d 251 (Colo. App. 1999). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*. Testimony is not incredible as a matter of law absent extreme circumstances where the testimony is rebutted by such hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). Accordingly, we do not find adequate cause to set aside the decision of the ALJ.

**IT IS THEREFORE ORDERED** that the ALJ's order issued April 3, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

MICHAEL SMITH  
W. C. No. 4-920-458-01  
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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/26/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

MICHAEL SMITH, 8307 COUNTY RD #98, FLORISSANT, CO, 80816 (Claimant)  
TELLER COUNTY, C/O: LINDSEY CHAPMAN, PO BOX 959, CRIPPLE CREEK, CO,  
80813-0959 (Employer)  
TELLER COUNTY WC POOL, Attn: KURT MUEHLER, C/O: CTSI, 800 GRANT ST #400,  
DENVER, CO, 80203 (Insurer)  
WHEELOCK LAW PC, C/O: CULLEN A WHEELOCK ESQ, 320 S CASCADE AVE,  
COLORADO SPRINGS, CO, 80903 (For Claimant)  
DWORKIN CHAMBERS WILLIAMS YORK BENSON & EVANS PC, C/O: DAVID  
DWORKING ESQ MARY B PUCELIK ESQ, 3900 EAST MEXICO AVE, DENVER, CO,  
80210 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-932-395-01

IN THE MATTER OF THE CLAIM OF  
ANTHONY TRUJILLO,

Claimant,

v.

FINAL ORDER

LOWE'S,

Employer,

and

SELF-INSURED,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated April 9, 2014, that dismissed the claimant's claim for benefits. We affirm the order of the ALJ.

The ALJ determined the claimant was engaged in a deviation from his employment when he fractured his left arm at work on October 17, 2013. The claimant asserts the activity involved, a 'chest bump' with a fellow employee, was integral with the activities of the job, was therefore within the course and scope of his employment and should be found compensable.

The claimant testified at the March 5, 2014, hearing that he was working at his job in the employer's warehouse and store on October 17. He was working with co-employee Matthew Walz. The two were nearing the end of their shift and had just successfully completed the preparation of a large order with the final application of shrink wrap. In order to note their achievement, Mr. Walz inquired of the claimant, "High five?" The claimant responded "no, chest bump." The claimant testified that Mr. Walz had taken a step closer to the claimant while the claimant was turned around placing an item on the floor. The claimant then described how he simply turned around and walked into Mr. Walz, causing the claimant to fall backwards onto his left arm. This caused a fracture of the left humerus. Mr. Walz also testified that the claimant walked

into him leading him to fall backwards. The claimant discussed how a chest bump, in contrast, required “running and jumping into somebody.”

The ALJ found more credible the history taken in the emergency room which described the claimant as “celebrating with a fellow employee, and ‘chest bumped’ that individual falling backwards and landing on his left elbow.” This was also the account provided to the employer’s human resource manager when she completed the First Report of Injury form. Accordingly, the ALJ determined the claimant was indeed injured in the course of a ‘chest bump’ with Mr. Walz.

The ALJ concluded that the chest bumping activity constituted a deviation from employment that was so substantial it could not be considered part of the employment relationship. The ALJ noted that the claimant and Mr. Walz still had further steps to take to complete the order on which they were working and the chest bump activity was not consistent with the balance of the work required. Instead, the ALJ characterized the chest bump as a celebratory action in the nature of horseplay. It was seen by the ALJ as an activity that did not arise out of the employment relationship and, as such, did not result in a compensable injury. The ALJ dismissed the claim and the request for medical and temporary disability benefits.

On appeal, the claimant contends the ALJ did not make factual findings that would remove the chest bumping activity from the circumstances of work. The claimant points to the more recent construction of the opinion given in *Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995) by the decision in *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). In the *Lori’s Family Dining* opinion the court set forth four criteria by which to gauge the horseplay activity pertinent to a finding the activity arose out of employment. In *Panera Bread* the court pointed out that only the first two of the criteria are critical. Those two suggest consideration of: (1) the extent and seriousness of the deviation; and (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of duty. The claimant argues he was engaged in a brief celebration with his co-employee due to the completion of the largest part of a difficult task required before the end of their shift. Because the celebration had to do with the work activity and it was a brief and insubstantial deviation, it was said to be similar to the claimant’s playful kick found compensable in *Panera Bread*.

To obtain compensation for an injury, an injured employee must, at the time of injury, have been performing service arising out of and in the course of the employee’s employment. § 8-41-301(1)(b) C.R.S. An injury or occupational disease arises out of

employment when it has its origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer in connection with the contract of employment. The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. It is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Under this approach, horseplay is analyzed under general principles that govern whether a claimant has deviated from employment so substantially as to remove him from the course of employment. When, as here, a particular act of horseplay, as opposed to the employment environment in general, is at issue, the act is to be judged according to the same standards of extent and duration of deviation that are accepted in other fields, such as resting, seeking personal comfort, or indulging in incidental personal errands. It does not matter whether the horseplay doctrine fits best under the arising out of causation category or the course of employment time and place category. Whichever theoretical framework is applied, the issue remains whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit. *Panera Bread, LLC v. Industrial Claim Appeals Office*, *supra*.

Because the issues are factual in nature, they must be reviewed under the substantial evidence standard. Section 8-43-308, C.R.S.. The evidence must be considered in the light most favorable to the prevailing party, and we must defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *See Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

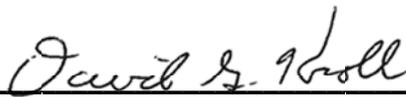
Here, the ALJ found the chest bump activity occurred while the claimant still had further work to do to get the designated order complete. The ALJ relied on this finding to establish the activity was a deviation from work. The ALJ did not specify a list of additional factors which led him to conclude the deviation was a serious abandonment of duty. However, the ALJ did take note that Mr. Walz is 6' 8" tall and weighs 280 pounds. The claimant, on the other hand was observed to be "diminutive in stature." The ALJ also discussed the fact that at the hearing both the claimant and Mr. Walz carefully testified that the claimant did not actually initiate a chest bump as he suggested. They

stated he just walked into Mr. Walz. The ALJ noted the testimony was a significant departure from the claimant's statements to the emergency room attendant and to the human resources manager. The claimant had also testified that if the activity was a chest bump, he would have been "running and jumping" into Mr. Walz. The ALJ found the claimant and Mr. Walz changed their description of the activity involved from the original accounts they had provided. This change would reasonably support the inference that the claimant and Mr. Walz perceived a chest bump could indeed be seen as a substantial deviation from work duties. The claimant also testified that neither he nor Mr. Walz had ever previously tried a chest pump, deferring instead to execute a high five or a hand shake. This would logically follow from the ill-advised nature of an activity wherein a smaller person runs and jumps at a 6' 8" 280 pound co-worker. We find these circumstances to be substantial evidence in the record to support the findings of the ALJ that the chest bump by the claimant which led to his injury was such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit. This finding is consistent with the requirements of *Panera Bread*.

Accordingly, we do not deem there to be a sufficiently compelling reason to find error in the determinations of the ALJ.

**IT IS THEREFORE ORDERED** that the ALJ's order issued April 9, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

ANTHONY TRUJILLO  
W. C. No. 4-932-395-01  
Page 6

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 7/29/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

ANTHONY TRUJILLO, 4886 RAVEN RUN, BROOMFIELD, CO, 80023 (Claimant)  
LOWE'S, C/O: CHRISTINE HARRIS -MARK WALZ, 5600 W 88TH AVE, WESTMINISTER,  
CO, 80031 (Employer)  
SEDGWICK CMS, C/O: SHIRIN CHOWDHURY, PO BOX 14493, LEXINGTON, KY, 40512  
(Insurer)  
KEATING WAGNER POLIDORI FREE PC, C/O: BRADLEY UNKELESS ESQ, 1290  
BROADWAY STE 600, DENVER, CO, 80203 (For Claimant)  
WHITE AND STEELE PC, C/O: MATTHEW W TILLS ESQ, 600 SEVENTEENTH ST STE  
600N, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-926-816-01

IN THE MATTER OF THE CLAIM OF  
SANDRA WEITZEL,

Claimant,

v.

DELTA COUNTY,

Employer,

and

SELF INSURED,

Insurer,  
Respondent.

ORDER

The respondent seeks review of an order of Administrative Law Judge Mottram (ALJ) dated April 3, 2014, that determined the claimant suffered an occupational disease during the course and scope of her employment, denied the respondent's request for apportionment, and ordered the respondent to pay for reasonable and necessary medical treatment provided by authorized medical providers. We dismiss the petition to review without prejudice.

A hearing was held on a number of the issues including compensability, apportionment pursuant to *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993), and medical benefits. Following the hearing, the ALJ entered an order finding the claimant's claim compensable and making a general award of medical benefits. The ALJ ordered the respondent to pay reasonable and necessary medical treatment provided by authorized providers that are necessary to cure and relieve the claimant from the effects of her occupational disease. The ALJ reserved all matters not determined by the order for future determination.

The respondent has filed a petition to review, raising numerous contentions of error in the ALJ's fact finding, and in his determination that the claimant's carpal tunnel syndrome is related to her employment.

Under §8-43-301(2), C.R.S., a party dissatisfied with an order "which requires any party to pay a penalty or benefits or denies a claimant a benefit or penalty," may file a petition to review. Orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties, are interlocutory and not subject to review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989). Further, orders which determine liability for benefits without determining the amount of benefits, do not award or deny benefits as contemplated by this statute and, therefore, are not subject to review. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989); *CF & I Steel Corp. v. Industrial Commission*, 731 P.2d 144 (Colo. App. 1986).

We previously have held that orders determining compensability and containing only a general award of medical benefits are interlocutory, unless the record reveals that specific medical benefits were at issue. *See Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996); *Tilton v. ABC Turf Care*, W.C. No. 3-105-542 (August 18, 1994). Here, the ALJ determined the claimant proved a compensable claim and her entitlement to reasonable and necessary medical benefits. The ALJ, however, did not determine what specific treatment was reasonably necessary. Rather, the ALJ reserved other issues for future determination. Consequently, the order does not award or deny the claimant any particular medical benefit and, is not currently subject to review. *Director of Division of Labor v. Smith*, 725 P.2d 1161 (Colo. App. 1986); *Bollig v. Petco*, W.C. 4-625-226 (October 19, 2005).

**IT IS THEREFORE ORDERED** that the respondent's petition to review the ALJ's order dated April 3, 2014, is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

SANDRA WEITZEL  
W. C. No. 4-926-816-01  
Page 3

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/20/2014 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

SANDRA WEITZEL, 650 LEON STREET, DELTA, CO, 81416 (Claimant)  
DELTA COUNTY, C/O: BILL BEVER, 501 PALMER #227, DELTA, CO, 81416 (Employer)  
SELF INSURED, Attn: DEBBIE MCDERMOT, C/O: CTSI, 800 GRANT ST #400, DENVER,  
CO, 802013 (Insurer)  
WITHERS SEIDMAN RICE & MUELLER PC, C/O: SEAN E P GOODBODY ESQ, 101  
SOUTH THIRD ST STE 265, GRAND JUNCTION, CO, 81501 (For Claimant)  
DWORKIN CHAMBERS WILLIAMS YORK BENSON & EVANS PC, C/O: DAVID  
DWORKIN ESQ MARY B PUCELIK ESQ, 3900 EAST MEXICO AVENUE #1300,  
DENVER, CO, 80210 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-012-01

IN THE MATTER OF THE CLAIM OF

OATFIELD WHITNEY,

Claimant,

v.

FINAL ORDER

WEST METRO FIRE PROTECTION  
DISTRICT,

Employer,

and

SELF-INSURED C/O  
COUNTY TECHNICAL  
SERVICES, INC.,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated April 4, 2014, that denied and dismissed the claimant's request for temporary total disability benefits for April 27 and April 28, 2013. We affirm the ALJ's order.

The matter went to hearing on the issue of temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant has worked for the respondent employer as a firefighter since 1996. The claimant was admitted to the hospital on April 26, 2013, and was eventually diagnosed with Chronic Lymphocytic Leukemia (CLL). The claimant was scheduled to work on April 27, 2013, and April 28, 2013, but used sick leave because he was unable to work. The claimant received pay for the preceding dates but was charged with two days of sick leave. On May 4, 2013, the employer completed a First Report of Injury reflecting that the claimant's wages would continue pursuant to §8-42-124, C.R.S.

The claimant was also scheduled to work the following dates in 2013; May 3, May 4, May 9, May 10, May 15, May 16, May 21, and May 22. At hearing the claimant explained that he was taken off work due to the CLL and requested temporary total disability benefits for these dates. The ALJ, however, found that during this time period, the claimant had engaged in "trade time agreements" with other firefighters. The trade

time agreements were individual agreements between firefighters to trade shifts so that one firefighter agrees to work for the second firefighter on one day and the second firefighter will work for the first firefighter on another day. Trade time can be used for any reason, whether it's due to a health related issue or simply to take a day off to go skiing. When two firefighters participate in trade time both of them continue to receive regular pay and neither firefighter is charged with any sick leave or vacation time. The trade time agreements result in no impact on the paychecks of either firefighter involved. The employer neither required, requested nor encouraged the claimant to utilize trade time during the period from May 3, 2013, through May 22, 2013, and the claimant's participation was completely voluntary. Since returning to full duty work on June 3, 2013, the claimant has participated in additional trade time agreements and has both covered the shifts of other firefighters and has had other firefighters cover his shift. The claimant did not work and trade time shifts for any of the firefighters who covered his shifts in May of 2013. The claimant testified that he did not expect that he would be requested or required to work the shifts for fellow firefighters who covered his shifts between May 3 and May 22, 2013. The employer continued to pay the claimant his full shift salary and did not charge the claimant with any sick or leave or vacation during this time period. Based on these facts, the ALJ concluded that the claimant was not entitled to temporary total disability benefits because he did not sustain a wage loss. The claimant specifically does not appeal the ALJ's denial of temporary disability benefits during this time period.

The ALJ went on to hold that the claimant was not entitled to temporary disability benefits for April 27 and April 28, 2013. Although the employer erroneously charged the claimant with sick time (*see* §8-42-124(4), C.R.S., claimant's right to receive temporary disability benefits is reinstated if the employer charges the claimant with earned sick time); Tr. at 6 (documenting stipulation), the claimant was not entitled to temporary disability benefits for these two days pursuant to §8-42-103(1), C.R.S. This statute provides that the claimant is entitled to recover temporary disability benefits from the first day the claimant leaves work, only if the period of disability lasts longer than two weeks. The ALJ determined that the claimant had not been disabled for longer than two weeks because he continued to be paid his regular wages. The claimant, therefore, was not entitled to temporary disability benefits for April 27 and April 28, 2013.

The only issue on appeal is the claimant's entitlement to temporary disability benefits for April 27 and April 28, 2013. The claimant contends the ALJ misapplied the three-day waiting period in §8-42-103(1), C.R.S., and argues that because he was restricted from working, he was, "disabled" for longer than two weeks and was entitled to temporary disability benefits despite receiving his full wages for the relevant time period. We are not persuaded the ALJ erred.

In our view, the ALJ used the proper analysis in deciding whether the claimant was entitled to temporary disability benefits for April 27<sup>th</sup> and 28<sup>th</sup>. Section 8-42-103(1)(b), C.R.S., provides that the period of disability must last longer than two weeks, and only then is the disability indemnity "recoverable from the day the injured employee leaves work." The term "disability" as it is used in workers' compensation connotes two distinct elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant's inability "to resume his or her prior work." *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Co.*, W.C. No. 4-373-392 (June 11, 1999). We agree with the ALJ's conclusion that the claimant's "disability" here was not longer than two weeks because he continued to receive his regular wages.

The claimant argues that it is enough under the statute to show that the claimant was physically unable to work even though he was paid wages. We disagree. Section 8-42-103(1), C.R.S. sets forth the claimant's general right to recover temporary disability benefits for the injury. However, §8-42-103(1), C.R.S. expressly states that the right to disability benefits is "subject to" the limitations in subsections (1)(a) through (1)(f). Subsections 1(a) and (b), relevant here, provide in pertinent part:

- (1) If the injury or occupational disease causes disability, a disability indemnity shall be payable as wages pursuant to section 8-42-105(2)(a) subject to the following limitations:
  - (a) If the period of disability does not last longer than three days from the day the injured employee leaves work as a result of the injury, no disability indemnity shall be recoverable...
  - (b) If the period of disability lasts longer than two weeks from the day the injured employee leaves work as a result of the injury disability indemnity shall be recoverable from the day the injured employee leaves work.

To establish an entitlement to temporary disability benefits, the claimant must prove that the industrial injury caused a disability, that he left work as a result of the disability, that he was disabled for more than three regular work days, and that he suffered an actual wage loss. Section 8-42-103(1)(b), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The period of temporary disability is measured from the day after the employee leaves work as a result of the injury. *See Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991).

Temporary disability benefits are designed to replace the claimant's actual lost wages during the period he is recovering from the industrial injury. *Broadmoor Hotel v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996); *PDM Molding, Inc. v. Stanberg, supra*; *Mesa Manor v. Industrial Claim Appeals Office*, 881 P.2d 443 (Colo. App. 1994). We agree with the ALJ that a claimant is not considered “disabled” for purposes of recovering temporary disability benefits if the claimant does not sustain a wage loss from his injury. *See Atencio v. JBQ Allen, Inc.* W.C. No. 4-350-555 (May 19, 2000); *See Matus v. David Matus* W.C. No. 4-740-062 (July 13, 2010)(claimant not entitled to temporary disability benefits where the claimant’s business and financial records supported findings that the claimant did not suffer any actual wage loss); *Hendricks v. Keebler Company, supra* (temporary disability benefits precluded during the time the claimant performed modified duty and earned pre-injury wage.)

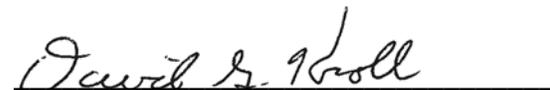
Here, the ALJ found, and the claimant does not contest, that he did not sustain a wage loss during May 2013. The only days the claimant did not receive regular wages were April 27 and April 28. The claimant was “disabled” for purposes of determining entitlement to temporary disability benefits for these two days. However, because the claimant’s period of disability has not yet exceeded two weeks, the first three days are not paid and the claimant is not entitled to temporary disability benefits for April 27 and April 28. Section 8-42-103(1)(a) and (b), C.R.S. We perceive no error in the ALJ’s application of §8-42-103(1).

Additionally, although not raised by either party, we note that the admission filed by the respondent and the subsequent pleadings filed in this case indicate that the admitted date of onset of disability is May 2, 2013. Consequently, the claimant is not entitled to temporary disability prior to the date of onset. *See SCI Manufacturing v. Industrial Claim Appeals Office*, 879 P.2d 470 (Colo. App. 1994)(an occupational disease is not compensable until the "onset of disability.") Moreover, we are unable to determine from the order and the record on appeal whether the claimant has sustained an injury in fact and has standing to bring the appeal. The respondent stipulated that the sick days on April 27 and April 28 will “count towards TTD,” and from the paystubs submitted into evidence, it appears that the claimant was paid his full wages for the days in question. The ALJ also found that the employers’ First Report of Injury reflected that the claimant’s wages will continue pursuant to an §8-42-124, C.R.S. Under these circumstances it does not appear that the claimant is owed any benefits, even if temporary disability benefits were to be awarded for April 27 and 28. If this is indeed the case, the claimant has not sustained an injury in fact and lacks standing to appeal. *See Ainscough v. Owens*, 910 P.3d 851, 855 (Colo. 2004)(standing is premised on the presence of an actual injury to the interests of the appealing party).

**IT IS THEREFORE ORDERED** that the ALJ's order dated April 4, 2014 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
David G. Kroll

OATFIELD WHITNEY

W.C. 4-920-012-01

Page 7

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/27/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

OATFIELD WHITNEY, 7414 E COSTILLA PLACE, CENTENNIAL, CO, 80012 (Claimant)

WEST METRO FIRE PROTECTION DISTRICT, 485 S ALLISON PARKWAY,

LAKEWOOD, CO, 80216 (Employer)

SELF INSURED c/o CTSI, Attn: LESLIE CAVANAUGH, 800 GRANT ST STE 400,

DENVER, CO, 80203 (Insurer)

LAW OFFICE OF O'TOOLE & SBARBARO PC, C/O: NEIL D O'TOOLE ESQ, 226 WEST

12TH AVE, DENVER, CO, 80204 (For Claimant)

DWORKIN CHAMBERS WILLIAMS YORK BENSON & EVANS PC, C/O: C SANDRA

PYUN ESQ, 3900 E MEXICO AVE STE 1300, DENVER, CO, 80210 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-621-01

IN THE MATTER OF THE CLAIM OF

MORGAN WILLIAMS,

Claimant,

v.

FINAL ORDER

COLORADO CAB d/b/a  
DENVER YELLOW CAB,

Employer,

and

OLD REPUBLIC C/O SEDGWICK CMS,

Insurer,  
Respondents.

The pro se claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated March 5, 2014, that ordered his claim for compensation dismissed. We affirm the order of the ALJ.

A hearing was held on the issue of compensability, eligibility for temporary total disability benefits and medical benefits. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant is a cab driver for the employer. The claimant testified he had a regular customer in the person of Merl Mitchell. On May 22, 2013, the claimant and Mr. Mitchell drove around the Denver metro area for several hours with the meter off. The two then stopped off at Tequila's Restaurant for tacos and tequila. Mr. Mitchell expressed an interest in traveling to Paonia, Colorado, to view some land he owned and to rest for several days. The two picked up another, unnamed, passenger and the claimant's dog and set off for Paonia. The cab's meter was still off. After the group passed through the Eisenhower tunnel on Interstate 70, the claimant swerved the cab to avoid a rock. The cab went out of control and rolled several times before it came to rest. The claimant and Mr. Mitchell exited through a car window. The second passenger fled the scene. The claimant was transported to the St. Anthony Summit Medical Center. At the hospital, the claimant was determined to be intoxicated and was treated for several minor injuries. The claimant was then treated at the Concentra Medical Center in Denver. He complained of a left knee injury on May 24. However, X rays were said to be normal and the claimant was released to regular duty. The claimant continued to claim his knee was injured. A subsequent MRI revealed meniscal tears and surgery was recommended. The

respondents denied the compensability of the claim as well as temporary benefits and further medical care.

The respondent employer is a taxi company that provides transportation for fees derived from a meter running in the cab. The employer's witness, Randy Jensen, explained that a meter is used to calculate all fares with the exception of trips to Denver International Airport, the Denver Tech Center and Boulder. Cabs are not allowed to be driven more than 16 miles outside the Denver metro area for the reason that they are fitted with radio transmitting GPS devices which cannot be detected by the employer if driven any further away. The claimant was aware of this policy as it was covered in the orientation training the claimant had completed two months previously. The claimant did not communicate with the employer prior to setting off for Paonia, which is located in Colorado's western slope region. The claimant asserted in his position statement that while he was driving to Paonia off the meter, Mr. Mitchell had agreed to pay him \$500 plus the cost of gasoline for the trip to Paonia.

The ALJ credited the testimony of Mr. Jensen and found the testimony of the claimant unpersuasive. It was determined the claimant and his friend, Mr. Mitchell, were driving to Paonia for a vacation and the claimant was not acting in the course of his occupation as a taxi driver during the trip. Accordingly, the ALJ found the claimant's injuries not compensable. The claimant's request for benefits was denied and dismissed.

On appeal the claimant essentially disputes the evidence and testimony submitted by the respondent and reiterates his version of events. The claimant did not file a brief in support of his petition to review but did make arguments in the petition to review concerning the ALJ's factual findings and credibility determinations. We are not persuaded that the ALJ committed reversible error.

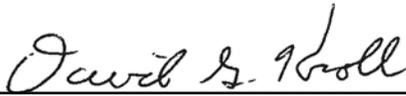
The claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. Section 8-43-301(8), C.R.S. Where, as here, the appealing party fails to procure a transcript of the relevant hearing, we must presume the pertinent findings of fact are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). The ALJ's order here is based in large part on credibility determinations and the ALJ found that the claimant's testimony about the alleged work injury was not credible. Under the substantial evidence standard of review it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the

probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *See People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Consequently, the ALJ's credibility determinations are binding except in extreme circumstances. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000). We perceive no extreme circumstances here.

Although the evidence may have been subject to conflicting inferences, without transcripts, it is presumed that there is substantial evidence in the testimony of the employer's witness to support the ALJ's factual findings and conclusions. Where, as here, the record was subject to conflicting inferences it is left to the ALJ's discretion to resolve those conflicts and to determine the inference to be drawn and we may not substitute our judgment for the ALJ in this regard. *Gelco Courier v. Industrial Commission*, 702 P.2d 295 (Colo. App. 1985).

**IT IS THEREFORE ORDERED** that the ALJ's order dated March 5, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David G. Kroll

  
\_\_\_\_\_  
Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 6/25/2014 \_\_\_\_\_ by \_\_\_\_\_ KG \_\_\_\_\_ .

MORGAN WILLIAMS, 7985 W 51ST AVE, UNIT 1, ARVADA, CO, 80002 (Claimant)  
COLORADO CAB d/b/a DENVER YELLOW CAB, 7500 E 41ST AVE, DENVER, CO,  
80216-4706 (Employer)  
OLD REPUBLIC C/O SEDGWICK CMS, C/O: SHANNON BROWNE, PO BOX 14493,  
LEXINGTON, KY, 40512-4493 (Insurer)  
MOSELEY BUSSEY & APPLETON PC, C/O: SCOTT M BUSSEY ESQ, 300 SOUTH  
JACKSON ST STE 240, DENVER, CO, 80209 (For Respondents)

13CA1991 Spacecon v. ICAO 08-21-2014

COLORADO COURT OF APPEALS

DATE FILED: August 21, 2014  
CASE NUMBER: 2013CA1991

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Court of Appeals No. 13CA1991  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-792-073-03

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Spacecon Specialty Contractors, LLC and Tristar Risk Management,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Erasmo Ordonez,

Respondents.

---

ORDER AFFIRMED

Division I  
Opinion by JUDGE KAPELKE\*  
Bernard and Navarro, JJ., concur

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

Announced August 21, 2014

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Lee & Kinder, LLC, Francis M. Cavanaugh, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Marra & Leavitt, LLC, Teresa A. Marra, Arvada, Colorado, for Respondent  
Erasmo Ordonez

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2013.

In this workers' compensation action, employer, Spacecon Specialty Contractors, LLC, and its insurer, Tristar Risk Management, seek review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed the order of an administrative law judge (ALJ) awarding claimant, Erasmo Ordonez, medical benefits, as well as temporary and permanent total disability (TTD and PTD) benefits. We conclude that substantial evidence supports the ALJ's determination, and therefore affirm the Panel's order.

### I. Background

Claimant sustained an admitted, work-related injury to his back in 2008. His pain did not improve and instead spread to the big toe on his right foot. He also developed severe depression, which his psychologist believed was causally related to his work injury. The psychologist opined that claimant's pain and severe depression rendered him unable to work. The parties stipulated that claimant reached maximum medical improvement (MMI) in August 2010.

Claimant sought medical, PTD, and TTD benefits. During the ensuing hearing, employer questioned claimant's immigration

status. In response, claimant invoked his Fifth Amendment privilege against self-incrimination, choosing not to answer the question. Employer also inquired whether claimant had applied for social security disability benefits. The parties stipulated that claimant had not applied for social security disability benefits because he believed he would be ineligible.

Later in the hearing, a vocational evaluator retained by employer testified that claimant indicated he was ineligible for social security benefits because he did not have “papers.” The vocational evaluator took this response to mean that claimant was not legally in this country. Based on this testimony, and on claimant’s invocation of the Fifth Amendment privilege, employer argued that claimant was not entitled to PTD benefits because his immigration status, not his work-related injuries, prevented him from working.

The ALJ disagreed, however, finding instead that claimant’s work-related physical and mental disabilities rendered him unable to work. The ALJ therefore awarded claimant TTD benefits for the period before claimant reached MMI; PTD benefits “for the rest of

[c]laimant’s natural life”; and all causally related and reasonably necessary post-MMI medical maintenance care. Over employer’s objection, the ALJ declined to draw a negative inference from claimant’s invocation of the Fifth Amendment privilege, finding instead that there was “no evidence whatsoever” demonstrating that claimant had ever provided false documentation to obtain employment.

The Panel concluded that substantial evidence supported the ALJ’s decision, and therefore affirmed. This appeal followed.

## II. Analysis

Employer raises two arguments on appeal: (1) that claimant improperly invoked the Fifth Amendment and the ALJ failed to properly weigh the applicable Fifth Amendment factors; and (2) that the ALJ should have considered claimant’s immigration status in determining whether claimant is entitled to PTD benefits. We are not persuaded that any error occurred.

### A. Substantial Evidence Supports the ALJ’s Order

A claimant is entitled to PTD benefits if he or she is “unable to earn any wages in the same or other employment. Except as

provided in paragraph (b) of this subsection (16.5), the burden of proof shall be on the employee to prove that the employee is unable to earn any wages in the same or other employment.” § 8-40-201(16.5), C.R.S. 2013. “[A] claimant cannot obtain PTD benefits if he or she is capable of earning wages in any amount.” *Weld Cnty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998).

“The determination whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant.” *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 703 (Colo. App. 1999).

[I]n making a PTD determination, the ALJ may consider the effects of the industrial injury in light of the claimant’s human factors, including, *inter alia*, the claimant’s age, work history, general physical condition, and prior training and experience. . . . The crux of the test is the “existence of employment that is reasonably available to the claimant under his or her particular circumstances.”

*Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001) (quoting *Bymer*, 955 P.2d at 558.)

Whether a claimant is entitled to PTD benefits is a question of

fact for determination by the ALJ. *Joslins Dry Goods Co.*, 21 P.3d at 868-69. Therefore, if the ALJ's PTD determination is supported by substantial evidence in the record, we are bound by it. *Christie v. Coors Transp. Co.*, 919 P.2d 857, 860 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

Here, the ALJ determined that claimant's physical and psychological injuries rendered him permanently and totally disabled and incapable of earning wages. He therefore awarded claimant PTD and other benefits. In reaching his conclusion, the ALJ found the opinions of claimant's psychologist and occupational therapist/vocational evaluator credible and persuasive. The psychologist and the occupational therapist took claimant's mental state into consideration when they opined that claimant was unable to work because of his work-related injuries. Conversely, the ALJ rejected the opinions of employer's vocational evaluator, partly because the evaluator did not rely on the opinion of any psychologist in reaching his conclusion, and partly because the evaluator conceded at hearing that if he had relied on claimant's psychologist, he would have found claimant unable to earn wages.

The weight to be given expert testimony is within the sound discretion of the ALJ. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). We may not disturb the ALJ's credibility determinations absent a showing that the overwhelming weight of the evidence rebuts the opinion. *See Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 46 ("Nor may we set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence."); *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *Rockwell Int'l*, 802 P.2d at 1183.

Although employer may disagree that the ALJ considered all relevant factors in weighing claimant's request for PTD benefits, the evidence in the record supports the ALJ's findings and conclusions. Because the evidence does not overwhelmingly rebut the ALJ's findings, and, to the contrary, supports them, we may not disturb the ALJ's credibility determinations. *See Youngs*, ¶ 46; *Arenas*, 8 P.3d at 561. Accordingly, because we conclude that substantial evidence supports the ALJ's determination that claimant was permanently and totally disabled, we find no error in the Panel's decision affirming the ALJ's order. *See Christie*, 919 P.2d at 860.

B. Because Substantial Evidence Supports the ALJ's Findings,  
Claimant's Immigration Status Was Irrelevant

Although the evidence supports the ALJ's findings and conclusions, employer contends that the ALJ erred by disregarding claimant's immigration status. Employer argues here, as it did before the Panel and the ALJ, that if claimant lacks legal authority to work in the United States, his immigration status creates a legal impediment which prevents him from earning wages. Thus, it claims, because claimant's legal status, and not his disability, may be the cause of his inability to work, the ALJ erred by disregarding claimant's immigration status.

A division of this court has held, however, that a worker's immigration status does not create a legal disability that precludes a claimant "as a matter of law from proving an entitlement to temporary disability benefits." *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671, 673 (Colo. App. 1997). Under *Champion Auto Body*, an individual illegally residing in this country may still recover workers' compensation benefits if injured on the job. Employer suggests, however, that *Champion Auto Body* does not foreclose consideration of immigration status.

We need not reach this question, however, because substantial evidence in the record, particularly the opinions of claimant's psychologist and occupational therapist, supports the ALJ's conclusion that claimant could not work, regardless of his immigration status. Indeed, the ALJ found that claimant would be permanently and totally disabled whether he lived in the United States or Mexico. Because substantial evidence supports the award of PTD benefits to claimant, we agree with the ALJ and the Panel, that claimant's immigration status is essentially irrelevant in this case.

C. Any Error Committed in Considering Claimant's Fifth Amendment Plea Was Harmless

Lastly, employer argues that the ALJ erred by permitting claimant to invoke the Fifth Amendment privilege without considering the requisite factors. We conclude that even if an error was committed, it was harmless given that substantial other evidence in the record supports the ALJ's decision.

As pertinent here, the Fifth Amendment to the United States Constitution provides as follows:

No person shall be held to answer for a capital

or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; . . . nor shall be compelled, in any criminal case, to be a witness against himself. . . .

U.S. Const. amend. V. When a party invokes his or her Fifth Amendment privilege against self-incrimination in a civil action, an ALJ, like a trial court,

must engage in a three-part balancing test before determining what adverse consequences, if any, will flow from that invocation.

Specifically, when confronted with the tension between the plaintiff's invocation of the privilege and the defendant's need for discovery, a trial court must determine: (1) whether the defendant has a substantial need for the information withheld; (2) whether the defendant has an alternative means of obtaining the information; and (3) whether any effective, alternative remedy, short of dismissal, is available. In applying the third prong of this analysis, the trial court must ensure that "the detriment to the party asserting [the privilege is] no more than is necessary to prevent unfair and unnecessary prejudice to the other side."

*Steiner v. Minnesota Life Ins. Co.*, 85 P.3d 135, 141 (Colo. 2004)

(quoting *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d

Cir.1994)).

Employer contends that the ALJ failed to engage in the requisite inquiry before permitting claimant to invoke the Fifth Amendment privilege when asked about his immigration status. Upon review of the exchange between the ALJ and the parties, it is evident that the ALJ suggested that claimant might wish to invoke his privilege against self-incrimination. The ALJ advised the parties:

[T]his is a tough one, because I think you have the right to – and I’ve noticed something in the record, to advise [claimant] to be in the country illegally is a criminal offense. He should be advised of his [F]ifth [A]mendment right not to say something. . . . It shouldn’t come out of his lips. Do you want to advise your client of the [F]ifth [A]mendment rights not to say anything that will incriminate him?

In response, claimant’s counsel affirmatively answered that she did wish to so advise her client, after which claimant expressly stated that he was “taking my rights – assuming my rights under the [F]ifth [A]mendment.” The exchange makes clear that the ALJ did not engage in the three-part analysis mandated by *Steiner*.

Nevertheless, we conclude that employer’s contention that the

Fifth Amendment was improperly invoked and ruled upon provides no basis for setting aside the Panel's order. In light of the substantial evidence supporting the ALJ's findings and conclusions any error the ALJ committed was harmless. See § 8-43-310, C.R.S. 2013; *L.E.L. Constr. v. Goode*, 849 P.2d 876, 883 (Colo. App. 1992) (admission of report which may have contained inadmissible statement was harmless in light of testimony establishing assertions contained in report), *rev'd on other grounds*, 867 P.2d 875 (Colo. 1994); *Featherstone v. Loomix, Inc.*, 726 P.2d 246, 249 (Colo. App. 1986) (any error in the fact-finding process was harmless and not prejudicial where issue was resolved by legal question).

The testimony and opinions of claimant's psychologist and occupational therapist amply support the ALJ's finding that claimant's work-related mental and physical injuries prevented him from working and rendered him permanently and totally disabled.

Whether claimant is in this country legally and whether he is legally able to work does not change his physical and mental inability to work. The ALJ concluded, with record support, that

claimant's disability, not his immigration status, caused his loss of earning capacity. Consequently, inquiring into the bases for claimant's invocation of the Fifth Amendment, or analyzing the legal and evidentiary consequences of doing so would not have altered the outcome of the case. As employer concedes, even if claimant is in this country illegally, his immigration status does not bar him from receiving workers' compensation benefits. *See Champion Auto Body*, 950 P.2d at 673.

We therefore conclude that any error the ALJ may have committed in addressing or analyzing claimant's Fifth Amendment privilege against self-incrimination was harmless. *See* § 8-43-310.

The order is affirmed.

JUDGE BERNARD and JUDGE NAVARRO concur.

**H**

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.

**ALEXANDER INTERACTIVE, INC.**, **Alexander**  
Schmelkin, and Josh Levine, Plaintiffs,

v.

**ADORAMA, INC.**, **Adorama** Enterprises LLC, Eu-  
gene Mendlowits, and Mendel Mendlowits, Defend-  
ants.

Mendel Mendlowits, **Adorama** Enterprises LLC,  
**Adorama, Inc.**, and Eugene Mendlowits, Counter  
Claimants,

v.

**Alexander Interactive, Inc.**, Josh Levine, and **Alex-**  
**ander Schmelkin**, Counter Defendants.

No. 12 Civ. 6608(PKC)(JCF).

Signed June 26, 2014.

*MEMORANDUM AND ORDER*

**JAMES C. FRANCIS IV**, United States Magistrate  
Judge.

\*1 “You’re an asshole, Dan” is not how an attorney should address her adversary. Nor is it proper professional conduct for a lawyer to make a surreptitious tape recording of her conversation with an opposing expert while he is performing a forensic examination. In this case, plaintiffs’ attorney, Denise Savage, is alleged to have done both.

*Background*

This case arises from a contract pursuant to which Adorama, Inc. (“Adorama”), an electronics retailer, engaged Alexander Interactive, Inc. (“AI”) to develop a new website. The project did not go smoothly, and the relationship between the parties ultimately broke down. AI sued, alleging breach of contract and mis-

appropriation of its proprietary software; it later added claims of defamation. Adorama counterclaimed, alleging that AI wrongfully terminated the contract, failed to meet deadlines, misrepresented its capabilities, and delivered substandard work.

Discovery has been contentious. On January 6, 2014, I issued a Memorandum and Order that, among other things, authorized Adorama to engage an expert to conduct a forensic examination of certain aspects of AI’s computer system. *Alexander Interactive, Inc. v. Adorama, Inc.*, No. 12 Civ. 6608, 2014 WL 61472, at \*7 (S.D.N.Y. Jan.6, 2014). Following a partial inspection by the expert, Adorama’s counsel, Daniel J. Brown, sent an e-mail to Ms. Savage asserting that, because the plaintiffs had advised Adorama’s expert that two of AI’s hard drives had been damaged or “wiped” and no longer contained relevant data and the expert was unable to access backup information because of poor internet connectivity on site at AI, the continued inspection scheduled for the following day would not go forward as planned. (E-mail of Daniel J. Brown dated April 23, 2014, attached as part of Exh. A to Letter of Daniel J. Brown dated April 25, 2014 (“Brown Letter”). Ms. Savage responded, disputing her adversary’s assertions. She concluded as follows:

You’re an asshole dan. I have everything taped. And yes, under ny law and the rules of professional conduct, it’s allowed. If you think you’re going to sully my clients with your fictions, you’re a fool. If you try any shit with the court, I welcome it. We have provided all requested data, all requested backups and have provided it in an orderly and accessible manner, unlike your clients.

Don’t fuck me. I’m done with your unethical behavior. Any motions by you, if you’re trying to build a case for some unmeritorious motion to deflect from your clients’ unethical behavior, will include

my recordings from today.

Please govern yourself accordingly.

(E-mail of Denise Savage dated April 24, 2014 (“Savage E-mail”), attached as part of Exh. A to Brown Letter).

By letter dated April 25, 2014, Mr. Brown brought this conflict to my attention. He asks that Ms. Savage be admonished for her use of profanity toward opposing counsel. (Brown Letter at 2). He further contends that the tape recording of Adorama's experts was improper and requests an order requiring Ms. Savage to produce the original recording and any other surreptitious recordings she may have made. (Brown Letter at 2–3).

\*2 Ms. Savage responded, apologizing for her use of vulgarities. (Letter of Denise L. Savage dated April 25, 2014 (“Savage Letter”) at 2). She attributed her conduct to being tired and angry, but she also argued that Mr. Brown had engaged in inappropriate and intimidating behavior during meet and confer sessions and depositions by shouting at her and telling her to “shut up.” (Savage Letter at 2–3). She attached deposition transcripts to her letter and offered to provide videotapes of the depositions for my review. (Savage Letter at 3).

With respect to the surreptitious tape recording, Ms. Savage stated, “I can represent to this Court, under penalty of perjury, that no such taping took place.” (Savage Letter at 3). She went on to explain that “[m]y purpose in stating that the conversation was taped was to compel honest conduct by Mr. Brown, his clients and their experts.” (Savage Letter at 3). Further, Ms. Savage argued that, even if she had made such a recording, it would not have been a violation of professional ethics. (Savage Letter at 4–5).

### A. Intemperate Language

Although federal courts do not generally enforce state bar disciplinary rules, they have the inherent power to address attorney misconduct that occurs during the course of litigation. See *In re Snyder*, 472 U.S. 634, 645 n. 6, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985); *United States v. Seltzer*, 227 F.3d 36, 40–42 (2d Cir.2000); *Handschu v. Police Department of the City of New York*, 679 F.Supp.2d 488, 501–03 (S.D.N.Y.2010). In doing so, they often look to the standards of professional conduct in the state where the federal court sits. See *Coggins v. County of Nassau*, 615 F.Supp.2d 11, 30 n. 8 (E.D.N.Y.2009); *Richards v. City of New York*, No. 97 Civ. 7990, 2000 WL 130635, at \*4 (S.D.N.Y. Feb.2, 2000). Rule 8.4(h) of the New York Rules of Professional Conduct (formerly Disciplinary Rule (“DR”) 1–102(A)(7) of the New York Code of Professional Responsibility) provides that “[a] lawyer or law firm shall not engage in any [ ] conduct that adversely reflects on the lawyer's fitness as a lawyer.” Similarly, Rule 8.4(d) (formerly DR 1–102(A) (5)) proscribes “conduct that is prejudicial to the administration of justice.” It is well-established that the use of vulgar, insulting, and offensive language toward an adversary in litigation constitutes a violation of these rules. See *In re Chiofalo*, 78 A.D.3d 9, 10–11, 909 N.Y.S.2d 36, 37 (1st Dep't 2010) (per curiam) (lawyer sent “hostile, obscene, and derogatory” communications to wife and her attorneys during divorce proceedings); *In re Schiff*, 190 A.D.2d 293, 294, 599 N.Y.S.2d 242, 242–43 (1st Dep't 1993) (per curiam) (counsel was intimidating and abusive and directed vulgar, obscene, and sexist epithets to adversary during deposition).

The gravity of Ms. Savage's misconduct is mitigated somewhat by the fact that she has recognized the impropriety and has apologized. Furthermore, the suggestion that she was overwrought when she created the offending e-mail is corroborated by the fact that it was sent at 12:22 in the morning. (Savage E-mail). In

the clear light of day, she might have used better judgment and pressed “delete” instead of “send.”

\*3 On the other hand, Ms. Savage's contrition is undercut by her attempt to deflect blame to her adversary. While I have reviewed the videotaped depositions as well as the transcript excerpts provided by counsel, I can find nothing that would support Ms. Savage's position. To be sure, both counsel occasionally became heated during the examinations, but Mr. Brown's most strident behavior was to tell Ms. Savage, “Enough.” (Deposition of Tim Broder dated Oct. 28, 2013 (“Broder Dep.”), excerpts attached as part of Exh. A to Letter of Matthew Sheppe dated May 8, 2014 (“Sheppe Letter”), at 309). Moreover, Mr. Brown generally admonished Ms. Savage only when she appeared to coach a witness by making speaking objections or directed the witness not to answer even though no privilege was being asserted. (Deposition of Alexander Schmelkin dated May 20, 2013, excerpts attached as part of Exh. A to Sheppe Letter, at 60–61, 240–41; Deposition of Joshua Levine dated May 13, 2013, excerpts attached as part of Exh. A to Sheppe Letter, at 41, 109–10; Deposition of Philip Cotty dated May 9, 2013, excerpts attached as part of Exh. A to Sheppe Letter, at 44–47; Broder Dep. at 114, 320).

Accordingly, Ms. Savage is cautioned that incivility among counsel will not be tolerated and that any similar misconduct in the future will warrant the imposition of sanctions, potentially including her being relieved from representing any party in this action.

#### B. *Undisclosed Tape Recording*

Had Ms. Savage made a tape recording of her conversation with the defendants' expert without disclosing that she was doing so, she would likely have violated Rule 8.4(c) of the New York Rules of Professional Conduct, which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.” Ms. Savage points out that, pursuant to Formal Opinion 2003–02, the Committee on Professional and Judicial Ethics of the Association of the Bar of the

City of New York concluded that not all undisclosed recording by an attorney should be considered unethical. (Savage Letter at 4). However, the Committee “remain[ed] of the view ... that undisclosed taping smacks of trickery and is improper as a routine practice.” Formal Opinion 2003–02. At the same time, it acknowledged that “if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical.” *Id.* But Ms. Savage's alleged recording hardly seems to fit within this safe harbor. She suggests that “the proposed taping of any conversation to compel an honest recitation of the Plaintiffs' conduct in this case by the Defendants' counsel is certainly a generally accepted societal good.” (Savage Letter at 4). By this interpretation, the exception would swallow the rule, as counsel could always represent that their intent in making a surreptitious recording was to keep the adversary honest. The Committee Report provides much narrower examples of where undisclosed taping might be acceptable, including the investigation of ongoing criminal activity or significant misconduct or conversations with persons who had previously made threats against the attorney or a client. Formal Opinion 2003–02.

\*4 In any event, I need not determine the precise contours of the proscription against surreptitious recording; Ms. Savage has represented under penalty of perjury that, in fact, she did not make such a recording. (Savage Letter at 3). Rather, she pretended that she had recorded the conversation in order “to compel honest conduct by Mr. Brown, his clients and their experts.” (Savage Letter at 3). This, however, is in itself an acknowledgment of having engaged in deceit and misrepresentation. Therefore, Ms. Savage is admonished to abide by her duty to deal with opposing counsel with candor. In addition, within ten days she shall produce any undisclosed recordings she has made or caused to be made in connection with this case or shall provide an affidavit stating that none was made.

Slip Copy, 2014 WL 2968528 (S.D.N.Y.)  
**(Cite as: 2014 WL 2968528 (S.D.N.Y.))**

*Conclusion*

It is unfortunate that in the heat of litigation counsel sometimes act contrary to their better judgment and the standards of professional responsibility. I expect that Ms. Savage will comply with her obligations as discussed above and that there will be no further need to address her conduct.

SO ORDERED.

S.D.N.Y., 2014.  
Alexander Interactive, Inc. v. Adorama, Inc.  
Slip Copy, 2014 WL 2968528 (S.D.N.Y.)

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