

BROWN BAG SEMINAR

Thursday, September 19, 2013

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

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 10, 2013 through September 13, 2013

Contents

Industrial Claim Appeals Office decisions

Abenth v. Northside Christian Church	2
Bromirski v. Shiman Chu LLC	7
Chandler v. Wal-Mart	13
Lovett v. Stroup Insurance Services	20
Lucero v. Peak Brewing Co.	27
Ortiz v. Pueblo City Schools	32
Schisler v. Walmart Stores	38
Vigil v. Pueblo School District #60	44
White v. Tractor Supply Co.	49

Court of Appeals decision

Employers Compensation Ins. v. Industrial Claim Appeals Office	54
Weaver v. Industrial Claim Appeals Office	64
Winter v. Industrial Claim Appeals Office	78

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-893-024

IN THE MATTER OF THE CLAIM OF

WANDA ABENTH,

Claimant,

v.

FINAL ORDER

NORTHSIDE CHRISTIAN CHURCH,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated February 20, 2013, that found the claim not compensable. We dismiss the appeal, without prejudice, for lack of a final order.

The claimant alleges she slipped in some water on August 13, 2011, and fell hitting her left shoulder. The claimant testified this fall occurred in the afternoon while she was “babysitting” the employer’s church. The claimant was employed part time by the church as a secretary and janitor in the morning.

A hearing was conducted in this matter on January 31, 2013. At the hearing, claimant’s counsel requested the ALJ find the claim compensable and allow the claimant “to choose her own physician.” No other benefits were requested. The ALJ later submitted an order finding the claimant was working as a volunteer when she fell and any injury she had did not arise out of and in the course of her employment.

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). Moreover, we have previously noted that we cannot review an interlocutory order solely on the basis that “there is no other adequate remedy.” *See Jones v. Chicken-N-Pasta*, W.C. No. 4-197-841 (February 3, 1995).

The panel previously has 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 Harley v. Life Care Centers*, W.C. No. 4-810-998 (May 20, 2011); *Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996). Conversely, an order which only has the effect of denying a general award of medical benefits would also be interlocutory. Because the claimant was not seeking any benefits, other than possibly a general award of medical benefits, the order finding her claim not compensable did not deny her a benefit. *See, Scott v. Exempla Health Care*, W.C. No. 4-753-124 (March 4, 2009).

We note that this determination of compensability was not necessary to the resolution of any issues regarding benefits, compensation, or penalties before the ALJ. The claimant was not claiming entitlement to any temporary or permanent disability benefits. She stated she had not received treatment for her alleged shoulder injury and she had not received any recommendations for any treatment. Rather, presumably the claimant was advancing her argument concerning compensability so as to use the legal effect of this finding in some future litigation wherein she may actually have need of some benefits. Because the effect of the finding in future litigation is both hypothetical and speculative, we have no authority to address the argument. There has been no denial of benefits in the hypothetical litigation, because none were sought, and any order which we might issue on the question of whether the ALJ committed error in his ruling pertinent to compensability would be merely advisory. *See Board of Directors v. National Union Fire Insurance Company*, 105 P.3d 653 (Colo. 2005) (courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur). In *Sunny Acres Villa v. Cooper*, 25 P.3d 44 (Colo. 2001) the Court ruled an ALJ's order can only serve the function of issue preclusion in a subsequent hearing when, among other requirements, there is a final judgment on the merits in the prior proceeding. Because the ALJ's order in this matter is not reviewable, it is not final and is inadequate to avoid further litigation in the case.

While it may appear superficially that an ALJ's finding that a claim is not compensable would be tantamount to stating 'all' benefits are denied, it is the practical effect that is critical. An order which denies all benefits when there are no benefits requested, actually denies no benefits. The dilemma presented represents a tension existing throughout the statute. While § 8-43-207(1) allows that hearings may be conducted "to determine any controversy concerning any issue arising under articles 40 to 47", § 8-43-211(d) mandates the assessment of fees against a party requesting a hearing over "issues which are not ripe for adjudication." The Supreme Court responded to this tension in *Sunny Acres Villa v. Cooper, supra*. The Court determined issue preclusion would not apply when an earlier ALJ found temporary benefits were justified

by the claimant's subjective complaints of mental disability while a subsequent ALJ determined in a claim for permanent total benefits that the claimant's mental condition was not work related. This was because the respondents in the first proceeding were found to have less motivation to defend a comparatively small financial exposure than the motivation they would have to contest the much more expensive liability of the permanent total claim. "A party necessarily lacks the same incentive to defend where its exposure to liability is substantially less at the earlier proceeding." *Sunny Acres Villa*, 25 P.3d at 47. This same analysis informs the resolution of the issue in this matter. Neither the respondents nor the claimant would have as much incentive to litigate compensability in the situation where there are no benefits at stake as they would where there was an actual request for medical treatment or disability compensation. Accordingly, the General Assembly has declined over many years to amend § 8-43-301(2) despite its steady application in denials of petitions to review. The fact that the posture of this matter features a denial of compensability, in the face of no request for the granting of a benefit or a penalty, does not alter the need to apply the terms of § 8-43-301(2) to deny appellate review. When benefits are actually at stake, an ALJ will presumably be offered a more vigorous presentation of the evidence and the issues than would occur when benefits are not involved.

The finding then, of a lack of compensability in this case, is not a dispositive one in the award or denial of any benefits, compensation or penalties. Indeed, we note that at the commencement of the hearing the claimant's attorney stated that an issue for resolution was whether the claim be found "compensable" and that "she be allowed to choose her own physician" with no discussion of any disputed medical benefits. Tr. at 13. It is certainly true that in the future the claimant may actually undergo some treatment, and may seek to have the treatment paid for and, in connection with that dispute, the respondents may attempt to interpose this order to preclude liability for medical treatment or some other form of benefits or compensation. The allegations of error complained of here may well be final and reviewable in connection with a final order entered in the future resolving such a dispute over medical benefits. However, at this particular hearing the claimant sought only a ruling that she sustained a compensable injury. Whether the ALJ committed error in connection with resolving that dispute is not presently a reviewable question. At present the claimant merely seeks an advisory ruling. We conclude that this order is currently not subject to review. *See Scott v. Exempla Healthcare, Inc.* W. C. No. 4-753-124 (March 4, 2009).

IT IS THEREFORE ORDERED that the claimant's petition to review the ALJ's order dated, February 20, 2013, is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_____ 9/12/2013 _____ by _____ RP _____ .

WANDA ABENTH, 2907 CHEYENNE AVENUE, PUEBLO, CO, 81008 (Claimant)
NORTHSIDE CHRISTIAN CHURCH, Attn: KNUTE COTTON, 2901 HIGH STREET,
PUEBLO, CO, 81008 (Employer)
HASSLER LAW FIRM, LLC, Attn: STEPHEN M. JOHNSTON, ESQ., 616 W. ABRIENDO
AVENUE, PUEBLO, CO, 81004 (For Claimant)
KUHN LAW OFFICE, Attn: MARTIN D. KUHN, ESQ., 21 E. MONUMENT STREET,
COLORADO SPRINGS, CO, 80903 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-882-047-01

IN THE MATTER OF THE CLAIM OF

MEGAN BROMIRSKI,

Claimant,

v.

FINAL ORDER

SHIMAN CHU LLC DBA NO COAST SUSHI,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated March 26, 2013, that denied and dismissed their request for a 50% reduction of non-medical benefits pursuant to §8-42-112(1)(b), C.R.S. for a safety rule violation. We affirm.

The claimant was employed for the respondent employer as a floor manager. The claimant was injured on March 3, 2012, when she slipped and fell while at work.

The matter went to hearing on whether the claimant's injury resulted from the willful violation of a safety rule, §8-42-112(1)(b), C.R.S. During the hearing, the claimant testified that she previously had read that employees were required to wear non-slip shoes. The claimant testified, however, that the safety rule was not enforced for her or any other employee. The claimant further testified that she was not provided non-slip shoes by the respondent employer, but that the employer did have a catalog that offered non-slip shoes that would allow for the shoes to be paid by withdrawals from the employees' paychecks. The claimant also testified that on the date she fell, she was wearing shoes similar to the shoes she wore at the hearing. The shoes that the claimant was wearing at the hearing had rubber tread on the bottom.

The owner of the respondent employer, Ms. Boyd, testified that non-slip shoes were required because the floors in the restaurant can become slippery due to water spills or other slippery substances on the floors. Ms. Boyd testified that non-slip shoes are shoes that contain tread on the bottom. Ms. Boyd also testified that the employer had a requirement for employees to wear non-slip shoes because of safety concerns. Ms. Boyd

testified that she discussed non-slip shoes with the claimant on several occasions. Ms. Boyd further testified that there was an incident with another employee who fell at work and was injured. This employee was not wearing non-slip shoes. So, Ms. Boyd held meetings during which the non-slip shoes requirement was discussed. Ms. Boyd testified that the claimant never was written up or verbally warned for failing to wear non-slip shoes. Ms. Boyd testified that when the claimant reported the injury to her, the claimant informed her that she was not wearing non-slip shoes. Ms. Boyd testified that there were times that the claimant probably was wearing what would be considered non-slip shoes. She testified, however, that she did not know if the shoes the claimant was wearing on the date of her injury would be considered non-slip shoes.

During the hearing, the respondents entered into evidence excerpts from the claimant's Facebook page that they asserted indicated the claimant admitted to not wearing non-slip shoes at the time of her injury.

After hearing, the ALJ concluded that the respondents had failed to demonstrate by a preponderance of the evidence that the shoes the claimant was wearing on the date of her injury were not non-slip shoes. Conclusions of Law at 5-6 ¶9. The ALJ found that the shoes the claimant wore to the hearing were similar to the shoes she had on at the time of her accident. The ALJ found that those shoes had a rubber tread on the bottom. Findings of Fact at 3 ¶9. The ALJ further found that Ms. Boyd testified there were times that the claimant probably was wearing what would be considered non-slip shoes, but that the respondent employer did not inspect the claimant's shoes on the date of her fall to determine if they were, in fact, non-slip shoes. Findings of Fact at 3 ¶8; Conclusions of Law at 5-6 ¶9. The ALJ also found that while the claimant admitted to her employer that she was not wearing non-slip shoes at the time of her fall, the claimant also demonstrated insufficient knowledge as to what constitutes non-slip shoes. Findings of Fact at 3 ¶10. Consequently, the ALJ denied and dismissed the respondents' request for a 50% offset for the claimant's non-medical benefits per §8-42-112(1)(b), C.R.S.

On review, the respondents contend that it was contradictory for the ALJ to find that the claimant admitted she was not wearing non-slip shoes and then conclude that the claimant had insufficient knowledge of what constituted a non-slip shoe. The respondents further argue that the ALJ erred by applying an incorrect standard that required them to further investigate whether the claimant was wearing non-slip shoes at the time of the incident. The respondents assert that a reasonable person would not have inquired further after the claimant's admission. The respondents also argue that it was unnecessary for the claimant to have knowledge of what non-slip shoes are when she was aware of the safety rule. Similarly, the respondents contend that it was unnecessary for the employer to prove whether the claimant knew what constituted a non-slip shoe

because the claimant was aware of the safety rule. We are not persuaded that the ALJ erred.

Section 8-42-112(1)(b), C.R.S. provides for the imposition of a 50% reduction in compensation in cases of “willful failure to obey any reasonable rule” adopted by the employer for the claimant's safety. Under §8-42-112(1)(b), C.R.S. it is the respondents' burden to prove every element justifying a reduction in compensation for the willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders, Inc.*, W. C. No. 4-576-463 (May 11, 2004). The question of whether the respondents met their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

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

Here, we do not perceive contradictory findings in the ALJ's order. During the hearing, Ms. Boyd testified that there are several shoe brands that have non-slip surfaces, and Dansko is one of the brands with non-slip surfaces that are made for work environments. Ms. Boyd also admitted that there were times she would say the claimant was wearing non-slip shoes. Tr. at 59-60. Additionally, the claimant testified that on the date of her fall, she was wearing shoes “very similar” to the shoes she was wearing at the hearing. In fact, the claimant testified that the shoes she had on at the hearing were “pretty much the same shoes” as the ones she was wearing on the date of her fall, except for the color. The shoes the claimant was wearing on the date of the hearing were Dansko clog shoes. Tr. at 46. The claimant further testified that a non-slip shoe has different tread on the bottom that prevents a person from slipping. Tr. at 28. Despite this, the claimant admitted that on the date of her injury, she was not wearing non-slip shoes. Tr. at 47. The ALJ resolved the conflicting testimony by finding that the claimant demonstrated “insufficient knowledge of what constitutes non-slip shoes.” Findings of Fact at 3 ¶10. Based on the above referenced testimony from the claimant and Ms. Boyd, we conclude that it was reasonable for the ALJ to infer that the claimant had insufficient

knowledge of what constituted a non-slip shoe. *See Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968)(to extent testimony is subject to conflicting interpretations, ALJ may resolve the conflict by crediting all, part, or none of the testimony). We are required to defer to the ALJ's resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *see also Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

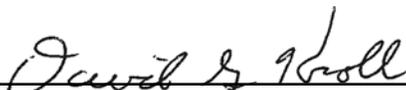
We further are not persuaded by the respondents' argument that the ALJ applied an incorrect standard by requiring them to engage in further investigation. In his order, the ALJ correctly placed the burden on the respondents to demonstrate that the claimant engaged in a willful violation of a safety rule. Conclusions of Law at 5 ¶¶7, 8, 9. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*. Part of the respondents' burden, therefore, was to prove that the claimant actually violated the safety rule. *Id.* Given the evidence that was presented at the hearing, however, the ALJ was not persuaded that the respondents satisfied their burden of proving that the claimant did not wear non-slip shoes on the date of her fall. Conclusions of Law at 5-6 ¶9. The respondents' argument notwithstanding, the ALJ did not hold them to a higher standard of further investigation. Rather, in his order, the ALJ specifically addressed the evidence that was introduced on the shoes the claimant was wearing when she fell. The ALJ stated "that as of the conclusion on the hearing, there was no credible evidence as to what shoes Claimant was wearing on the date of her fall, except for the Claimant's testimony that the shoes were similar to the shoes she wore at the hearing." Findings of Fact at 3 ¶11. The ALJ further concluded that the respondent employer did not inspect the shoes to determine if they were non-slip shoes. Conclusions of Law at 5-6 ¶9. The ALJ simply weighed all of the evidence that was presented regarding the claimant's shoes, and resolved the conflicts by determining that even though the claimant admitted she was not wearing non-slip shoes when she fell, she nevertheless had insufficient knowledge as to what constituted a non-slip shoe, and the respondents did not satisfy their burden of proving that the claimant was not wearing non-slip shoes when she fell. Again, based on the evidence presented, we are unable to say that the ALJ erred in his resolution or in the inferences drawn. *See Colorado Springs Motors, Ltd. v. Industrial Commission, supra*.

To the extent the respondents argue that it was unnecessary for the claimant to have knowledge of what non-slip shoes are when she was aware of the safety rule, or that it was unnecessary for the employer to prove the claimant knew what constituted a non-slip shoe, these arguments are unavailing here. Again, the ALJ found, with record support, that the respondents failed to satisfy their burden of proving that the shoes the claimant was wearing on the date of her injury were not non-slip shoes. Conclusions of Law at 5-6 ¶9; Tr. at 46, 59-60. Section 8-43-301(8), C.R.S. Since the ALJ found that the claimant did not violate the employer's safety rule, any allegation of error pertaining

to the claimant's knowledge of what constituted a non-slip shoe fails to provide any relief on review. Thus, despite the respondents' assertions, in our view there is substantial evidence to support the ALJ's determination to deny and dismiss the respondents' request for a 50% reduction of non-medical benefits pursuant to §8-42-112(1)(b), C.R.S. for a safety rule violation.

IT IS THEREFORE ORDERED that the ALJ's order dated March 26, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 8/21/2013 _____ by _____ RP _____ .

MEGAN BROMIRSKI, 1304 N MAIN ST. P O BOX 1141, OURAY, CO, 81427 (Claimant)
SHIMAN CHU LLC DBA NO COAST SUSHI, Attn: ELIZABETH BOYD, 1119 NORTH 1ST
STREET SUITE A, GRAND JUNCTION, CO, 81501-2175 (Employer)
TRUCK INSURANCE EXCHANGE, P O BOX 108843, OKLAHOMA CITY, OK, 73101
(Insurer)
MINTZ LAW FIRM, LLC, Attn: HAYDN WINSTON, ESQ., 605 PARFET STREET, SUITE
102, LAKEWOOD, CO, 80215 (For Claimant)
HUNTER & ASSOCIATES, Attn: JOE M. ESPINOSA, ESQ., 1801 BROADWAY, SUITE
1300, DENVER, CO, 80202-3878 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-802-469

IN THE MATTER OF THE CLAIM OF

BETTY CHANDLER,

Claimant,

v.

FINAL ORDER

WAL-MART STORES, INC.,

Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Allegretti (ALJ) dated April 5, 2013, that ordered the respondents to pay the claimant temporary total disability (TTD) benefits from April 3, 2011, through September 20, 2011. We reverse the ALJ's order on this issue.

A hearing was held on a number of issues, including whether the claimant's pulmonary embolism condition was caused, aggravated, or accelerated by her admitted industrial hamstring injury, whether the claimant's pre-existing low back condition was aggravated by her admitted hamstring industrial injury, whether the claimant proved she was entitled to TTD benefits from April 3, 2011, through September 20, 2011, and whether the respondents proved the claimant was responsible for her termination of employment and, therefore, barred from receiving TTD benefits.

After hearing, the ALJ found that the claimant worked as a customer service manager for the respondent employer. On August 16, 2009, the claimant sustained an admitted industrial injury when she slipped and fell on a wet floor while walking behind the checkout lanes in the employer's store. The claimant sustained a hamstring injury as a result of her fall. Dr. Nix treated the claimant's work injury.

Due to her hamstring injury, the claimant was off of work from August 16, 2009, through September 14, 2009, and she received TTD benefits for this time period. The claimant returned to work part-time from September 15, 2009, through September 26, 2009, and received temporary partial disability (TPD) benefits for this time period. The

claimant returned to work full time on September 27, 2009, and eventually was placed at maximum medical improvement (MMI) on September 20, 2011.

The claimant remained working full duty in her regular job until February 28, 2010, when she was hospitalized for pulmonary embolisms. The claimant remained hospitalized for her pulmonary embolism condition until March 4, 2010.

Following her pulmonary embolisms, the claimant returned to work on or about August 20, 2010, as a people greeter. The claimant continued to work as a people greeter for the respondent employer until she was terminated on April 3, 2011, for excessive absences and/or tardies. The termination notice indicated that after written coaching, the claimant acquired additional absences on March 27, 2011, and March 28, 2011.

Dr. Repsher performed a records review for purposes of determining the causes of the claimant's pulmonary embolism. Dr. Repsher opined that the claimant's pulmonary embolism condition was not related to the industrial injury. Rather, he opined that the claimant's condition was caused by an idiopathic coagulopathy. He further suggested that the claimant has a clot coming from somewhere in the central circulation, most commonly due to the internal iliac vein as opposed to a clot in the peripheral veins that are in the lower extremities.

Dr. Davis examined the claimant and reviewed her medical records. Dr. Davis opined that the claimant had an approximately 10 year history of problems with her low back. He opined that the claimant's medical records showed severe degenerative changes to the claimant's lower lumbar spine. Dr. Davis opined that there was no causal relationship between the claimant's fall on August 16, 2009, and any change in her back condition.

The ALJ subsequently issued her order finding that the claimant's hamstring injury largely resolved with some residual effects that may have affected her range of motion. While the ALJ noted that there were conflicting medical reports as to the claimant's altered gait, she found that the altered gait was secondary to the claimant's pre-existing low back and hip condition. The ALJ therefore found that the altered gait may have temporarily aggravated the claimant's low back and hip condition, but that any such aggravation was not permanent and resolved. Findings of Fact at 8 ¶18.

Crediting the opinions of Dr. Repsher, the ALJ also found and concluded that the claimant's pulmonary embolism condition was not causally related to the claimant's work injury. Findings of Fact at 10 ¶24; Conclusions of Law at 23. The ALJ also credited the opinions of Dr. Davis and found and concluded that the claimant's low back

condition was chronic and pre-existing and not causally related to her fall at work. Findings of Fact at 8 ¶18; Conclusions of Law at 23.

In reference to her admitted injury in August of 2009, the ALJ further found that the claimant met her initial burden of proving that she was entitled to temporary disability benefits. The ALJ found and concluded that the respondents failed to prove that the claimant was terminated for cause from her employment. The ALJ found the claimant's testimony credible that she missed work on March 27 and 28, 2011, because she was ill, and that she provided her supervisor with paperwork stating that she was not to go back to work for two days. The ALJ found that the claimant understood these absences would not result in her termination because she was under a doctor's orders to stay home due to illness. Based on these circumstances, the ALJ found that the claimant did not commit a volitional act and she did not exercise the requisite control over the circumstances leading to her termination. The ALJ therefore concluded that the claimant was not barred from receiving temporary disability benefits from April 3, 2011, through her MMI date of September 20, 2011, on the theory that she was responsible for her termination. The ALJ ordered the respondents to pay TTD benefits for the time period of April 3, 2011, through September 20, 2011.

The respondents have filed a petition to review and brief in support arguing that the ALJ erred in awarding the claimant TTD benefits from April 3, 2011, through September 20, 2011. The claimant has not filed a brief in opposition.

On review, the respondents argue that after the claimant was released from the hospital for her pulmonary embolisms, she was given work restrictions as a result of her pulmonary embolism and preexisting low back condition, and she subsequently was terminated for excessive absences on April 3, 2011. The respondents contend that the claimant's wage loss after April 3, 2011, was due to her unrelated low back and pulmonary conditions, not her industrial hamstring injury and, therefore, she was not entitled to recover TTD benefits after this date. We agree that the ALJ erred in awarding TTD benefits for the period of April 3, 2011, to September 20, 2011.

Pursuant to §§ 8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of TTD benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

Section 8-42-105(3), C.R.S. specifically provides that TTD benefits shall continue until the first occurrence of any one of the following: (a) the employee reaches MMI; (b) the employee returns to regular or modified employment; (c) the attending physician gives the employee a written release to return to regular employment; (d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. The termination of TTD benefits under any one of the four enumerated conditions is mandatory. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

Additionally, even if a claimant is terminated without fault, post-separation temporary indemnity benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. On the other hand, if a claimant's wage loss is not contributed to by her work injury, but is the result of non-industrial factors, the claimant will not be entitled to temporary indemnity benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 548 (Colo. 1995), *superseded by statute on other grounds*, Ch. 90, secs. 1–2, §§ 8–42–103(1)(g), –105(4), 1999 Colo. Sess. Laws 266.

Here, because the ALJ's findings do not support the conclusion that the claimant's industrial hamstring injury contributed to some degree to her wage loss for the period of April 3, 2011, to September 20, 2011, we conclude that it was error to award TTD benefits for this time period. As mentioned above, the ALJ found that after suffering her admitted hamstring injury, the claimant returned to regular duty on September 27, 2009. Findings of Fact at 15 ¶38. The claimant testified that when she returned to work full duty, there were no restrictions. Tr. at 27; see also Ex. E at 14-22. Section 8-42-105(3)(d), C.R.S. (TTD benefits cease when employee returns to regular employment). Additionally, Dr. Nix provided return to regular work releases on October 26, 2009, December 2, 2009, January 13, 2010, and February 9, 2010. Ex. 3 at 52-53, 54, 60; Ex. E at 14, 16, 18, 21. The ALJ further found that the claimant continued to work full duty in her regular job until she was hospitalized for pulmonary embolisms on February 28, 2010. Findings of Fact at 15-16 ¶38; Ex. 2 at 27-31. The ALJ also found that following her pulmonary embolisms, the claimant returned to work on or about August 20, 2010, as a people greeter. Findings of Fact at 16 ¶39; Tr. at 33-35.

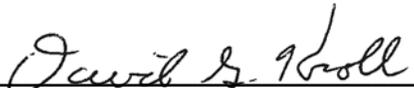
It is not disputed that when the claimant returned to work as a people greeter, she was under restrictions for her low back and pulmonary embolism conditions. As noted above, the ALJ found that the claimant's hamstring injury largely resolved. Findings of Fact at 8 ¶18. Further, the claimant's counsel asserted that when the claimant returned to work as a greeter, she had additional restrictions for her back and embolism conditions. Tr. at 13. Additionally, the claimant testified that at the time she returned to work as a greeter, she was under work restrictions for her low back and pulmonary embolism conditions. The claimant testified her restrictions included not lifting more than five

pounds, and sitting and standing as needed. She testified that these restrictions prevented her from returning to her regular job. Tr. at 34-36, 40. It follows, therefore, that at the time the claimant returned to work as a people greeter, she could not have been under restrictions for her hamstring injury. Since the ALJ found that the claimant's low back and pulmonary embolism conditions were not causally related to the industrial injury, then the claimant's claim for temporary indemnity benefits for the period of April 3, 2011, through September 20, 2011, must fail for lack of a causal connection between the admitted hamstring injury and her wage loss for this period. *See Bennett v. Bennett Plumbing & Backflow Services*, W.C. No. 4-702-985 (March 23, 2009)(claimant failed to establish entitlement to TTD because disability was caused by unrelated surgery and nonunion from that surgery), *aff'd* (Colo. App. No. 09CA0761, Jan. 28, 2010); *see also Liberty Heights at Northgate v. Industrial Claim Appeals Office, supra* (to establish eligibility for disability compensation including TTD benefits, a claimant must show causal connection between industrial injury and subsequent wage loss).

Additionally, while the ALJ found that the claimant did not commit a volitional act and did not exercise the requisite control over the circumstances leading to her termination, this is not dispositive of whether the claimant is entitled to receive temporary indemnity benefits for the period of April 3, 2011, to September 20, 2011. As specified above, even if a claimant is terminated without fault, post-separation temporary indemnity benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *PDM Molding, Inc. v. Stanberg, supra*. Again, as found by the ALJ, the claimant's hamstring injury largely resolved, and neither the claimant's low back condition nor her pulmonary embolism condition was causally related to the claimant's work injury. As such, post-separation temporary indemnity benefits are not available to the claimant since the ALJ's findings lead to the conclusion that the industrial hamstring injury did not contribute to some degree to her wage loss for the period of April 3, 2011, to September 20, 2011. *Liberty Heights at Northgate v. Industrial Claim Appeals Office, supra*; §§8-42-103 and 8-42-105, C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued April 5, 2013, is reversed to the extent it ordered the respondents to pay the claimant TTD benefits for the period of April 3, 2011, through September 20, 2011.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

BETTY CHANDLER

W. C. No. 4-802-469

Page 8

CERTIFICATE OF MAILING

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

_____ 8/30/2013 _____ by _____ RP _____ .

BETTY CHANDLER, 627 BROADWAY STREET, STERLING, CO, 80751 (Claimant)
WAL-MART STORES, INC., 1501 W. MAIN STREET, STERLING, CO, 80751 (Employer)
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, 70 PINE STREET, NEW YORK, NY, 10270-0094 (Insurer)
KENNETH M. PLATT & ASSOCIATES, Attn: KENNETH M. PLATT, ESQ., 2013 CLUBHOUSE DRIVE, SUITE LL 02, GREELEY, CO, 80634 (For Claimant)
CLIFTON & BOVARNICK, P.C., Attn: HOLLY M. BARRETT, ESQ., 789 SHERMAN STREET, SUITE 500, DENVER, CO, 80203 (For Respondents)
CLAIMS MANAGEMENT INC, Attn: SARAH WICKHAM, 3901 SE ADAMS ROAD, BARTLESVILLE, OK, 74006-3708 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-808-092-04

IN THE MATTER OF THE CLAIM OF

CURTIS LOVETT,

Claimant,

v.

FINAL ORDER

STROUP INSURANCE SERVICES, INC.,

Employer,

and

HARTFORD UNDERWRITERS INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Stuber (ALJ) dated May 8, 2013, that denied a claim for penalties by the claimant. We affirm.

The ALJ's order had denied several claims for medical benefits, approved one such claim and denied a claim for penalties by the claimant. The claimant has limited his appeal to the denial, "without prejudice," of his claim for penalties. In response, the respondents argue the ALJ's order pertinent to penalties is interlocutory and, as such, is not a final order available for review. We conclude a portion of the order is final, and, as such, is affirmed.

The claimant worked as an insurance salesman. On June 26, 2009, he injured his left knee when he struck it on an open desk drawer. His injuries eventually required treatment for both his left knee and his low back. The claimant underwent surgery on the knee and on his back. The claimant was scheduled to undergo his most recent back surgery on April 9, 2013. Six days prior to the April 9 surgery, on April 3, a hearing was convened before the ALJ. The claimant listed as issues on either his December 7, 2012, application for a hearing, or on his March 29, 2013, Case Information Sheet, medical benefits in the form of a sleep comfort bed, a personal health club trainer, physical therapy, massage therapy, moist heat, ultrasound, low back traction and chiropractic care. On both documents, the claimant also asserted a claim for penalties which stated in its entirety: "violation of Rule 16 regarding medical denials for preauthorization with completed request". The respondents replied to the penalty claim by stating in their response to the application for hearing: "Failure to state grounds with specificity or clarity, §8-43-304(4), CRS".

The claimant stated at the outset of the April 3, 2013, hearing he was requesting approval for the bed, an ergonomic chair, the gym trainer, massage therapy, and physical therapy. In his post hearing position statement, the claimant withdrew his request for the bed, the chair, massage therapy, physical therapy, as well as a request for a TENS unit a referral to Dr. Malinky, ultrasound and traction treatment. This was said to be due either to the fact the treatment had been provided already or because its need was obviated by the claimant's pending surgery. In his May 8 order, the ALJ noted this lack of practical value for the requested medical benefits. The ALJ nonetheless made findings in his order that, with one exception, none of the medical benefits were reasonable or necessary. The ALJ did rule the request for a health club trainer was authorized by default because the respondents did not respond in a timely fashion to the preauthorization request for the trainer.

In regard to the claimant's request for an assessment of penalties, the ALJ found that the claimant asserted for the first time on the day of the hearing, as a basis for the penalty claim, that the respondents had violated Worker's Compensation Rule of Procedure 16-9(E). That section requires an insurance carrier to give notice to a medical provider, when the provider's first bill is received, the procedures the provider must follow as specified in Rule 16-9 to obtain prior authorization for medical treatment. The claimant alleged the respondents had failed to inform Dr. Messner, the claimant's treating doctor in 2009, of these preauthorization procedures.

In his May 8 order, the ALJ resolved the pleading of the penalty claim prior to the date of the hearing was inadequate. It was determined § 8-43-304(4) imposed a specific statutory pleading standard on penalty claims. That subsection requires "in any application for hearing ... the applicant shall state with specificity the grounds on which the penalty is being asserted." The ALJ also made reference to the instructions appearing on the application for hearing form required by the Office of Administrative Courts to be used by the parties. Those instructions advise the party to "Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended." Finding the claimant had failed to comply with § 8-43-304(4) due to his lack of specificity in his penalty pleading, the ALJ ruled the claim for penalties "must be denied without prejudice."

On appeal, the respondents note the claimant is not appealing any of the decisions reached by the ALJ regarding the issues of medical benefits. The respondents also state they are not appealing any of those decisions. The respondents then argue that because the ALJ denied the penalty claim of the claimant 'without prejudice,' there is no final order available for review. They assert then, that the claimant's petition to review should be dismissed due to the lack of a reviewable order.

Section 8-43-301(2) provides any party may file a petition to review when they have a dispute with an order “that requires any party to pay a penalty or benefits or denies a claimant any benefits or penalty”. The ALJ did deny the claimant a penalty. However, by adding the qualifying phrase, ‘without prejudice’, the ALJ also sought to limit the extent of his determination. Colorado Rule of Civil Procedure 41(b) provides for the involuntary dismissal of a claim by a judge on the basis that “upon the facts and the law the plaintiff has shown no right to relief.” The Rule requires that such a dismissal operates as an adjudication upon the merits unless the judge “otherwise specifies.” Because the ALJ entered his order at the conclusion of an evidentiary hearing, where all the evidence was presented, his order parallels a CRCP 41(b) dismissal order. While the ALJ’s caveat states his order pertinent to penalties was “without prejudice”, this qualification may be more of a statement aimed at indicating the order did not proceed to the merits of any penalty claim rather than to serve as a bar to the ability of the claimant to seek appellate review.

A final judgment is a jurisdictional prerequisite to review on appeal. *People v. Proffitt*, 865 P.2d 929, 931 (Colo.App.1993). Generally, a trial court's dismissal of a claim without prejudice does not constitute a final judgment for purposes of appeal because the factual and legal issues underlying the dispute have not been resolved. C.R.C.P. 41(a)(2); *District 50 Metro. Recreation Dist. v. Burnside*, 157 Colo. 183, 186-87, 401 P.2d 833, 835 (1965); *Norby v. Charnes*, 764 P.2d 407, 408 (Colo.App.1988). However, a trial court's characterization of an order to dismiss a claim without prejudice is not dispositive. *Proffitt*, 865 P.2d at 931. If a judgment in fact completely resolves the rights of the parties before the court with respect to a claim and no factual or legal issues remain for judicial resolution, the judgment is final as to that claim. *Id.*; *Kempton v. Hurd*, 713 P.2d 1274, 1277 (Colo.1986); *Snyder v. Sullivan*, 705 P.2d 510, 512 n. 2 (Colo.1985); *Brody v. Bock*, 897 P.2d 769, 777 (Colo. 1995).

In this matter the claimant has endeavored to present his penalty claim in a variety of fashions at various points in the proceedings. In his application for a hearing, and again in his Case Information Sheet, the claimant described the basis for his penalty as “violation of rule 16 regarding medical denials for preauthorization with completed request.” At the outset of the hearing the claimant’s counsel described the penalty claim as involving requests for various medical treatments and “some of those items were not objected to, timely, with an adverse determination ... and, so we are asking for penalties, under Rule 16”. (Tr. pg. 4). A few moments later, claimant’s counsel articulated the penalty claim as “The respondents did not comply with Rule 16-9(E) ... basically, indicates that the onus is upon the insurance company to tell the doctor exactly what is needed to get preauthorization. The claims adjuster has indicated that they never did that, at any time, with Dr. Messner.” (Tr. 6-7). In his post hearing position statement the claimant alleges a penalty should be assessed due to the untimely denial of a request for

physical therapy on October 3, 2012, in violation of Rule 16-10(B) and 16-9(C). In that same position statement the claimant refers to his penalty claim as implicating a delay by the respondents of approving the request for a gym trainer as a violation of Rule 16-10(B). Finally, the claimant predicates his penalty claim is justified by violations of Rule 16-10(B)(3)(c), when the respondents failed “to provide identification of the information deemed most likely to influence the reconsideration of the contest when applicable.”

The ALJ, in his May 8 order, acknowledges the claimant set forth “multiple alleged requests for prior authorization pursuant to WCRP 16,” The ALJ made the additional finding that “at hearing and in his post hearing written argument, claimant made clear for the first time that his principal allegation was that the insurer had violated WCRP 19-9(E) by failing to provide an initial notice to Dr. Messner about the procedures in WCRP 16 for obtaining prior authorization of payment.” The ALJ concluded these latter descriptions of the claimant’s penalty claim were untimely. Viewing only the penalty description contained in the claimant’s application for hearing, the ALJ found it an inadequate statement of the claim and did not comply with § 8-43-304(4) or the instructions on the OAC application for hearing form.

A review of the ALJ’s order shows that it “resolves the rights of the parties” and that “no factual or legal issues remain for judicial resolution” insofar as it holds the claimant’s statement that “violation of rule 16 regarding medical denials for preauthorization with completed request” is an insufficient notice of a penalty claim. Should the claimant file another application for hearing containing the same notice, with little more, issue preclusion would apply premised on the ALJ’s May 8 order. The validity then, of the ALJ’s order in that regard is subject to appellate review.

To the extent the ALJ referenced penalty claims advanced by the claimant alleging the untimely denial of medical benefits or the failure to comply with Rule 16-9(E), the ALJ has stated those claims are not being reviewed in his order. The implication of his order is that those claims were not successfully put before him for decision. No determination on their merits is being attempted. Those claims are being denied “without prejudice”. Accordingly, those penalty allegations are not subject to our review at this juncture.

The finding by an ALJ that a penalty pleading is inadequate has been the subject of previous review by the panel. An appeal was not determined to be premature on the basis that the order did not finally resolve the rights of the parties. In *Young v. Bobby Brown Bail Bonds*, W.C. No. 4-632-376 (April 7, 2010), affirmed, *Young v. Industrial Claim Appeals Office*, (Colo. App. No. 10CA0801, February 24, 2011)(not selected for publication), the claimant alleged on appeal that the ALJ was in error when he declined to assess penalties for the respondents’ mistaken notice sent to medical providers stating

the claim was denied. In his application for hearing the claimant had cited only to the penalty statute, § 8-43-304(1) C.R.S. The ALJ found the claimant did not specify or plead any specific rule, statute, or order that the respondents violated that would form the basis for a penalty. The claimant argued at hearing and on appeal that § 8-43-401 imposed a time limit to pay medical bills as did Rule 16. However, the ALJ and the panel agreed that because neither that statute nor that rule had been pled by the claimant in his statement of his penalty, those claims were not properly before the ALJ. The requirement in § 8-43-304(4) that a pleading for a penalty “shall state with specificity the grounds on which the penalty is being asserted” required the citation of those sources to adequately present to the ALJ a penalty claim. The denial of the penalty claim was affirmed by the panel. The possibility that the claimant could have filed a subsequent application for a hearing featuring a more specific pleading did not preclude appellate review.

Consistent with the analysis in *Young*, we conclude the ALJ committed no error in denying a penalty in this case based upon the deficient pleading of the penalty claim by the claimant. The claimant’s statement: “violation of rule 16 regarding medical denials for preauthorization with completed request” does not state a basis for a penalty. Rule 16-10(A) specifically allows an insurer to deny a request for preauthorization of medical treatment. To the extent the claimant alleged a violation of the procedures established in Rule 16 governing such a denial, the claimant is required to cite to the specific procedure involved. This is a requirement of § 8-43-304(4) and the OAC application instructions. Those instructions also request a statement of the dates on which it is claimed the violation began and ended. Section 8-43-304(4) requires an indication of the “grounds” for the penalty. The claimant’s statement here does not cite to the statute or rule being implicated, the dates of the violation nor a statement as to how the violation is said to have occurred. Those are the requirements for pleading a penalty. The claimant’s statement does not satisfy any of these three pleading conditions.

We previously have determined that the requirement for specificity serves two functions. First, it notifies the putative violator of the basis of the claim so that the violator may exercise its right to cure the violation. The specificity requirement also ensures the alleged violator will receive notice of the legal and factual basis for the penalty claim so that their rights to present evidence, confront adverse evidence, and present argument in support of their position are protected. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Jakel v. Northern Colorado Paper Inc.*, W.C. No. 4-524-991 (October 6, 2003); *Gonzales v. Denver Public School District No. 1*, W.C. No. 4-437-328 (December 27, 2001); *Stilwell v. B & B Excavating Inc.*, W.C. No. 4-337-321 (July 28, 1999). The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered, and

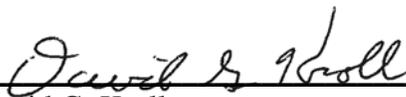
afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990); *Carson v. Academy School District # 20*, W.C. No. 4-439-660 (April 28, 2003); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010).

The claimant argues on appeal that the respondents could tell by six questions on cross examination his counsel posed to the respondents' claims adjuster in her deposition, that the actual claim for penalties surrounded a violation of Rule 16-9(E). The deposition featured approximately 160 questions from claimant's counsel and was taken 28 days prior to the hearing in this matter. It is not clear how the respondents were to be able to distinguish questions submitted to obtain information from statements that were to serve as notice of a penalty claim. It is also not explained by the claimant how the respondents could conduct additional discovery, add witnesses, and plead affirmative defenses to the penalty claim within that 28 day span prior to defending at the hearing. Notice provided through the selection of cross examination questions is not an adequate procedure to inform the opposing party of a new claim.

Here, both the respondents and the ALJ would be left unaware and unfairly surprised by the ambiguity of the claimant's description of his penalty in his application for hearing. The ALJ was correct to conclude a penalty had not been adequately pled by the claimant.

IT IS THEREFORE ORDERED that the ALJ's order issued May 8, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 8/30/2013 _____ by _____ RP _____ .

CURTIS LOVETT, 1214 NORTH MEADE AVENUE, COLORADO SPRINGS, CO, 80909
(Claimant)

STROUP INSURANCE SERVICES, INC., 500 N. CIRCLE DRIVE, SUITE 207, COLORADO
SPRINGS, CO, 80909 (Employer)

HARTFORD UNDERWRITERS INSURANCE, Attn: LEANN NEGRON, P O BOX 14474,
LEXINGTON, KY, 40512 (Insurer)

STEVEN U. MULLENS, P.C., Attn: ROBERT W. TURNER, ESQ., P O BOX 2940 105 EAST
MORENO AVENUE, COLORADO SPRINGS, CO, 80901-2940 (For Claimant)

LAW OFFICES OF SCOTT TESSMER, Attn: BENJAMIN P. KRAMER, ESQ., 7670 SOUTH
CHESTER STREET, SUITE 300, ENGLEWOOD, CO, 80112 (For Respondents)

RITSEMA & LYON, P.C., Attn: TAMA L. LEVINE, ESQ., 999 18TH STREET, SUITE 3100,
DENVER, CO, 80202 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-899-912

IN THE MATTER OF THE CLAIM OF

KENNETH LUCERO,

Claimant,

v.

FINAL ORDER

PEAK BREWING COMPANY, LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated March 15, 2013, that found the claim compensable and ordered the respondents to pay for the claimant's medical costs and temporary total disability benefits beginning May 31, 2012, and continuing. We affirm.

The claimant was working on a construction project when he sustained a severe laceration of his left hand due to contact with a Skill saw on May 30, 2012. The construction project involved the addition of a permanent roof and bar to the outdoor courtyard adjacent to the employer's restaurant. The respondents denied liability for the injury asserting the claimant was an independent contractor and that the employer could not be characterized as a statutory employer. After a hearing conducted on January 15, 2013, the ALJ determined the claimant was not an independent contractor, but rather, an employee of Ferris Woodwork. Ferris Woodwork had contracted with the employer to construct the roof and bar. It was not disputed that Ferris Woodwork had no workers' compensation insurance coverage. The ALJ found the respondents were liable for the claimant's injury because the employer was a company "owning any real property or improvements thereon" which contracted out "any work done on and to said property" pursuant to § 8-41-402(1) C.R.S.

The respondents appeal contending § 8-41-402(1) does not apply because the employer did not own the restaurant site where the claimant was injured and did not own the improvement being made to the property. The employer leased the property on which the restaurant was located. However, the case law construction that section has received in the past does not support the respondents' position.

On appeal, the respondents argue § 8-41-402(1) does not apply for the reason that the employer is not the ‘owner’ of either the real property or of the ‘improvement’ to the property on which the claimant was working. That section specifies a party “owning any real property or improvements thereon” will have the liability of a statutory employer. The respondents point out the ALJ misconstrued the lease regarding the property. The ALJ found the employer can make improvements to the property without consulting the landlord. The lease does provide the landlord must authorize improvements but the landlord’s approval for improvements cannot be unreasonably withheld. The ALJ’s finding may have been based on the testimony of the employer’s assistant general manager, David Woodruff. Woodruff testified he was in charge of the project to install the courtyard roof and bar. He stated he consulted with others on the project, but not with the landlord. The provisions of the lease also include a paragraph which informs the parties that should the property be seized through an act of eminent domain by local authorities, any condemnation award is to be apportioned between the landlord and the employer.

These lease provisions are cited by the parties as being relevant to a determination of the question as to whether the employer ‘owned’ the improvement upon which the claimant was working when injured. These facts however, play an inconsequential part in the application of the statute. This issue pertaining to the ownership of an ‘improvement’ was determined many years ago by the Court of Appeals. In *Wagner v. Coors Energy Co.*, 685 P.2d 1380 (Colo. App. 1984), Coors was defending in district court a claim for personal injury damages. Coors asserted as a defense the statute implicated in this matter. Section 8-41-402(1) requires that “every person, company, or corporation owning any real property or improvements thereon and contracting out any work done on and to said property ... shall be deemed to be an employer under the terms of articles 40 to 47 of this title.” Subsection (2) then provides that so long as any contractor or subcontractor performing the work on the property carries workers’ compensation insurance, none of their “employees ... shall have any right of contribution or action of any kind ... against the person, company, or corporation owning real property and improvements thereon ...”. Coors was contracting to have a well serviced on property it did not own. Wagner was injured while working on the well project. He pursued a claim for personal injuries against Coors alleging a Coors supervisor caused his injury. Coors successfully obtained a summary judgment dismissing the claim premised on the authority of § 8-41-402(2) by asserting in its affidavit simply that the well was “owned by Coors”. The summary judgment was affirmed by the Court of Appeals. “Accordingly, we hold that an owner of real property or an owner of improvement on real property which contracts out work to be performed thereon is immune from suit ...” (*Wagner*, 685 P.2d at 1382). The court appeared to reason, that unless shown otherwise, the activity of contracting out work on an improvement signifies ownership of the improvement. Because a well cannot be

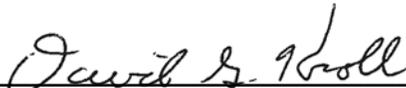
moved, the fact that the improvement to the real property is indivisible from the property itself did not pose a barrier to the court. As applied in this circumstance, the contracting out by the employer of work to construct a permanent roof over the outdoor courtyard would lead to the conclusion the employer was an “owner” of the improvement as those terms are used in § 8-41-402(1). The provisions of the lease which distributes rights between the landlord and the tenant pertinent to improvements would be of little significance.

A similar result was reached more recently in *Barron v. Kerr-McGee*, 181 P.3d 348, (Colo. App. 2008). Two employees of a contractor hired by Kerr-McGee to work on salt water storage tanks were injured when an explosion occurred in one of the tanks. The employees initiated a premises liability action against Kerr-McGee. Relying on § 8-41-402(2), Kerr-McGee obtained a summary judgment dismissing the claims. The Court of Appeals affirmed the dismissal. The court noted Kerr-McGee did not own the real property on which the tanks were located. The court also noted the tanks were such that they were “a permanent feature affixed to the real property.” Nonetheless, Kerr-McGee was viewed as the owner of the tanks. That party had the tanks placed on the property. Because Kerr-McGee viewed the tanks as an ‘improvement’, the court found they qualified as such according to § 8-41-402(2). Kerr-McGee had also contracted with the plaintiffs’ employer to have work performed on the tanks.

The employer’s position in this matter is indistinguishable from that of Kerr-McGee. The employer did not own the real property. It did contract for work on an improvement the employer was responsible for adding to the premises. The improvement was attached to the real property in a fairly permanent manner. Consistent with *Wagner* and *Barron*, the employer would qualify as an ‘owner’ of an ‘improvement’ to real property. The employer also contracted out work to be performed on the improvement to the property. Pursuant to § 8-41-402(1), the employer “shall be liable ... to pay compensation for injury or death resulting therefrom to ... said employees ...”. The ALJ did not err when he applied § 8-41-402(1) and determined the respondent employer was a statutory employer liable for the claimant’s workers’ compensation benefits.

IT IS THEREFORE ORDERED that the ALJ’s order issued March 15, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

KENNETH LUCERO

W. C. No. 4-899-912

Page 6

CERTIFICATE OF MAILING

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

_____ 9/11/2013 _____ by _____ RP _____ .

KENNETH LUCERO, P O BOX 4473, DURANGO, CO, 81302 (Claimant)

PEAK BREWING COMPANY, LLC, Attn: JENNIFER BURGSTHALER, 801 E 2ND AVENUE, DURANGO, CO, 81301 (Employer)

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

GAIL C. HARRISS, LLC, Attn: GAIL C. HARRISS, ESQ., 450 S CAMINO DEL RIO, STE 201, DURANGO, CO, 81301 (For Claimant)

RITSEMA & LYON, P.C., Attn: CAROL A. FINLEY, ESQ., 225 NORTH 5TH ST, STE 1010, GRAND JUNCTION, CO, 81501 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-838-088-03

IN THE MATTER OF THE CLAIM OF

RANDY ORTIZ,

Claimant,

v.

FINAL ORDER

PUEBLO CITY SCHOOLS,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated March 20, 2013, that denied and dismissed the claim for benefits. We affirm.

The claimant was injured on September 22, 2010, when the stand he was using to referee a volleyball game broke causing him to fall approximately six feet and injure his low back. The claimant was employed by the respondent as a student counselor at an elementary school. The ALJ found the injury did not arise out of and in the course of the claimant's employment. The claimant appeals arguing he was hired by the respondent to serve as a volleyball referee and his injury did occur as a consequence of his employment.

The ALJ made several findings of fact. In addition to the claimant's full time work as a school counselor, the claimant had also worked part time in the past for the respondent as an assistant wrestling coach. In addition, the claimant had worked as a referee or official at football games and wrestling matches featuring teams from the respondent school district for which he had been paid. The claimant had just recently completed his certification requirements with the Colorado High School Activities Association (CHSAA) to allow him to referee volleyball games. On September 22, 2010, he was assigned by his contact at the CHSAA to referee a middle school volleyball game at Corwin International School. Corwin was a middle school in the respondent's district. The visiting team was a middle school from another school district. The respondent sanctions and offers extracurricular athletics in a variety of sports in its high schools. It

offers a much more limited sports program in its middle schools. The only sports sanctioned in the middle schools are boys and girls basketball, boys and girls track, wrestling and softball. Volleyball is a sport offered in high school, but not in middle school.

The volleyball tournament for which the claimant refereed on September 22, 2010, was organized and run by the YMCA. This was in keeping with a program whereby the respondent would provide the use of school district physical facilities to allow outside community groups to organize youth sports events in sports not offered by the school district itself. The claimant, in fact, had participated in one of these community organized sports when he volunteered as a soccer coach for middle school age youth in a league run by the Ranger soccer club. The games were played on the respondent's athletic fields. The claimant did not know how much he might be paid to referee volleyball or the source of any payment. His primary motivation was that he enjoyed working with kids.

On September 22, the claimant arrived to referee the YMCA volleyball game. The Corwin vice principal, Brian Repola, greeted him. When the claimant inquired about payment, Mr. Repola gave him a school district vendor payment application. Mr. Repola stated he was unclear as to the procedure for payment of officials since he had been informed of the volleyball tournament just previous to the September 22 event. The respondent's athletic director, Robert Gonzales, had just recently addressed a meeting of the district's school officials and advised them the district, and their schools, had no budget to pay for any expenses associated with sports that are not sanctioned by the school district. Mr. Repola stated he did not attend this meeting with Mr. Gonzales. It was not clear who set up the referee stand used by the officials at the volleyball tournament. While the claimant was on the stand officiating, it collapsed and the claimant fell to the floor. The next day, the claimant called Mr. Repola, informed him the claimant was an employee of the respondent and had indeed hurt his back the previous evening while serving as a volleyball referee. Mr. Repola then complied with the claimant's request to fill out an injury report and deliver it to the claimant. The claimant had previously reported a work injury so he knew the clinic the respondent used to refer its employees for treatment of work injuries. He asked Mr. Repola if he should treat at that clinic and it was agreed he would do so.

Shortly after the claimant's initial visit to the clinic, he was informed the respondent was disputing the claim on the basis that the injury occurred outside the claimant's job as a school counselor. The claimant was not paid by the respondent for his referee activities on September 22, nor was he paid for another volleyball tournament he officiated three weeks later.

The claimant argued he was performing an activity incident to his job with the employer as a school counselor. He asserts the respondent sponsors sports programs because they are an “integral part of the educational process.” He relies on cases from New Mexico and New Jersey which found compensable injuries to city employees incurred in a lunch time basketball game or in a recreational softball game because the employer either knew of the basketball game or it had supplied equipment for the softball game.

The ALJ found the claimant had paid to attend the volleyball referee clinics offered by the CHSAA, and had paid for his own uniform. Once certified by the CHSAA, the claimant was eligible to serve as a referee at volleyball games sponsored by a variety of groups including leagues, the YMCA or school districts. The youth participants at the September 22 volleyball game were all wearing YMCA shirts. The claimant had never contracted with the respondent to referee the September 22 game and the respondent had never agreed to pay him, or anyone, for services at a middle school volleyball game. The ALJ concluded the claimant was engaged in an independent activity during which he was not an employee of the respondent. The claim then, was determined to be not compensable and was dismissed.

Unlike in the states of New Mexico and New Jersey cited by the claimant, Colorado specifically excludes from workers’ compensation coverage an injury to any person “while participating in recreational activity,” § 8-40-301(1) C.R.S., or through “participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program,” § 8-40-201(8) C.R.S. The ALJ did not cite to these statutes, but they did preclude the ALJ from finding the claimant’s activities as a volleyball referee from being incident to his job as a school counselor.

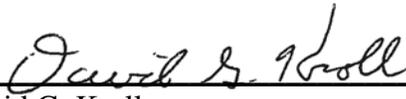
The ALJ made findings that in the circumstances of the September 22 volleyball game, the claimant could not be seen as having been employed by the respondents. The claimant had pointed to his past service as an assistant high school wrestling coach and as an official at football games and at wrestling matches where he was paid. The ALJ however, noted that the claimant was specifically paid through his salary check for his extra duty as a wrestling coach. The ALJ also found that when employed by the respondent as an official, the claimant was sent a separate check for the specific event involved. The claimant would have been aware that if he was to be paid for volleyball officiating, he would have received a check as he had for football and wrestling referee work. He did not receive such payment. The ALJ concluded the mistaken provision of a vendor form by Mr. Repola did not serve to establish an employment relationship. The ALJ then, resolved the claimant was not acting as an employee of the respondent at the time he was injured.

Only injuries which arise out of and in the course of employment are compensable under the Workers' Compensation Act. § 8-41-301(1)(b), C.R.S. An injury arises out of and in the course of employment if it is “sufficiently interrelated to the conditions and circumstances under which the employee usually performs his job functions that the activity may reasonably be characterized as an incident of employment.” *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Lori's Family Dining, Inc., v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The ultimate determination of whether an injury arose out of and in the course of the claimant's employment is a question of fact for resolution by the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. § 8-43-301(8), C.R.S.; *Lori's Family Dining Inc. v. Industrial Claim Appeals Office, supra*. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory or contrary inferences. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996). Under the substantial evidence standard we must defer to the ALJ's credibility determinations, his assessment of the sufficiency and probative weight of the evidence and plausible inferences drawn from the record. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether there is a sufficient “nexus” between the employee's activity at the time of the injury and the circumstances of the employment is a question of fact for resolution by the ALJ. See *L.E.L. Construction v. Goode*, 849 P.2d 876 (Colo. App. 1992), *rev'd.* on other grounds, 867 P.2d 875 (Colo.1994). Here, we cannot say there was a sufficiently close connection between the claimant's work for the employer and his volleyball officiating activity at the time of his injury. The claimant was employed as a student counselor at an elementary school. None of the students at the volleyball tournament attended his assigned school because the tournament was among middle school students. The claimant had been specifically employed in the past as a wrestling coach and as an official at football games and at wrestling matches. There was no connection that would logically extend between his past work in those other sports and his participation as an official at a volleyball game. His past pay for work in the other sports was always documented by a separate vendor check for officiating or a notation on his salary check for his coaching work. The claimant was never paid by the respondent for work at a volleyball game. The work as a volleyball official bore more of a similarity to his work as a volunteer soccer coach. Soccer was also not a sport offered by the respondent at the Middle School level, so the claimant was not paid for that work. Because volleyball shared that status as an unsanctioned sport, it was reasonable to conclude the claimant's work in that activity would also be a voluntary recreational activity. It would not be part of his employment with the respondent.

IT IS THEREFORE ORDERED that the ALJ's order issued March 20, 2013, 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

_____ 8/21/2013 _____ by _____ RP _____ .

RANDY ORTIZ, 3520 MARICOPA DRIVE, PUEBLO, CO, 81001 (Claimant)
PUEBLO CITY SCHOOLS, 315 W. 11TH STREET, PUEBLO, CO, 81003 (Employer)
MINTZ LAW FIRM, LLC, Attn: HAYDN WINSTON, ESQ., 605 PARFET STREET, SUITE
102, LAKEWOOD, CO, 80215 (For Claimant)
CAIRNS & ASSOCIATES, P.C., Attn: GREGORY B. CAIRNS, ESQ., 3900 EAST MEXICO
AVENUE, SUITE 700, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-872-358

IN THE MATTER OF THE CLAIM OF

LADONNA SCHISLER,

Claimant,

v.

FINAL ORDER

WALMART STORES, INC.,

Employer,

and

ILLINOIS NATIONAL INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated April 3, 2013, that denied and dismissed the claim for benefits. We affirm.

The claimant alleged an injury to her right shoulder occurred on September 25, 2011, while she was pushing a row of shopping carts in the employer's parking lot. After a hearing conducted on September 19, 2012, the ALJ ruled the claimant's activities on September 25 did not cause her to sustain an injury. Instead, the ALJ concluded her shoulder symptoms were the result of a preexisting condition of longstanding. The claimant appeals, asserting the evidence shows she did incur a work injury while pushing the shopping carts, and that she was denied procedural due process when she was required to participate in the September 19, 2012, hearing by video teleconference.

The claimant had worked for the employer for several years and was a customer service manager. In June, 2011, she transferred from a store in Pontiac, Illinois, to the employer's store in Colorado Springs. On September 25, 2011, she stated she was pushing a line of four or five carts through the parking lot. She was required to maneuver the carts in several directions in order to avoid depressions in the parking lot. She completed her task by pushing the carts into a storage bay and tripping a rope that closed the outer door to the bay. When she straightened up, she felt pain from her right shoulder across her chest to her sternum. She was referred for treatment, and eventually underwent a surgical shoulder labrum repair on February 2, 2012. She was off work from December, 2011, until May 2, 2012. At the September 19, 2012, hearing the claimant was requesting a finding her injury was compensable, that her medical treatment

had been reasonable and necessary, an award of temporary total and partial disability benefits, and a calculation of the average weekly wage.

The ALJ noted the claimant's history of significant right shoulder injuries. The claimant underwent a surgical repair of her right labrum on January 27, 2009. Subsequent to this surgery, the claimant continued to treat with her doctors in Illinois. Her medical records documented complaints of continuing pain in the shoulder through a visit as late as January 28, 2011. The claimant was evaluated by two medical experts. The respondents arranged for an examination and report by Dr. B. Jefferson Parks, and the claimant obtained a similar review by Dr. Timothy Hall. The ALJ found Dr. Park's opinions to be the more persuasive. Dr. Parks originally stated in his report that the claimant's action of reaching for the rope to close the cart bay door may have aggravated her previous condition. However, upon watching the parking lot security video of the claimant on that day, he reported that the motion involved in pulling the rope was performed below shoulder level and could not have caused her shoulder injury. Dr. Hall agreed the rope was not involved. Dr. Hall expressed the opinion that the activity of pushing the shopping carts caused a new injury to the claimant's shoulder. Dr. Parks disagreed. He pointed out how the motion and effort used to push the carts was not consistent with the injury for which the claimant was treated. Dr. Parks concluded the claimant did not sustain a new injury at work on September 25. He offered that the claimant suffered a chronic injury that was present long before the events of September 25. The ALJ found, based largely on Dr. Park's opinion, that the claimant did not receive an injury through work activities on September 25, 2011. The ALJ denied and dismissed the claim.

The claimant argues on appeal that both Dr. Hall and Dr. Parks were in agreement with the cause of the claimant's injury. She points to Dr. Hall's opinion that pushing the shopping carts can approximate the same stress on the arm and biceps as would an overhead activity. The record however, indicates that Dr. Parks sharply disagreed with this opinion by Dr. Hall. (Parks depo. Pg. 17-20, 46-48). His conclusion was "I couldn't find a mechanism of injury that correlated with the shoulder joint pathology for September 25, 2011." (Parks depo. Pg. 49).

The burden of proof rests on the claimant to establish a 'direct causal relationship' between her employment and her injury. *Finn v. Industrial Commission, Colo.*, 437 P.2d 542 (Colo. 1968). A claimant has the burden to prove that her injury was proximately caused by an injury arising out of and in the course of her employment. Section 8-41-301(1)(b) and (c), C.R.S. Whether the claimant has met that burden of proof is a factual question for resolution by the ALJ, and his factual findings must be upheld if supported by substantial evidence in the record. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). Substantial evidence is that quantum of

probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Additionally, “where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury.” *Duncan v. Industrial Claim Appeals Office*, 107 P. 3d 999, 1001 (Colo. App. 2004). Here, the ALJ reviewed the medical evidence which included records both prior and subsequent to the claimant’s September 25, 2011, work activities. He also had available and examined the reports, testimony and opinions of Dr. Hall and of Dr. Parks. The ALJ credited the testimony of Dr. Parks. That testimony stated the claimant suffered for years from a preexisting right shoulder condition. Dr. Hall found the claimant’s pain symptoms, need for treatment and any resulting disability were not causally connected to the September 25 incident pushing shopping carts. This evidence supported the conclusion there was no evidence of an aggravation that directly led to the need for medical treatment or to disability. These findings, based as they are on substantial evidence, may not be set aside. Section 8-43-301(8), C.R.S. The ALJ accurately applied the law and applicable standard of proof.

The claimant also argues she was deprived of her rights to procedural due process because she appeared for the hearing through electronic video conferencing. While she was required to appear in Colorado Springs, she complains the respondents achieved an advantage by appearing in Denver in the same room with the ALJ. As the respondents point out, the claimant made no objection for the record in regard to the use of video conferencing and never preserved this issue for appeal. The failure to timely raise an issue serves as a waiver of its argument on appeal. *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003). In addition to the failure to timely preserve the issue of procedural due process, the record does not justify the complaints of the claimant in that regard. At the conclusion of the hearing on September 19, 2012, claimant’s counsel proposed rescheduling the hearing in order to obtain the balance of the witnesses’ testimony. This included the testimony of her expert witness. The ALJ however, recommended depositions of these witnesses to which claimant’s counsel agreed. The procedure using depositions placed the parties in an identical situation in regard to appearance before the ALJ (both were now disembodied voices). The claimant’s suggestion to reschedule the hearing would have presented to her the same obstacles for which she is now complaining.

The claimant also complains of a denial of equal protection of the laws on the basis that hearing participants located outside of Denver are treated differently.

Due process is a flexible standard that calls for no specific procedure as long as the basic opportunity for a hearing and judicial review is present. *Wecker v. TBL Excavating*,

Inc., 908 P.2d 1186 (Colo. App. 1995). When an administrative adjudication turns on questions of fact, due process requires that the parties be apprised of all the evidence to be submitted and considered and that they be afforded a reasonable opportunity to confront adverse witnesses and to present evidence and argument in support of their positions. *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076 (Colo.App.1990).

The appellate courts have held in workers' compensation cases that due process is satisfied if the hearing officer either reads a transcript of testimony or hears live testimony. *See Walton v. Indus. Comm'n*, 738 P.2d 66 (Colo.App.1987); *Ski Depot Rentals, Inc. v. Lynch*, 714 P.2d 516 (Colo.App.1985). Under these decisions, a due process violation cannot arise from the mere fact that a claimant did not have the opportunity to testify in person in the presence of the ALJ.

The Claimant nevertheless maintains that the use of video teleconferencing deprived her of a fair hearing because (1) the evidence she presented did not have the same persuasive effect as if it had been presented in person; (2) the respondents moved into evidence some photos the claimant had not seen previously; and (3) she and her counsel could not always hear what was said in the Denver location. We are not persuaded.

The ALJ did not find the Claimant's testimony was untruthful. Her testimony, in fact, was not contradicted, except by a written medical record. The ALJ made his ruling based on his reading of the medical testimony. The largest part of that testimony was in the form of deposition transcripts. The claimant's charge of an unfair persuasive effect is little more than conjecture. Further, the video teleconferencing technology was superior to that used in telephone hearings, which are also allowed by rule, or audio depositions, in that it allowed the ALJ not only to hear claimant's inflection, but also to see her expression and gestures. Finally, the exhibits in question were photos depicting the same shopping carts as were present in photos submitted by the claimant. It is not clear as to how the handling of these exhibits was affected by the circumstance of video teleconferencing.

Our review of the transcript also confirms that, despite the technical difficulties, the claimant was accorded a full and complete opportunity to testify regarding the details of her injury and her medical history. Whenever the proceedings became inaudible, the ALJ directed that the question or comment be repeated. The claimant's testimony was responsive to the questions asked and did not appear confused or reflect any chronological gaps in her narrative. The transmission clearly conveyed the claimant's description of the events, pain, the stages of her treatment and the level of relief she gained with each surgery, including the surgical procedure at issue in this proceeding. A very similar issue was reviewed in *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The court in *Kroupa* expressed similar conclusions.

The court in *Kroupa* also discussed the claimant's equal protection argument. Classifications based on place of residence are not suspect, and receiving workers' compensation benefits is not a fundamental right. Thus, the rational basis test applies here. *See Indus. Claim Appeals Office v. Romero, supra*. Under rational basis review, the threshold issue is whether the challenged procedure results in dissimilar treatment for similarly situated individuals. *See Culver v. Ace Elec.*, 971 P.2d 641 (Colo.1999).

Here, although video conferencing is done more often in locations remote from Denver, there is no rule that requires the reverse will not also sometimes be the case. Moreover, even if we were to assume that such will not be the case, the potential fiscal savings and increased efficiency arising from the use of video teleconferencing amounts to a legitimate governmental purpose for instituting this procedure and therefore satisfies the rational basis test. Thus, the use of the video teleconferencing procedure does not violate the claimant's equal protection rights.

IT IS THEREFORE ORDERED that the ALJ's order issued April 3, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

LADONNA SCHISLER

W. C. No. 4-872-358

Page 7

CERTIFICATE OF MAILING

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

_____ 8/23/2013 _____ by _____ KG _____ .

LADONNA SCHISLER, 239 CRESTRIDGE AVENUE, COLORADO SPRINGS, CO, 80906
(Claimant)

WALMART STORES, INC., Attn: TAMMY ARNELL-POWELLS, 6310 SOUTH U.S. HWY
85-87, FOUNTAIN, CO, 80817 (Employer)

ILLINOIS NATIONAL INSURANCE COMPANY, Attn: LISA SMITH, C/O: CLAIMS
MANAGEMENT INCORPORATED, P O BOX 1288, BENTONVILLE, AR, 72712 (Insurer)

STEVEN U. MULLENS, P.C., Attn: PATTIE J. RAGLAND, ESQ., 105 EAST MORENO
AVENUE, COLORADO SPRINGS, CO, 80901-2940 (For Claimant)

CLIFTON, MUELLER & BOVARNICK, P.C., Attn: JOHN M. ABRAHAM, ESQ., 789
SHERMAN STREET SUITE 500, DENVER, CO, 80203 (For Respondents)

LADONNA SCHISLER, 230 CRESTRIDGE AVENUE, COLORADO SPRINGS, CO, 80906
(Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-875-633-02

IN THE MATTER OF THE CLAIM OF

LINDA VIGIL,

Claimant,

v.

FINAL ORDER

PUEBLO SCHOOL DISTRICT #60,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The respondent seeks review of an order of Administrative Law Judge Stuber (ALJ) dated January 15, 2013, that awarded temporary disability benefits commencing March 18, 2010. The respondent contends that the ALJ erred in finding that the claimant was not responsible for her termination from employment. We affirm the ALJ's order.

A hearing was held 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 had worked as a paraprofessional with the respondent since October 30, 2006. The claimant sustained an admitted industrial injury on February 24, 2010, when the claimant and another paraprofessional, Ms. Holcombe, were called to return to the classroom to deal with a child, "Alex." When the claimant and Ms. Holcombe entered the room, Alex was screaming profanities and struck one of the other students. The claimant asked Alex not to do that. At that point, the teacher left the room to attend a meeting. Alex struck another student and challenged him to a fight. Ms. Holcombe attempted to deal with Alex while the claimant radioed for the teacher to return but got no answer.

The claimant then called the secretary and asked for the principal, Ms. Neal, to respond. Alex then struck the claimant in the nose and the mouth and kicked the claimant in her knees. Alex grabbed the claimant's shoe and she fell onto her buttocks and Alex pulled the claimant's hair and scratched the claimant's hands and arms and also struck the claimant's ears. Ms. Holcombe attempted to restrain Alex's lower body. Another teacher, Ms. Rogers, responded to the room and saw that Ms. Holcombe was sitting on Alex, who was on his back. Ms. Rogers helped hold the claimant's hair behind

her head so that Alex could not pull it again. At some point in the incident, Alex turned on his stomach and Ms. Holcombe continued to sit on Alex's lower body. Ms. Rogers asked if the restraint was proper but Ms. Holcombe replied that it was normal. The claimant never sat on Alex and was never able to restrain his hands.

After the incident the claimant went to the office to report her injuries and to request a doctor. Ms. Neal arrived and referred the claimant to a physician. The claimant was prescribed medications and restrictions were imposed. The claimant returned to work and attempted to perform her usual job duties but was unable to perform all activities due to the restrictions. The claimant was injured in another incident on March 3, 2010, when a child threw a wire basket which struck the claimant's knees. The claimant was seen by a doctor but no restrictions were imposed as a result of this incident.

On March 4, 2010, the claimant was placed on administrative leave pending an investigation into the incident with Alex, after Alex's mother reported that she had observed both Ms. Holcombe and the claimant sitting on Alex when she walked into the room on February 24, 2010. On March 17, 2010, Ms. Neal met with the claimant to ask her about the February 24th events. The claimant admitted that Ms. Holcombe rolled Alex onto his stomach and sat on him, asking for the claimant's help and the claimant stood up and shook her head "no." The claimant denied holding Alex's hands or legs down at any time. On March 18, 2010, Ms. Neal informed the claimant that she had been suspended without pay pending termination of her employment. Ms. Neal noted that she had concluded that the claimant participated in an inappropriate restraint of Alex including holding his hands and sitting on him and holding his legs with Alex in an improper face-down restraint. Ms. Neal noted that the claimant's use of an inappropriate restraint violated the school board's policy of a general philosophy of a "hands off" practice and that face-down restraints are strictly prohibited by the State Department of Education and training that the claimant had received. Ms. Neal also noted that the claimant witnessed and did not communicate to Ms. Holcombe to stop the inappropriate restraint and that the inappropriate restraint should have been reported by the claimant immediately.

Based on these findings the ALJ determined that the claimant proved by a preponderance of the evidence that the claimant was unable to return to the usual job duties due to the effects of the work injury as of February 24, 2010. The claimant, however, continued to receive full wages through March 17, 2010, when she was suspended without pay, pending termination. The ALJ further determined that the respondent failed to establish that the claimant was responsible for her termination from employment. The ALJ found that respondent terminated the claimant's employment based upon, at least in part, her injury-producing conduct during the restraint incident on

February 24, 2010. The March 18, 2010, letter of suspension from Ms. Neal explicitly based the suspension and ultimate termination on the conclusion that the claimant had been engaged in an inappropriate restraint of the student. The ALJ found that the respondent referred “almost in passing” to the claimant’s failure to report the conduct of Ms. Holcombe to Ms. Neal and, therefore, the ALJ concluded that the termination of employment was not based on the claimant’s post-injury failure to inform Ms. Neal about Ms. Holcombe’s inappropriate restraint of the student. The ALJ, therefore, concluded that the claimant was entitled to temporary disability benefits beginning March 18, 2010, and continuing.

On appeal, the respondent contends that the ALJ erred in his determination that the claimant was primarily terminated for her actions during the injury. The respondent asserts that the claimant was terminated based on a combination of behaviors that preceded the injury, behaviors after the injuries occurred but before the restraining incident was over, and her failure to report the inappropriate restraint after the injury. We perceive no reversible error.

Sections 8-42-103(1)(g), C.R.S. and 8-42-105(4), C.R.S., (collectively the termination statutes), provide that in cases “where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” The term “responsible” introduces into the statute the concept of “fault.” See *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). A finding of fault requires the ALJ to consider the totality of the circumstances and determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. Cf. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). Moreover, in *Colorado Springs Disposal v. Industrial Claim Appeals Office*, *supra*, the court held that the “word ‘responsible’ does not refer to an employee's injury or injury-producing activity. The court reasoned that treating a claimant as “responsible” for the loss of employment resulting from “injury-producing conduct” would “dramatically alter” the “mutual renunciation of common-law rights and defenses by employers and employees alike.” *Id.*

The question of whether the claimant was “at fault” is usually one of fact for determination by the ALJ. See *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. 1987). Consequently, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 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. The mere fact that the ALJ might have made other findings and reached a different result affords no basis for

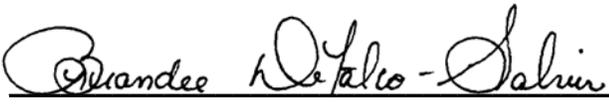
relief on appeal. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, the ALJ found as a matter of fact that the claimant was terminated because of her actions during the restraint event and not necessarily because of her failure to report the inappropriate restraint by Ms. Holcombe. Although the evidence was conflicting, the ALJ's findings are a plausible inference of the testimony and evidence provided. The claimant was initially notified that she was being suspended in order for the District to conduct an investigation into the February 24, 2010, incident. Respondent Exhibit 9 at 46. The actual termination letter from the employer details the activity of February 24, 2010, which led to the termination. Respondent Exhibit 9 at 47. Moreover, the testimony of Ms. Neal established that although the employer eventually asserted numerous reasons for the termination, the primary and overriding reason was because of the claimant's involvement in the February 24, 2010, incident. Tr. at 89-90. Thus, substantial evidence supports the ALJ's findings in this regard.

The evidence was conflicting and the ALJ resolved the conflicts in the evidence against the respondent. Under these circumstances we may not interfere with the ALJ's findings of fact. Section 8-43-301(8), C.R.S. Because the evidence supports the ALJ's determination that the claimant was discharged because of her actions during the restraint incident, the ALJ correctly determined the claimant was not "responsible" for the termination and awarded TTD benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated January 15, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


Lisa A. Klein

LINDA VIGIL
W. C. No. 4-875-633-02
Page 6

CERTIFICATE OF MAILING

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

_____ 8/28/2013 _____ by _____ RP _____ .

LINDA VIGIL, 24947 CACTUS FLOWER WAY, PUEBLO, CO, 81007 (Claimant)
KONCILJA & KONCILJA, P.C., Attn: ROBERT D. BAUMBERGER, ESQ., 125 WEST "B"
ST, PUEBLO, CO, 81003 (For Claimant)
CAIRNS & ASSOCIATES, P.C., Attn: GREGORY B. CAIRNS, ESQ., 3900 E MEXICO AVE.,
SUITE 700, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-905-665

IN THE MATTER OF THE CLAIM OF

SABRA WHITE,

Claimant,

v.

FINAL ORDER

TRACTOR SUPPLY COMPANY,

Employer,

and

NEW HAMPSHIRE INS. CO.,
c/o GALLAGHER BASSETT
SERVICES

Insurer,
Respondents.

The respondents seek review of a supplemental order of the Director of the Division of Workers' Compensation (Director) dated June 3, 2013, that ordered the respondents to pay a penalty of \$4,180.00. We affirm.

The Director made the following pertinent findings of fact. The claimant filed a workers' claim for compensation on December 17, 2012. On December 18, 2012, the Division sent the claim to the respondents requesting a position statement. Pursuant to §8-43-203, C.R.S. and Workers' Compensation Rule of Procedure 5-2(D), the respondents were required to either admit or deny liability within twenty days of filing of the workers' claim for compensation, making the position statement due on January 7, 2013. The respondents did not timely file a position statement but did file a first report of injury on January 9, 2013.

On March 6, 2013, the Director issued an order requiring the respondents to file a position statement or to submit another appropriate explanation as to why a position statement was not required within 15 days from the date the order was mailed. Receiving no response from the respondents, the Director issued an order on April 9, 2013, imposing penalties for the respondents' failure to obey the March 6, 2013, order. In response to the April 9, 2013, penalty order, the respondents filed an "Amended General Admission," a petition to review the April 9, 2013, order and a "Response to Director's

Penalty Order.” The Director issued a briefing schedule and the respondents subsequently filed a brief in support of the petition to review. The Director then issued the supplemental order under review on June 3, 2013. The Director’s supplemental order assessed penalties against the respondents pursuant to §8-43-304, C.R.S., for a period of 19 days from March 22, 2013, through April 10, 2013, in the amount of \$220 per day for the failure to comply with the Director’s March 6, 2013, order. The Director apportioned the penalty with seventy-five percent payable to the claimant as the aggrieved party and 25 percent payable to the workers’ compensation cash fund.

Although the respondents filed a timely petition to review of the Director’s June 3, 2013, the petition to review was not accompanied by a brief in support as required by §8-43-301(6), C.R.S. While the failure to file a brief in support does not deprive us of jurisdiction (*See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986)), the respondents’ arguments are, nonetheless, limited to the general allegations contained in the petition to review of the supplemental order and, as such, our review is limited. *Id.* We perceive no reversible error in our review of the file.

Section 8-43-304, C.R.S., provides that an insurer who refuses to obey any lawful order made by the Director shall be punished by a fine of not more than one thousand dollars per day for each such offense. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. The Director must first determine whether the disputed conduct constituted a violation of a lawful order. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). Where a violation is found, the violator is subject to a penalty if the violator's actions were objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). The reasonableness of the violator's actions depends on whether the actions were predicated on rational argument based in law or fact, and this determination is to be made by the Director. *See Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). Further, where the violator fails to offer a reasonable factual or legal explanation for its actions, it may be inferred that the violation was objectively unreasonable. *See Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999),

Here, the respondents’ conduct warranting a penalty was its disregard of the Director’s lawful order directing it to file a position statement or to provide an explanation of why one was not required within 15 days. Because the issue is factual in nature, we must uphold the Director's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the Director's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d

1117 (Colo. App. 2003). The court of appeals has noted that in this context the scope of our review is “exceedingly narrow.” See *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Although the respondents here argued to the Director that a general admission of liability was filed on February 4, 2013, prior to the Director’s March 6, 2013, order, the February 4, 2013, admission of liability attached to the respondents’ “Response” to the Director’s Penalty award does not appear to have been received by the Division and lists a different employer and date of injury than the subsequent amended admissions filed by the respondent.

In any event, the respondents failed, neglected, or refused to obey a lawful order made by the Director. The respondents were ordered to file a position statement or provide an explanation of why one was not required. The panel has previously held that a respondent has an independent duty to comply with the Director's order regardless of whether it believed that the position statement had already been filed. See *Coatright v. Express Services, Inc.*, W.C. No. 4-744-728 (November 5, 2008). Such an interpretation furthers the legislative intent of the Act to assure quick and efficient delivery of disability and medical benefits to injured workers at reasonable cost, without litigation. *Id.*; Section 8-40-102, C.R.S. Thus, the imposition of penalties under §8-43-304, C.R.S., for the disobedience of the Director's order, deters misconduct and compels compliance with lawful orders. See *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

Moreover, the respondents do not dispute that they did not respond to the March 6, 2013, order until after the penalty order was issued on April 9, 2013, and provide no explanation for its failure to respond during this period. As the Director’s supplemental order states, had the respondents responded to the March 6, 2013, to notify the Division that a position statement had already been filed, albeit with a discrepancy in the date of injury and employer name, penalties would not have been assessed for violation of the order. Consequently, under the circumstances of this case, it was proper for the Director to infer that the respondents’ violation was objectively unreasonable. *Human Resource Co. v. Industrial Claim Appeals Office, supra*. Therefore, we perceive no error on the part of the Director for imposing penalties under §8-43-304, C.R.S.

Insofar as the respondents contest the amount of penalty assessed against it, we are not persuaded the Director erred. With the right to impose a penalty having been proved, the respondents bore the burden to establish that the penalty was grossly disproportionate. *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Furthermore, we consider the assessment of the statutory penalty under an abuse of discretion standard of review. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). Under this standard, we must determine whether, under the totality of the factual circumstances at the time of the Director’s

determination, the Director's order "exceeds the bounds of reason." *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985). Because the Director's authority is discretionary, we may not disturb his determination of the amount of the penalty to be imposed in the absence of fraud or an abuse of discretion. *See Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986); *Brunetti v. Industrial Commission*, 670 P.2d 1246 (Colo. App. 1983).

Factors for determining whether a penalty is grossly disproportionate can include the degree of reprehensibility of respondents' misconduct, the disparity between the harm or potential harm suffered by the aggrieved party and the penalty, and the difference between the penalty imposed and the amount of penalties available or imposed in comparable cases. *See Associated Business Products v. Industrial Claim Appeals Office, supra*. In this case, the Director expressly considered factors such as the duration and type of violation and whether there was a pattern of misconduct, noting that the respondent has been the subject of nine penalty orders in the proceeding 12 months and the amount of the penalty is well within the amount authorized by statute. The Director's imposition of penalties, therefore, is in accordance with applicable law and we see no basis to disturb the order.

IT IS THEREFORE ORDERED that the Director's order dated June 3, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

CERTIFICATE OF MAILING

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

_____ 8/28/2013 _____ by _____ RP _____ .

SABRA WHITE, 202 N 7TH STREET, GRAND JUNCTION, CO, 81501 (Claimant)
TRACTOR SUPPLY COMPANY, 200 POWELL PLACE, BRENTWOOD, TN, 37027
(Employer)

NEW HAMPSHIRE INS. CO., Attn: KELLIE PROOST, C/O: GALLAGHER BASSETT
SERVICES, 720 E PARK BLVD. #125, BOISE, ID, 82712 (Insurer)

HALL & EVANS, L.L.C., Attn: MEGAN E. COULTER, ESQ./DOUGLAS J. KOTAREK,
ESQ., 1125 17TH STREET, SUITE 600, DENVER, CO, 80202 (For Respondents)

NEW HAMPSHIRE INSURANCE COMPANY, 70 PINE STREET, NEW YORK, NY, 10270
(Other Party)

CHRISTOPHER RICHTER, ESQ., Attn: CHRISTOPHER RICHTER, ESQ./ERIN C. BURKE,
ESQ., P O BOX 4859, GRAND JUNCTION, CO, 81502 (Other Party 2)

TRACTOR SUPPLY CORPORATION, Attn: NATE GAGNE-STORE MANAGER, 1668
GRAND JUNCTION, 2449 HIGHWAY 6 AND 5, GRAND JUNCTION, CO 81505 (Other
Party 3)

DIVISION OF WORKERS' COMPENSATION, Attn: PAUL TAURIELLO, DIRECTOR, 633
17TH STREET, 4TH FLOOR, DENVER, CO 80202 (Other Party 4)

13CA0526 Employers Comp. v. ICAO 08-29-2013

COLORADO COURT OF APPEALS

DATE FILED: August 29, 2013

Court of Appeals No. 13CA0526
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-682-496

Employers Compensation Insurance Company,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Sharon Weakley,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE FURMAN
Graham and Miller, JJ., concur

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

Announced August 29, 2013

Ruegsegger, Simons, Smith & Stern, LLC, Frank M. Cavanaugh, Denver,
Colorado, for Petitioner

No Appearance for Industrial Claim Appeals Office

Law Office of Regina M. Walsh Adams, Regina M. Walsh Adams, Greeley,
Colorado, for Respondent Sharon Weakley

Employers Compensation Insurance Company (Employers Compensation), insurer for former employer, Ronald R. Carr, seeks review of the final order of the Industrial Claim Appeals Office (Panel) which upheld the increase of Sharon Weakley's (claimant) average weekly wage (AWW). We affirm.

The relevant facts are undisputed. In 2006, claimant suffered a neck injury while working as a waitress in a restaurant owned by her former employer. Employers Compensation admitted liability and paid claimant temporary total disability (TTD) benefits based on her AWW at that time of \$96.01. Claimant later reached maximum medical improvement (MMI) and received a permanent impairment rating. Employers Compensation filed a final admission, admitting liability for claimant's permanent impairment rating, and her claim was closed.

Claimant, who returned to work as a hostess and continued to work for the restaurant after it sold to new owners in December 2006, later left that job to work as a general manager at a different restaurant. In March 2012, Employers Compensation voluntarily reopened claimant's claim after her neck condition worsened and she had to undergo another surgery.

Following a hearing on the issue of increasing claimant's AWW, the administrative law judge (ALJ) concluded that claimant's current salary represented the fairest basis for calculating her AWW in light of the changes she had experienced in her new job and her family's reliance on her increased earnings. The ALJ, therefore, increased claimant's AWW to \$665.38. The ALJ also rejected Employers Compensation's argument that the increase was unfair and not warranted because it would be unable to offset the additional cost through a premium adjustment or risk audit as it no longer insured the prior employer.

On review, the Panel affirmed the AWW increase.

On appeal, Employers Compensation contends that the ALJ abused his discretion by increasing the AWW to an amount that is over six times claimant's original AWW rate. Employers Compensation also contends that the ALJ's AWW calculation violated its equal protection rights by increasing claimant's AWW without regard to its inability to mitigate its resulting financial loss.

I. No Abuse of Discretion in Raising AWW

We first consider whether the ALJ abused his discretion by increasing the AWW to an amount that is over six times claimant's

original AWW rate. We conclude that the increase was not so disproportionate as to be either unfair or constitute an abuse of discretion.

A. Fairly Computed AWW

Sections 8-42-102(1) and (2), C.R.S. 2012, require compensation to be calculated based on the AWW earned by the employee at the time of the industrial injury. *See Sears Roebuck & Co. v. Indus. Claim Appeals Office*, 140 P.3d 336, 337 (Colo. App. 2006). Subsection (2), referred to as the “default provision,” gives various computation methods depending on whether the claimant earns remuneration on a monthly, weekly, daily, or hourly basis. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 780 (Colo. 2010).

When an employee’s AWW is determined under the default provision, the wage on the date of the accident must be used. § 8-42-102(5)(a), C.R.S. 2012. The “discretionary exception” to this provision, however, allows the ALJ to calculate the AWW by another method if a fairly computed AWW cannot be determined because of “the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed thereunder or has been ill or has been self-

employed or for any other reason.” § 8-42-102(3). Under this exception, the AWW may be computed “in such other manner and by such other method as will, . . . based upon the facts presented, fairly determine” it. *Benchmark/Elite, Inc.*, 232 P.3d at 780 (quoting section 8-42-102(3)).

B. Abuse of Discretion Standard

Because the authority to select an alternative method for computing the AWW is discretionary, we may not interfere with the ALJ’s order “unless it is beyond the bounds of reason, that is, where it is unsupported by the evidence or contrary to law.” *Loofbourrow v. Indus. Claims Appeals Office*, ___ P.3d ___, ___ (Colo. App. No. 10CA2176, Oct. 13, 2011)(*cert. granted in part on other grounds* Oct. 15, 2011)(citing *Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867, 869 (Colo. App. 2001)).

C. AWW Calculation

Employers Compensation maintains that the amount of the AWW increase was not fairly determined, not only because it far exceeded claimant’s wage at the time of the injury and could not be recouped through a premium increase, but also because claimant was earning a salary, rather than the hourly wage her former job

paid, and her wages were lower when she returned to full-time modified capacity after her original injury. Employers Compensation also contends that the ALJ exceeded his discretion by considering claimant's personal financial circumstances, including her husband's job loss and her family's increased reliance on her employment income, that had no direct bearing on her employment situation.

The discretionary exception, however, does not limit the circumstances that may be considered by the ALJ when determining whether an AWW calculated pursuant to the default provision would be unfair. Nor does it tie the computation of the AWW to the wage loss experienced at the time of the injury. The supreme court acknowledged as much in *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589, 592-94 (Colo. 2008), *overruled on other grounds by Benchmark/Elite*, 232 P.3d at 781, when it recognized that the default provision is subservient to the discretionary exception, and that the discretion vested in the ALJ under the discretionary exception to select a computation method that fairly determines a claimant's proper AWW is not subject to any time limit, including the time of injury. The court also noted that the

Workers' Compensation Act (Act) contains multiple limitations, such as the requirements for reopening and statutory caps on the maximum benefit that operate to contain a carrier's costs. *See id.* at 596.

Additionally, section 8-42-102(5)(b), C.R.S. 2012, specifies that nothing in section 8-42-102(5)(a), which, as noted, uses the worker's wage on the accident date, alters the discretion to fairly determine the worker's AWW in accordance with the discretionary exception.

Thus, although it is undisputed that claimant's financial pressures did not exist when she worked at her former employer and was injured, those circumstances, as well as her career advancement, were relevant considerations and sufficiently supported the ALJ's decision that using her substantially lower wages in 2006 would be unfair. *See IBM Corp.*, 867 P.2d at 82. Moreover, calculating claimant's AWW based on her current salary reflected the actual wage loss and diminished earning capacity she had suffered when her condition worsened. Consequently, the ALJ's computation method was reasonable under the circumstances and did not constitute an abuse of the ALJ's broad

discretion.

Further, because *Benchmark/Elite* reaffirmed the majority opinion in *Avalanche* regarding the breadth of the ALJ's discretion to compute an employee's AWW based on the higher wages the employee was earning in subsequent employment, we are not at liberty to adopt the reasoning of Justice Rice in her *Avalanche* dissent that such discretion requires tying the AWW to the time of injury.

II. Equal Protection

We next consider whether the ALJ's AWW calculation violated Employers Compensation's equal protection rights by increasing claimant's AWW without regard to its inability to mitigate its resulting financial loss. We conclude it did not.

We review constitutional challenges to statutes, including the Act, de novo. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1214 (Colo. App. 2009). When conducting such a review, we presume that a statute is constitutional until shown otherwise, *id.*, and the party challenging a statute's constitutionality "bears the burden of proving its invalidity beyond a reasonable doubt." *Culver v. Ace Elec.*, 971 P.2d 641, 646 (Colo. 1999).

In any facial equal protection challenge, the threshold question is whether the legislation results in dissimilar treatment of similarly situated individuals. *Indus. Claim Appeals Office v. Romero*, 912 P.2d 62, 66 (Colo. 1996); *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190-91 (Colo. App. 2002). An “as applied” challenge asks whether “the governmental officials who administer the law are applying it with different degrees of severity to different groups of persons who are described by some suspect trait.” *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 507 n.2 (Colo. 1997).

Regardless of whether Employers Compensation is making a facial or “as applied” constitutional challenge, it has not shown that, by having to absorb the increased AWW, it was treated differently from other carriers, including those who continue to insure a worker’s former employer. For example, its senior claims adjuster testified that an insurer only has a three-year period after the date of injury during which it can assess additional premiums. He also acknowledged that the possibility an employer may go out of business is part of the risk a carrier insures, and agreed that restaurants go out of business more frequently, and that the

actuarial tables used in setting premiums take that into consideration. Thus, neither the record nor any argument made by Employers Compensation indicates that other insurers would be relieved of the additional cost associated with an increased AWW under identical circumstances. Indeed, the evidence at hearing indicated to the contrary.

Because Employers Compensation has shown no disparate treatment, it has not met its burden of demonstrating its right to equal protection has been violated. Consequently, we need not determine whether a rational basis supports the alleged disparate treatment to which Employers Compensation contends it has been subjected. *See Dillard v. Indus. Claim Appeals Office*, 134 P.3d 407, 413 (Colo. 2006) (a party asserting a violation of equal protection must show that a classification lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated).

The order is affirmed.

JUDGE GRAHAM and JUDGE MILLER concur.

12CA2121 Weaver v. ICAO 08-29-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA2121
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-657-012

Jason Weaver,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; R.A.
Waffensmith/Quanta Services, Employer; and Old Republic Insurance
Company, Insurer,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE PLANK*
Casebolt and Kapelke*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 29, 2013

Wade Ash Woods Hill & Farley, P.C., Steven R. Schumacher, Denver, Colorado,
for Petitioner

No appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Tama L. Levine, Denver, Colorado for Respondents R.A.
Waffensmith/Quanta Services and Old Republic Insurance Company

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

In this workers' compensation action, claimant, Jason Weaver, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) denying claimant's request for coverage for sleep studies and sleep disturbance treatment. We conclude that substantial evidence supports the ALJ's determination, and therefore affirm the Panel's order.

I. Background

Claimant suffers from Scheuermann's disease, a type of kyphosis of the spine. Some time ago, he had a spinal fusion and rods installed in his back to treat the condition.

In 2005, while working for employer, R.A. Waffensmith/Quanta Services, claimant helped a coworker lift a desk. Claimant immediately felt and heard a pop in his back; lifting the desk had broken one of the rods in his spine and caused his spinal fusion to fail. Employer admitted for the injuries, and compensated claimant for several ensuing surgeries. Claimant reached maximum medical improvement (MMI) in 2009, but continued to receive post-MMI medical care to treat the symptoms

of his condition, including pain medication to relieve his back pain.

After the surgeries, claimant began experiencing difficulty sleeping. He reported difficulty sleeping at night secondary to pain, as well as the “sudden onset of sleep approximately three times each day,” to his authorized treating physician (ATP), Dr. Kathy McCranie. Although she gave him some sleep medications to help him sleep, she did not believe “his sudden onset of sleep throughout the day” was related to his work injury because “there has not been a specific correlation with any drug.” She therefore wrote to claimant’s primary care physician for assistance with the sleep symptoms.

By late 2010 and early 2011, claimant was receiving the drug, Suboxone, to ease his pain complaints. Because she could not adjust his prescription for this medication, Dr. McCranie referred claimant to another physician associated with a pain program, Dr. Richard Stieg, to adjust the Suboxone prescription.

Claimant complained of “very significant sleep disturbance” to Dr. Stieg, who then referred him for an “all night sleep study” conducted by Dr. Neale Lange. Dr. Stieg made the referral even

though it was “not clear whether [the insomnia] is simply pain related at this point in time.” The sleep study showed claimant suffered from obstructive sleep apnea, central sleep apnea, and hypersomnia.

Claimant sought coverage for the sleep treatment, sleep study, and related procedures, but employer denied the request. Employer asked Dr. McCranie to clarify the scope of her referral to Dr. Stieg. Dr. McCranie responded that her referral was limited to adjustment of the Suboxone prescription. In her opinion, the sleep study prescribed by Dr. Stieg was unrelated to claimant’s work injury. A physician later retained by employer to conduct an independent medical examination (IME) agreed with Dr. McCranie.

Finding Dr. McCranie’s opinions credible and persuasive, the ALJ denied claimant’s claim for coverage for the sleep study and sleep treatments. The ALJ was not persuaded by Dr. Lange’s note that Suboxone could “generate central sleep apnea” because Dr. Lange had only “anecdotally . . . seen this.” Instead, the ALJ was persuaded by the IME physician that numerous possible causes of claimant’s sleep problems had not been eliminated, that it was

“difficult to determine if the back injury, chronic pain, or medications . . . are contributing to his sleep disordered breathing,” and that the medical literature did not support a connection between claimant’s level of Suboxone use and sleep apnea or sleep difficulty.

The Panel affirmed the ALJ’s decision, holding that substantial evidence supported the ALJ’s factual determinations, rendering the findings binding on review. This appeal followed.

II. Relatedness of Sleep Study and Sleep Treatments

Claimant contends that the ALJ incorrectly limited the scope of his claim. He argues that his claim for sleep disturbance coverage included not just the sleep apnea component, but also insomnia and hypersomnia. These conditions, he contends, are “admittedly related” to his work injury. He argues that because treatment for these conditions follows the same course as treatment and diagnosis of his sleep apnea, even if the latter is determined to be unrelated, the sleep disturbance treatment he underwent should have been covered. He claims that the Panel consequently erred in affirming the ALJ’s decision. We disagree.

Every employer is required to “furnish such medical, surgical . . . nursing, and hospital treatment . . . as may reasonably be necessary . . . to cure and relieve the employee from the effects of the injury.” § 8-42-101(1), C.R.S. 2012. An employer may be required to continue providing a claimant with future medical treatment post-MMI to relieve a claimant’s ongoing symptoms. *See Grover v. Indus. Comm’n*, 759 P.2d 705, 710 (Colo. 1988). A claimant must nonetheless establish a causal relationship between the work injury and the need for medical treatment. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997); *see also* § 8-43-201(1), C.R.S. 2012 (“A claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence.”). An employer consequently retains the right to challenge, and a claimant must prove, the reasonableness, necessity and relatedness of the treatment requested. *See Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993).

Whether a claimant has met his burden of demonstrating the relatedness, reasonableness, and necessity of the continuing

medical benefits he seeks is a question of fact for determination by the ALJ. *Id.* (determination “that claimant had failed to prove that his continuing need for care was caused by the industrial injury . . . was fully within the ALJ’s discretion as fact-finder”). Accordingly, an ALJ’s determination of this issue will not be set aside if it is supported by substantial evidence in the record. *See Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854, 855 (Colo. App. 1995).

Here, the ALJ found credible and persuasive the opinions of claimant’s ATP, Dr. McCranie, who opined that the sleep study and sleep treatments sought by claimant were not related to his work injury. Her opinions were corroborated by those of employer’s IME physician who noted that the medical literature does not support a causal connection between the amount of medication taken by claimant and sleep disturbances. The ALJ had the discretion to find their opinions credible and persuasive, despite contrary opinions expressed by claimant’s sleep specialist, Dr. Lange. *See Rockwell Int’l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990) (“[T]he weight to be accorded to [expert] testimony is a matter exclusively within the discretion of the . . . ALJ as fact-finder.”).

The ALJ discredited Dr. Lange's opinion that Suboxone can lead to sleep apnea because, as pointed out by employer's IME physician, medical literature has not established such a connection and Dr. Lange's opinion was based on his own "anecdotal" observations.

Because the weight and credibility given expert witnesses is within the ALJ's sound discretion, such findings "may not be disturbed absent a showing that the ALJ's credibility determination is 'overwhelmingly rebutted by hard, certain evidence' to the contrary." *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 224 (Colo. App. 2008) (quoting *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000)). Thus, we may not disturb the ALJ's finding that Dr. McCranie's testimony was credible and persuasive.

Claimant nevertheless argues that the ALJ confused the evidence. He asserts that the ALJ misunderstood the scope of his claim, arguing he was seeking treatment for *all* of his sleep issues, not just his sleep apnea, as implied by the ALJ. He claims that the ALJ improperly limited the scope of his claim based on this misunderstanding.

But, we do not read the ALJ's order so narrowly. To the contrary, the ALJ expressly addressed claimant's "hypersomnolence due to a multitude of sleep pathologies." He noted that Dr. McCranie "has consistently and persuasively opined that" claimant's "sudden onset of daytime sleep approximately three times per day . . . is probably not related to the injury, but instead to the onset of some intervening non-industrial condition."

We therefore conclude that substantial evidence supports the ALJ's determination that claimant's sleep disturbances and sleep difficulties were unrelated to his work injury. Accordingly, we, like the Panel, are bound by that finding and perceive no error in the Panel's order affirming the ALJ's decision. *See Suetrack*, 902 P.2d at 855.

III. Authorization for Sleep Study and Sleep Treatments

Claimant next contends that the ALJ erred in determining that the sleep study prescribed by Dr. Stieg and performed by Dr. Lange was unauthorized. The ALJ determined that upon this ground, as well, the sleep study was non-compensable. Claimant argues that the evidence does not support a finding that Dr. McCranie limited

the scope of her referral to Dr. Stieg to adjustment of claimant's Suboxone medication. He argues that because Dr. Stieg became his ATP by virtue of the referral from Dr. McCranie, Dr. Stieg acted within his authority when he in turn referred claimant for the sleep study. We disagree.

Medical treatment under the Act is compensable "where it is provided by an 'authorized treating physician.'" *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

'Authorization,' as that term is used in workers' compensation proceedings, refers to a physician's status as the health care provider legally authorized to treat an injured worker. When the authorized treating physician refers a claimant to another health care provider, the treatment rendered by the referred provider is compensable as part of the legal chain of authorization.

Mason Jar Rest. v. Indus. Claim Appeals Office, 862 P.2d 1026, 1029 (Colo. App. 1993). Employers have "the right to choose treating physicians in the first instance in order to protect their interest in being apprised of the course of treatment for which they could ultimately be held liable." *Bunch*, 148 P.3d at 383; see § 8-43-404(5)(a), C.R.S. 2012. But, if a claimant seeks treatment from an

unauthorized provider, the employer is not obligated to pay for the treatment. *See Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229-30 (Colo. App. 1999).

Moreover, an ATP may limit the scope of a referral; treatment rendered outside the scope of that referral may not be compensable. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008). A claimant choosing to continue treatment despite exceeding the limits of the scope of a referral “does so at her [or his] own financial risk.” *Id.* at 1277.

Here, the ALJ determined that the sleep study ordered by Dr. Stieg was not authorized. Claimant contends that Dr. McCranie’s referral was broad enough to encompass treatment for claimant’s sleep issues. But, Dr. McCranie’s referral to Dr. Stieg states only: “In order to determine if he would be able to have his Suboxone adjusted, I have recommended that he follow-up with Centennial Rehab pain program to assist with any medication adjustment for this drug.” She later clarified that the referral was “solely for the purposes of adjusting the patient’s Suboxone and with the intention of taking back over his prescriptions for Suboxone once his doses

had been adjusted. I did not refer [claimant] to Dr. Stieg [sic] for any other treatment or recommendations.” Dr. Stieg himself acknowledged that he saw claimant “in consultation for Dr. Kathy McCranie for the specific purpose of regulating his Suboxone.”

While we do not disagree with claimant that a pain management regimen can include sleep studies, or that the evidence could have supported a finding that the treatment in question fell within the scope of the referral, the evidence described above soundly supports the ALJ’s conclusion that the sleep study conducted by Dr. Lange and the sleep treatment sought by claimant were outside the scope of Dr. McCranie’s authorization.

Consequently, the ALJ’s finding in this regard is binding, and we may not set it aside. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997) (whether a referral has been made is a question of fact for determination by the ALJ).

Claimant’s reliance on *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), does not persuade us to reach a different conclusion. In *Cabela*, a division of this court held that a referral to a claimant’s personal physician made by the

claimant's ATP based upon the ATP's mistaken belief that the claimant's injury was not work-related would be considered authorized treatment. Because an ALJ later determined the injury was compensable, treatment for the injury, including referral to the claimant's personal physician, was covered, despite the ATP's contrary conclusion that the requested treatment was unrelated to the work injury. *Id.* at 1281.

Claimant here argues that Dr. McCranie was similarly mistaken in her belief that his need for a sleep study and sleep treatment was not work-related, and that the referral to Dr. Stieg and Dr. Lange should have been covered. Unlike in *Cabela*, however, the ALJ here did not disagree with Dr. McCranie; rather, the ALJ concluded that claimant's sleep treatment and sleep study were *not* work-related. Thus, in contrast to the physician in *Cabela*, Dr. McCranie was not found to be mistaken in her view that claimant's sleep treatment and sleep study were not work-related. Consequently, the treatment claimant received for his sleep condition beyond that rendered by Dr. McCranie exceeded the scope of her referral and was unauthorized.

We therefore perceive no error in the Panel's affirmance of the ALJ's order finding that the sleep study conducted by Dr. Lange and the prescribed sleep treatments were not authorized.

The order is affirmed.

JUDGE CASEBOLT and JUDGE KAPELKE concur.

DATE FILED: August 15, 2013

Court of Appeals No. 12CA2437
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-834-668

Ty Winter,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; City of Trinidad; and
CIRSA,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE TERRY
Loeb and Márquez*, JJ., concur

Announced August 15, 2013

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

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Susan K. Reeves, Colorado Springs, Colorado, for
Respondents City of Trinidad and CIRSA

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

¶ 1 In this workers' compensation proceeding, Ty Winter (claimant) seeks review of the final order issued by the Industrial Claim Appeals Office (Panel) in favor of his employer, the City of Trinidad, and its insurer, CIRSA, which upheld the denial of his request for prepayment of the hotel and meal expenses he incurred while traveling to see his authorized treating physician. We affirm.

I. Background

¶ 2 In August 2010, claimant suffered a compensable knee injury. He developed a pathology in the knee that necessitated surgery by an orthopedic surgeon with special expertise in treating the condition. CIRSA designated a specialist in Vail, Colorado, and claimant, who lives in Trinidad, Colorado, had a number of routine post-surgical appointments with him.

¶ 3 CIRSA initially prepaid claimant's round-trip mileage, hotel room, and meals. However, after claimant's third appointment with the specialist, CIRSA advanced only the cost of claimant's round-trip mileage. CIRSA based its refusal to prepay the meals and hotel on Department of Labor and Employment Rule 18-6(E), 7 Code Colo. Regs. 1101-3, which provides:

The payer shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The reimbursement rate shall be 52 [formerly 47] cents per mile. The injured worker shall submit a statement to the payer showing the date(s) of travel and number of miles traveled, with receipts for any other reasonable and necessary travel expenses incurred.

¶ 4 CIRSA's refusal to advance the costs of the hotel or meals continued even after claimant had informed it that he could not afford to prepay such costs. Claimant then applied for a hearing, seeking an order requiring CIRSA to advance the costs of mileage, meals, and hotel accommodations for his scheduled appointments with the specialist.

¶ 5 Following an evidentiary hearing, the administrative law judge (ALJ) noted that CIRSA had acknowledged its responsibility to pay the travel costs associated with claimant's appointments with the specialist, including meals and lodging, as medical benefits it was obligated to provide to claimant. However, relying on Rule 18-6(E), the ALJ concluded that claimant did not establish his entitlement to advance payment of the costs of meals and lodging by a

preponderance of the evidence. Instead, the ALJ concluded that under Rule 18-6(E), mileage and other travel-related expenses were to be reimbursed rather than advanced.

¶ 6 The Panel affirmed on review, and claimant appeals that decision.

II. Legal Standards

¶ 7 We uphold the ALJ's factual findings in a workers' compensation case if they are supported by substantial evidence in the record. § 8-43-308, C.R.S. 2012; *Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 12. However, we review de novo questions of law and of the application of law to undisputed facts. *Hire Quest, LLC v. Indus. Claim Appeals Office*, 264 P.3d 632, 635 (Colo. App. 2011). Thus, an agency's decision that misconstrues or misapplies the law is not binding. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 431 (Colo. App. 2010).

¶ 8 We review the construction of statutes de novo. *Lobato v. Indus. Claims Appeals Office*, 105 P.3d 220, 223 (Colo. 2005). When interpreting a statute, we must determine and give effect to the General Assembly's intent. *Davison v. Indus. Claim Appeals*

Office, 84 P.3d 1023, 1029 (Colo. 2004). If the statutory language is clear, we interpret the statute according to its plain and ordinary meaning. *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010).

¶ 9 In construing an administrative rule or regulation, we apply the same rules of construction as we would in interpreting a statute, *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103, 105 (Colo. App. 2008), and our review is de novo, *Colorado Division of Insurance v. Trujillo*, 2012 COA 54, ¶ 12. The provisions of an administrative rule should be read in connection with and in relation to each other, so that the rule itself may be interpreted as a whole. *Safeway*, 186 P.3d at 105.

III. Application of Statutes

¶ 10 Claimant first contends that the ALJ erred by determining that CIRSA had no obligation to prepay his expenses under section 8-42-101, C.R.S. 2012. We disagree.

¶ 11 Section 8-42-101(1)(a), C.R.S. 2012, requires employers to furnish all reasonable and necessary medical care, treatment, or supplies to cure and relieve the employee from the effects of his or

her industrial injury and throughout the course of any such disability. Section 8-42-101(4), C.R.S. 2012, then provides that, once the employer's, or its insurer's, liability has been established, "a medical provider shall under no circumstances seek to recover such costs or fees from the employee."

¶ 12 Claimant maintains that his travel expenses represent services incident to his authorized medical care, and, therefore, the hotels and restaurants he patronizes in Vail qualify as medical providers within the meaning of section 8-42-101(4). Essentially, he argues that section 8-42-101(4) creates a statutory duty to refrain from billing an injured worker for any part of the authorized medical benefits and that such duty applies to his meals and lodging. We are not persuaded.

¶ 13 In arguing that the Vail restaurants and hotels that claimant patronizes qualify as "medical providers" under section 8-42-101(4), he relies on Department of Labor and Employment Rule 16-2(R), 7 Code Colo. Regs. 1101-3. That rule defines the term "provider" for purposes of both Rules 16 and 18 as "a person or entity providing authorized health care service, whether involving treatment or not,

to a worker in connection with work-related injury or occupational disease.” Although claimant argues that his meals and lodging are medical benefits because they are recoverable as services incident to his medical treatment, the rules do not define “health care service.”

¶ 14 The ordinary, everyday meaning of the term “health care service” connotes a service provided to “maintain or restore health.” See *Merriam–Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary> (last visited July 25, 2013) (defining “health care”); see also § 10-16-102(22), C.R.S. 2012 (defining “[h]ealth care services” for Colorado Health Care Coverage Act, §§ 10-16-101 to -1015, C.R.S. 2012, as any and all services for “the purpose of preventing, alleviating, curing, or healing human physical or mental illness or injury”). Further, Department of Labor and Employment Rule 16-5(A)(1), 7 Code Colo. Regs. 1101-3, identifies “recognized health care providers” and defines “non-physician providers” as “those individuals who are registered or licensed by the State of Colorado Department of Regulatory Agencies, or certified by a national entity recognized by

the State of Colorado,” and fall within the specified list of twenty-one occupations, ranging from acupuncturists and pharmacists to massage therapists and professional counselors.

¶ 15 We reject claimant’s assertion that section 8-42-101(4) applies, for two reasons. First, whether or not claimant’s lodging and meals technically qualify as medical benefits for purposes of compensability, the tangential relationship they hold to claimant’s treatment logically precludes their classification as health care services. Second, restaurants and hotels cannot be considered “health care providers,” either under the commonsense meaning of that term or under Rule 16-5(A)(1)’s specific definition. *Cf. Safeway*, 186 P.3d at 106-07 (holding that the plain language of the rules patently indicates that a claimant or injured worker is not a “provider” for purposes of submitting mileage reimbursement requests within the presumptive deadline applied to bills for services). Notwithstanding claimant’s assertions to the contrary, the rules, including Rule 16-2(R), establish that section 8-42-101(4)’s restriction preventing “medical providers” from seeking payment from an injured worker does not apply to the restaurants

or hotels that claimant patronizes when he is in Vail for treatment with the specialist.

¶ 16 Claimant argues that narrowly construing “medical provider,” as that term is used in section 8-42-101(4), defeats the remedial and beneficent purposes of the Workers’ Compensation Act, leading to an unnecessarily harsh and absurd result in cases such as his where he has suffered financial hardship as a result of his injury. However, reimbursement of travel costs under Rule 18-6(E) accounts for the possibility that an injured worker may cancel an appointment or spend less than anticipated. The record also shows that claimant did not have to forego treatment, and that CIRSA reimbursed him within thirty days for his expenses (which he had paid by credit card), thus minimizing any financial burden.

¶ 17 Other divisions of this court have applied a narrow statutory interpretation when determining whether a particular service or apparatus is medical in nature, and, therefore, compensable under section 8-42-101(1)(a). *See Kuziel v. Pet Fair, Inc.*, 931 P.2d 521, 522 (Colo. App. 1996) (applying narrow statutory interpretation used by prior divisions to determine that child care services are not

a compensable medical benefit). The omission of a prepayment requirement in sections 8-42-101(1)(a) and 8-42-101(4) contrasts with section 8-43-404(1)(b), C.R.S. 2012, which expressly provides for the advancement of an employee's estimated expenses, including "transportation, mileage, food, and hotel costs," when the employee must undergo an independent medical examination at the employer's request.

¶ 18 The out-of-state authorities relied on by claimant are inapposite because they either involve the prepayment of a readily recognizable medical service or address the prepayment of mileage, which CIRSA has consistently advanced.

IV. Application of Rule 18-6(E)

¶ 19 Claimant next contends that the ALJ and Panel erred in determining that Rule 18-6(E) was dispositive of the issue presented here. The ALJ and Panel interpreted the rule to require only reimbursement – and not prepayment – of expenses for lodging and meals. According to claimant, however, the rule applies exclusively to mileage expenses, which are not at issue here, and is silent regarding overnight accommodations and meals, and thus is

inapplicable. We disagree with claimant's interpretation of Rule 18-6(E), and we conclude that that rule controls here.

¶ 20 Claimant is correct that Rule 18-6(E) refers to the reimbursement of mileage expenses only, and makes no direct reference to expenses for meals or lodging. However, the rule's directive requiring the injured worker to submit a statement showing the number of miles and dates traveled, with "receipts for any other reasonable and necessary travel expenses incurred," plainly contemplates reimbursement of travel expenses such as meals and lodging. Because no reasonable argument can be made against categorizing meals and lodging as "other travel expenses," Rule 18-6(E) allows them to be reimbursed even though it does not expressly mention them. Thus, the ALJ and Panel correctly applied Rule 18-6(E) to preclude claimant's contention that CIRSA had to prepay his expenses for meals and lodging.

V. Alleged Contractual Duty to Prepay

¶ 21 Claimant finally contends that CIRSA is contractually bound to prepay his meal and lodging expenses. Again, we disagree.

¶ 22 Claimant argues that CIRSA's prepayments of expenses for

meals and lodging for his first three visits to the specialist, and his acceptance of those prepayments, evidence CIRSA's contractual agreement to prepay all of his travel expenses. The Panel rejected claimant's contractual theory, concluding that the law governing express or implied-in-fact contracts did not apply, and that the ALJ's findings regarding CIRSA's prepayments of hotel and meal expenses merely demonstrated the processing and adjusting of claimant's claim. Because the record does not support the making of an implied contract, the Panel's analysis is correct.

¶ 23 A contract implied in fact arises from the parties' conduct that evidences a mutual intention to enter into a contract, and such a contract has the same legal effect as an express contract. *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo. 2001). To be enforceable, a contract requires mutual assent to an exchange for legal consideration. *See Indus. Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997).

¶ 24 Here, claimant has cited no testimony or other evidence that he reached any such agreement with CIRSA. And, contrary to his assertion on appeal that he relied on this alleged agreement,

claimant did not demonstrate the mutual assent or legal consideration necessary to the formation of an enforceable contract. Consequently, the Panel properly concluded that CIRSA's prepayments represented nothing more than claim processing and adjustment.

¶ 25 Because claimant did not prove the existence of an implied contract, we need not review the Panel's determination that any such agreement was a settlement that had to be in writing, signed, and sworn to be enforceable under section 8-43-204, C.R.S. 2012.

¶ 26 Thus, the ALJ and the Panel properly determined that the Act imposed no obligation on CIRSA to prepay claimant's travel expenses.

¶ 27 We recognize the potential harshness of this result, particularly for a claimant who simply cannot afford to advance substantial costs for lodging and meals in advance of reimbursement by an insurer. However, as claimant aptly points out in his opening brief, courts cannot rewrite statutory or administrative rules under the guise of interpretation. *See Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 385 (Colo. App. 2006)

(“Claimant’s arguments that the [Workers’ Compensation] Act is unfair or that the result is contrary to public policy amount to a request for a change of statutory law. Absent constitutional infringement, it is not our province to rewrite statutes.”).

¶ 28 Although the record here shows that claimant was able to charge these costs to his credit card, and was reimbursed by CIRSA within thirty days of incurring such expenses, and thus he does not appear to have been substantially harmed, not all claimants may have such resources at their disposal. The Division of Workers’ Compensation may wish to address this issue in a rule.

¶ 29 The order is affirmed.

JUDGE LOEB and JUDGE MÁRQUEZ concur.