COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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September Case Law Update

Presented by Judge David Gallivan and Judge Laura Broniak

This update covers ICAO and COA decisions issued between August 18, 2017 to September 8, 2017

Industrial Claims Appeals Office Decisions

Ethics

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-976-657-03

IN THE MATTER OF THE CLAIM OF

JESSIE JONES,

Claimant,

v.

ORDER OF REMAND

REGIS CORPORATION,

Employer,

and

HARTFORD INSURANCE CO.,

Insurer,
Respondents.

The claimant and the respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated March 2, 2017, that reopened his prior Summary Order based on the ground of fraud and/or mistake, and that determined the claimant did not sustain a compensable injury. We affirm the ALJ's order, and remand the matter for the ALJ to hold a hearing and make findings of fact and an order on the repayment of medical and temporary benefits.

On September 29, 2015, a hearing was held before the ALJ on whether the claimant sustained a compensable injury to her neck on February 28, 2015.

As part of her February 28, 2015, claim, the claimant presented to Concentra Medical Centers on March 2, 2015, with complaints of neck pain shooting down her right arm. During her visit, the claimant reported that she had a prior motor vehicle accident in 2007 that completely resolved with 10 visits of physical therapy. The claimant also saw Dr. Rauzzino as part of a surgical consult. The claimant told Dr. Rauzzino that her symptoms began on February 28, 2015, when she was mopping and felt her neck pop. She reported a history of a car accident in 2007, but said her symptoms completely resolved and she was pain free until her incident at work.

On November 4, 2015, the ALJ issued his Summary Order finding the claimant had proven she sustained a compensable aggravation of a pre-existing soft tissue

condition of her cervical spine. In support of his determination, the ALJ credited the claimant's testimony that she had been pain free and without the need for medical treatment for an extended period of time prior to her alleged work injury on February 28, 2015. The ALJ specifically concluded in pertinent part as follows:

> The evidence presented persuades the ALJ that Claimant's soft tissue condition also pre-existed the claimed injury in this case. Nonetheless, careful review of the record, as submitted, fails to disclose that Claimant received treatment to the neck or upper back in the years leading up to her February 28, 2015 work injury. Importantly, Dr. Lesnak acknowledged on cross examination that he saw no records documenting treatment for Claimant's previous neck injury in 2011, 2012, 2013, 2014, or 2015 prior to the date of injury in question. … Based on the evidence presented, the ALJ concludes that Claimant likely aggravated her pre-existing cervical soft tissue condition. … Given the dearth of records supporting cervical treatment or documented cervical complaints of pain from 2011 up through the date of injury in this case, the ALJ is not persuaded by Respondents (sic) suggestion that Claimant's prior applications for benefits to the SSA support a finding that Claimant was experiencing cervical pain at the time of the February 28, 2015 incident giving rise to the instant claim. To the contrary, the ALJ concludes, from the evidence presented that Claimant was working full duty at the time of the incident question (sic) and was probably asymptomatic from a cervical spine standpoint until she abruptly turned her head in response to be started (sic).

The ALJ therefore ordered the respondents liable for medical benefits and temporary total disability (TTD) benefits from February 28, 2015, through April 10, 2015.

Following entry of the ALJ's Summary Order, the claimant continued to treat with her medical providers. Authorized treating provider, Dr. Hattem, examined the claimant for a permanent impairment rating on March 24, 2016. Dr. Hattem's impression was cervical strain. He opined the claimant was at maximum medical improvement (MMI) and assessed her with a 6% whole person impairment rating.

The respondents requested a Division sponsored independent medical examination (DIME). On August 22, 2016, Dr. Douthit performed the DIME. The claimant reported having a prior car accident in 2007 with back and neck injuries, but she did not mention any other prior injuries or cervical conditions. Dr. Douthit noted that the claimant had multiple complaints over her entire body, substantial pain behavior, and an out of proportion pain response. The claimant could not move her shoulders and only would lift

her arms slightly over her head level. Her neck motion was virtually zero with no motion in any direction. Dr. Douthit opined the claimant's range of motion was invalid due to the pain behavior. He placed the claimant at MMI with 6% whole person permanent impairment for "injury of her cervical spine, i.e. aggravation of degenerative disc disease."

Following the hearing and the ALJ's entry of his Summary Order, the respondents located additional records, including records from the Social Security Administration (SSA). These records revealed the claimant's prior efforts to obtain social security disability benefits for her cervical disc herniation. They also outline multiple complaints of cervical pain and treatment, including a visit referencing the status of the claimant's cervical condition two days before the alleged February 28, 2015, work injury. The medical records are dated beginning on May 7, 2008, when the claimant was seen for neck and back pain following a motor vehicle accident and which also refer to the claimant's rollover motor vehicle accident two years prior. They also include the claimant's application for Social Security benefits on March 16, 2009, wherein she explained the condition that limited her ability to work as being bulging neck vertebrae C4-C5. Also included were records dated July 2009 when the claimant was examined by Dr. Baca for complaints of chronic neck pain, chronic lower back pain, and other symptoms. The claimant told Dr. Baca that her problems started approximately 12-13 years ago after a motor vehicle accident in 1997 when she was involved in a 13 car pile-up and her car flipped and crushed her. She explained the pain in her neck, back, and extremities started at this time. The claimant also explained that in 2001, she fell down several stairs exacerbating her chronic pain problems. The medical records also include Dr. Reasoner's examination of the claimant on May 8, 2013, for complaints of neck pain and neck stiffness after slipping on wet tiles and falling on her back while at work. Additionally, on February 26, 2015, two days before the alleged industrial neck injury, the claimant was seen by Dr. Barbee for chronic pain and degenerative disc disease for which she was provided with a referral to pain management and physical therapy and provided with a prescription for Norco. The respondents therefore sought to reopen the ALJ's November 4, 2015, Summary Order on the basis of fraud and/or mistake, to set aside the ALJ's Summary Order, to withdraw their General Admission of Liability, and to seek an overpayment. The respondents' application also sought to overcome the DIME opinion of Dr. Douthit. The respondents asserted that the claimant intentionally misled the ALJ regarding the status of her cervical spine condition.

Thereafter, on January 18, 2017, a hearing was held on the respondents' petition to reopen, to set aside the ALJ's prior Summary Order, and to hold her claim not compensable. During the hearing, the claimant denied ever being referred for pain

management or physical therapy or obtaining a prescription for Norco. The claimant also testified that she had not reported having chronic neck pain following motor vehicle accidents and instead reported a history of thyroid disease. She further testified that she "did not have any treatment or issues with [her] neck for years other than a little discomfort here and there."

Applying a preponderance of the evidence standard, the ALJ entered his Order reopening and setting aside his prior Summary Order on the ground of fraud and/or mistake under §8-43-303(1), C.R.S. He found that the claimant's testimony was fraudulent and that his prior Summary Order was induced by the claimant's material misrepresentations and issued by mistake. The ALJ further found that the claimant did not sustain a compensable injury on February 28, 2015, when she turned her head abruptly in response to being startled. Instead, he found her symptoms were likely a manifestation of the natural progression of her pre-existing degenerative disc disease caused by her prior falls and motor vehicle accidents. He found the claimant made misrepresentations and concealed material facts with the intent to cause him to act upon it to find her injury compensable. He also expressly found that the claimant had misrepresented the history surrounding her cervical spine complaints/symptoms to her medical providers.

Both the claimant and the respondents have petitioned to review the ALJ's Order.

Claimant's Appeal

The claimant argues the ALJ erred in applying a preponderance of the evidence standard to the respondents' request to reopen the ALJ's prior Summary Order and to their attempt to establish the claimant did not sustain a compensable injury. The claimant contends the ALJ instead should have applied a clear and convincing standard. The claimant reasons that the respondents are attempting to circumvent the DIME physician's conclusive effect on the issue of causation. The claimant explains that in attempting to reopen the ALJ's prior award, the respondents relied on the medical report from Dr. Barbee dated February 26, 2015, and they were in possession of this report no later than June 20, 2016, more than two months prior to the DIME. They similarly argue that the respondents obtained medical records regarding the claimant's 2013 cervical injury around the same time. The claimant alleges that the DIME physician likely had both records prior to his examination, and he therefore made an informed decision as to causation of the claimant's injuries. The claimant argues that to avoid application of the clear and convincing burden of proof, the respondents would have had to file their application for hearing on the petition to reopen before the claimant underwent the

DIME. Since the respondents failed to timely file their petition to reopen until after the DIME physician issued his report unfavorable to the respondents, the claimant argues they now should be subject to the burden of overcoming the DIME by clear and convincing evidence. The claimant also argues that since the respondents challenged causation after the DIME took place, the clear and convincing standard of proof must be applied to their attempt to establish the claimant did not sustain a compensable injury. We are not persuaded the ALJ erred.

Initially, we address the respondents' argument that the claimant waived the issue of disputing the burden of proof. The respondents contend that the claimant did not raise this issue at hearing. However, in her proposed findings, the claimant specifically contested the burden of proof. Accordingly, we conclude the issue was not waived by the claimant. Claimant's Proposed Findings at 9.

A. The respondent's petition to reopen

We are not persuaded the ALJ erred in applying a preponderance of the evidence standard to the respondents' petition to reopen.

Pursuant to §8-43-303(1), C.R.S., the reopening authority granted ALJs "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002). The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." Section 8-43-303(4), C.R.S. In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal. *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Id*.

Further, the findings of fact upon which the ALJ bases his determination must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences that he drew from the evidence. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). To the extent medical evidence is presented, it is solely the ALJ's responsibility to assess the weight of that evidence and resolve any conflicts or inconsistencies. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Moreover, it is true that a DIME physician's finding of MMI is binding unless overcome by clear and convincing evidence, and that a determination of MMI inherently requires the examining physician to determine the cause or causes of the claimant's condition. Thus, a DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence when challenging a finding of MMI. Section 8-42-107(8)(b)(III), C.R.S.; *Cordova v. Industrial Claim Appeals Office, supra.*

However, the DIME process constitutes an exception to the usual burden of proof which requires the claimant to prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. Consequently, our courts have not given presumptive weight to a DIME physician's findings except when the Act expressly so requires. *Cordova v. Industrial Claim Appeals Office, supra* (DIME physician's opinion that alleged worsening of condition was caused by industrial injury so as to justify reopening was not entitled to presumptive effect); *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001)(DIME process did not apply to determination of whether, in the context of apportionment, pre-existing impairment was disabling). Consequently, because the extraordinary burden of proof is statutorily restricted to the determination of issues involving MMI and impairment, it does not apply to other issues.

Moreover, the Colorado Court of Appeals' holding in *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000), is instructive here. In *Faulkner*, the respondents sought to withdraw their admission on grounds that further investigation revealed the claimant had not sustained a compensable injury. The Court noted that the respondents raised the issue of causation pursuant to §8-41-301(1)(c), C.R.S., which requires the claimant to prove an injury "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." In such circumstances, the *Faulkner* Court concluded the issue did not involve the correctness of the DIME physician's impairment rating, but rather the threshold requirement that an injured employee establish a compensable injury by a preponderance of the evidence before any compensation is awarded. The Court therefore concluded the fact a DIME had been performed prior to hearing was inconsequential. Thus, the respondents' attempt to reopen and set aside the ALJ's prior Summary Order on the grounds of fraud and/or mistake did not require application of a clear and convincing burden of proof. Instead, the respondents' dispute pertinent to compensability would be decided upon a determination of the preponderance of the evidence.

The Colorado Court of Appeals' holding in *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005) also is instructive. In *Berg*, the Court upheld an ALJ's reopening of a claim on grounds of mistake because the claimant did not know the extent of his injuries at the time his claim was closed. The Court explained that while the claimant's petition to reopen was filed soon after the claim's closure, since the claimant was unaware of the extent of his injuries when the claim was closed, the Court rejected the respondents' argument that the claimant was strategically attempting to avoid the higher burden of proof required to overcome a DIME. *Id*. at 273-74. The Court also recognized that since the power to reopen is discretionary, there is an inherent protection against improper collateral attacks on a DIME determination of MMI. If a claimant files a petition to reopen in an attempt to circumvent the DIME process and gain the advantage of a lower burden of proof, the ALJ has authority to deny it. *Cf. Justiniano v. Industrial Claim Appeals Office*, 2016 COA 83, __ P.3d __ (Colo. App. 2016).

Here, similar to *Berg*, we are not persuaded that the evidence the claimant relies on to support her argument definitively establishes the respondents made a tactical decision to let the claim close and to petition to reopen, rather than contest the DIME's findings, in order to gain advantage of the lower standard of proof. While the claimant cites to two medical records that the respondents likely had obtained prior to the DIME, these medical records nevertheless post-date the hearing held on September 29, 2015. Rather, as found by the ALJ, it was not until after the September 29, 2015, hearing that the respondents obtained these medical records which demonstrate the claimant has suffered from chronic neck pain precipitated by pre-existing injuries as a result of prior falls and motor vehicle accidents. Based on this evidence, the ALJ reasonably could infer that the claimant consciously concealed the true nature of her cervical spine condition at the time of the September 29, 2015, hearing in an effort to mislead the ALJ into finding her claimed neck injury compensable. Consequently, we perceive no error in the ALJ's application of a preponderance of the evidence standard to the respondents' petition to reopen the claim on the ground of fraud and/or mistake. Section 8-43-303(1), C.R.S.; *see also Faulkner v. Industrial Claim Appeals Office, supra* (applying preponderance of the evidence rather than clear and convincing burden of proof).

B. <u>Modifying an issue previously determined by an order or admission</u>

Similarly, we are not persuaded the ALJ erred in applying a preponderance of the evidence standard to the respondents' attempt to establish the claimant did not sustain a compensable injury.

Section 8-43-201(1), C.R.S. provides in pertinent part as follows:

> A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence . . . and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Where the respondents attempt to modify an issue that previously has been determined by an admission or summary order, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012). Consequently, based on the plain language of §8-43-201(1), C.R.S., a preponderance of the evidence standard applies to a party seeking to modify a general or final admission or summary order. This is especially true since other provisions of the Workers' Compensation Act expressly apply a clear and convincing burden of proof but such a standard is not applied to a party seeking to modify an issue previously determined by an admission or summary order. *See* §8-43-304(4), C.R.S. (applying clear and convincing standard to party seeking penalty after a violator cures the violation); §8-42-107(8), C.R.S. (applying clear and convincing standard to overcoming DIME on MMI and impairment); §8-43-501(5), C.R.S. (applying clear and convincing standard to party disputing finding of utilization review committee); §8-42-112.5(1), C.R.S. (applying clear and convincing standard to overcoming presumption that injury was due to intoxication). Accordingly, we conclude the ALJ did not err in applying a preponderance standard to the respondents' attempt to modify an issue determined by their general admission or by the ALJ's prior Summary Order and establish the claimant did not sustain a compensable injury. Section 8-43-201(1), C.R.S.; *see also Faulkner v. Industrial Claim Appeals Office*, *supra* (ALJ did not err in applying preponderance of the evidence standard in determining whether claimant sustained compensable injury; fact that DIME had been performed prior to hearing was inconsequential).

Respondents' appeal

The respondents also have appealed the ALJ's Order. They argue that after entry of the ALJ's Summary Order on November 4, 2015, a hearing was held in front of ALJ Broniak. They claim that ALJ Broniak subsequently entered an Order on August 9, 2016, awarding the claimant TTD benefits. The respondents argue that the ALJ erred in failing to address the claimant's repayment of TTD and medical benefits.

Section 8-43-303(1), C.R.S., the reopening statute, provides in pertinent part as follows:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. Upon a prima facie showing that the claimant received overpayments, the award shall be reopened solely as to overpayments and repayment shall be ordered. In cases involving the circumstances described in section 8-42-113.5, recovery of overpayments shall be ordered in accordance with said section. If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. *No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. . . .* (emphasis added)

In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd in part on unrelated grounds*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that the respondents could recover as an overpayment money paid in excess of that which originally was owed. *See also Adams v. Heart of the Rockies Regional Medical Center*, W.C. No. 4-947-730-01 (Sept. 12, 2016); *Josue v. Anheuser-Busch, Inc.*, W.C. No. 4-954-271-04 (June 17, 2016), *aff'd , Josue v. Industrial Claim Appeals Office*, 16CA1036, Colo. App. 2017)(NSOP). Thus, based on the plain language of §8-43-303(1), C.R.S., and the holding in *Simpson*, it is clear that ALJs have authority to order a claimant who has received an overpayment or obtained benefits in cases of fraud, to repay both temporary indemnity and medical benefits. *See also Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981)(where claimant supplies materially false information upon which respondents rely in filing an admission, ALJ is justified in declaring admission void ab initio).

Here, during the hearing before the ALJ, the respondents stated that as part of their request to reopen the prior Summary Order on the ground of fraud and/or mistake, they also were trying to withdraw their general admission of liability and take the position that nothing is due to the claimant. They argued that their attempt to reopen also would include ALJ Broniak's prior award of TTD benefits. Tr. at 6-7. Additionally, in their proposed findings of fact, the respondents sought repayment of both medical and temporary disability benefits. Respondents' Proposed Findings at ¶23. In his Order, however, the ALJ did not make any findings on the repayment of medical and temporary indemnity benefits. We further add that the record does not contain the respondents'

general admission of liability or ALJ Broniak's Order awarding the claimant TTD benefits. We may not make findings of fact initially. Section 8-1-102(2), C.R.S. Consequently, we necessarily remand the matter for the ALJ to address the issue of the repayment of medical and temporary disability benefits and enter the necessary factual findings and order on this issue.

IT IS THEREFORE ORDERED that the ALJ's order dated March 2, 2017, is affirmed;

IT IS FURTHER ORDERED that the matter is remanded for the ALJ to hold a hearing and make the necessary findings of fact and an order on the respondents' contention that the claimant must repay medical and temporary benefits.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

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Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

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State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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MCDIVITT LAW FIRM, P.C., Attn: AARON S. KENNEDY, ESQ, 19 E. CIMARRON ST., COLORADO SPRINGS, CO, 80903 (For Claimant)
POLLART MILLER LLC, Attn: BRAD J. MILLER, ESQ, 5700 QUEBEC STREET, SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-003-724-04

IN THE MATTER OF THE CLAIM OF:

KURT BARNES,

Claimant,

v.

FINAL ORDER

CITY AND COUNTY OF DENVER,
DENVER POLICE DEPARTMENT,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Felter (ALJ) dated April 20, 2017, that found the claim compensable and ordered the respondents liable for three weeks of temporary disability benefits. We modify the ALJ's order and affirm as modified.

The claimant works as a police officer for the respondent. On January 5, 2016, the claimant was driving home from work on the respondent employer's service motorcycle. The claimant lives in Thornton, Colorado. As the claimant approached his home in Thornton, his motorcycle slipped on some ice and fell to the pavement injuring the claimant. The parties admitted that due to the accident, the claimant missed work from January 6 through the 26th, 2016. The respondent denied liability for the workers' compensation claim on the basis that the claimant was not at work when he was injured. Instead, the respondent asserted the claimant was traveling from work to his home following the end of his work shift.

At the March 30, 2017, hearing in the case, the claimant submitted a written Denver Police Department Authorization for Full Use Vehicle form issued to him on April 29, 2015. The Authorization form states motorcycle police officers have a law enforcement need to take their employer provided motorcycles home with them at the conclusion of their work shifts. The form identifies the work functions involved as including a 24-hour emergency response for traffic control, hostage/barricade situations,

civil disturbances, major fires, airplane accidents and any other incident that would affect traffic within the city of Denver. The form also references the effect the visible presence of a uniformed motorcycle officer has on traffic enforcement as the officer travels to and from their home to the place of work. The form prohibits the claimant from the personal use of the motorcycle.

The ALJ found the claimant in this matter satisfied one of the exceptions to the rule that injuries incurred by a claimant going to and coming from work are not compensable. The ALJ cited the Authorization for Full Use Vehicle form and determined the claimant's use of the motorcycle to go and come from work was made a part of the claimant's employment agreement. The ALJ reasoned that use served a benefit to both the claimant and the respondent, but primarily to the respondent. The ALJ noted the reasons set forth in the preamble to the form to allow the claimant's use of the motorcycle to travel to his home were credible and corresponded to situations typically encountered by the claimant and his employer. Accordingly, the ALJ concluded the claimant was entitled to workers' compensation benefits.

The respondent's counsel stated at the outset of the hearing that the respondent maintained a wage continuation plan pursuant to § 8-42-124(2), C.R.S. Therefore, she stipulated that the employer had paid the claimant his regular wage during the three weeks he was off work and had charged this pay against his allowance of sick time. The ALJ then, ruled the claimant was entitled to temporary total benefits between January 6 and the 26th, and directed the respondents to restore the claimant's sick leave and convert the wages paid to "work injury leave."

I.

On appeal, the respondent contends the hearing officer erred in finding the respondent enjoyed any benefit from the claimant's use of the motorcycle to travel to his home. The respondent argues that because the claimant lives in Thornton, a separate city north of Denver, his use of the motorcycle there does not provide any of the benefits described in the Authorization for Full Use Vehicle form. The respondent asserts the claimant would be available to note and intervene in traffic violations in Thornton, or to respond to emergencies quickly in Thornton, but could not assist the citizens of Denver while he was physically located in another jurisdiction.

In *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999), the court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable because they are not seen as arising out

of employment. The *Madden* opinion however, acknowledged the facts of any particular case might justify an exception to this general rule. The decision set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. The parties agree that in the case of category (1), (2) and (4), the evidence here reveals they do not apply. The respondent directs its objection to the applicability of category (3). The respondent insists the claimant's travel on the motorcycle to his home did not provide any special benefit to the employer apart from the claimant's arrival at work.

The *Madden* opinion observed that many of the exceptions to the going and coming rule recognized in previous cases were pertinent to the third exception asking if "the travel was contemplated by the employment contract." The court then listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer, (b) the travel was at the express or implied request of the employer and conferred a benefit beyond the employee's arrival at work, and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer. Finally, if the claimant establishes only one of the four "variables," recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from the work arises out of and in the course of employment. *Id.* at 865.

The Authorization for Full Use Vehicle form justifies the finding by the ALJ the claimant's use of his motorcycle to travel to his home and to work was part of the contract of employment with the respondent. That form specifies that in the case of a patrol officer living within a 25 mile radius of the Denver City and County Building that officer is authorized to "drive the assigned vehicle to and from work." The form then asserts the officer should do so because it allows more immediate response to emergency situations. The form, by itself, satisfies the third *Madden* exception to the going and coming rule. That is the circumstance where the travel is contemplated by the employment contract.

We also conclude the ALJ's finding that the respondent derived benefits from the claimant's use of the motorcycle to travel to his home. We reject the respondent's contention that the benefits to the employer specified in the Authorization for Full Use

Vehicle form would not apply when the claimant traveled to his home in Thornton. Despite the fact that the end of the claimant's commute home is in Thornton, he necessarily must routinely travel through Denver to reach that city's limits and continue on to Thornton. The obverse is the case when he returns to work. Accordingly, at any of the points in the claimant's commute while he is traveling through Denver the benefits to the City of Denver referenced in the Authorization form are applicable. In addition, were the claimant called out after work hours to attend to an emergency in Denver he could arrive much more quickly if he had the motorcycle immediately available to him than would be the case if he was first required to travel to the Denver Police garage. If this was not true, there would be no reason for the respondent to authorize the claimant to take the motorcycle to his home in Thornton. The fact that the respondent did so, knowing the claimant lived in a separate jurisdiction, belies the respondent's protest that it achieved no benefit from that arrangement.

The ALJ correctly observed that the respondent employer and the claimant achieved a mutual benefit when the claimant took his motorcycle to his home at the conclusion of his shift. *Berry's Coffee Shop v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967). In addition, the Authorization for Full Use Vehicle form serves as an express statement by the respondent that the claimant's travel via the motorcycle to his home and back is considered a part of his employment. In *Teller County v. Industrial Claim Appeals Office*, _ P. 3d_, 2015COA52 (Colo. App. 2015), the decision noted the *Madden* exception to the going and coming exclusion involving an express agreement by the employer. In *Teller County*, the claimant had been previously directed to attend a meeting of area emergency planners and had customarily done so for a period of time. When the claimant was injured on his way to one of the meetings, he was deemed to be in the course and scope of his employment:

> However, the *Hagans* division recognized that an employer can "expressly or impliedly" agree that the employment relation shall continue during the period of coming and going. *Id. 602 P.2d at 196*. Likewise, *Madden* acknowledged that travel contemplated by employment could occur as the result of either an express or implied request by the employer. *Madden, 977 P.2d at 864*. The "common link" between situations that satisfy *Madden*'s third variable is that the travel "is a substantial part of the service to the employer." *Id. at 865*.

Here, the ALJ also noted in his Conclusions of Law the employer expressly made the claimant's use of the motorcycle to go home a "part of the contract of employment." The Authorization for Full Use Vehicle form represents substantial evidence to support this finding. Accordingly, the ALJ determined the claimant's auto accident injuries were incurred performing an activity, which arose out of and in the course of his employment, and benefits were awarded. These findings and conclusions are supported by the record and by the case law. Section 8-43-301(8), C.R.S. We are compelled to affirm the order of the ALJ.

II.

The respondent also contends the ALJ was without jurisdiction to order the respondent to restore to the claimant the sick leave attributed to the wages paid him between January 6 and the 26th when he was gone from work due to his January 5 injuries. The respondent cites as authority our decision in *Mihulka v. University of Northern Colorado*, W.C. No. 4-431-682 (March 30, 2001). The respondent misreads our decision in that case. Section 8-42-124(2)(a) states that an employer that continues to pay an injured employee regular wages that are in excess of the amount of temporary disability benefits, will not be required to pay the employee any additional indemnity benefits due to the employee's entitlement to temporary disability benefits. We indicated in *Mihulka*, and also in *Soppe v. City of Colorado Springs*, W.C. No. 4-130-885 (February 28, 1997) and *Barnhill v. City and County of Denver*, W.C. No. 4-525-398 (August 27, 2003), that § 8-42-124(4) provides that once an employer pursuant to such a wage continuation plan "has charged the employee with any earned … sick leave, … for any reason, the rights of the employee to receive direct payment of any award for temporary partial or temporary total disability … shall be reinstated in accordance with the provisions of articles 40 to 47 of this title." In those decisions, we noted that even in the event the employer proposes to change a prior characterization of sick leave to regular wages that change in the status of the wage payments is ineffective to excuse the employer from being required to pay the claimant directly for the temporary indemnity benefits. In *Mihulka*, the employer acknowledged the claimant's eligibility for temporary benefits due to 15.25 hours lost from work. The claimant had been paid his regular wages during this period. The employer therefore charged the 15.25 hours to sick leave. We held:

> It follows that, to the extent the employer charged the claimant for earned sick leave of 15.25 hours, it is not entitled

> to reduce its liability for temporary disability benefits for this amount of time. Consequently, the respondents shall pay the claimant compensation for temporary total disability, at the admitted rate, for 15.25 hours. The ALJ's order shall be modified accordingly.

The same reasoning applies in this matter. The employer states it has paid the claimant his regular wages between January 6 and the 26th. However, the employer has also stipulated it charged the claimant sick leave for these wages. Therefore, the employer may not apply the terms of § 8-42-124(2)(a) and must pay the claimant directly compensation in the amount of temporary total disability benefits under the formula set forth in § 8-42-105(1). The order of the ALJ is modified accordingly.

IT IS THEREFORE ORDERED that the ALJ's order issued April 20, 2017, is affirmed as modified above.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

8/25/17 by TT .

ELKUS & SISSON, P.C., Attn: STEVEN T. MANDELARIS, ESQ, 501 SOUTH CHERRY STREET, SUITE 920, DENVER, CO, 80246 (For Claimant)
OFFICE OF THE DENVER CITY ATTORNEY, Attn: MICHELLE S. SISK, ESQ, C/O: EVIN BERG, ESQ, 201 WEST COLFAX AVE., DEPT. 1108, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-889-298-04

IN THE MATTER OF THE CLAIM OF:

ALLEN VILLEGAS,

Claimant,

v.

FINAL ORDER

DENVER WATER,

Employer,

and

TRAVELERS INDEMNITY CO.,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Nemechek (ALJ) dated March 5, 2016, that denied his claim for permanent total disability benefits. We affirm the ALJ's order.

This matter went to hearing on the claimant's request for permanent total disability benefits and the respondents' request to terminate permanent partial disability benefits for reaching the statutory cap. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for the employer for 38 years and was involved in emergency repair for broken water pipes. The claimant's position was in the heavy job classification, involving intensive physical labor, including lifting. Dr. Macaulay is the director of the medical clinic for the employer and works for them pursuant to a written contract. The claimant saw Dr. Macaulay periodically for various conditions from 1998 to 2011. The claimant sustained an admitted injury to his low back on February 12, 2012, when he was working in a vault and was required to bend down for an extended period of time. The claimant went to the clinic and saw Dr. Macaulay who noted that the claimant was able to perform his regular work duties. The claimant then began treating for his back with Dr. LaFontano in March of 2012. Dr. LaFontano issued work restrictions. The claimant has not returned to work since April 28, 2012, and retired from his position with the employer effective June 25, 2013.

The claimant underwent a Division Independent Medical Examination (DIME) on July 16, 2015, which was performed by Dr. Mason. Dr. Mason's assessment was lumbar disc disease with some left lower extremity radiculopathic pain. She confirmed the claimant was at maximum medical improvement (MMI) and assigned a 17 percent whole person impairment rating. Dr. Mason also stated that the claimant's permanent work restrictions were in the sedentary to light category and activity restriction has helped the claimant control his symptoms. The respondents filed a final admission of liability admitting to the DIME physician's rating.

O.T. Resources performed a functional capacity evaluation (FCE) which determined that the claimant had limitations on lifting of 15 pounds, could sit for 30 minutes at a time for a maximum of two to three hours per day, stand for 10-15 minutes at a time for one hour in a day and walk 30-60 minutes for two to three hours a day. The claimant also had limits on reaching, climbing, stooping, crouching and crawling. Doris Shiver of O.T. Resources testified as an expert at hearing that there were no jobs in the open labor market for the claimant.

Dr. LaFontano signed a letter dated December 22, 2015, agreeing with the O.T. Resources assessment. Dr. LaFontano also testified at hearing that he did not believe that the claimant could return to work without further harm.

The ALJ credited the claimant's testimony that he takes care of his six year old niece by getting her ready for school and driving her to and from school. The claimant goes to the gym two to three times per week, walks his dogs two to three times per week and does some work around the house, including mopping, vacuuming, making beds, and cooking meals.

Dr. Macaulay testified that the claimant could work in the sedentary to light work category which meant to him, involved lifting 10 pounds or less.

Mr. Hartwick, a vocational rehabilitation counselor, also testified at hearing. According to Mr. Hartwick, the claimant stated he was able to lift in the 20 pound range as well as noting that he was actively involved in an exercise program and doing a number of activities in the day, the claimant also performed good or average in reading, arithmetic, sentence comprehension and spelling. Mr. Hartwick concluded that the claimant would be able to perform the occupations of unskilled, to semi-skilled electronic assembly or production and there were open jobs within the Denver labor market for the claimant. Thus, Mr. Hartwick concluded that the claimant was capable of working.

The ALJ made detailed findings on the claimant's ability to work. The ALJ credited Mr. Hartwick that the claimant had skills that would apply in other employment and his work experience qualified him for potential jobs that were available in the Denver labor market. The ALJ also found that the claimant's permanent restrictions placed him in the sedentary to light job category, although as testified by Dr. LaFantano, there was some variability within those restrictions and the claimant's pain complaints would vary on a daily basis. The ALJ therefore concluded that the claimant has the ability to earn wages within those restrictions and is not permanently and total disabled as a result of his injury. The ALJ also denied the respondents' request to terminate the claimant's permanent partial disability benefits because they had reached the statutory cap in October of 2016, finding no authority for the respondent's position. The claimant now appeals the ALJ's denial of permanent total disability.

On appeal the claimant contends that the ALJ erred in allowing Dr. Macaulay to testify, in denying his request to sequester Dr. Macaulay and in refusing to allow him to call Sherry Young as a rebuttal witness. The claimant also argues that the permanent total disability standard is unconstitutionally vague, the ALJ lost jurisdiction of the claim and the ALJ was unconstitutionally arbitrary. We are not persuaded the ALJ committed reversible error.

A claimant must prove permanent total disability by establishing that the effects of the industrial injury render him unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. In determining whether the claimant has proven permanent total disability the ALJ may consider the effects of the industrial injury in light of the claimant's human factors, including the claimant's age, work history, general physical condition, prior training and experience. Ultimately, the question of whether the claimant has proven permanent total disability is one of fact for determination by the ALJ. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Because determination of the issue is factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. *Id*.

Here, there is substantial evidence in the record to support the ALJ's finding of that the claimant is not permanently and totally disabled. The ALJ explicitly credited Mr. Hartwick's opinions and testimony that there are jobs available within the claimant's work restrictions. The ALJ also discredited the evidence relied upon by the claimant. The fact the evidence might have supported a different result affords no basis for appellate review. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Nor are we persuaded by the claimant's other arguments to set aside the ALJ's order.

I.

(A)

The claimant contends that the ALJ erred in allowing Dr. Macaulay to testify as an expert because the respondents did not designate Dr. Macaulay as an expert in the response to the claimant's interrogatories. The claimant contends that this is a violation of CRCP 37 and §8-43-210. We find no error.

In this case, the respondents listed Dr. Macaulay as a witness on the response to application for hearing. OAC Rule 13(only endorsed witnesses may testify in a party's case-in-chief). The claimant sent interrogatories requesting in interrogatory number two that the respondents name each and every witness they intended to produce at hearing and provide a detailed description of the witnesses anticipated testimony. In response to this interrogatory, the respondents listed Dr. Macaulay and stated he was expected to testify as to his care and treatment of claimant, any restrictions placed on the claimant and his opinions as to claimant's abilities. In interrogatory number five the claimant requested that the respondents' list the name of all experts retained in this matter. The respondents' only witness listed in this response was the vocational counselor, Mr. Hartwick. The respondents provided a supplemental response to the interrogatories on February 25, 2016, again listing Dr. Macaulay as a witness in response to interrogatory number two and only listing Mr. Hartwick in response to interrogatory number five.

At the beginning of the hearing and through the proceedings, the claimant objected to Dr. Macaulay's testimony contending that the respondents failed to list him as an expert and stating that he was unfairly surprised by his testimony. The ALJ overruled the claimant's objection at the first hearing which concluded without Dr. Macaulay's testimony. At the end of the first hearing, the ALJ offered claimant the opportunity to depose Dr. Macaulay prior to the second hearing. The claimant did not depose Dr. Macaulay. Between the first and second hearing the claimant filed a motion to reconsider the ruling allowing Dr. Macaulay to testify. In an order dated July 22, 2016, the ALJ denied the motion to reconsider. The ALJ found that the claimant had notice that Dr. Macaulay was going to testify and of his expected testimony. Dr. Macaulay was listed as a witness and the respondents' provided a brief summary of his proposed testimony in the responses to discovery. The claimant timely received a copy of the Dr. Macaulay's medical records prior to the first hearing. The ALJ noted that if the claimant required

additional information he could have requested supplementation of the response or availed himself of the opportunity to depose Dr. Macaulay which the ALJ provided at the end of the first hearing. The ALJ also noted that Dr. Macaulay was listed as a witness on the respondents' response to application for hearing and the Case Information Sheet filed prior to hearing. The ALJ, therefore, denied the claimant's request for sanctions for failure to disclose Dr. Macaulay and denied the motion for reconsideration.

The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. *See* 8-43-207(1)(p), C.R.S.; *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991). Because the ALJ's determinations in this respect are discretionary, we may only disturb the ALJ's order if it exceeds the bounds of reason, such as where it is wholly unsupported by the evidence or is contrary to applicable law. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). Even assuming, as claimant argues, that the respondents failed to disclose Dr. Macaulay as an expert witness under these circumstances, we cannot say the ALJ's determination to allow Dr. Macaulay to testify exceeded the bounds of reason.

Witness preclusion is one sanction that may be imposed for a party's failure to disclose expert testimony without substantial justification, unless the failure to disclose is harmless. *See C.R.C.P. 37; Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). In evaluating whether a failure to disclose is harmless, the question is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence. *See Todd v. Bear Valley Village Apartments*, 980 P.2d 973 (Colo. 1999). Failure to disclose expert testimony is harmless if the opposing party had the opportunity for cross examination on the objected topic. *See Antolovich v. Brown Group Retail, Inc*., 183 P.3d 582 (Colo. App. 2007).

The ALJ here comprehensively outlined why he allowed Dr. Macaulay to testify as an expert. The claimant had ample notice that Dr. Macaulay was going to testify and a statement of his expected testimony. In these circumstances, any failure to disclose was harmless and we cannot say that the ALJ's decision to allow Dr. Macaulay to testify exceeded the bounds of reason.

The claimant also contends that Dr. Macaulay should have been precluded from testifying under §8-43-210, which requires that expert reports be exchanged 20 days prior to hearing and the respondent failed to provide a report for Macaulay. However, Dr.

Macaulay's records were exchanged with the claimant, as required, 20 days prior to the hearing. Respondent's Exhibit I. There were no outstanding reports to exchange. The claimant has not cited to any authority and we are not aware of any authority that requires an expert write a report before testifying. We therefore reject the claimant's argument.

(B)

The claimant also contends that the ALJ failed to sequester Dr. Macaulay after the claimant requested the sequester. CRE 615 provides that "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." The purpose of a sequestration order is to "prevent a witness from conforming his [or her] testimony to that of other witnesses and to discourage fabrication and collusion." *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998). It is not error, however, to permit an "advisory" witness to remain in the courtroom. *People v. Gomez*, 632 P. 2d 586 (Colo. 1981). As a physician expert witness who provided treatment for the claimant over the course of his employment, the ALJ determined that Dr. Macaulay was essential to the respondents' case. May 13, 2016 hearing, Tr. at 11. We find no error.

(C)

The claimant contends that the ALJ also erred in allowing Dr. Macaulay to testify because the respondents could not show the testimony would be reliable and relevant as required by *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). The claimant's reliance on *Shreck* is misplaced.

In *Shreck* the Colorado Supreme Court held that CRE 702 governs a trial court's determination as to whether scientific or other expert testimony should be admitted. The Court held that such an inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. The *Shreck* Court also held that when a court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case.

During voir dire examination, the claimant raised an objection to Dr. Macaulay's qualifications as an expert in this case based on the principles in *Shreck.* July 25, 2016, hearing, Tr. at 31. As noted by the ALJ, the principles announced in *Shreck* require the

ALJ to consider the reliability of an expert's opinions and not his qualifications. Tr. at 31. Moreover, we note that the principles articulated in *Shreck* pertain especially to scientific evidence that is "novel." Here, in our view, Dr. Macaulay's testimony did not rely on novel medical theories or opinions. His opinions were within the usual expertise of the doctors who treated, evaluated, or examined the claimant, and we perceive nothing that renders those opinions unreliable as a matter of law. The claimant's alleged inadequacies of Dr. Macaulay's opinions go to the weight and probative value of the evidence; however, those evaluations were for the ALJ to make. We conclude that the ALJ did not abuse his discretion in admitting the expert evidence in this matter.

II.

The claimant also contends that the ALJ committed reversible error by not allowing rebuttal testimony from occupational therapist, Sherry Young. July 25, 2016, hearing, Tr. at 237- 240. Ms. Young performed an FCE at the claimant's request between the first and second hearing. The claimant argued that he was seeking to rebut Dr. Macaulay's testimony that there was a psychological component to the claimant's work restrictions and also because Mr. Hartwick had questioned the report done with O.T. Resources. The respondents objected because Ms. Young was not identified as a witness anywhere in an application for hearing, interrogatories or in the CIS form. The respondents also stated that Dr. Macaulay's testimony only addressed the psychological component of pain and did not say that the psychological factors influenced O.T. Resources' report. The respondents also pointed out that Mr. Hartwick testified that he did not need another FCE to render his opinions. The ALJ denied Young's testimony noting that the respondents had no notice of the witness, the report was not timely exchanged, the testimony was cumulative and did not rebut Dr. Macaulay's testimony concerning the physical factors.

The decision of whether to admit rebuttal testimony is committed to the sound discretion of the ALJ, and we may not interfere with the decision to exclude evidence unless an abuse is shown. Section 8-43-207(1) (c), C.R.S.; *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). There is no abuse of discretion in the ALJ's ruling here. The purpose of rebuttal testimony is to explain, counteract, or disprove the proof of the opposing party. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973). The party offering rebuttal evidence "must demonstrate that the evidence is relevant to rebut a specific claim, theory, witness or other evidence of the adverse party." *People v. Welsh*, 80 P.3d 296, 304 (Colo.2003). Here, we agree with the ALJ's determination that the proffered evidence did not rebut Dr. Macaulay's or Mr. Hartwick's opinions.

III.

The claimant contends that the standard for determining whether a claimant is permanently and totally disabled is unconstitutionally vague as written and as applied. The claimant specifically asserts that the ALJ relied on the general classifications of "sedentary or light" to deny the claimant's benefits and this decision is arbitrary regarding the determination of whether the claimant unable to earn any wage.

The standard for determining whether a claimant is permanently and totally disabled means the employee is unable to earn any wages in the same or other employment. Section 8-40-201(16.5), C.R.S. The terms "sedentary or light" as used to describe the claimant's ability to work are factors for the ALJ to consider when determining whether the claimant is capable of earning any wages. Any vagueness that the claimant attributes to these terms go to the weight and credibility the ALJ chose to give these factors and does not render the permanent and total disability statute unconstitutionally vague.

In any event, we lack jurisdiction to resolve the claimant's facial challenge to the constitutionality of §8-40-201(16.5). *Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971); *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Furthermore, we recognize that the Supreme Court has indicated that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *Horrell v. Department of Administration*, 861 P.2d 1194, 1196 (Colo. 1993). However, the claimant's "as applied" argument is inherently intertwined with the facial challenge to the constitutionality of the statute. Under these circumstances we do not know how we can consider the "as applied" argument without addressing the claimant's argument that the statute is unconstitutional as written. To do so would violate the principle of separation of powers, and cause us to engage in constitutional decision-making beyond the scope of our authority. See *Denver Center for Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. 1985) (administrative rulings concerning "facial" challenges to statutes will not be considered "authoritative" on judicial review). Consequently, we decline to consider the claimant's arguments in support of his contention that "as applied" to this claim, §8-40-201(16.5)(a) is unconstitutionally vague.

IV.

We reject the claimant's contention that the ALJ lost jurisdiction to enter an order in this case because the hearing was not commenced within180 days of the application for hearing pursuant to §8-43-209, C.R.S.

Section 8-43-209 states that hearings shall be heard within one hundred twenty days from the date of the notice of setting…" Upon agreement of the parties, the ALJ shall grant one extension of time not exceeding sixty days to commence the hearing. This statute, however, does not establish a procedure to be followed if a hearing is not commenced and completed within the time limitations. The panel has previously held that the provisions of § 8-43-209 are directory rather than jurisdictional. *See Palacios-Ortiz v. Excel Corporation,* W.C. No. 4-527-581(April 2, 2004); *see Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996). The claimant has not provided us with a reason to depart from these prior holdings.

V.

Finally, the claimant generally asserts that the ALJ's decision was arbitrary and violated the due process clause of the 14th Amendment and that the ALJ was not fair and impartial. We are not persuaded the ALJ erred.

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 (1990). As detailed above, in our view, the claimant had ample notice and opportunity to be heard. Our review of the record and the claimant's assertions do not persuade us that the ALJ's conduct at the hearing and her handling of the case deprived the claimant of a fair hearing. *See Nesbit v. Industrial Comm'n,* 43 Colo. App. 398, 399, 607 P.2d 1024, 1025 (1979) ("A substantial showing of personal bias is required before a ruling can be made that the hearing procedure was unfair.") The ALJ's order reflects his reliance on the applicable statutory criteria, and the award was within the ambit of his discretion and we have no basis to disturb the ALJ's order. §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated March 5, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

8/22/17 by TT .

CHRIS FORSYTH LAW OFFICE, LLC, Attn: CHRIS FORSYTH, ESQ, 999 18TH ST. SUITE 2400 S, DENVER, CO, 80202 (For Claimant)
HALL & EVANS, LLC, Attn: DOUGLAS J. KOTAREK, ESQ, C/O: EVAN M. BLONIGEN, ESQ, 1001 17TH STREET, SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-981-338-03

IN THE MATTER OF THE CLAIM OF

DONALD TURNER,

Claimant,

v.

FINAL ORDER

SUNRISE TRANSPORT,
d/b/a PINZGAUER BREEDERS, LTD.,

Employer,

and

NON-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated January 31, 2017, that determined there was no jurisdiction available to impose workers' compensation liability in regard to his claim and therefore dismissed the claimant's request for temporary disability and medical benefits. We affirm the decision of the ALJ.

The claimant worked for the respondent employer as an over the road truck driver. The employer is a company headquartered in British Columbia, Canada. The claimant is a resident of British Columbia. The employer hired him in June 2012, in British Columbia. The claimant's job required him to drive extensively across the western half of the United States and Canada. On December 4, 2013, the claimant was dispatched to make a delivery of lumber to a Home Depot facility in Henderson, Colorado. When the claimant arrives at a delivery destination, he is required to uncover the load and remove the devices securing the load to the truck. While doing so the claimant slipped on ice, fell and hit his head. The claimant recovered, got up and resumed his work. A few moments later, he fell again. He was unconscious for a period and was transported by ambulance to a local hospital. The claimant was hospitalized for three days. After his release, he resumed his work for the employer and drove his truck back to British Columbia.

The claimant pursued a workers' compensation claim with his employer's insurance carrier in British Columbia. Claimant's counsel described the claimant's compensation award as in the neighborhood of $50,000, comprised primarily of medical benefits and was limited to six months' duration. The claimant initiated a workers' compensation claim in Colorado. In May, 2016, he filed an application for a hearing requesting temporary total disability benefits, medical benefits and a penalty pursuant to § 8-43-408(1) C.R.S. asserting the respondent failed to carry insurance in Colorado.

The respondent denied liability for the claim on the basis the claimant's injury did not arise out of his employment and that the respondent employer was not subject to either personal jurisdiction or subject matter jurisdiction in Colorado concerning this workers' compensation claim.

On September 22, 2016, the ALJ convened a hearing concerning the claimant's application. The parties and the ALJ agreed to initially present and hear evidence pertinent to the issue of jurisdiction. The parties submitted documentary exhibits and the testimony of the claimant. At the close of that portion of the hearing, the respondents moved for a judgment in their favor. The ALJ issued his findings and order on January 31, 2017.

The ALJ determined the matter on the basis of subject matter jurisdiction.[1] The ALJ found the controlling authority to be represented by the Supreme Court's decision in *United States Fidelity & Guaranty Co. v. Industrial Commission*, 99 Colo. 280, 61 P.2d 1033 (1936). That decision concerned a claimant, a resident of Texas, hired in Texas, by a Texas employer. The claimant was injured in Colorado when the employer sent the claimant to work on an oil well it was drilling in the state. The Court found Colorado did have jurisdiction pursuant to its workers' compensation system. The decision set forth that the essential element necessary was "that a substantial portion of the work must be done in this state." In addition, it must be shown there was either an injury occurring in Colorado or a contract of hire in Colorado. Here, relative to a substantial portion of the work, the parties and the ALJ paid particular attention to the claimant's travel logs and the employer's Equipment Routing Reports. These documents recorded the claimant's over the road trips in 2013 including the point of origin, destination, days and mileage involved. The ALJ found that in 2013 the claimant was dispatched on nine trips to

[1] The ALJ also made a finding that personal jurisdiction over this out of state employer was not established pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310, 66 St. Ct. 154, 90 L.Ed. 95 (1945). The Colorado Supreme Court has recently set forth the constitutional standards for personal jurisdiction in workers' compensation matters in *Youngquist Bros. Oil & Gas v. Miner*, 390 P.3d 389 (2017). However, the determination by the ALJ that there is no subject matter jurisdiction here renders moot the conclusion pertinent to personal jurisdiction.

Colorado, which encompassed 21 total days. These trips occurred in February, March, April, June, July, September, October and December. The ALJ calculated this amount of time was no more than 6.2% of the claimant's workdays in 2013. This sum was ruled "insubstantial" and not regular employment in Colorado. Accordingly, the claimant's work was deemed insufficient to satisfy the requirement in the *United States Fidelity* decision that the claimant must have performed a substantial portion of his work in this state. The ALJ concluded jurisdiction in Colorado was not established and the claim was dismissed.

The claimant contends the ALJ is in error by finding that 'substantial' work in Colorado could be characterized by a numerical calculation. The claimant also argues the ALJ was mistaken by reasoning that substantial work is distilled by comparing the amount of work the claimant performed in Colorado with the amount he accomplished in all of the other states he visited. Instead, the claimant asserts the ALJ must examine the regularity and routine nature of the work that the claimant did complete in Colorado. The claimant suggests that when the percentages of work the claimant performed in any of the 20 western states he most often contacted are compared to each other; they would not vary more than a few percentage points. As a result, no state would have jurisdiction over any injury he might sustain.

The ALJ derived his calculations in an effort to quantify the location and substance of the claimant's employment. The ALJ did so while mindful of the *United States Fidelity & Guaranty Co.* requirement that to establish Colorado jurisdiction over the claim a claimant was required to prove that a "substantial portion" of his employment was performed in Colorado.

As expressly recognized by the ALJ, the determination of whether the claimant had "substantial employment" in Colorado is factual in nature, and there is no strict formula for determining whether a claimant's work in Colorado is "substantial." *See Roseborough v. Schneider National*, W.C. No. 4-007-808, December 17, 1991. However, in *RCS Lumber Co. v. Worthy*, 149 Colo. 537, 369 P.2d 985 (1962), the court considered the claimant's "usual" and "regular" employment in determining that one day of work in Colorado did not constitute "substantial employment" in Colorado. Relying upon *RCS* we have repeatedly held that the claimant's usual and regular employment are relevant factors in determining whether the claimant has established "substantial employment" in Colorado. *See Pfuhl v. Prime, Inc*. 2.C. No. 4-215-425 (February 16, 1995); *Hatt v. Scneider National Carriers, Inc.*, W.C. No. 4-121-034 (October 2, 1992); and *Bryan v. Schneider National Inc.*, W.C. No. 3-962-117 (August 23, 1991).

In *Richardson v. Big Mac Trucking Co*., W. C. No. 4-258-486 (May 12, 1997), the claimant was an over the road driver injured in Colorado. The ALJ reviewed the comparative percentage of the claimant's mileage in Colorado to the total miles he compiled driving everywhere else and found that Colorado accounted for only 3.2% of that mileage. The ALJ concluded this was a "very insubstantial" portion of the claimant's employment and declined to find Colorado had jurisdiction over his claim. In a case also featuring an over the road driver, *Masters v. Viking Freight System*, W.C. No. 4-119-690 (March 21, 1995), we noted that the small percentage of time the claimant spent in any particular state, including Colorado, was substantially reduced by the nature of his employment which included driving through 48 different states. Despite the fact the claimant's employment was not localized, the ALJ determined the claimant did perform a substantial portion of his work in Colorado. The ALJ resolved that Colorado did have jurisdiction over the claimant's injury. We found the ALJs' conclusions in both cases were supported by substantial evidence and were therefore affirmed.

Generally, the question of whether the claimant has established "substantial employment" in Colorado is one of fact for resolution by the ALJ. *Monolith Portland Cement v. Burak, supra*. Consequently, we must uphold the ALJ's pertinent findings of fact if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying this standard, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences, which he drew from the evidence. *Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993); *May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988).

We do not dispute the claimant's assertion that "routineness and regularity" are factors, which an ALJ should consider in determining whether the claimant engaged in "substantial" employment in Colorado. *See RCS Lumber Co. v. Worthy*, 149 Colo. 537, 369 P.2d 985 (1962). However, we disagree that the ALJ failed to consider these factors. The ALJ stated the 'regular' and 'routine' nature of the claimant's work was considered. To the extent the ALJ found the routine character of his work in Colorado was affected by the requirement that he make deliveries to other states does not represent a departure from the standard set forth in *United States Fidelity & Guaranty Co., supra.*

We may not substitute our judgment for that of the ALJ in assessing the sufficiency and probative weight of the evidence. Therefore, we are bound by the ALJ's determination and it is immaterial on review that the record contains some evidence, which, if credited, might support a contrary determination. *See Durocher v. Industrial Claim Appeals Office*, 905 P.2d 4 (Colo. App. 1995) (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).

Here, the ALJ's factual determinations concerning the claimant's employment for the respondent employer are supported by substantial evidence and plausible inferences drawn from the record. Further, the ALJ's findings support his determination that the claimant's employment in Colorado was "not substantial."

IT IS THEREFORE ORDERED that the ALJ's order issued January 31, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

8/23/17 by TT .

DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: MELISSA J. LOMAN EVANS, ESQ, C/O: MARY B. PUCELIK, ESQ, 3900 EAST MEXICO AVENUE, #1300, DENVER, CO, 80210 (For Claimant)
TREECE ALFREY MUSAT, P.C., Attn: JAMES B. FAIRBANKS, ESQ, 633 17TH STREET, SUITE 2200, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-997-641-02

IN THE MATTER OF THE CLAIM OF:

JAMEY V. MADONNA,

Claimant,

v.

FINAL ORDER

WALMART,

Employer,

and

CLAIMS MANAGEMENT INC.,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Edie (ALJ) dated March 21, 2017, that determined the claimant's claim was not compensable and that ordered the respondents liable for the claimant's emergency medical treatment. We reverse the ALJ's order to the extent it ordered the respondents liable for the claimant's emergency medical treatment.

This matter went to hearing on whether the claimant sustained a compensable injury to his neck and upper back on August 1, 2014, medical benefits, temporary total disability (TTD) benefits, and other issues.

After the hearing, the ALJ found that the claimant had worked for the respondent employer as a Department Manager of the automotive department. On August 1, 2014, the claimant was lifting a case of oil onto the top shelf when a customer called from the door to his left. The claimant was startled and turned sharply to look at the customer while lifting the case of oil. The claimant immediately felt a sharp pain that he described as feeling more in his chest along with numbness in the left arm and lightheadedness.

When it became apparent the claimant had not improved, his immediate supervisor, Vivian Quintana, immediately issued a "code white" and called an ambulance. The claimant was transported by ambulance to the Parkview Medical Center emergency room. According to the ambulance records, the claimant's complaints

included "numbness and tingling to the left arm and leg" with other cardiac related symptoms for two hours. The claimant also noted that he had not felt well for several days.

The triage notes associated with the claimant's emergency room visit at Parkview Medical Center indicate that the claimant had been sick for a few days with "chest pain this a.m." The notes further reflect that the claimant had experienced intermittent chest pain for several weeks, that the pains had been a problem for years, and that the claimant has spinal stenosis and radiation into his back. Dr. MacKerrow, admitting physician, noted the claimant had a "long standing history of symptoms including chest pain, dizziness and upper back pain." Dr. MacKerrow stated the claimant had "chronic back pain from a cervical surgery that he had 10-12 years ago." He further noted the claimant's back bothers him all the time, and that he often experiences dizziness. Dr. MacKerrow opined the claimant's pain was referred pain from his cervical and thoracic spine and his dizziness was chronic. The claimant was discharged from Parkview Medical Center on August 2, 2014.

The claimant has had a long history of chest pain dating to 1990. He also has had a long history of intermittent neck pain, culminating in a March 11, 1999, cervical decompression laminectomy with medical facetectomy, arthrodesis posterolateral C3 through C7 and posterior instrumentation with segmental fixation bilaterally C3 through C7. The March 11, 1999, surgery ultimately had catastrophic results, with the claimant awaking from surgery completely paralyzed on the right side. A re-exploration cervical laminectomy with foraminotomies on the right C4-5, C5-6, and C3-4 was performed on May 12, 1999. Despite undergoing the second surgery, the claimant required an 18-month recovery period and was left with permanent restrictions in the right bicep and deltoid, resulting in an inability to curl three pounds on the right.

On June 8, 1999, the claimant underwent a third cervical surgery to treat his cervical myelopathy due to severe stenosis throughout the cervical spine. X-rays following this procedure demonstrated posterior laminectomy at the level of C3 to at least the level of C6. One of the posterior fixation plates became loose and displaced posteriorly and the superior 3 or 4 screws associated with this loose plate appeared to have pulled loose from the bone. Also noted was a screw projecting posterior to the fixation plate and lying parallel with the plates at the C5 and C6 levels.

The ALJ ultimately determined that the claimant failed to prove he suffered an injury arising out of and in the course and scope of his employment on August 1, 2014. Crediting the opinions of the respondents' medical expert, Dr. Reiss, the ALJ found that

the claimant's condition and need for surgery existed prior to arriving at work on August 1, 2014. The ALJ found this opinion also was supported by the medical records. Moreover, relying on the holding in *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990), the ALJ ordered the respondents liable for the claimant's emergency medical treatment. He found the claimant's emergency was bona fide, and it was widely believed he was suffering a heart attack while at work.

The respondents have petitioned to review that portion of the ALJ's order that determined they were liable for the claimant's emergency medical treatment. They contend that the plain language of §8-42-101(1)(a), C.R.S. cannot be expanded to render them liable for "non-injury related emergency medical care." They further contend the ALJ's reliance on the holding in *Sims* is misplaced. The claimant has not appealed the ALJ's order, and has not filed a brief in opposition to the respondents' petition. We agree with the respondents' arguments.

An employer must pay for authorized medical treatment if it is reasonable and necessary to cure and relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *see also Winter v. Industrial Claim Appeals Office*, 321 P.3d 609 (Colo. App. 2013). Under Colorado's Workers' Compensation Act (Act), a claimant is not entitled to disability and medical benefits merely because an accident occurred during the course and scope of his employment. Instead, the work-related accident must be a proximate cause of the injury suffered, and the medical treatment provided must be reasonable and necessary to cure and relieve the effects of injury. *See Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The burden to prove a causal relationship between the work injury and the condition for which benefits are sought rests with the claimant. *See Snyder v. Industrial Claim Appeals Office*, *supra*. Further, the determination of whether the medical treatment is reasonably necessary to cure and relieve the effects of a work-related injury is a question of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Here, the ALJ found, and it is not contested, that the claimant did not sustain an industrial injury on August 1, 2014. Rather, the ALJ found that the claimant's condition existed prior to arriving at work on August 1, 2014. Thus, the ALJ essentially found that the claimant's need for emergency medical treatment was not proximately caused by the work incident on August 1, 2014. As such, the respondents may not be held liable for the emergency medical treatment provided to the claimant. Section 8-42-101(1)(a), C.R.S.; *see also Winter v. Industrial Claim Appeals Office*, *supra*; *see also McTaggart-Kerns v. Dell, Inc*., W.C. No. 4-915-218-02 (May 29, 2014)(we may not read §8-42-101(1)(a),

C.R.S. as requiring respondents to pay for emergency medical treatment on day of crash where ALJ found with record support that claimant did not sustain any injuries in crash), *aff'd,* 14CA1140 (Jan. 22, 2015)(NSOP). If we were to hold to the contrary, this would conflict with the plain language of the Act. *See* §8-42-101(1)(a), C.R.S. (requiring employer to furnish medical services reasonably needed "to cure and relieve the employee from the effects of the injury"). That is, under the plain statutory language of the Act, "[t]he right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment." *Snyder v. Industrial Claim Appeals Office*, 942 P.2d at 1339; *see also Cabela v. Industrial Claim Appeals Office*, 198 P.3d at 1279 ("To be eligible for benefits under the Workers' Compensation Act," a claimant must prove that his disability was proximately caused by a work-related injury or disease.).

Additionally, in support of his determination that the respondents are liable for the claimant's emergency medical treatment, the ALJ relied upon the Colorado Court of Appeals' holding in *Sims*. However, we conclude the ALJ's reliance on *Sims* is misplaced. In *Sims*, the claimant slipped and fell on stairs on February 28, 1987, while working at a Safeway store. The claimant complained to the store manager of pain in her knee and later left work to seek emergency treatment at Memorial Hospital. The claimant was treated by an emergency room physician who released her and told her she could return to work on March 3, 1987. The claimant later sought medical services from Dr. Watts, a physician she previously had seen. She did not contact anyone at Safeway about her injury until March 14, 1987. Safeway subsequently referred the claimant to a physician assistant (PA) working under the direction of a licensed medical doctor. Upon his examination, the PA determined that the claimant was not injured or incapacitated. He released her to return to work without restrictions on May 15, 1987. The ALJ ultimately held the claimant failed to sustain her burden of showing she was injured or incapacitated and denied benefits arising from the February 28, 1987, incident. The ALJ specifically found the subsequent medical treatment by Dr. Watts was unauthorized and non-compensable. The Panel affirmed the ALJ's determination that the respondent was not financially responsible for Dr. Watts' treatment.

On appeal, the Court affirmed. As pertinent here, the Court held the ALJ did not err in denying payment of the claimant's medical bills for the treatment provided by Dr. Watts. The Court explained that in cases of medical emergency, the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. The Court held that an emergency creates an exception to the employer's statutory right of first selection of a treating physician and to the claimant's

duty to give notice of the injury to the employer before selecting his own physician. However, the Court also held that once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. The claimant ultimately was released by the emergency room physician to return to work in three days. Thus, after the emergency had ended, the claimant was required to notify her employer and give it a reasonable opportunity to furnish any subsequent medical services that were needed. However, the claimant failed to do either. The Court concluded, therefore, that the treatment provided by Dr. Watts was without approval or acquiescence by the employer and was not compensable. Additionally, since the ALJ had made no finding on whether the emergency room expenses were compensable, the Court remanded the matter for a determination of that issue.

Here, it is true that the ALJ found the claimant had a bona fide emergency while at work. However, the ALJ also found that the claimant's emergency was not caused by the work incident on August 1, 2014, but instead was solely caused by his pre-existing condition. Thus, since the ALJ did not find a causal relationship between the claimant's need for medical treatment and the work incident on August 1, 2014, the respondents may not be held liable for emergency medical treatment provided to the claimant. *See* §8-42-101(1)(a), C.R.S. As detailed above, the holding in *Sims* does not dictate the conclusion that the respondents may be held liable for emergency medical care for an injury that is not compensable. *See also McTaggart-Kerns v. Dell, Inc*., *supra*. Consequently, we reverse the ALJ's order to the extent it orders the respondents liable for the claimant's emergency medical treatment.

IT IS THEREFORE ORDERED that the ALJ's order dated March 21, 2017, is reversed to the extent it ordered the respondents liable for the claimant's emergency medical treatment.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

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Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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8/21/17 by TT .

MCDIVITT LAW FIRM, Attn: AARON S. KENNEDY, ESQ, 19 EAST CIMARRON ST., COLORADO SPRINGS, CO, 80906 (For Claimant)
LEE + KINDER, LLC, Attn: M. FRANCES MCCRACKEN, ESQ, 3801 EAST FLORIDA AVE., SUITE 210, DENVER, CO, 80210 (For Respondents)

In the
United States Court of Appeals
For the Seventh Circuit

No. 11-1665

MONICA DEL CARMEN GONZALEZ-SERVIN, *et al.*,

Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:07-cv-05837-SEB-DML—**Sarah Evans Barker**, *Judge*.

SUBMITTED OCTOBER 17, 2011—DECIDED NOVEMBER 23, 2011

No. 08-2792

IN RE:

FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LIABILITY LITIGATION:

YEHUDA KERMAN, *et al.*,

Plaintiffs-Appellants,

v.

BAYER CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 7452—**John F. Grady**, *Judge*.

SUBMITTED OCTOBER 27, 2011—DECIDED NOVEMBER 23, 2011

Before EASTERBROOK, *Chief Judge*, and POSNER and TINDER, *Circuit Judges*.

POSNER, *Circuit Judge*. We have consolidated for decision two appeals that raise concerns about appellate advocacy. These concerns are likely to arise in similar appeals, so we have decided to address them in a published opinion. Both are appeals from grants of *forum non conveniens* in multidistrict litigation.

No. 11-1665—an appeal from an order to transfer a case from the U.S. District Court for the Southern District of Indiana to the courts of Mexico—is one of many offshoots of litigation arising out of vehicular accidents allegedly caused by defects in Bridgestone/Firestone tires installed on Ford vehicles in Latin America. All these cases have been consolidated for pretrial proceedings in that district court before Judge Barker.

In *Pastor v. Bridgestone/Firestone North American Tire, LLC* (decided with and under the name *Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009)), we affirmed Judge Barker's transfer of a similar case to the courts of Argentina under the doctrine of *forum non conveniens*. The appellants in

No. 11-1665 (the plaintiffs in the district court), the accident case, do not cite *Abad* in their opening brief, though the district court's decision in their case was issued in 2011—long after *Abad*. In their response the defendants cite *Abad* repeatedly and state accurately that its circumstances were "nearly identical" to those of the present case. Yet in their reply brief the appellants still don't mention *Abad*—let alone try to distinguish it—and we take this to be an implicit concession that the circumstances of that case are indeed "nearly identical" to those of the present case.

Even apart from that concession, Judge Barker's careful and thorough analysis demonstrates that she was acting well within her discretion in deciding that the Mexican courts would be a more appropriate forum for the adjudication of this lawsuit by Mexican citizens arising from the death of another Mexican citizen in an accident in Mexico.

The second appeal, No. 08-2792, is an offshoot of the other multidistrict litigation that gave rise to the *Abad* decision—suits against manufacturers of blood products used by hemophiliacs, which turned out to be contaminated by HIV (the AIDS virus). This particular suit was brought by Israeli citizens infected by the contaminated blood products in Israel. The defendants, invoking *forum non conveniens*, moved to transfer the case to the courts of Israel and Judge Barker obliged, precipitating the appeal. The issue is controlled not just by *Abad* but also by *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010), which arose from the same multidistrict litigation

concerning blood products that had given rise to *Abad* and presented the identical issue as this case does.

The appellants' opening brief was filed in January 2009, before either *Abad* or *Chang* had been issued, but the appellees' brief was not filed until September of this year, well after both decisions, and it relies heavily on both. (The huge delay—32 months—between the filing of the opening brief and the filing of the response brief was the result of an order entered by our Settlement Conference Office suspending briefing in the hope that the case would settle.) The appellants filed a reply brief, and in it discuss *Abad* a little and *Chang* not at all, even though both decisions are heavily relied on by the appellees and highly relevant to their case. And the only time they discuss *Abad* they state incorrectly that the appellees in the response brief had cited only the portions of the opinion dealing with the automobile accident (*Pastor*).

When there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it. We don't know the thinking that led the appellants' counsel in these two cases to do that. But we do know that the two sets of cases out of which the appeals arise, involving the blood-products and Bridgestone/Firestone tire litigations, generated many transfers under the doctrine of *forum non conveniens*, three of which we affirmed in the two ignored precedents. There are likely to be additional such appeals; maybe appellants think that if they ignore our precedents their appeals will not be assigned to the same panel as decided

the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches *really* bury their heads in the sand when threatened; don't be fooled by the picture below.) The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989), quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987).

The attorney in the vehicular accident case, David S. "Mac" McKeand, is especially culpable, because he filed his opening brief as well as his reply brief after the *Abad* decision yet mentioned it in neither brief despite the heavy reliance that opposing counsel placed on it in their response brief. In contrast, counsel in the blood-products appeal could not have referred to either *Abad* or *Chang* in their opening brief, did try to distinguish *Abad* (if unpersuasively) in their reply brief, and may have thought that *Chang* added nothing to *Abad*. Their advocacy left much to be desired, but McKeand's left more.

AFFIRMED.

11-23-11