

BROWN BAG SEMINAR

Thursday, January 21, 2016

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

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

1 CLE (including .4 ethics)

Presented by

Craig Eley

Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued through
January 14, 2016

Contents

Industrial Claim Appeals Office decisions

Defrece v. 20/20 Theatrical	2
Edgar v. Hallibuton Energy Services	9
Miles v. City & County of Denver	15
Mitchem v. Donut Haus #2	22
Muro-Rios v. Ashley Manor	30
Taylor v. Alpine Management Services	37

Colorado Court of Appeals decisions

Keel v. Industrial Claim Appeals Office and Ace American Insurance Company	41
Sackett v. Industrial Claim Appeals Office and City Market (unpublished)	63

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-920-455-04

IN THE MATTER OF THE CLAIM OF
SHANNON DEFRECE,

Claimant,

v.

FINAL ORDER

20/20 THEATRICAL, AKA PROSIGHT
GLOBAL, INC.,

Employer,

and

PROSIGHT SPECIALTY INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated July 31, 2015, that ordered the respondents entitled to collect an overpayment. The order declined to allow the claimant to reopen the issue of the average weekly wage (AWW) so as to reduce the amount of the asserted overpayment through an award of additional temporary benefits. We affirm the order of the ALJ.

The claimant worked for the respondent employer as a rigger. The employer is a specialized construction company that installs theatrical equipment in theatres. The claimant was working for the employer on a project to install an automated rigging system in connection with the renovation of Memorial Hall in Colorado Springs. On May 7, 2013, the claimant lacerated his left thumb while at work. The claim was admitted by the respondents and the claimant was paid temporary total disability benefits beginning May 8, 2013, through July 7, 2014. The date the claimant reached maximum medical improvement (MMI) was later determined to be March 18, 2014. The ALJ concluded after the June 11, 2015, hearing that the claimant's injury justified a 20% impairment rating of the loss of use of the thumb. The ALJ also awarded the claimant \$2,000 in disfigurement benefits. The ALJ determined the claimant was overpaid \$6,551.76 in temporary disability benefits he received subsequent to the date of MMI. After subtracting the award of permanent partial disability benefits and disfigurement benefits, the ALJ concluded the claimant had been overpaid \$4,551.76.

The respondents had filed a Final Admission of Liability (FAL) on October 14, 2014. On November 13, 2014, the claimant filed an application for a hearing in regard to the issue of penalties alleging an untimely FAL. They withdrew the application on November 19. The respondents then filed their own application for a hearing on December 10, 2014, pertinent to the issue of overpayment. The claimant submitted a response to the application endorsing as issues petition to reopen, AWW, conversion of the impairment rating and disfigurement.

The claimant argued at the June 11 hearing that the ALJ should allow them to reopen the issue of the AWW. The claimant contended the AWW should have been calculated as \$1,115.10, instead of the admitted figure of \$796.50. He computed the additional temporary benefits justified by this increase to be \$9,556.65. This increase then, would eliminate the claimed overpayment. The claimant asserted the respondents' AWW figure was in error because it included a week in the middle of his period of employment during which the employer's crew could not work on the Memorial Hall project, and because the respondents miscounted the number of days included in a pay period.

The respondents replied by pointing out that the claimant did not have the type of job with them which allowed for a steady 40 hours per week. Their witness indicated the jobs typically encounter delays when other construction contractors make access to the required portion of the building impossible. Each week therefore results in a considerable variance in the number of hours worked and in the amount of money each employee is able to get paid. The respondents argued that counting the slow week serves to provide a more representative calculation of the AWW than does a summation which includes only the busiest weeks. The respondents' documentation showed the claimant was hired on April 8, 2013, and worked through the date of his injury on May 7. This period contains 30 days. During that time the claimant was paid \$3,294. Dividing the second figure by the first would lead to an AWW somewhat lower than the admitted \$796.50.

The ALJ found the issue of the AWW was closed because the claimant had not included the issue in an application for a hearing filed within 30 days of the October 14, 2014, FAL. The ALJ then considered the claimant's request to reopen the issue. The ALJ found the circumstances of the claimant's job with the employer did not fit concisely with the statutory formula for determining an AWW, presumably as set forth in § 8-42-102(2)(d) or (e). The ALJ concluded the respondent employer's manner of calculating the AWW was appropriate based on the facts presented. The ALJ found there was no error or mistake of fact. The ALJ also determined there was no mistake of law. The ALJ

noted the absence of case law to justify a reopening of the AWW issue which did not involve an addition to the AWW due to the loss of health care benefits or a statutory offset. The ALJ concluded the claimant's dispute in regard to the AWW was not the kind of mistake for which the issue of AWW can be reopened.

The claimant argues on appeal that the ALJ was in error in holding that the AWW issue may be reopened only in the case where it can be shown that the cost of continuing group health insurance coverage was omitted from the AWW calculation in violation of § 8-40-201(19)(b). The claimant points to our decision in *Casias v. Interstate Brands*, W.C. No. 4-740-818 (March 25, 2013), as holding that the AWW is subject to reopening due to any type of mistake, and not just one involving the cost of health care benefits. The respondents argue the claimant had an opportunity to contest the AWW by timely submitting an application for a hearing but failed to do so. They contend the closing of an issue pursuant to statute, § 8-43-203(2)(b)(II), would have no integrity if the claimant was allowed to reopen the AWW issue based on a mathematical dispute of the admitted AWW figure.

We agree the issue of the AWW may be reopened pursuant to § 8-43-303 in the case of a mistake either in fact or in law. Where the issue is one of mistake, an ALJ is required to make two determinations. First the ALJ must decide whether a mistake was made. If so, the ALJ must then decide whether it is the type of mistake which justifies reopening the case. *See Travelers Insurance Co., Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). In this case, the ALJ determined there was no mistake of either law or fact.

Section 8-43-303(1), C.R.S., provides that an ALJ may reopen "any award" on the grounds of error, mistake, or a change in condition. The reopening statute is evidence of a legislative policy that the goal of achieving a fair and just result overrides the parties' interests in finality. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). Under the reopening statute the ALJ has the authority to correct any error or mistake of law or fact. *Id.* The power to reopen is permissive, and therefore, we may not interfere with the ALJ's order unless it constitutes an abuse of discretion. *Id.*; *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). An abuse of discretion is shown if the ALJ has misapplied the law. *Coates, Reid & Waldron*, 856 P.2d 850 (Colo. 1993).

In determining whether a particular mistake of fact or law justifies reopening, the ALJ may consider whether the mistake could have been avoided if the party seeking reopening timely exercised procedural or appellate rights prior to entry of the award.

Industrial Commission v. Cutshall, 164 Colo. 240, 433 P.2d 765 (1967); *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984). However, the failure to exercise procedural or appellate rights is not dispositive, and an ALJ may conclude that reopening is appropriate even though a party failed to exercise procedural rights. See *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). Indeed, one of the purposes of reopening is to permit equitable adjustments in the amount of compensation. *Ward v. Azotea Contractors*, 748 P.2d 338 (Colo. 1987); *Kuziel v. Pet Fair, Inc.*, 948 P.2d 103 (Colo. App. 1997); *Koch Industries, Inc. v. Pena*, 910 P.2d 77 (Colo. App. 1995). We held in *Noyes v. Wal-Mart Stores*, W.C. no. 4-692-745 (October 24, 2011), that an ALJ's sole reliance on the claimant's failure to timely object to a FAL as the basis for a denial of a request to reopen the AWW issue represented error.

This case may be distinguished from either *Casias* or *Noyes* for the reason that the ALJ in this matter found there was no error or mistake. Here, the ALJ made a finding of fact which determined:

13. The ALJ finds that the circumstances surrounding the claimant's employment do not fit squarely under the statutory formula for calculating an employee's AWW. Thus, the respondent insurer was not obligated to follow the normal procedure in determining AWW. The ALJ finds that it is appropriate to calculate the claimant's AWW using an alternative manner that would fairly determine his AWW based on the facts presented.

Under §8-42-102, C.R.S., the ALJ may choose either of two methods to calculate a claimant's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 780 (Colo. 2010). The first method, which is known as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured employee was receiving at the time of the injury." Section 8-42-102(2), C.R.S.; *Benchmark/Elite, Inc.*, 232 P.3d at 780.

The second method, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." Section 8-42-102(3), C.R.S.; see also *Benchmark/Elite, Inc.*, 232 P.3d at 780. An ALJ has broad, statutorily granted discretion to calculate AWW "in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." Section 8-42-102(3), C.R.S.; see also *Pizza Hut v.*

Industrial Claim Appeals Office, 18 P.3d 867, 869 (Colo. App. 2001) (“[Section] 8-42-102(3) ... grants the ALJ discretionary authority to calculate the [AWW] in some other manner if the prescribed methods will not fairly calculate the wage in view of the particular circumstances.”); *Loofbourrow v. Industrial Claims Office*, 321 P.3d 548 (Colo. App. 2011).

The overall objective when calculating AWW is to arrive at “a fair approximation of the claimant's wage loss and diminished earning capacity.” *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). Because the authority to select an alternative method for computing the AWW is discretionary, we may not set aside the ALJ's AWW calculation unless it amounts to an abuse of discretion. An abuse of discretion exists when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Pizza Hut v. Industrial Claim Appeals Office*, *supra*. We may not interfere with the ALJ's findings of fact, however, if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Here, the claimant's supervisor, Mr. Tomaro, testified the claimant was hired on a temporary basis to work on just one project. There was no written contract nor was there any agreement as to the length of his employment on the project. Mr. Tomaro described how it is very common in the field of theatrical construction to encounter delays in the work schedule. These delays were due to other workers' activities on tasks which disrupted the employer's ability to complete its assignment. There were also delays dictated by the theatre's performance schedules. Tr. at 57. In this case, the employer's project was delayed in the week of April 28 through May 4 due to interference by work on the heating and air conditioning system. Tr. at 58. For these reasons, Mr. Tomaro agreed the claimant's employment could be characterized as sporadic.

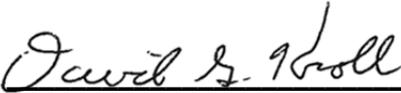
In *Lundeen v. Tradesmen International*, W.C. No. 4-835-484 (August 4, 2011), we similarly affirmed the ALJ's employment of an alternative method for calculating the AWW pursuant to § 8-42-102(3). The claimant in *Lundeen* was also hired on a temporary basis. The wage records showed the claimant did not always get to work 40 hours per week due to the nature of the work. The ALJ determined a fairer method for calculation of the AWW would be represented by an average of all the weeks during the claimant's employment rather than just those featuring 40 hours of work. We affirmed this calculation based as it was on substantial evidence in the record. The ALJ's analysis was within the bounds of reason and did not reveal an abuse of discretion. The evidence in this claim is substantially similar to that in *Lundeen* and compels a similar affirmance of the ALJ's order.

The finding by the ALJ is certainly within the bounds of reason in this case and we find no sufficient reason to set it aside. The ALJ's finding that the respondents did not

commit an error or mistake in their determination of the AWW renders moot the contention that the ALJ was mistaken in refusing to reopen the AWW issue due to the nature of the AWW dispute. In the case where it is found there is no mistake, there is no statutory basis to reopen for that reason. We therefore affirm the conclusion of the ALJ that the reopening of that issue was not justified.

IT IS THEREFORE ORDERED that the ALJ's order issued July 31, 2015 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

SHANNON DEFRECE
W. C. No. 4-920-455-04
Page 8

CERTIFICATE OF MAILING

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

_____ 12/7/2015 _____ by _____ RP _____ .

MICHAEL W. SECKAR, P.C., Attn: LAWRENCE D. SAUNDERS, ESQ., 402 WEST 12TH STREET, PUEBLO, CO, 81003 (For Claimant)
THOMAS POLLART & MILLER LLC, Attn: ERIC J. POLLART, ESQ./ALISSA M. PEASHKA, ESQ., 5600 S. QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-971-336-01

IN THE MATTER OF THE CLAIM OF

DAVID EDGAR,

Claimant,

v.

ORDER OF REMAND

HALLIBURTON ENERGY SERVICES,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated July 31, 2015, that found his claim compensable and awarded medical benefits and temporary total disability (TTD) benefits, but denied temporary partial disability (TPD) benefits. We reverse the ALJ's denial of TPD benefits and remand the matter for further findings and a new order regarding the amount, if any, of TPD benefits the claimant is entitled to recover.

This matter went to hearing on whether the claimant sustained a compensable injury, whether the medical treatment the claimant received for the injury was reasonable and necessary, whether the claimant is entitled to TTD benefits from December 29, 2014, until February 23, 2015, whether the claimant is entitled to TPD benefits beginning on February 24, 2015, and continuing, and whether the claimant committed a volitional act that led to his termination of employment. During the hearing, the parties stipulated to an average weekly wage (AWW) of \$1,601.47.

After the hearing, the ALJ found the claimant worked for the respondent employer as a Systems Operator I. His job duties included operating a fork lift and a front end loader. On December 27, 2014, the claimant was working on a drilling site in Wyoming. At approximately 9:00 p.m., he slipped and fell on an icy ramp and landed on his right shoulder.

The claimant eventually was examined by Dr. Smith. On January 2, 2015, Dr. Smith diagnosed the claimant with a likely injury to the rotator cuff and provided the claimant with restrictions of no lifting over 10 pounds. Dr. Smith referred the claimant to Dr. Adams. Dr. Adams evaluated the claimant, and referred him for a MRI of the right shoulder. The respondent insurer denied the request for the MRI.

The claimant eventually underwent the MRI of his right shoulder. The claimant returned to Dr. Smith, and Dr. Smith noted it was evident the claimant sustained a torn rotator cuff. Dr. Smith noted the claimant likely would need surgery.

On January 2, 2015, the respondent employer terminated the claimant. The Senior Human Resources Operations Partner for the respondent employer, Mr. Merritt, testified that the claimant was fired on January 2, 2015, for failing to attend safety meetings and because the owner of the drilling rig had requested the claimant be removed from the job site. Mr. Merritt testified that the claimant would not have been fired had he attended the safety meetings. The claimant testified on rebuttal that he missed some safety meetings because the tool pusher in charge of the safety meetings allowed other workers to smoke during the meetings, and he did not like being around the smoke.

After considering the totality of the evidence, the ALJ found that the claimant sustained a compensable injury on December 27, 2014. The ALJ ordered the respondents liable for medical benefits from Dr. Smith and Dr. Adams, including the MRI scan of the claimant's right shoulder. The ALJ also found the medical restrictions that were imposed by Dr. Smith on January 2, 2015, were the result of the claimant's December 27, 2014, slip and fall, and also resulted in the claimant's subsequent wage loss. The ALJ found the claimant's wage loss continued until February 24, 2015, when he returned to work for a new employer. He therefore ordered TTD benefits from January 2, 2015, until February 24, 2015. The ALJ also found, however, that the claimant was not entitled to TPD benefits beginning on February 24, 2015. He found the claimant failed to establish that it was more likely true than not that his earnings after he returned to work for the new employer were related to the claimant's work injury. The ALJ specifically found that insufficient evidence was presented at hearing of a wage loss after February 24, 2015, related to the industrial injury. As such, the ALJ denied the claimant's request for TPD benefits.

The claimant has appealed the ALJ's order denying the TPD benefits. The claimant contends the ALJ misapplied the law by not following an award of TTD benefits with an award of TPD benefits when he returned to work at less than his pre-injury wage while still under a disability. The claimant further contends that the ALJ impermissibly

required him to prove “disability” a second time when he showed some earning capacity by returning to modified employment.

To prove entitlement to temporary disability benefits, the claimant must prove the industrial injury caused a “disability.” Sections 8-42-103(1), 8-42-106, C.R.S. The term “disability” as it is used in workers’ compensation connotes two distinct elements. The first element is “medical incapacity” evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant’s inability “to resume his or her prior work.” *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999); *Hendricks v. Keebler Co.*, W.C. No. 4-373-392 (June 11, 1999). Disability may be evidenced by the complete inability to work, or by restrictions which impair the claimant’s ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998); *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991).

Whether the claimant has proved a disability, including proof that the injury has impaired the ability to perform the pre-injury employment, is a factual question for the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The ALJ’s factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

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

As argued by the claimant, the holding in *Ashmore v. NU Horizon Window Systems, Inc.*, W. C. No. 4-593-027 (Aug. 25, 2004), is instructive here regarding the claimant’s entitlement to TPD benefits. In *Ashmore*, the claimant sustained a compensable wrist injury, his authorized treating physician imposed restrictions that prohibited the claimant from performing all of his regular duties as a welder, and the employer provided modified duty within his restrictions. The claimant continued working at modified employment but eventually was separated from employment. The

claimant sought TPD benefits, but the ALJ found that the claimant's wage loss was caused by the employer's decision to reduce overtime hours for all employees, including the claimant, in an effort to increase plant efficiency. Under these circumstances, the ALJ concluded that the claimant's wage loss was not caused by the injury and denied TPD benefits.

On appeal, the claimant contended the ALJ erred in denying TPD benefits because his wage loss was not "caused" by the injury. The claimant argued that where an employee is disabled from performing his usual duties "economic wage loss" is "caused" by the injury because his ability to find alternative employment is compromised by the injury. The Panel agreed with the claimant. The Panel held that once the claimant establishes the injury has caused "disability" in the sense that the injury impairs the claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by the claimant's wage loss. The Panel explained that this is true because the physical restrictions caused by the injury affect the claimant's prospects for finding alternative employment. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989); *Kaminski v. Grand County Roofing & Sheet Metal, Inc.*, W.C. No. 4-525-562 (March 21, 2003). The Panel therefore ordered the respondents to pay TPD benefits based on the difference between the claimant's AWW and the actual earnings during the pertinent period of time.

Here, the ALJ found, with record support, that the claimant suffered a compensable injury to his right shoulder on December 27, 2014. The claimant's treating physician, Dr. Smith, subsequently imposed restrictions which prevented the claimant from performing his pre-injury employment. As such, the ALJ found the claimant was entitled to recover TTD benefits as a result of his industrial injury, effective January 2, 2015, when his physician imposed restrictions until February 24, 2015, when he returned to work for a new employer. The ALJ further found, with record support, that the employer's decision to fire the claimant on January 2, 2015, was not due to any volitional act of the claimant and, therefore, the termination was not his fault. Sections 8-42-103(1)(g) C.R.S., 8-42-105(4) C.R.S. (where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury). When the claimant eventually obtained another job with a new employer on February 24, 2015, he remained under the same restrictions with the same disability. During the hearing, the claimant discussed his new job. He explained that he now works for Avis Rent-A-Car as a car renter at the front desk. The claimant explained that in his new job, he does not have to perform any heavy lifting, but just the action of lifting his arm up to the keyboard, or about a little above his waist. The claimant also testified that the wage records that were submitted as an exhibit at the

hearing accurately reflected his pay at his new job. Tr. (June 4, 2015) at 44-45, 47-48. The ALJ made no findings that the claimant was placed at maximum medical improvement, or that the attending physician gave the claimant a written release to return to modified employment, which was offered by the employer, and the claimant failed to begin such employment. Section 8-42-106, C.R.S. As such, it logically follows that the claimant's temporary wage loss following February 23, 2015, was not caused by his separation from employment but, rather, was caused by his industrial injury. Thus, a causal link between the industrial injury and the subsequent wage loss was maintained, and TPD benefits must be awarded.

While the ALJ found the claimant obtained new employment with another employer after he was terminated on January 2, 2015, through no fault of his own, the ALJ did not make any findings regarding the earnings the claimant made at his new job. The claimant, however, submitted as an exhibit his wage records from his new job. Ex. 3. Because we are not able to make our own findings, it is necessary to remand this matter to the ALJ for additional findings to resolve this issue. *See* §8-43-301(8), C.R.S. (Panel may remand if findings of fact not sufficient to permit appellate review). Consequently, on remand the ALJ shall issue further findings and a new order on the difference between the claimant's pre-injury AWW and the wages he earns in his modified employment. Section 8-42-106(1), C.R.S. (employee shall receive sixty-six and two-thirds percent of the difference between employee's AWW at the time of injury and AWW during continuance of temporary partial disability). After the new findings are made, then the respondents must be ordered to pay TPD benefits based on the difference between the claimant's AWW and the actual earnings commencing on February 24, 2015. *See also Gaitan v. Pita Subway*, W.C. No. 4-726-194 (Aug. 26, 2009).

IT IS THEREFORE ORDERED that the ALJ's order dated July 31, 2015, is reversed to the extent he denied TPD benefits, and the matter is remanded for further findings and a new order regarding the amount, if any, of TPD benefits the claimant is entitled to recover.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 12/22/2015 _____ by _____ RP _____ .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-961-742-01

IN THE MATTER OF THE CLAIM OF

PAULA MILES,

Claimant,

v.

FINAL ORDER

CITY AND COUNTY OF DENVER,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Broniak (ALJ) dated July 10, 2015, that determined her claim was not compensable and denied and dismissed her request for medical benefits, including surgery. We affirm.

A hearing was held in regard to the compensability of the claimant's left knee injury of September 16, 2014, and corresponding medical benefits.

After the hearing, the ALJ found that the claimant works for the respondent employer as a Senior Financial Management Analyst at the Denver International Airport. On September 16, 2014, the claimant was co-leading a work meeting in a conference room on the premises of the respondent employer. The claimant had ordered lunch in for the conference attendees. The restaurant delivered the lunches in a large box which was placed on the floor at one end of a long conference table.

The claimant bent over to grab lunches for two employees. She stood up, turned, and took a step with her left leg in order to hand out the two lunches. As she stepped forward, she heard a pop, and felt immediate pain in her left knee. The room was carpeted and there was no evidence the carpet was unusual or posed any hazards.

The claimant called the employer's "Ouchline" about 40 minutes after the incident to report her injury. The claimant reported that she merely stepped with her left

foot, felt something pop in her knee, and then immediate pain. At no time in her report to the Ouchline did the claimant allege she twisted her knee.

The claimant was evaluated at a Concentra clinic by Patrick Freeman, a physician's assistant. The claimant advised Mr. Freeman that she took a step with her left foot and felt immediate pain. Mr. Freeman's medical report specifically states "there was no twisting motion at the knees."

Dr. Parker subsequently evaluated the claimant on October 21, 2014. Dr. Parker noted that the MRI the claimant underwent on October 20, 2014, showed "a large medial meniscus tear in the root region with associated degenerative arthritis in the medial femoral condyle with grade 3 and 4 severity." Dr. Parker believed the claimant's meniscus tear occurred when she twisted her left knee when stepping forward or pivoting on her left foot.

Dr. Lindberg examined the claimant at the respondent's request. He stated that the claimant suffered from severe degenerative arthritis in the medial compartment of her left knee. He opined that the arthritis and degeneration caused the claimant's meniscus tear, making the tear chronic rather than acute. He further opined the claimant's significant degenerative knee arthritis could have caused a meniscal radial tear in the absence of significant force.

On November 13, 2014, Dr. Parker performed surgery on the claimant, which included a left knee examination under anesthesia, left knee arthroscopy, left knee partial arthroscopic medial meniscectomy, right corticosteroid injection, and left knee patella shave.

The ALJ ultimately determined the claim was not compensable. The ALJ found that the claimant did not twist her left knee as she stepped forward to hand out lunches, as reported by Dr. Parker. Rather, she found the claimant merely took a step forward with her left leg after which she experienced pain and heard a pop. The ALJ specifically analyzed the claimant's injury with regard to the three categories of risks set forth in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014), or those of employment risks, personal risks, and neutral risks. The ALJ found that the claimant failed to prove that any employment or neutral risk accelerated or aggravated her pre-existing degenerative knee condition. Instead, the ALJ found that the claimant merely was stepping forward when she experienced pain due to her pre-existing condition. The ALJ found that stepping forward constitutes a normal activity of daily living and is not a special hazard inherent to the claimant's work nor is it a neutral risk as contemplated by *City of Brighton*. The ALJ

instead found that the claimant's injury arose out of a personal risk. The ALJ credited Dr. Lindberg's opinions over those of Dr. Parker, and found that the claimant's pre-existing arthritis precipitated her injury and produced the need for medical treatment. She stated that under *City of Brighton*, the claimant had to prove a special hazard of her employment contributed to her injury or produced the need for medical treatment for the pre-existing left knee condition. However, the ALJ found that the claimant failed to prove that a special hazard of her employment contributed to her injury or produced the need for medical treatment for her left knee. She specifically found that no evidence suggested the flooring was uneven, contained any debris or other tripping hazards, or that the carpet was unusual in any way. As pertinent here, the ALJ expressly discredited Dr. Parker's opinion regarding causation because he erroneously believed the claimant suffered the meniscus tear at work when stepping forward and either twisting or pivoting with her left leg. Consequently, the ALJ denied the claimant's request for medical benefits, including the surgery performed by Dr. Parker.

On appeal, the claimant argues the ALJ applied the incorrect standard when considering the facts of this case. The claimant contends the ALJ incorrectly inferred that the only way she could have suffered from an acute torn meniscus was if she had twisted her knee. The claimant instead argues that under the third category of risks, or neutral risks, her claim is compensable because the cause of her "stumble" was by stepping awkwardly and stumbling due to being surprised her co-workers were not present to accept the lunches she was handing out. According to the claimant, therefore, the conditions and obligations of her employment caused her injury and it is, therefore, compensable under the third category of risks enunciated in *City of Brighton*, or that of neutral risks. We perceive no error in the ALJ's order.

To establish that an injury arose out of an employee's employment, there must be a "causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). Further, a preexisting disease or infirmity does not disqualify a claimant from receiving compensation "if the employment aggravates, accelerates, or combines with the disease or infirmity to produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990).

The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is generally one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by*

the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). We must therefore uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. *Metro Moving v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Thus, the scope of our review is exceedingly narrow. *Id.*

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

Here, the claimant's argument notwithstanding, we are not persuaded the ALJ applied the incorrect standard when considering the facts of this case or made an improper inference. As detailed above, under the third category of neutral risks, an injury would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. Based on the ALJ's findings, however, this is not the case here. The ALJ specifically credited Dr. Lindberg's opinion that the claimant's arthritis and degeneration caused her meniscus tear, making the tear chronic rather than acute. During Dr. Lindberg's deposition, he testified that he could not find any discernible mechanism of injury that would cause either the claimant's osteoarthritis or meniscal tear. He explained that it was more likely that the claimant's

inability to bear weight on her knee was secondary to inflammation from the osteoarthritis than it was from any kind of acute injury as there was virtually no mechanism of injury. He further testified that more than likely the claimant's arthritis preceded her meniscal tear and caused the meniscal tear. Depo. of Dr. Lindberg at 23-24, 25-26, 27-28; Ex. B at 3. Under *City of Brighton*, this type of a purely personal injury generally is not compensable under the Act, unless an exception applies. In *City of Brighton*, the court noted in its footnote 7 that; "If an idiopathic cause contributes to a fall, then, by definition, the fall is not actually 'unexplained.'" Therefore, an injury featuring some contribution from a personal, or idiopathic, characteristic, would not fall into the third category, but instead, into the second, which is "generally not compensable" unless accompanied by a 'special employment hazard.' *City of Brighton*, FN 3, at 503. Since the ALJ here found, with record support, that there was no evidence the carpet was unusual or had any hazards, we are bound by her conclusion that the claimant's injury was caused by a personal risk and, therefore, is not compensable. *City of Brighton v. Rodriguez*, 318 P.3d at 503. Section 8-43-301(8), C.R.S.

We further note that in her Brief In Support, the claimant cites to and highlights Dr. Parker's causation opinions. However, the ALJ expressly credited Dr. Lindberg's opinions over those of Dr. Parker. The ALJ's findings reflect that she resolved the pertinent conflicts based upon her credibility determinations. *See Ralston v. Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991)(ALJ not required to resolve all conflicts in the evidence but only pertinent conflicts). We may not reweigh the evidence on appeal. *Rockwell v. International Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Neither may we substitute our judgment for that of the ALJ concerning the credibility of the expert witnesses. Accordingly, we may not disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated July 10, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 12/15/2015 _____ by _____ RP _____ .

MARTINEZ TENREIRO & LAFORETT, LLC, Attn: ELSA MARTINEZ TENREIRO, ESQ.,
6000 E. EVANS AVE., SUITE 3-400, DENVER, CO, 80222 (For Claimant)
OFFICE OF THE DENVER CITY ATTORNEY, Attn: MICHELLE S. SISK, ESQ., 201 WEST
COLFAX AVE., DEPT 1108, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-785-078-03

IN THE MATTER OF THE CLAIM OF

BARBARA MITCHEM,

Claimant,

v.

FINAL ORDER

DONUT HAUS #2, INC.,

Employer,

and

FARMERS INSURANCE EXCHANGE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 14, 2015, that denied and dismissed the claimant's request for maintenance medical benefits and her request for automatic authorization for the respondents' alleged failure to comply with the requirements of Workers' Compensation Rule of Procedure (WCRP) 16-10. We modify the ALJ's order and as modified, affirm.

The claimant sustained an admitted injury on October 8, 2008, to both of her extremities. The claimant received treatment and the respondents eventually filed a final admission of liability (FAL) based on a Division Independent Medical Examination (DIME) report. The FAL listed a date of maximum medical improvement (MMI) as April 12, 2011, and awarded the claimant 2 percent impairment for the right upper extremity. The respondents also admitted for ongoing maintenance medical benefits based on the DIME physician's recommendation of 12 sessions of hand therapy over the following six months.

The claimant continued to receive maintenance medical treatment from Dr. Risenhoover. Dr. Risenhoover referred the claimant to rheumatologist Dr. Westerman for an evaluation. On January 22, 2013, Dr. Westerman diagnosed the claimant with bilateral epicondylitis or tennis elbow and stated that this explained the majority of her pain. Dr. Westerman did not make any treatment recommendations.

The claimant underwent an independent medical examination with Dr. Shih on April 2, 2013. Dr. Shih determined that “further intervention was not likely to result in significant impairment in pain or function.” However, he remarked that if the claimant was “open to a course of pain management intervention, six to ten sessions of biofeedback would be appropriate.”

The claimant returned to Dr. Risenhoover for an examination on February 28, 2014, and expressed interest in visiting an orthopedic surgeon and undergoing an MRI and wondered whether surgery would improve her condition. Dr. Risenhoover noted that he would be happy to refer her to an orthopedic surgeon and commented that an MRI would help to determine whether surgical intervention was necessary but deferred to the orthopedic surgeon whether an MRI was appropriate.

Dr. Risenhoover submitted a prior authorization request for the claimant to visit orthopedic surgeon, Dr. Young, for an evaluation of her right upper extremity. The request was received by the insurer’s claim representative on March 7, 2013. The claims representative transmitted the request to Dr. Shih for review. Dr. Shih issued a report concluding that any additional imaging or medical evaluation would not constitute reasonable or necessary treatment for the claimant’s October 8, 2008, industrial injury. Dr. Shih explained that Dr. Risenhoover apparently had not realized that the claimant had reached MMI when she sought a referral to an orthopedic surgeon on February 28, 2014, and that the claimant had not suffered a new injury or change in condition. According to Dr. Shih the claimant had chronic upper extremity symptoms with a non-specific presentation and no further evaluations were warranted. The insurer denied Dr. Risenhoover’s request for prior authorization on March 18, 2014. The ALJ found that the insurer complied with the requirements of WCRP 16-10 and, therefore, denied the claimant’s request for penalties.

The ALJ relied on the opinion of Dr. Shih to conclude that the “claimant failed to present substantial evidence to support a determination that additional medical treatment is reasonably necessary to relieve the effects of her October 8, 2008, industrial injury or prevent further deterioration of her condition.” ALJ Order Findings of Fact 16 at 4; ALJ Order Conclusions of Law 4-5 at 6. The ALJ also made references in the order to the claimant’s failure to produce persuasive evidence that she was entitled to ongoing medical treatment. The ALJ therefore denied and dismissed the claimant’s request for medical maintenance benefits.

On appeal the claimant argues that the ALJ erred in failing to consider whether the respondents’ WCRP 16-10 denial should be deemed an authorization for Dr.

Risenhoover's referral because the insurer allegedly failed to comply in full with the requirements of WCRP 16-10 (B). We are not persuaded the ALJ erred on this issue. The claimant also alleges that the ALJ applied the wrong burden of proof in determining the claimant's entitlement to maintenance medical benefits and that he erred in terminating the claimant's entitlement to ongoing maintenance medical benefits. We agree with the claimant and modify the ALJ's order accordingly.

I.

The claimant renews her argument below and contends that the referral from Dr. Risenhoover should be deemed authorized because the respondents did not properly deny the request for prior authorization under WCRP 16-10(B)(3)(b), because the denial did not include a specific citation to the *Medical Treatment Guidelines*. The ALJ, however, found that the basis of the denial was clearly based on Dr. Shih's review and the *Guidelines* were not applicable. We perceive no error in the ALJ's application of the relevant rules.

WCRP 16-10(B) provides that "the payer shall," within seven business days of the completed request have all the submitted documentation reviewed by a physician and furnish the provider and the parties with either a verbal or written approval, or a written contest that sets forth an explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion. A payer's failure to comply in full with WCRP 16-10 (A) or (B), "shall be deemed authorization for payment of the requested treatment."

WCRP 16-10(B)(3) specifically provides, in relevant part, that the payer must furnish the provider and the parties with a written contest that sets forth the following information: "The specific cite from the Medical Treatment Guidelines Exhibits to Rule 17, *when applicable*." (*Emphasis added*).

Here, the ALJ found, and the claimant does not dispute, that the respondents provided a timely denial after review by medical provider. The respondents' denial was based on Dr. Shih's IME and record review. The ALJ found that Dr. Shih's opinion focused on the fact that the claimant's symptoms had a non-specific presentation and had not changed since she was previously put at MMI and thus did not necessitate further treatment. We agree with the ALJ's determination that under these circumstances a citation to the *Guidelines* was not applicable nor warranted in view of the supporting opinion provided by Dr. Shih as the basis of the denial was apparent. The ALJ also

concluded that the respondents' denial included specific medical reasons explaining that any additional imaging or medical evaluation would not constitute reasonable or necessary treatment for the claimant's October 8, 2009, industrial injury. Moreover, if the treatment was within the purview of the *Guidelines*, prior authorization is unnecessary unless otherwise specified. See WCRP 17-5 (A). We are not aware and the claimant has not directed us to any applicable *Guidelines*. We cannot say that the ALJ's determination was unreasonable based on the evidence presented.

II.

The claimant contends that the ALJ erred in terminating all maintenance medical benefits and his application of the burden of proof he applied to the claimant. We agree that the ALJ's order appears to misapply the law in this regard.

Although the ALJ's order makes references to denying the claimant's specific request for maintenance medical benefits, the ALJ's order also references terminating the claimant's entitlement to all maintenance medical benefits. To the extent that the ALJ's order terminates all ongoing maintenance medical benefits, the ALJ was in error. As found by the ALJ, the respondents filed an FAL admitting for ongoing maintenance medical treatment. The claimant filed an application for hearing on the issues of medical benefits, reasonable necessary and penalties for alleged failure of the respondents to fully comply with Rule 16 10(B) on March 18, 2014 denying ATP referral for orthopedic evaluation , Rule 16-10E and penalty Rule 16-10 F WCRP and "claimant entitlement to post MMI benefits."

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

(1) The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; *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.

(2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

(Emphasis added).

Where the respondents file an FAL admitting for maintenance medical treatment pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), this does not preclude them from later contesting their liability for a particular treatment. Rather, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *See Grover v. Industrial Commission*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Where, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.; *see also Barker v. Poudre School District*, W.C. No. 4-750-735 (March 7, 2012).

Here, because the respondents had previously filed an FAL admitting for maintenance medical benefits, under §8-43-201, C.R.S., the respondents would have had the burden to show why they are no longer responsible for maintenance medical benefits in general. The respondents did not seek to withdraw the FAL here or raise this issue prior to hearing. Therefore, to the extent the ALJ's order can be read to terminate all maintenance medical treatment, the order is in error. The respondents nonetheless continue to remain free to challenge any particular treatment the claimant may request on the basis that it is not reasonable, necessary or related to the October 8, 2008, injury. *See Geist v. Valley Block, Inc.*, W.C. No. 4-426-466 (June 10, 2008).

We further note that the ALJ's failure to reserve other issues for future determination has the unintended and unanticipated effect of closing the claim and subjecting the claimant to the reopening provisions if the claimant seeks additional benefits. *Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991). Where, as here, the issues adjudicated in the ALJ's order do not encompass the full range of benefits available under the Act, including termination of all maintenance medical benefits, the order should reserve unaddressed issues. Failure to reserve such issues may negatively affect the claimant's due process rights because such

action has the effect of foreclosing the claimant from pursuing benefits which were not the subject of the application for hearing or the order itself. *See, Morris v. King Soopers*, W.C. No. 4-508-533 (August 13, 2004). Consequently, we modify the ALJ's order to provide that "issues not addressed in the order, including the claimant's future eligibility for maintenance medical benefits, are reserved for future determination."

Moreover, because the only issue concerning maintenance medical benefits that was properly before the ALJ was the claimant's entitlement to the orthopedic referral and not the termination of maintenance medical benefits, the claimant had the burden to prove her entitlement to the orthopedic referral by a preponderance of the evidence. The ALJ's order, however, makes numerous references to the claimant's burden to prove her entitlement to maintenance medical benefits by "substantial evidence." This is an incorrect statement of the law in this instance.

As the respondents point out in *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), the court noted that when determining whether the claimant is initially entitled to ongoing maintenance medical benefits the ALJ is tasked with finding "substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary ..." *Grover*, 759 P.2d at 711. We have noted in such circumstances that "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Woods v. The Home Depot*, W.C. 4-365-829 (Sept. 27, 2001).

In this case, however, the respondents had filed an FAL admitting for maintenance medical benefits and the only issue before the ALJ was the claimant's entitlement to the orthopedic referral. In determining whether the claimant has proven entitlement to a specific medical benefit, the ALJ is charged with making pertinent factual determinations under a preponderance of the evidence standard. See § 8-43-201, C.R.S. Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995)).

The ALJ's reference to the "substantial evidence" standard, therefore, is in error. However, the error is harmless in this instance and should be disregarded. See §8-43-310, C.R.S. (harmless error to be disregarded). Under the circumstances of this case, the substantial evidence standard of review is a lower burden of proof. Under the substantial evidence standard, a reviewing body must determine whether the ALJ's factual findings are supported by the evidence in the record, and must do so by viewing the evidence as a whole and in a light most favorable to the prevailing party. Further, the reviewing court

may not interfere with the ALJ's credibility determinations and the plausible inferences drawn from the evidence. Because the ALJ found that the claimant failed to meet the lesser substantial evidence standard to prove her entitlement for the orthopedic referral, it necessarily follows that the claimant failed to meet the higher preponderance of the evidence standard as well. Thus, the ALJ's reference to the "substantial evidence standard" is harmless. The ALJ detailed his credibility determinations and the basis of his order is apparent and remand is not necessary. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated July 14, 2015, is modified to provide that issues not addressed in the order, including the claimant's future eligibility for maintenance medical benefits, are reserved for future determination. As modified, the order is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 12/28/2015 _____ by _____ RP _____ .

CLYDE E. HOOK, ESQ., 3773 CHERRY CREEK NORTH DRIVE, STE. 575, DENVER, CO, 80209 (For Claimant)

JOE M. ESPINOSA, ESQ., 1801 BROADWAY, STE. #1300, DENVER, CO, 80202 (For Respondents)

JOE M. ESPINOSA, ESQ., PO BOX 258829, OKLAHOMA CITY, OK, 73125 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-964-081-01

IN THE MATTER OF THE CLAIM OF

JUAN MURO-RIOS,

Claimant,

v.

FINAL ORDER

ASHLEY MANOR, LLC,

Employer,

and

BERKSHIRE HATHAWAY HOMESTATE
INS. CO.,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cain (ALJ) dated August 12, 2015, that denied his claim for temporary total disability (TTD) benefits. We affirm.

This matter went to hearing on whether the claimant was entitled to an award of TTD benefits commencing on October 22, 2014. The respondents contended that if the claimant proved he was disabled on October 22, 2014, then he was not entitled to TTD benefits because he was responsible for his termination from employment on October 21, 2014.

After the hearing, the ALJ found the claimant was hired by the respondent employer in February 2008 to perform the job of lead maintenance worker. At the time of his hiring, the claimant had signed a U.S. Department of Justice Employment Eligibility Verification Form I-9. On this Form, the claimant represented that he was a “lawful permanent resident” of the United States and an “alien authorized to work.” The claimant also submitted to the respondent employer copies of a driver’s license issued in his name and a Social Security card also issued in his name.

On September 17, 2014, the claimant suffered work-related injuries to his right upper extremity and back. Dr. Richardson subsequently assessed shoulder pain, shoulder/upper arm strain, and a lumbar strain. Dr. Richardson imposed restrictions of no

lifting over three pounds, no pushing or pulling with over three pounds of force, no reaching above the shoulder, and no squatting and/or kneeling. The claimant continued to work within his restrictions.

In the fall of 2014, the respondent employer conducted open enrollment for its 401(k) program. The respondent employer's risk manager, Shannon Janson, encouraged the claimant to enroll in the program, and the claimant submitted an application. Ms. Janson went online to submit the application for the new 401(k) enrollees, including for the claimant. However, Ms. Janson was unable to enter the claimant's application. Ms. Janson contacted the third party administrator about the problem. A representative subsequently advised Ms. Janson that the system showed that 13 other individuals had the same Social Security number that the claimant originally provided to the respondent employer.

Thereafter, on October 7, 2014, the claimant received a notice from the respondent employer advising him that his Social Security number did not match with the information he had given to the respondent employer and that he "needed to fix the situation." The respondent employer gave the claimant until October 21, 2014, to resolve the situation. The ALJ found, however, that the claimant admitted he did not have a valid Social Security number matching the one he provided to the respondent employer in February 2008. The respondent employer terminated the claimant's employment on October 21, 2014, because he failed to correct the problem with the Social Security number.

On November 24, 2014, the respondent insurer filed a General Admission of Liability for medical benefits only.

On December 9, 2014, Dr. Richardson assessed a shoulder strain, supraspinatus tendinitis, a labral tear of the shoulder, shoulder pain, and a lumbar strain. At that time, Dr. Richardson imposed restrictions of lifting up to 10 pounds, pushing and pulling up to 20 pounds, occasional bending, and no reaching above shoulder with the affected extremity.

The ALJ subsequently entered his order finding that the claimant was not entitled to receive TTD benefits. The ALJ found the respondents proved that when the claimant applied for employment, he submitted a false Social Security card as documentation of his immigration status. The ALJ further found the employer terminated the claimant's employment on October 21, 2014, because he failed to correct the problem with the Social Security number. According to the ALJ, since the claimant submitted a false

Social Security card to the respondent employer, the claimant acted volitionally and was responsible for his termination from employment on October 21, 2014.

On appeal, the claimant argues that substantial evidence does not support the ALJ's determination that he was terminated for providing a false Social Security number at the time of hire in February 2008. The claimant reasons that the employer instead terminated him on October 21, 2014, because he did not supply an accurate Social Security number by October 21, 2014, not because of any misrepresentation at the time of hire. We are not persuaded the ALJ erred.

Sections 8-42-105(4), C.R.S. and 8-42-103(1)(g), C.R.S. (referred to as the termination statutes) contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). That determination must be based upon an examination of the totality of circumstances. *Id.* As the ALJ correctly recognized here, the burden to show that the claimant was responsible for his discharge is on the respondents. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

The question whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004). Accordingly, we must follow the same standard of review as outlined above and uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, we perceive no error in the ALJ's determination that the claimant is responsible for his termination of employment and, therefore, is not entitled to recover temporary disability benefits. The ALJ essentially found, with record support, that while the claimant provided the employer with a false Social Security number at the time of

hire, the employer did not discover the claimant's false Social Security number until October 2014. The ALJ found the employer terminated the claimant because he was unable to resolve that problem by the deadline of October 21, 2014. The question posed by the termination statutes, §§8-42-105(4) and 8-42-103(1)(g), C.R.S., is whether the claimant is responsible for the termination of his employment. Regardless of whether the claimant was terminated for providing a false Social Security number at the time of hire or for failing to resolve the Social Security problem by October 21, 2014, the result is the same. That is, the claimant is responsible for the termination of his employment as contemplated under both §§8-42-105(4) and 8-42-103(1)(g), C.R.S.

During the hearing, the claimant testified that on October 7, 2014, he received the notice saying that his Social Security number did not match with the information he previously gave the respondent employer. He explained that the employer gave him until October 21, 2014, to fix the situation. The claimant testified, however, that despite giving him until October 21, 2014, he knew he could not fix the situation because he "did not have that." Tr. at 12-13, 20-22; Ex. F at 21. Further, Ms. Janson testified that in the fall of 2014, the employer had an open enrollment period for the 401(k), and that she had talked to the claimant about contributing to it. She explained that she sent the claimant's paperwork in to enroll him online, but that she was unable to do so. After calling the third party administrator about the problem, she was informed that 13 other people had the same Social Security number as the one the claimant provided to the employer at the time of his hire. She testified that the employer gave the claimant two weeks or until October 21, 2014, to correct the issue with his Social Security number, but he was unable to do so by that time, and, therefore, the employer terminated him from employment. Tr. at 28-30. Since substantial evidence supports the ALJ's determination that the claimant supplied a false Social Security number to the respondent employer at the time of hire, and that he eventually was terminated on October 21, 2014, after the employer finally learned of the false Social Security number and the claimant could not resolve the Social Security problem, we may not disturb his determination that the claimant is at fault for his termination from employment. Section 8-43-301(8), C.R.S.; see *Olaes v. Elkhorn Construction Co.*, W.C. No. 4-782-977 (April 11, 2011), *aff'd*, Colo. App. No. 11CA0908 (Dec. 29, 2011); *Barron-Tapia v. Swift Foods Co.*, W.C. No. 4-597-844 (December 8, 2004); *Godoy v. Al Aurora Relocation Services*, W.C. No. 4-506-060 (December 4, 2002); *Gutierrez v. Exempla Healthcare, Inc.*, W.C. No. 4-495-227 (June 24, 2002).

We also are not persuaded by the claimant's argument that since his volitional act predates his injury by approximately six years, the causal connection between the volitional act and the termination is attenuated. Merely because the claimant's conduct of

supplying the employer with a false Social Security number predated the industrial injury by approximately six years, however, this is inconsequential to whether the claimant is responsible for his termination. As explained above, in *Colorado Springs Disposal v. Industrial Claim Appeals Office*, *supra*, the Court concluded that a claimant is "responsible" for the termination if he acts volitionally or exercises some control in light of the totality of the circumstances. As detailed above, the ALJ found, with record support, that the claimant provided the employer with a false Social Security number at the time of hire, and the claimant was unable to resolve the problem by October 21, 2014, so he was responsible for the termination of his employment. We are persuaded that the claimant's conduct at the time of hire and in October 2014 satisfies the meaning of "fault" as contemplated under §§8-42-105(4), C.R.S, and 8-42-103(1)(g), C.R.S.

We similarly are not persuaded by the claimant's argument that he is entitled to full workers' compensation benefits under *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). As explained by the ALJ in his order, the holding in *Champion Auto Body* does not warrant temporary benefits here. In *Champion Auto Body*, the Colorado Court of Appeals held that an undocumented alien does not have a "legal disability" which precludes him receiving temporary disability benefits where his work status is not the sole cause of the loss of employment and the industrial injury contributed to some degree to the temporary wage loss. However, *Champion Auto Body* was decided under the predecessor statute which was interpreted to provide that a disabled worker who is at fault for the loss of modified employment may receive temporary disability in connection with the subsequent wage loss if the injury remains "to some degree" the cause of the post-termination wage loss. See *PDM Molding, Inc. v. Stanberg*, *supra*; *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Black Roofing Inc., v. West*, 967 P.2d 195 (Colo. App. 1998). We previously have held that the General Assembly enacted § 8-42-105(4) and §8-42-13(1)(g) to overturn *PDM Molding, Inc. v. Stanberg*, *supra*, and to preclude an injured worker from recovering temporary disability benefits where the worker is at fault for the loss of post-injury modified employment, regardless of whether the industrial injury remains a proximate cause of the subsequent wage loss. See *Godoy v. AI Aurora Relocation Services*, *supra*; *Gutierrez v. Exempla Healthcare, Inc.*, *supra*. Further, *Champion Auto Body* in no way holds or implies that a claimant's work status may not be considered when evaluating the cause of post-injury wage loss. Neither does that case suggest that misleading the employer concerning eligibility for employment cannot be considered a form of volitional conduct for purposes of the termination statutes. *Godoy v. AI Aurora Relocation Services*, *supra*. Thus, the holding in *Champion Auto Body* is inapplicable to claims governed by §8-42-105(4), C.R.S., including the claimant's claim here. As a result, the ALJ correctly determined that the claimant is not entitled to recover

temporary disability benefits when he is responsible for the termination of his employment.

The claimant also argues that the denial of TTD benefits violates his due process guarantees of the Fifth, Sixth, and Fourteenth amendments of the United States and Colorado Constitutions. We, however, lack jurisdiction to address the claimant's constitutional attack on §§8-42-103 and 8-42-105, C.R.S., which we interpret as a facial challenge to the statute's constitutionality. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Administrative agencies do not have the authority to pass on the constitutionality of statutes. That function may be exercised only by the judicial branch of government. *Arapahoe Roofing & Sheet Metal, Inc. v. Denver*, 831 P.2d 451 (Colo. 1992).

The claimant further argues that the employer is estopped from terminating him because he continued to work as an alien for six years prior to the injury without a valid Social Security number. However, consideration of this issue is beyond our jurisdiction. Our authority is limited to matters arising under the Colorado Workers' Compensation Act. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated August 12, 2015, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 12/22/2015 _____ by _____ RP _____ .

MARK A SIMON, ATTORNEY AT LAW, 950 S CHERRY ST. STE. 1200, DENVER, CO,
80246 (For Claimant)

DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C.,
Attn: C. SANDRA PYUN, 3900 E MEXICO AVE., STE. 1300, DENVER, CO, 80210
(For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-959-907-02

IN THE MATTER OF THE CLAIM OF

WILLIAM TAYLOR III,

Claimant,

v.

ORDER

ALPINE MANAGEMENT SERVICES,

Employer,

and

NON-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Michelle Jones (ALJ) dated June 23, 2015, that ordered the respondent employer dismissed as a party in this matter. We conclude the order is not presently subject to our review and therefore dismiss the appeal without prejudice.

The claimant originally filed this claim for benefits against the respondent employer. The respondent is a property management company owned and operated by Jace Johnson. The respondent has no employees and did not have workers' compensation insurance. The respondent, which is interchangeable with Mr. Johnson himself, was hired by the Pagosa Pines Condominiums to manage its property. These parties entered into a written agreement which specified the respondent was to manage the day to day operations of Pagosa Pines and that everything the respondent did in that regard he did as an agent of Pagosa Pines. The ALJ found the respondent advertised for bids on the grounds keeping and maintenance work for the Pagosa Pines facilities. The claimant's wife had previously been engaged by the respondent to perform some bookkeeping work for the respondent. The claimant thereby became aware of the respondent's advertisement and was hired by the respondent to perform the maintenance work. The claimant submitted invoices to Pagosa Pines for payment for all work he performed and was paid by checks drawn on the bank account of Pagosa Pines. One of the duties assigned to the claimant involved replacing siding on the condominium buildings. On January 30, 2014, while the claimant was working on a ladder removing

siding, he fell fracturing his tibia and fibula. The claimant asserted he was an employee of the respondent and the respondent was therefore liable for his worker's compensation benefits. The respondent denied responsibility arguing the claimant was either an independent contractor or an employee of Pagosa Pines. The respondent contended it was acting solely as an agent of Pagosa Pines when it hired the claimant and directed his work on the Pagosa Pines property.

The ALJ presided at two sessions of the hearing in this matter. These occurred on March 19 and May 4, 2015. The ALJ did not address the contention the claimant was an independent contractor. Instead, she agreed the respondent was acting in regard to the claimant solely in its capacity as an agent of Pagosa Pines. The respondent was found to not have employed the claimant and was therefore not a responsible employer. The respondent was dismissed from the claim by the ALJ.

In her June 23, 2015, order, the ALJ noted details of the procedural posture of the claim. At the commencement of the May 4 session, the claimant's counsel advised the ALJ the claimant had recently filed a claim for benefits naming Pagosa Pines as an employer. Counsel explained that the Division of Workers' Compensation would not assign a separate claim number to the Pagosa Pines matter for the reason that it involved the same claimant and the same date of injury pertinent to the Alpine Management case. However, counsel indicated the claimant did not wish to begin the hearing anew by scheduling another date where both respondent employers could participate. Instead, he desired to complete the hearing involving only the respondent Alpine Management without the participation of the respondent Pagosa Pines. The hearing involving the respondent Alpine Management was thereupon recommenced and concluded. The claimant now seeks review of the ALJ's order dismissing Alpine Management as a party.

We have recently ruled in a similar case, *Frontera v. Western Concrete, Inc.*, W.C. No. 4-926-368 (September 9, 2015), that the dismissal of two respondent parties to a claim featuring four named respondents did not represent a denial to the claimant of a benefit or a penalty. In this matter, the claimant is similarly seeking review of an ALJ's order dismissing some, but not all, of the respondents named in the claim. In *Frontera*, we determined the order dismissing the parties was not an order that could be presently reviewed.

Under § 8-43-301(2), C.R.S., a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty," may file a petition to review. Consequently, orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to

review. *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Moreover, we have previously noted that we cannot review an interlocutory order solely on the basis that “there is no other adequate remedy.” *See Jones v. Chicken-N-Pasta*, W.C. No. 4-197-841 (February 3, 1995).

The finding then, that the respondent Alpine Management Services is not a proper party to this proceeding is not dispositive in regard to the award or denial of any benefits, compensation or penalties. While there are several circumstances that could cause the order granting the dismissal to escape appellate review altogether, depending on the eventual ruling of the ALJ following a future hearing, at this juncture § 8-43-301(2) precludes such a review. Whether the ALJ committed error in connection with resolving that dispute is not currently a reviewable question. At present the claimant merely seeks an advisory ruling. We conclude that this order is not at this time subject to review. *See Scott v. Exempla Healthcare, Inc.* W. C. No. 4-753-124 (March 4, 2009).

IT IS THEREFORE ORDERED that the claimant’s petition to review the ALJ’s order dated June 23, 2015, is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 12/22/2015 _____ by _____ RP _____ .

ELLIOT LAW OFFICES, Attn: ALONIT KATZMAN, ESQ, C/O: MARK D ELLIOTT, ESQ.,
7884 RALSTON ROAD, ARVADA, CO, 80002 (For Claimant)
HALL & EVANS, L.L.C, Attn: ALYSSA L. LEVY, ESQ., C/O: DOUGLAS J KOTAREK,
ESQ., 1001 SEVENTEENTH ST., STE. 300, DENVER, CO, 80202 (For Respondents)

Court of Appeals No. 15CA0466
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-897-030-02

DATE FILED: January 14, 2016
CASE NUMBER: 2015CA466

Misty Keel, individually and as guardian ad litem of Riley Cooper Keel,
dependents of John Eric Keel,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado, Transportation
Technology Services, and Ace American Insurance Company,

Respondents.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE BERNARD
Terry and Nieto*, JJ., concur

Announced January 14, 2016

Killian David Richter & Mayle, PC, J. Keith Killian, Erin C. Burke, Grand
Junction, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Thomas Pollart & Miller, LLC, Eric J. Pollart, Tina R. Oestreich, Greenwood
Village, Colorado, for Respondents Transportation Technology Services and Ace
American Insurance Company

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

¶ 1 A worker, John Eric Keel, lived in Mississippi, where he had a job working for an employer, Transportation Technology Services. (The employer’s insurer, Ace American Insurance Company, is aligned with the employer’s interests in this case. We shall therefore refer to the employer and the insurer cumulatively as “the employer.”)

¶ 2 At the employer’s request, the worker transferred to Colorado to work. He was killed in a workplace accident in Pueblo. The worker’s family — his wife, Mindy Keel, and their minor son, Riley Cooper Keel — are the claimants in this case.

¶ 3 When workers who live in other states die on the job in Colorado, our Workers’ Compensation Act sets out a test to determine whether their families will receive death benefits in this state. An administrative law judge — an “ALJ” in legal parlance — in Colorado decided that this test had been satisfied in the worker’s case.

¶ 4 This appeal asks us to decide a question that arises out of the award of death benefits under that test: What is the effect of workers’ compensation death benefit payments in other states on the interest paid on past due Colorado death benefits?

¶ 5 We conclude that the answer is found in section 8-42-114, C.R.S. 2015. As is pertinent to this appeal, this statute describes a particular circumstance and the statutory response to it. The circumstance concerns “cases where it is determined that periodic death benefits granted by the federal . . . survivors . . . insurance act or a workers’ compensation act of another state . . . are payable to . . . [an] individual’s dependents.” The response to the circumstance is that “aggregate benefits payable for death . . . shall be reduced . . . by an amount equal to fifty percent of such periodic benefits.”

¶ 6 Section 8-42-114 controls our decision in this case: the worker’s case presents the circumstance described in the statute, so we must respond as the statute directs. Consequently, we further conclude that a Panel of the Industrial Claim Appeals Office applied the wrong test when it declined to apply section 8-42-114. As a result, it awarded the claimants less interest than the pertinent statute required.

¶ 7 We reverse the Panel’s order. We remand the case to the Panel to remand it, in turn, to the ALJ to recalculate the interest on the past due death benefits in Colorado in the manner that we describe

in this opinion and to order the employer to pay that sum to the claimants.

I. Background

¶ 8 In March 2010, the worker took a job with the employer in Mississippi, where he lived with the claimants. In October 2010, the employer offered the worker a job in Pueblo for a lot more money. The worker took the job. He was killed in a workplace accident on the second day that he worked in Pueblo.

¶ 9 A short time later, the employer started paying the claimants workers' compensation death benefits in Mississippi — \$337.58 per week — and the Social Security Administration started paying them survivor benefits — \$380.77 per week.

¶ 10 The claimants applied for death benefits under Colorado's Workers' Compensation Act in 2012. In April 2013, an ALJ decided that (1) "Colorado ha[d] jurisdiction" over their claim; and (2) the employer's insurer "was liable [to the claimants] for death benefits" under the Workers' Compensation Act. *See* §§ 8-42-114 & 8-42-121, C.R.S. 2015. But the ALJ did not decide how much money the employer should pay as a continuing future death benefit, whether the employer owed any past due death benefit payments, or

whether the employer should pay any interest on any past due death benefits. The ALJ wrote that these issues were “for future determination.”

¶ 11 The employer had paid the claimants’ death benefits in Mississippi for 148 weeks, from the day after the worker died, October 28, 2010, until August 28, 2013. It stopped paying benefits in Mississippi on that latter date, and it began to pay benefits in Colorado. During those 148 weeks, the insurer paid the claimants a total of \$49,961.84.

¶ 12 If the employer was obligated to pay the claimants’ benefits in Colorado from the day after the worker died, then what was the effect of the 148 weeks of Mississippi payments *and* the ongoing Social Security survivor benefits on the employer’s Colorado obligation? The employer offered its answer to this question in an amended general admission that it filed in mid-September 2013.

¶ 13 First, the admission stated that the maximum Colorado weekly death benefit would be \$810.67.

¶ 14 Second, apparently following section 8-42-114, the employer wrote that it was entitled to two offsets. One offset was “[f]ifty percent of all benefits paid to date under the laws of the State of

Mississippi, in the amount of \$168.79 per week from the date of the incident to the date of this filing.” The second offset was “Social Security [survivor benefits] in the amount of \$190.38 per week from the date of the incident forward.”

¶ 15 Third, keeping these offsets in mind, the employer calculated the continuing future benefit that it would be obligated to pay the claimants by deducting one-half of the on-going Social Security survivor benefit, or \$190.38 per week, from \$810.67 to arrive at an adjusted continuing benefit figure of \$620.29. (We note that there is no disagreement about this continuing benefit figure and that it is not at issue in this appeal.)

¶ 16 Fourth, the employer turned to calculating the “admitted [Colorado past due] death benefits” for the 148-week period between the worker’s death and the date when it began to pay benefits in Colorado. The employer determined that one half of the Mississippi weekly benefit of \$337.58 was \$168.79. Subtracting this amount from the adjusted Colorado benefit of \$620.29, the employer calculated that it owed the claimants’ a weekly past death benefit of \$451.50 for the 148-week period. Multiplying the weekly figure by

the number of weeks, the employer arrived at a past due death benefit figure of \$66,822.

¶ 17 The employer paid the claimants this amount. (We know this because the claimants have said so several times in documents filed in the course of this case, including the opening brief in this appeal, and during oral argument. The employer has never contested these statements.)

¶ 18 Now we zero in on the crux of this appeal. The employer also had to determine the interest that it owed the claimants on the past due death benefit. The statutory rate was eight percent. *See* § 8-43-410(2), C.R.S. 2015. The employer stated in the amended general admission that it owed the claimants an additional \$2040.32 in interest. But the employer did not make clear how it had reached that figure.

¶ 19 The claimants filed a motion for summary judgment. As is pertinent to this appeal, they contended that the employer had significantly miscalculated the interest due on the past due death benefits.

¶ 20 The employer offered clarification later in a cross-motion for summary judgment, most directly in an affidavit attached to the

cross-motion that was completed by a claims representative. It asserted that the total of the Mississippi payments — \$49,961.84 — should be subtracted from the total of the Colorado past due death benefits — \$66,822 — to reach a total figure of \$16,860.16 that the employer owed the claimants. Then the employer used this last figure to calculate the interest on the Colorado past due death benefits.

¶ 21 The ALJ agreed with employer’s reasoning and calculations. She ordered the employer to pay the claimants the interest that employer had listed in the general admission.

¶ 22 The claimants sought review. A Panel of the Industrial Claim Appeals Office disagreed with the ALJ’s interest calculations. It held that section 8-42-114 did not apply to the Colorado past due death benefits that the employer owed to the claimants because the claimants’ Mississippi death benefits, which employer “timely paid for the period of October 28, 2010, through August 28, 2013, actually were subsumed by or converted to Colorado workers’ compensation benefits.” The Panel therefore held that the claimants were not entitled “to collect the full aggregate amount of workers’ compensation benefits from two applicable states.” This

meant, the Panel explained, that the claimants were not “entitled to recover \$116,783.84,” or the sum of the Colorado past due death benefits that the employer paid — \$66,822 — and the full Mississippi death benefit — \$49,961.84.

¶ 23 The Panel decided that it would calculate the interest that the employer owed the claimants on the Colorado past due death benefit in the following way. It initially decided that, for the 148-week period during which Mississippi paid the claimants’ death benefits, they were entitled to Colorado benefits of \$91,902.92, or 148 weeks multiplied by \$620.29 — the weekly Colorado benefit minus the offset for the Social Security survivors’ benefit. It then subtracted all the Mississippi death benefits that the claimants had actually received — \$49,961.84 — from the \$91,902.92 figure. This left a figure of \$41,841.08 on which the employer was obligated to pay interest.

¶ 24 The Panel remanded the case to the ALJ to enter an order on the interest. The ALJ, following the Panel’s direction, ordered the employer to pay the statutory eight percent interest on \$41,841.08. The claimants again sought review.

¶ 25 The Panel affirmed the ALJ’s order. In doing so, it expanded on its reasoning. Citing section 8-42-114, it concluded that the claimants were “not entitled to recover full Colorado death benefits minus only 50% of the Mississippi benefits . . . because there is now no award from another state that is ‘payable’” to the claimants.

II. Analysis

¶ 26 We first make clear what the scope of this appeal is. As indicated above, the employer has already paid the claimants \$66,822, and it does not want any of that money back. It made clear in the response brief that it filed before the Panel issued its first order that it was not asking for any of it. Because Mississippi law did not “provide a recovery mechanism for overpaid benefits,” (1) the employer was not “able to recover the \$49,961.84 in [death] benefits” that it had paid “under Mississippi law”; and (2) it “had . . . elect[ed] to take the 50 percent offset for those benefits under Colorado law.”

¶ 27 So, as we stated above, the only issue before us is: What is the effect of workers’ compensation death benefit payments in other states on the interest paid on past due Colorado death benefits?

A. Section 8-42-114

¶ 28 The claimants contend that the Panel erred when it concluded that section 8-42-114 did not apply to the interest calculation in this case. We agree.

1. Standard of Review and General Legal Principles

¶ 29 We review an ALJ's or a Panel's conclusions of law de novo. *Colo. Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 193 (Colo. 2001). This appeal asks us to determine what the language of section 8-42-114 means. Statutory interpretation is also an issue of law that we review de novo. *Id.* at 194.

¶ 30 When we interpret a provision of the Workers' Compensation Act, we give it its "plain and ordinary meaning" if its language is clear. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). "[W]hen examining a statute's plain language, we give effect to every word and render none superfluous because '[w]e do not presume that the legislature used language "idly and with no intent that meaning should be given to its language[.]'" *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)(citation omitted)(quoting *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003), *superseded in part by statute*

on other grounds as recognized by *St. Jude's Co. v. Roaring Fork Club, LLC*, 2015 CO 51 ¶ 17).

¶ 31 It is our function to decide these issues of law, including the interpretation of statutes. *El Paso Cty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 705 (Colo. 1993) (“An administrative agency’s construction [of a statute] should be given appropriate deference, but is not binding on the court.”). We defer to an agency’s interpretation of its governing statute if the statute is subject to different reasonable interpretations and the issue comes within the administrative agency’s special expertise. *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 17 (Colo. 1996).

2. Application of Legal Principles

¶ 32 We conclude that the language of section 8-42-114 is clear, so we give it its plain and ordinary meaning. *See Davison*, 84 P.3d at 1029. We give all its words effect and we render none superfluous. *See Colo. Water Conservation Bd.*, 109 P.3d at 597. We conclude that, because we can readily give the words that the legislature used their full effect, the legislature meant what it said. We will therefore apply section 8-42-114 as the legislature wrote it. *See State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000).

¶ 33 Section 8-42-114 begins, as is pertinent here, with a categorical statement: “In case of death, the dependents of the deceased entitled thereto *shall receive . . . death benefits*” (Emphasis added.) In other words, because the worker died in Colorado, once the Colorado ALJ determined that “Colorado ha[d] jurisdiction” over the claim, the employer “was liable [to the claimants] for death benefits” under the Workers’ Compensation Act. The employer has not questioned this ruling.

¶ 34 Then, as we have indicated above, we conclude that section 8-42-114 sets forth a circumstance and a response to the circumstance. It states:

- *If* “it is determined that periodic death benefits granted by the federal . . . survivors . . . insurance act or a workers’ compensation act of another state . . . are payable to an individual and the individual’s dependents”
- *then* “the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.”

¶ 35 We next apply section 8-42-114 to the facts of this case. The claimants received federal survivors’ death benefits and Mississippi

workers' compensation benefits. We therefore conclude that section 8-42-114 means that the past due death benefits that the employer owed the claimants in Colorado must be calculated by determining the weekly Colorado benefit. The claimants and the employer agree that it would be \$810.67.

¶ 36 But section 8-42-114 requires that we reduce this amount by two things: fifty percent of the claimants' Social Security survivors' benefit, or \$190.38 per week, and fifty percent of the weekly Mississippi workers' compensation payments, or \$168.79. Subtracting these figures, we arrive at a weekly past death benefit figure of \$451.50. Multiplying this figure by 148 weeks, or the length of time that the employer paid weekly workers' compensation death benefits in Mississippi, we reach a Colorado past due death benefit figure of \$66,822. (We note that this was the same methodology that the employer used to reach the same figure in the amended general admission.)

¶ 37 Turning to section 8-43-410(2), we conclude that the claimants are entitled to eight percent interest on this past due death benefit figure of \$66,822.

¶ 38 So, unlike the Panel, we have concluded that section 8-42-114 applies to this case and that its application is clear. Giving the Panel appropriate deference, we nonetheless recognize that its reasoning and conclusions do not bind us. *See Craddock*, 850 P.2d at 704. We conclude that we should not defer to the Panel’s position because the language of section 8-42-114 is not subject to different reasonable interpretations. We also conclude that, because we cannot find a reason in the Workers’ Compensation Act, in Colorado case law, or in the record to stray from the statute’s plain language and the legislature’s clear intent, we are in as good a position as the Panel to interpret section 8-42-114. *See Huddleston*, 913 P.2d at 17. We next proceed to explain why we respectfully disagree with the Panel’s reasoning, which was based primarily based on policy considerations.

B. The Panel’s Policy Considerations

The Panel decided that death benefits were not “payable” in Mississippi; they were “subsumed” by the benefits payable in Colorado; and the claimants were not entitled to the aggregate benefit of the Mississippi death benefits and the Colorado past due death benefits. We disagree for the following reasons.

First, benefits *were paid* in Mississippi. The record contains a document from the Mississippi Workers' Compensation Commission. It states in part that, as of January 11, 2011, "payment of compensation for temporary total disability has begun and will continue until further notice." The claimants, the employer, the ALJ, and the Panel all agree that these benefits were paid. And there is nothing in section 8-42-114 that directs us, suggests to us, or even allows us, to look behind these payments to determine whether these benefits were paid because the employer wanted to pay them or because Mississippi law required the employer to pay them.

The Panel's reliance on the Full Faith and Credit Clause is misplaced. As a general rule, "[t]he Full Faith and Credit Clause protects the final judgments of one state from collateral attack in another state." *McClure v. JP Morgan Chase Bank NA*, 2015 COA 117, ¶ 26.

But, in *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 286 (1980), the Supreme Court held that the Full Faith and Credit Clause was not violated if two states granted a worker successive compensation awards. In reaching its conclusion, the Court

observed that the industrial commission of one state does not have the authority to bar recovery of benefits in another state because “[t]ypically, a workmen’s compensation tribunal may only apply its own State’s law.” *Id.* at 282-83. Rather, if more than one state has jurisdiction over a workers’ compensation claim, a claimant can seek successive awards from those different states without concern that the Full Faith and Credit Clause would bar the additional recovery.

¶ 39 Applying *Thomas*’s reasoning here, we conclude that it undercuts the Panel’s rationale. It means that the Panel only had the authority to “apply [Colorado’s workers’ compensation] law,” *see id.*, meaning section 8-42-114, and not Mississippi’s workers’ compensation law. And it means that, absent a Colorado statute saying otherwise, the claimants could seek successive awards from Mississippi and Colorado. *See Thomas*, 448 U.S. at 283.

¶ 40 Second, the Panel did not cite any Colorado legal authority to support its conclusions that (1) the claimants were not entitled “to collect the full aggregate amount of workers’ compensation benefits from two applicable states”; and (2) the claimants’ “Mississippi death benefits . . . were subsumed by or converted to Colorado

workers' compensation benefits." Section 8-42-114 does not make any such statement; there are no other statutes in the Workers' Compensation Act that make any such statement; and Colorado case law does not make any such statement.

¶ 41 But, third, the Panel cited out-of-state cases to support its conclusions. These cases held that an employer could be granted an offset for benefits awarded under another state's workers' compensation scheme. Mississippi, for example, gives an offset of one hundred per cent for benefits paid by another state. See *Southland Supply Co. v. Patrick*, 397 So. 2d 77, 79 (Miss. 1981). But, as *Thomas* points out, such out-of-state law does not bind us under the Full Faith and Credit Clause. *Thomas*, 448 U.S. at 282-83. And, even more to the point, section 8-42-114 grants the employer a fifty percent offset for the Mississippi death benefits that it paid. So, although the amount of the offset is different, the employer nonetheless received the offset that Colorado law allowed.

¶ 42 Fourth, the Panel's reading of the statute would render it empty. The Panel's reasoning means that benefits would never be "payable" under another state's workers' compensation system. Instead, all out-of-state benefits would be "subsumed by and

converted to” Colorado benefits. In turn, if all out-of-state awards are “subsumed by and converted to” Colorado awards, then section 8-42-114 would never apply.

¶ 43 We cannot endorse such a reading of this statute because it would render parts of it meaningless and without effect. *See USF Distrib. Servs. Inc. v. Indus. Claim Appeals Office*, 111 P.3d 529, 532 (Colo. App. 2004)(“An interpretation that renders a particular clause meaningless and without effect is to be avoided.”). And we cannot insert language that would additionally qualify when and how death benefits are to be offset. *Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985)(Neither this court nor the Panel may “read nonexistent provisions” into the Workers’ Compensation Act.).

¶ 44 Fifth, the Panel was concerned that the claimants might receive a windfall, a “double recovery with no reduction of any sort in the cost of the claim for the employer.” But this concern was clearly *not* implicated in this case. In the amended general admission, the employer used section 8-42-114 to offset the past due death benefit by subtracting one-half of the claimants’ weekly Social Security survivor benefits and one-half of Mississippi’s weekly workers’ compensation benefits. So the claimants did not

receive a “double recovery,” and the employer received the “reduction . . . in the cost of the claim” required by Colorado law.

¶ 45 Sixth, the Panel thought that applying section 8-42-114 would encourage a claimant who might receive death benefits in two states to “creatively time” a claim in a way designed to maximize benefits. In this case, for example, the Panel thought that the claimants took advantage of the differences in offsets of death benefits paid by the two states — Mississippi’s one hundred percent offset versus Colorado’s fifty percent offset. If they had first filed in Colorado instead of Mississippi, their Mississippi past death benefit payments would have been offset by one hundred percent of their Colorado death benefits.

¶ 46 But, to the extent that the claimants may have had the opportunity to receive more benefits by engaging in such tactics, it is not up to us to amend the statute to prevent such an additional recovery. That is the legislature’s prerogative. *See Nelson v. City of New York*, 352 U.S. 103, 111 (1956)(“[R]elief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed.”); *People v. Cooper*, 27 P.3d 348, 360 (Colo.

2001)(“[I]t is not the role of the courts to rewrite or eliminate clear and unambiguous statutes merely because they do not believe the General Assembly would have intended the consequences of its enactments.”); *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 385 (Colo. App. 2006)(“Claimant’s arguments that the [Workers’ Compensation] Act is unfair or that the result is contrary to public policy amount to a request for a change of statutory law. Absent constitutional infringement, it is not our province to rewrite statutes.”); *Waskel v. Guar. Nat’l Corp.*, 23 P.3d 1214, 1221 (Colo. App. 2000)(“Although defendants urge us to define the term more broadly in order to further the public policy of deterring wrongful conduct, we are not free to ignore the language chosen by the General Assembly in determining what public policy requires.”).

¶ 47 Last, the Panel asserted that one of the statute’s goals — encouraging claimants to seek Social Security survivor benefits by “exact[ing] a 50% reduction” of the Social Security benefits — was not similarly achieved by applying a fifty percent offset to benefits from another state. But, again, this is a policy argument best addressed to the legislature. See *Nelson*, 352 U.S. at 111; *Cooper*, 27 P.3d at 360; *Bunch*, 148 P.3d at 385; *Waskel*, 23 P.3d at 1221.

¶ 48 The Panel's order is reversed. The case is remanded to the Panel with directions that the Panel remand the case to the ALJ. The ALJ shall then order the employer to pay the claimants eight percent interest on the past due death benefits figure of \$66,822.

JUDGE TERRY and JUDGE NIETO concur.

15CA0786 Sackett v ICAO 01-14-2016

COLORADO COURT OF APPEALS

DATE FILED: January 14, 2016
CASE NUMBER: 2015CA786

Court of Appeals No. 15CA0786
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-944-222-01

Alice Sackett,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and City Market,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE HARRIS
Taubman and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced January 14, 2016

Killian & Davis, P.C., Christopher H. Richter, Eric C. Burke, Grand Junction,
Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ruegsegger Simons Smith & Stern, LLC, Jeff Francis, Denver, Colorado, for
Respondent City Market

In this workers' compensation action, claimant, Alice Sackett, appeals a final order of the Industrial Claim Appeals Office (Panel) holding that her employer, City Market, was not liable for payment of treatment she received from her primary care physician (PCP) and her orthopedic surgeon. The Panel determined, contrary to the administrative law judge's (ALJ) findings, that the authorized treating physician's (ATP) referral of claimant to her PCP was not part of the normal progression of authorized treatment.

We disagree. Accordingly, we reverse the Panel's ruling and remand the case with directions to reinstate the order of the ALJ finding the referral valid.

I. Background

Claimant sustained an injury to her right knee while working for employer. She told her supervisor of her injury that day and was advised to seek treatment at one of two authorized clinics. Three days after her injury, claimant saw the ATP, who recommended an MRI.

Two days later, before she was to return to the ATP for a follow-up visit, claimant received a telephone call from employer's claims adjuster advising her that her claim had been denied as

unrelated to her employment. Claimant informed the ATP of the denial and told him that she wanted to seek treatment with her PCP. In a letter written shortly thereafter, the ATP agreed that this was an “appropriate” course of action and indicated that he “would be glad to see her back once the administrative issues surrounding compensability with the workers’ compensation system are resolved.” At the request of claimant and her counsel, the ATP later clarified his position: “The patient had asked to be referred to her [PCP] for her injury. I have referred her to her [PCP] at her request. I hope that clarifies that I did refer her to her [PCP].”

In the meantime, claimant visited her PCP, who referred her to an orthopedic surgeon. The orthopedic surgeon recommended arthroscopic knee surgery, which claimant underwent. Claimant’s condition improved post-surgery.

The ALJ ordered employer to cover the PCP’s evaluation and the orthopedic surgeon’s treatment of claimant’s knee, including the arthroscopic surgery. As pertinent here, the ALJ found that the ATP “referred [c]laimant to her [PCP] after the claim was denied by [employer].” Therefore, the ALJ determined that “[c]laimant’s medical care is within the chain of referrals from [the ATP] and the

treatment with [the PCP and the orthopedic surgeon] is authorized by virtue of the referral.”

The Panel, however, disagreed, concluding that the ATP did not base his referral on his independent “medical consideration.” Rather, the Panel determined that the referral “appear[ed] . . . to be the product of a nonmedical decision . . . [and] a response to the claimant’s and her attorney’s request that she see her personal physician in this situation of a contested claim.” Based on this determination, the Panel held that neither the PCP nor the orthopedic surgeon was an authorized treating physician, and the care claimant received from those doctors was not compensable under her workers’ compensation claim.

II. Validity of Referral

On appeal, claimant contends that the Panel exceeded its authority when it reversed the ALJ’s ruling. She argues that substantial evidence, as well as relevant legal authority, supported the ALJ’s decision and that the Panel was therefore bound by it. We agree.

A. Governing Law

Once an injury is determined to be work-related, treatment

for the injury is compensable where it is provided by an “authorized treating physician.” *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). “‘Authorization,’ as that term is used in workers’ compensation proceedings, refers to a physician’s status as the health care provider legally authorized to treat an injured employee.” *Id.*

Employers are liable for the expenses incurred when, as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant, an authorized treating physician refers a claimant to other physicians. *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). Thus, the designation “authorized treating physician” includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an ATP. *Id.*

Whether a referral has been made is a question of fact for determination by the ALJ. *Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277, 1280 (Colo. App. 2008); *Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854, 856 (Colo. App. 1995). Both the Panel and reviewing courts must apply the substantial evidence

test in determining whether the evidence supports the ALJ's findings of fact. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Id.*

B. Analysis

The Panel concluded that the ATP's referral of claimant to her PCP was not a result of the ATP's "independent medical judgment" but rather solely a result of the request from claimant's attorney. Accordingly, the Panel ruled that the referral was invalid and that employer was not liable for payment of claimant's treatment.

As a preliminary matter, we reiterate that a referral is valid if it is made as part of the normal progression of authorized treatment. *Greager v. Indus. Comm'n*, 701 P.2d 168, 170 (Colo. App. 1985). We agree that a referral would not meet this standard where the ATP simply acquiesced in a claimant's request for a referral, but we do not agree with the Panel's unduly narrow view of "independent medical judgment," a term that does not appear in any of this court's published opinions, including those decisions

cited by the Panel and the employer.

The Panel ruled that referrals that “are not made as a result of the referring physician’s independent medical judgment” are invalid, citing *Bestway Concrete*, 984 P.2d 680. We do not read *Bestway Concrete* to support that proposition. The division in *Bestway Concrete* concluded that evidence in the record supported the ALJ’s finding that the treating physician had referred the claimant to an orthopedic surgeon. *Id.* at 684. The opinion neither discusses the basis for the referral nor states that a referral must be grounded in the physician’s “independent medical judgment.” Rather, under *Bestway Concrete*, treatment received as a result of a referral is covered if it is within “the normal progression of authorized treatment for a compensable injury.” *Id.* The Panel’s narrow “independent medical judgment” standard does not represent a reasonable extrapolation of *Bestway Concrete*’s analysis.

Moreover, the Panel’s standard is at odds with *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997), a case in which a referral requested by a claimant was deemed valid because it was based on the ATP’s “independent judgment.” In our view,

independent judgment may take many forms, so long as the physician determines, without undue outside influence, that a referral is in the injured worker's best interest. *See also Greager*, 701 P.2d at 170 (referral valid as part of the normal progression of authorized treatment where ATP based referral on geographic considerations); *cf. Clemonson v. Lovern's Painting*, W.C. No. 4-503-762, 2005 WL 2806993 (ICAO Oct. 21, 2005) (referral by physician who would not have made referral absent mistaken belief that referral was required by Division of Workers' Compensation was not valid as part of normal progression of authorized treatment), *aff'd in part and set aside in part sub nom., Clemonson v. Indus. Claim Appeals Office*, (Colo. App. No. 05CA2416, Oct. 5, 2006) (not published pursuant to C.A.R. 35(f)).

Thus, we review whether substantial evidence supported the ALJ's finding that the ATP's referral was made as part of the normal progression of authorized treatment. We conclude that the finding was amply supported by the record and that the Panel erred by substituting its judgment for that of the ALJ.

The ATP did not testify in this case, leaving the ALJ to rely on the ATP's notes to determine if the referral was made in the normal

course of treatment. Those notes confirmed the ATP's belief that it was "appropriate" for claimant "to proceed with care under the direction of her PCP," and clarified that he "did refer her to her [PCP]." Based on this evidence, the ALJ found that the ATP had referred claimant to her PCP for additional treatment. He further found that the PCP's referral of claimant to an orthopedic surgeon was "within the chain of referrals." Consequently, the ALJ ruled, the care claimant received from both the PCP and the orthopedic surgeon was compensable.

The Panel, however, drew a contrary inference from the ATP's letter, concluding that the referral was not "based on medical consideration, but rather a response to the claimant's and her attorney's request that she see her personal physician in this situation of a contested claim."

The letter may be susceptible of different interpretations, but if the ALJ's interpretation was reasonable, the Panel was obliged to uphold it. *See City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006) (where "two equally plausible inferences may be drawn from the evidence," neither the Panel nor the reviewing court may substitute its judgment for that

of the ALJ). In our view, the ALJ's interpretation was reasonable.

The ATP's written response to claimant's counsel, acknowledging and clarifying that he had referred claimant to her PCP, and his earlier note declaring that treatment with the PCP would be "appropriate" substantially support the ALJ's factual finding that the referral was valid. The ATP's initial referral letter stated he "would be glad to see [claimant] back once the administrative issues surrounding compensability within the workers' compensation system are resolved." The ALJ implicitly interpreted this language to mean that the ATP was unwilling to treat claimant until coverage had been established, noting that the ATP referred claimant to her PCP "after the claim was denied." See *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000) (court can consider findings that are necessarily implied by ALJ's decision). The claimant likewise testified that, based on the adjuster's verbal denial of her claim, she understood that employer would no longer pay for her treatment with the ATP.

Moreover, the ATP had already determined that claimant needed additional treatment and had referred her for an MRI. We are therefore unpersuaded by the Panel's position that if not for

claimant's request, the ATP would not have referred her for further treatment. Instead, we conclude that the ALJ's interpretation of the documents is reasonable — that the ATP, faced with the uncertainty of coverage, referred claimant to her PCP so that she could pursue the treatment the ATP had already recommended. Because the ALJ, and not the Panel, is best situated to read the referral in the context of the medical records, we perceive no basis here to stray from the ALJ's interpretation.

It is within the province of the ALJ to draw any plausible inference from the evidence received. *Suetrack USA*, 902 P.2d at 856. We agree with claimant that under the circumstances here, the Panel improperly drew its own inferences when it reviewed the referral letter and note.

We conclude that substantial evidence supports the ALJ's finding that the ATP's referral of claimant to her PCP was part of the normal progression of authorized treatment, and that the treatment she received in the chain of and as a result of that referral was compensable.

Claimant also contends that employer was responsible for compensating her for the treatment she received because the

applicable statute, section 8-42-101(6)(a), C.R.S. 2015, is not limited to authorized treating physicians. She argues that employer must reimburse her for all “related, reasonable and necessary treatment” regardless of the physicians’ status as authorized providers.

However, having found that the Panel exceeded its authority by reweighing the validity of the referral, we need not reach this issue. *See Reiff v. Colo. Dep’t of Health Care Policy & Fin.*, 148 P.3d 355, 359 (Colo. App. 2006) (declining to address claimant’s additional contentions in view of disposition in claimant’s favor).

III. Conclusion

The Panel’s final order is set aside to the extent it held the ATP’s referral of claimant to her PCP was invalid. The case is remanded with instructions to reinstate the ALJ’s order compensating claimant for related, reasonable, and necessary treatment she received from her PCP and the orthopedic surgeon.

JUDGE TAUBMAN and JUDGE J. JONES concur.