

BROWN BAG SEMINAR

Thursday, May 19, 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 May 6, 2016

Contents

Industrial Claim Appeals Office decisions

Miller v. United Insurance Group	2
Morrison v. Rock Electric, Inc.	6
Oldani v. Hartford Financial Services	12
Hefner v. Wal-Mart Stores	20
Horiagon v. Cody Manufacturing	25

Colorado Court of Appeals decisions

Restaurant Technologies v. Industrial Claim Appeals Office and Fortune (unpublished)	31
Youngquist Brothers Oil & Gas, Inc. v. Industrial Claim Appeals Office and Miner	41
Amerigas Propane v. Industrial Claim Appeals Office and England	63
Sanchez v. Industrial Claim Appeals Office (unpublished)	83

Colorado Supreme Court decisions

City of Littleton v. Industrial Claim Appeals Office and Christ	96
Industrial Claim Appeals Office and Zukowski v. Town of Castle Rock	136
City of Englewood v. Harrell and Industrial Claim Appeals Office	152

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-940-803-01

IN THE MATTER OF THE CLAIM OF
ALEX D MILLER,

Claimant,

v.

ORDER

UNITED INSURANCE GROUP,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Broniak (ALJ) dated August 28, 2015, that determined the claimant was an employee rather than an independent contractor, and that entered a general award of workers' compensation benefits. We dismiss the petition to review without prejudice.

The issues presented for determination were whether the claimant sustained a compensable injury and whether the claimant was an employee of the respondent or an independent contractor. Prior to the commencement of the hearing, the claimant filed an "unopposed motion to withdraw medical benefit issue without prejudice." This motion was granted on September 5, 2014.

The matter proceeded to hearing on November 10, 2014, and on December 15, 2014. After the hearing, the ALJ found that the claimant executed a contract on September 9, 2009, to become a "Career Agent I" for the respondent. The claimant's initial responsibilities included selling Medicare supplement insurance plans and other insurance products. In March 2010, the respondent promoted the claimant to District Sales Manager which resulted in additional responsibilities. The District Sales Managers, including the claimant, signed a separate Independent Contractor Agreement which outlined the compensation and production requirements for the District Sales Manager position. The claimant signed this agreement on March 11, 2011.

The respondent asserted that the claimant electronically signed another contract in July 2012 entitled New Agency Contract. The ALJ found the claimant was subject to this New Agent Contract which was signed on July 5, 2012. However, the ALJ found the contract failed to create a rebuttable presumption of an independent contractor relationship between the claimant and the respondent pursuant to §8-40-202(2)(b)(IV), C.R.S.

On January 2, 2014, the claimant was involved in an automobile accident near Fort Lupton, Colorado. The claimant was on his way to Arvada for a 1:00 p.m. appointment with a potential client. Prior to the accident, the claimant had gone to the Fort Lupton post office to mail documents to the respondent pertaining to another client. The claimant sustained serious injuries, including a broken left femur, right ankle dislocation, left rotator cuff shoulder injury, left knee injury, and traumatic brain injury, including a brain bleed and vision impairment. The claimant has undergone multiple surgeries on his right leg and additional surgeries are anticipated. The claimant was hospitalized for six months as a result of his injuries and his medical bills exceed \$2,500,000.

After weighing the conflicting evidence presented by both parties, the ALJ ultimately determined that the claimant was an employee of the respondent and not an independent contractor. The ALJ held that after balancing all the factors enumerated in §8-40-202(2)(a), C.R.S., and after considering the nature of the relationship between the claimant and the respondent, the respondent had failed to overcome the presumption that the claimant was an employee under the Workers' Compensation Act. She also determined that the claimant sustained a compensable incident arising out of and during the course and scope of his employment. The ALJ entered a general award of workers' compensation benefits.

On appeal, the respondent raises several arguments as to why the ALJ erred in determining that the claimant was an employee of the respondent. We, however, have no jurisdiction to address the respondent's arguments.

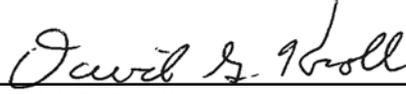
Section 8-43-301(2), C.R.S. provides that a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review. . ." It is well settled that orders which do not require the payment of benefits or penalties, or deny the claimant any benefit or penalty, are interlocutory and not subject to immediate review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989). Further, an award must determine the amount of benefits to be

awarded before it may be considered final and reviewable. *United Parcel Service v. Industrial Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999).

Here, the ALJ's order determined that the claimant was an employee of the respondent rather than an independent contractor. The order generally awards workers' compensation benefits to the claimant. As noted above, the issue of medical benefits was withdrawn prior to the commencement of the hearing. As such, the ALJ's order does not award any medical benefits and reserves all unresolved issues for future consideration. As such, the ALJ's order is not final and reviewable. Consequently, we dismiss the petition to review without prejudice for lack of a final, reviewable order. *See* §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the respondent's petition to review the ALJ's August 28, 2015, order is dismissed without prejudice.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

ALEX D MILLER
W. C. No. 4-940-803-01
Page 4

CERTIFICATE OF MAILING

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

_____ 2/25/2016 _____ by _____ RP _____ .

BELL & POLLOCK, PC, Attn: ROBERT J. LEONARD, ESQ, 5660 GREENWOOD PLAZA
BLVD., SUITE 220, GREENWOOD VILLAGE, CO, 80111 (For Claimant)
WHITE AND STEELE, PC, Attn: KEITH D. ORGEL, ESQ & ROBERT H. COATE, ESQ,
DOMINION TOWERS, NORTH TOWER, 600 SEVENTEENTH STREET, SUITE 600N,
DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-939-901-03

IN THE MATTER OF THE CLAIM OF

ANTHONY MORRISON,

Claimant,

v.

ROCK ELECTRIC, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 24, 2015, that determined the claimant's injury was not sustained in the course and scope of employment and denied benefits. We affirm.

This matter went to hearing on the issues of compensability, medical and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for the employer as an electrician. The claimant testified that he drove his personal vehicle to jobsites to perform electrical duties and he also sometimes used his truck during the course of the day to travel between jobsites and purchase material from Home Depot.

Dakota Carter also worked for the employer as an electrician apprentice. Carter's car was not working during early to mid-January 2014 so he needed rides to the jobsite. On the evening of January 14, 2014, Carter contacted the claimant by text message to confirm a possible ride to the jobsite. The claimant responded that he could give Carter a ride but sent a text to the owner of the employer, Rob Burek, stating "so I'm picking up Dakota in the morning. Am I supposed to take him with me.(sic)" Burek responded to the claimant that "He [Dakota] just texted me. If you want he can go with you." The claimant then told Carter that he had just gotten off the phone with Burek and confirmed that he would be driving Carter to work. The claimant and Carter then exchanged text messages about the pick-up location.

The claimant had to deviate from his typical route to pick up Carter. The claimant drove Carter to the jobsite on January 15th and 16th and he also drove to Home Depot and at least one other jobsite on January 15-16th. On January 17th, the claimant was traveling to pick up Carter and was involved in a motor vehicle accident at approximately 6:30 am. The claimant was rear-ended and suffered numerous injuries. The claimant received medical treatment and was prohibited from working because of his injuries.

The ALJ found that the claimant and Carter had an arrangement whereby Carter paid the claimant \$15.00 for transportation to the jobsite and that the employer did not care how or if Carter got to work. The ALJ also credited Burek's testimony that the employer does not compensate employees for driving their personal vehicles to work and that no employee has ever included "travel time" in his job description on a time sheet. Burek also testified that he has never been involved in how employees get to and from work and has never reimbursed employees for gas, travel or associated expenses for getting to and from jobsites. Burek also explained that the text message he sent to the claimant simply meant that the claimant could take Carter to work if he wanted to and that he had enough employees on his jobsites and that he would not have incurred a detriment if Carter was not at work the week of January 14, 2014.

Based on these findings the ALJ determined that the claimant's travel was not contemplated by the claimant's employment contract. The ALJ specifically noted that the employer did not require the claimant to use his automobile in order to work and the claimant's vehicle was not used to perform job duties and did not confer a benefit to the employer beyond his mere arrival at work. The ALJ, therefore, denied and dismissed the claimant's claim for benefits.

On appeal the claimant argues that the ALJ erred in his application of the factors set forth in *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). The claimant contends the ALJ's finding that he used his vehicle to travel to jobsites and to make trips to Home Depot mandates a conclusion that that the travel was contemplated by the employment contract. The claimant also argues that there is little evidence to support the assertion that Carter paid the claimant to drive him to work. We are not persuaded that the ALJ committed reversible error.

An injury must arise out of and in the course of the claimant's employment to be compensable. Section 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (Colo. 1967). However, there is an exception when

"special circumstances" create a causal relationship between the employment and the travel beyond the sole fact of the employee's arrival at work. *Madden v. Mountain West Fabricators, supra.*; *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989).

In *Madden*, the court listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. These factors are: 1) whether the travel occurred during work hours; 2) whether the travel occurred on or off the employer's premises; 3) whether the travel was contemplated by the employment contract; and 4) whether the obligations or conditions of employment created a "zone of special danger." *Id.* at 864.

The question of whether the claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Staff Administrators Inc., v. Reynolds*, 977 P.2d 866 (Colo. 1999); *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978). The ALJ's factual determinations must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

The pertinent inquiry at issue here is whether the travel was contemplated by the employment contract. The claimant's arguments notwithstanding, the ALJ reasonably inferred that under the facts presented here, the travel was not contemplated by the employment contract because it was the claimant's own choice to pick up Carter and the travel agreement was between them and not with the employer. The ALJ also found that the claimant's use of his personal vehicle did not confer a benefit to the employer and it was his decision to use his personal vehicle to travel to another jobsite or go to Home Depot.

In *Madden* the claimant was injured in a motor vehicle accident while traveling from his home in Grand Junction, Colorado to a construction site in Rifle, Colorado. The accident occurred approximately one hour before the claimant was to begin his duties as a construction worker, and the claimant was not earning wages or paid mileage expenses to drive to work. Although the employer required the claimant to get to the work site, the court concluded that travel was not contemplated by the employment contract because *Madden* was free to car pool or use any method of transportation to get to the job site, and once *Madden* arrived at the job site he was not required to use his own vehicle to perform his job duties. Moreover, the court held that *Madden's* travel on the day of the injuries did not confer a benefit on the employer apart from *Madden's* arrival at work. *Id.*

at 866. Therefore, the court held that Madden's injuries while driving to work were not compensable.

Here, as in *Madden*, the ALJ found the claimant was injured during travel that did not occur during work hours and was not on the employer's premises. Nor was the claimant earning a wage at the time of the injuries, paid for travel or provided a vehicle by the employer. Further, the claimant was not required to use a personal vehicle to get to work and was free to use any transportation method. *Sanchez v. Accord Human Resources*, W.C. No. 4-551-435, 4-552-982 (May 19, 2003). As found by the ALJ, the claimant's job was to perform electrician duties at a designated jobsite. The claimant may have chosen to use his vehicle to travel to jobsites and make trips to Home Depot, but the ALJ found that the claimant's job did not require him to do so. The employer witness testified that employees are not compensated for travel time and it is up to them how they get to a job site. Tr. at 157. The claimant similarly chose to give Carter a ride to work and picking up Carter was not compensated by the employment contract. Therefore, under the factors listed in *Madden*, the claimant failed to demonstrate a nexus between his injuries and his employment. *Hall v. Western Summit Construction, Inc.* W.C. No. 4-689-120 (November 2, 2007)(claim not compensable where claimant injured transporting co-workers to work).

The claimant contends that *Rieks v. On Assignment Inc.*, W.C. No. 4-921-644 (August 12, 2014) and *Norman v. Law Offices of Frak Moya W.C. No 4-919-557* (April 23, 2014), are analogous to the facts of the present case and compel a different result. In both of these cases the panel held that where the contract of employment required the claimant to transport his personal vehicle to the employer's premises or jobsites for the use during the day, an injury occurring to the claimant in the act of transporting that vehicle initially to the jobsite in the morning arises out of the employment and is compensable. However, these cases are distinguishable from the facts of the present case. In *Rieks* and *Norman*, the claimant's use of a vehicle was required. Here, in contrast, the ALJ found, with record support, that the claimant's use of a vehicle was not required on the jobsite or to perform the claimant's electrician duties.

Although the evidence may have been susceptible to different inferences, we cannot say that the ALJ erred in his interpretation of the evidence. There is conflicting evidence in the record and it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. We may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). In view of the employer

witness testimony, we cannot say that the claimant has produced such evidence here. Nor do we perceive any error in the ALJ's finding that Carter was paying the claimant to transport him to the jobsite. The existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

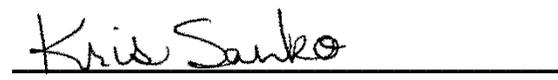
Because the ALJ's findings are supported by substantial evidence and those findings, in turn, support the ALJ's order, we have no basis to disturb the order. Section 8-43-301(8), C.R.S.

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

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

ANTHONY MORRISON
W. C. No. 4-939-901-03
Page 7

CERTIFICATE OF MAILING

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

_____ 2/22/2016 _____ by _____ RP _____ .

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

THE ELLIOTT LAW OFFICES, Attn: MARK D ELLIOTT, ESQ./ALONIT KATZMAN ESQ,
7884 RALSTON ROAD, ARVADA, CO, 80002 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, Attn: LISA SIMONS, ESQ, 1401 17TH ST., STE
900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-614-319-07

IN THE MATTER OF THE CLAIM OF
BEVERLY OLDANI,

Claimant,

v.

FINAL ORDER

HARTFORD FINANCIAL SERVICES.,

Employer,

and

HARTFORD FIRE INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated October 15, 2015, that denied her request for Botox injections. The Respondents appeal the same order because the ALJ failed to acknowledge their request to extinguish their liability for medical benefits after the date of maximum medical improvement (MMI). We affirm the order of the ALJ and deny both appeals.

The claimant had worked for the respondent employer as a litigation consultant until February of 2006. In that capacity the claimant was diagnosed in April, 2004, as suffering from carpal tunnel syndrome (CTS) as a result of her work activities. The claimant was found to be at MMI on April 15, 2007, by a Division Independent Medical Examiner (DIME). The DIME physician concluded the claimant suffered from bilateral CTS myofascial neck pain and carpal metacarpal arthropathy. The respondents filed a Final Admission of Liability on October 1, 2007. The Final Admission allowed for the provision of maintenance medical benefits after the date of MMI.

On April 3, 2008, the parties negotiated a full and final settlement. A provision of the settlement recited that "... the Respondents retain their responsibility to pay all authorized, reasonable/necessary medical care causally related to the industrial injury." After the settlement, the claimant underwent bilateral carpal tunnel release surgeries, a pronator release surgery on her right arm and a radial and pronator release surgery on her left. As of 2015, the claimant was receiving treatment in the form of prescriptions for

Cymbalta, Baclofen and Flexor patches. She also received Botox injections every three months, dry needling treatment, pool therapy and massage therapy.

In December, 2014, one of the claimant's authorized physicians, Dr. Machanic, reviewed a recent EMG study and suggested the claimant had developed a new disease process in the form of axonal nerve problems which was in addition to her previous work related conditions. He noted the new condition had a component of peripheral neuropathy due to metabolic processes such as diabetes or other vitamin deficiencies. Another of the claimant's authorized physicians, Dr. Villims had begun administering Botox injections to control the claimant's pain relative to thoracic outlet syndrome, carpal tunnel syndrome and peripheral nerve entrapments. On February 12, 2015, Dr. Villims submitted a one sentence request for Botox trigger point injections to the respondents. The respondents had the request reviewed by Dr. Roth and submitted a denial of the request based on that review on February 12, 2015. Also on that date the respondents filed an application for hearing. The application endorsed for hearing the specific issue of the request for Botox injections and the general issues of the reasonableness of the medical treatment and the treatment's relation to the work injury. The claimant added the issue of penalties due to an alleged violation of Rule 16-10 (E) and (F) (unreasonable delay of a prior authorization request) and for costs pursuant to § 8-42-101(5) C.R.S.

A hearing was convened on June 10, 2015. Testifying at the hearing was the claimant and Dr. Machanic. The deposition testimony of Dr. Pitzer, Dr. Roth and Dr. Machanic was submitted subsequent to the hearing. In his order of October 15, 2015, the ALJ ruled the request for Botox injections was not related to the claimant's work injury. Instead, he determined the injections were required to treat an underlying rheumatologic condition that affects a widespread axonal dysfunction of the claimant's nerves and was not caused by her 2004 work injury. The request for authorization of the injections was denied. The ALJ also denied the claimant's request for penalties.

On appeal, the claimant contends the ALJ was in error in finding the claimant had not maintained her burden of proof to establish the Botox injections were reasonable and also caused by the work injury. The claimant also argues there is insufficient evidence in the record to conclude she suffers from rheumatoid arthritis. The respondents assert the ALJ committed error by declining to entertain their request to terminate all post MMI medical benefits.

I.

The claimant notes that thoracic outlet syndrome was stipulated by the respondents in the 2008 settlement to be a work related condition. She points to the

testimony of Dr. Machanic that Botox injections are an appropriate treatment for that condition. The claimant also asserts that Dr. Machanic successfully rebutted the testimony of Dr. Pitzer that the long term application of Botox injections leads to an accumulating toxic effect and weakens the patient's muscles. The claimant was noted to have testified that the Botox injections provided her pain relief for her thoracic outlet syndrome. She maintains Dr. Pitzer was not aware the Botox injections were administered in regard to the claimant's thoracic pain. Finally, she observes there is no evidence in the record to indicate she suffers from a rheumatologic condition.

The ALJ made findings of fact in reference to numerous pieces of testimony contained in the record. He found the statements of Dr. Pitzer and of Dr. Roth to be persuasive. Dr. Pitzer noted in his April 20, 2015, report that the Botox injections are being provided to treat myofascial pain and that the medical records do not demonstrate the injections lead to any improvement in the claimant's condition. Neither Dr. Pitzer nor Dr. Roth conclude the claimant has rheumatoid arthritis. However, Dr. Roth noted the claimant testified at the hearing, (Tr. at 45), that she has received treatment for a diagnosis of psoriatic arthritis and was prescribed Humira medication for that condition. Dr. Roth explained psoriatic arthritis is a rheumatologic disorder and functions as a chronic inflammatory disease. Such a malady can contribute to the axonal neuropathy Dr. Machanic found documented by the December, 2014, EMG he conducted. Dr. Roth stated the medication prescribed to treat that condition can cause or aggravate axonal neuropathy. Dr. Roth also noted that when a patient suffers from psoriatic arthritis it is common to see chronic diffuse myofascial disorders. The Botox injections, he believed, are aimed at treating those myofascial pain complaints. Dr. Pitzer also observed that the treatment represented by Botox injections were not only responsible for the side effect of muscle weakness, but, in the claimant's case, failed to cause functional improvement in her condition. He noted the claimant's response to Botox injections was not consistent with the fact that those injections do not provide instant relief. That however, was the testimony of the claimant. Dr. Pitzer concluded the injections were actually providing an effect similar to a placebo. This evidence was adopted by the ALJ in paragraphs 16 through 23 of the ALJ's findings of fact.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337

(Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995). 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. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.d. 1182 (Colo. App. 1990). However, the ALJ is not held to a crystalline standard in articulating his findings, and we may consider findings which are necessarily implied by the ALJ's order. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Initially, to the extent the claimant argues the ALJ erred in allowing Dr. Roth to offer testimony regarding causation, we do not agree. Even if the respondents are obligated to pay ongoing medical benefits after MMI, they always remain free to challenge the cause of the need for continuing treatment and the reasonableness and necessity of specific treatments. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997); *see also Martin v. El Paso School District No. 11*, W.C. No. 3-979-487 (June 6, 2012)(settlement agreement did not preclude respondents from challenging or disputing medical benefits and treatment since the terms unambiguously allowed respondents to contest any treatment or payment of medical bills). If the claimant's contention is that the settlement agreement bars the respondents from opposing a medical treatment on the basis that it is designed to treat thoracic outlet syndrome, which was a diagnosis accepted by the respondents in the settlement agreement, her objection would not apply to this record. Dr. Roth and Dr. Pitzer testified Botox injections were not prescribed to treat thoracic outlet syndrome. Their analysis was that the Botox treatment was aimed at controlling an inflammatory disease process

that was responsible for the deterioration of the claimant's nerve function. The rheumatoid disease, which included psoriatic arthritis and the medication to treat it, were said to lead to myofascial and fibromyalgia disorders which are the targets of the Botox injections. Relying on the testimony, reports and opinions of Dr. Roth and Dr. Pitzer, the ALJ resolved that the Botox injections requested by Dr. Villims were not related to the claimant's work injury of 2004. The ALJ surmised the claimant suffered from a widespread axonal dysfunction of her nerves which was not caused or aggravated by her work exposure or to her 2004 occupational disease. The medical evidence from Dr. Roth and Dr. Pitzer represents substantial evidence to support the findings of the ALJ. Section 8-43-301(8), C.R.S. As a result, we perceive no persuasive reason to question the ALJ's findings or conclusions in this regard.

II.

The respondents appeal the refusal of the ALJ to rule on their request that their further obligations to provide maintenance medical benefits subsequent to the date of MMI (Grover meds) be concluded. At the outset of the June 10, 2015, hearing in the claim, the respondents' counsel stated the respondents were not only resisting the request for Botox injections, but they were asking for a cessation of their responsibility to continue to provide any medical treatment at all. The respondents asserted that because all the treatment the claimant was currently receiving was determined by Dr. Roth and Dr. Pitzer to be unrelated to the 2004 work injury, the respondents should be found absolved of the need to pay for any further medical treatment. The claimant was noted by her counsel to be receiving treatment in the form of medications, including Cymbalta, Baclofen Flexor patches and topical cream. The claimant also received dry needling therapy, pool therapy and massage therapy. The claimant objected to the respondents' issue being considered because it was not raised in an application for a hearing or in any previous motion. The claimant asserted the respondents had the burden of proof on the issue because they were either amending their Final Admission of Liability or reopening the 2008 settlement agreement. Accordingly, the claimant argued they also had the responsibility to plead the issue. The issue of causation in regard to the Botox injections was characterized by the claimant as distinct from the issue of terminating all current and future medical benefits in her claim.

Following the hearing and after the parties submitted their post hearing written arguments, the claimant moved to strike the issue of withdrawal of the final admission regarding maintenance medical benefits. The claimant reiterated as a basis for the motion that neither the issue of modification of the Final Admission nor a petition to reopen the settlement was ever raised by the respondents prior to the June 10 hearing. The

respondents answered that they had endorsed the issue of causation in their pleadings and that it was disclosed in their discovery responses. They also argue that the ALJ ruled prior to the June 10 hearing that they could proceed to defend on the basis that the current treatment was not causally related to the 2004 work injury. The ALJ however, ruled in the claimant's favor on October 7 and struck the issue from consideration. The ALJ did not deal with the issue further in his October 15, 2015, Findings of Fact, Conclusions of Law and Order.

The hearing file contains the respondents' application for hearing as well as their Case Information Sheet. Neither features a reference to a request to withdraw liability for Grover medical benefits or to reopen the 2008 settlement. There is no copy of discovery materials in the file which mentions the issue.

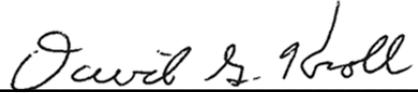
The 2008 settlement agreement contains two statements pertinent to maintenance medical benefits. Paragraph (9) (i) provides that the claimant "is not waiving any reasonable and necessary medical" benefits. Paragraph (11) specifies that "... the Respondents retain their responsibility to pay all authorized, reasonable/necessary medical care causally related to the industrial injury." While the former clause in paragraph (9) would mean the settlement is not taking a position in regard to Grover medical benefits, the latter clause in paragraph (11) is an explicit agreement by the respondents to provide those benefits. Accordingly, the respondents are required by § 8-43-303(1) to reopen the settlement in order to eliminate their obligation to provide reasonable and related medical benefits. In order to do so they must establish the settlement was concluded due to fraud or a mutual mistake of a material fact.

Our review of the ALJ's file does not reveal either that the issue of withdrawing liability for Grover medicals was successfully endorsed as an issue for hearing or that there was presented evidence of fraud or a mutual mistake at the time of the settlement on which an ALJ could rely to grant a reopening. We do not find error in the ALJ's striking of the issue to end the respondents' responsibility to continue to provide all medical treatment in the future. Instead, they reserve their ability to contest specific medical treatment recommendations on the basis they are not reasonable or related. The respondents may also initiate new proceedings in the future to address their continuing obligation for medical benefits contingent on the requirement that they provide sufficient advance notice of the issue.

IT IS THEREFORE ORDERED that the ALJ's order issued October 15, 2015, is affirmed and the appeals of both the claimant and the respondents are denied.

BEVERLY OLDANI
W. C. No. 4-614-319-07
Page 7

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

BEVERLY OLDANI
W. C. No. 4-614-319-07
Page 9

CERTIFICATE OF MAILING

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

_____ 3/9/2016 _____ by _____ KG _____ .

THE BISSET LAW FIRM, Attn: JENNIFER BISSET, ESQ., 1720 S. BELLAIRE, SUITE 500,
DENVER, CO, 80222 (For Claimant)

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-869-417-02

IN THE MATTER OF THE CLAIM OF

TOBY HEFFNER,

Claimant,

v.

FINAL ORDER

WAL-MART STORES INCORPORATED,

Employer,

and

ILLINOIS NATIONAL INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated November 13, 2015, insofar as it determined the rate of recovery of an overpayment. We affirm.

This matter went to hearing to determine whether there was an overpayment of temporary total disability benefits in the amount of \$13,721.35, and, if so, the rate at which the respondents could recover the overpayment. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on October 18, 2011, when pallets from a truck the claimant was loading fell and struck his head and cervical spine. The claimant underwent extensive medical treatment which included a cervical fusion surgery. The claimant received temporary total disability from October 1, 2011, through January 26, 2014, and November 26, 2014, through March 11, 2015.

The claimant was placed at maximum medical improvement by his authorized treating physician on April 15, 2013. The respondents filed a final admission of liability. The claimant objected and sought a Division Independent Medical Examination (DIME). The DIME was performed by Dr. Henke on September 18, 2013. The DIME physician determined that the claimant had not reached MMI and recommended additional treatment.

The authorized treating physician determined that the claimant had reached MMI again in May of 2014. However, in July of 2014, the claimant returned to the DIME physician who again concluded that the claimant had not reached MMI and recommended additional treatment. The respondents filed a general admission of liability and restarted temporary disability benefits while the claimant pursued additional treatment.

The claimant's treating physician placed the claimant at MMI and referred the claimant back to the DIME physician for a third time. The DIME physician examined the claimant on February 4, 2015, and concluded that the claimant had reached MMI on November 26, 2014, and that he had sustained a 20 percent whole person impairment.

The respondents filed a final admission of liability on March 19, 2015, based on the DIME physician's report. The respondents noted that the claimant had an overpayment in temporary total disability benefits in the amount of \$13,721.35. This was the amount of temporary disability benefits paid between November 26, 2014, the date of MMI, and March 11, 2015, the date the final admission was filed. The final admission also admitted for an average weekly wage of \$1822.88 and ongoing maintenance medical benefits.

The ALJ found that although the claimant's permanent impairment rating of 20 percent had a value of \$70,216.94, the claimant had reached the combined benefits cap in §8-42-107.5, C.R.S. and, therefore, the overpaid temporary disability benefits could not be credited against a permanent partial disability award. *See* WCRP 5-6(D) (An insurer shall receive credit against permanent disability benefits for any temporary disability benefits paid beyond the date of maximum medical improvement). The ALJ therefore determined that the respondents were entitled to recover the overpayment of temporary total disability benefits from the claimant in the amount of \$13,721.35. §8-40-201(15.5), C.R.S.; § 8-42-113.5, C.R.S. The ALJ further ordered that the claimant should be ordered to pay this amount back at the rate of \$250 per month which the ALJ determined was reasonable based on the claimant's admitted average weekly wage of \$1822.88.

On appeal, the claimant does not contest the ALJ's determination that there was an overpayment in these circumstances and we do not address that issue here. Rather, the claimant only contests the amount at which the ALJ ordered him to repay the overpayment. We perceive no reversible error on this issue and, therefore, affirm the ALJ's order.

Section 8-42-113.5(1)(c), C.R.S. provides that the insurer is authorized to seek an order for repayment of an overpayment. In the present case the ALJ had discretion to fashion a remedy, and we may not interfere with his determination unless there was an abuse of discretion. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994). An abuse is not shown unless the order is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). We cannot say the order concerning the rate of recoupment constitutes an abuse of discretion.

The transcript reveals that the parties discussed the issue of repayment with the ALJ. The claimant requested that he be ordered to pay \$50 to \$75 per month in the event a repayment was ordered. Tr. at 21. The respondents objected to that rate, stating that repayment at that rate would take almost 23 years and instead proposed a rate of \$250, which they contended was reasonable in relation to the admitted average weekly wage. Tr. at 22. In the claimant's position statement/proposed order, the claimant offers a rate of repayment at \$100 with no other evidence as to his particular financial circumstances. The ALJ found that the claimant is still employed by the employer and found it reasonable to use the admitted average weekly of \$1,822.88 as a basis to conclude that the claimant could pay \$250 per month to pay back the overpaid temporary disability benefits.

The claimant contends in his brief that this amount is not reasonable because his current average weekly wage is less than the admitted average weekly wage and \$250 per month would be unduly burdensome on him financially. As argued by the respondents, the claimant did not present any of these arguments or evidence to support these arguments to the ALJ. We, therefore, cannot consider them on appeal. *Kuziel v. Pet Fair, Inc.* 948 P.2d 103 (Colo. App. 1997). *Pacheco v. Roaring Fork Aggregates*, 897 P.2d 872 (Colo. App. 1995). The ALJ here drew permissible inferences from the record as to the claimant's ability to repay the overpayment. As such, the ALJ did not abuse his discretion and we have no basis to disturb the order on appeal. §8-43-301(8), C.R.S.

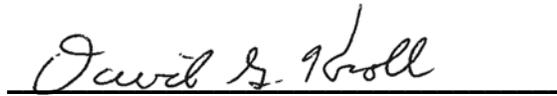
IT IS THEREFORE ORDERED that the ALJ's order dated November 13, 2015, is affirmed.

TOBY HEFFNER
W. C. No. 4-869-417-02
Page 4

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

TOBY HEFFNER
W. C. No. 4-869-417-02
Page 6

CERTIFICATE OF MAILING

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

_____ 4/26/2016 _____ by _____ RP _____ .

BURG SIMPSON, ELDREDGE HERSH & JARDINE, P.C., Attn: NICK D. FOGEL, ESQ, 40
INVERNESS DRIVE EAST, ENGLEWOOD, CO, 80112 (For Claimant)
LEE + KINDER, LLC, Attn: JOHN M. ABRAHAM, ESQ, 3801 EAST FLORIDA AVE,
SUITE 210, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-985-020

IN THE MATTER OF THE CLAIM OF
THOMAS HORIAGON,

Claimant,

v.

CODI MANUFACTURING, INC.,

Employer,

and

SENTRY INSURANCE,

Insurer,
Respondents.

FINAL ORDER

Dr. Horiagon seeks review of an order of Administrative Law Judge Turnbow dated November 23, 2015, (ALJ) that granted the respondents' motion for directed verdict and denied Dr. Horiagon's request for a determination of authorization and request for penalties. We affirm the ALJ's order but for slightly different reasons.

The claimant in this case, Dr. Thomas Horiagon, is not an injured worker. Dr. Horiagon provided treatment to Christopher McDaniel in his alleged workers' compensation injury against Codi Manufacturing and Sentry Insurance. McDaniel eventually settled his claim on a full and final basis. Dr. Horiagon filed an application on his own behalf listing the issues of compensability, medical benefits, authorized provider and penalties. The issue of compensability was resolved by the settlement agreement and is no longer an issue. The issue of medical benefits was also resolved by Dr. Horiagon's acceptance of an additional \$139 from the respondents at hearing. The only issues before the ALJ were authorized treating provider and penalties. We also note that the transcript of the hearing was not designated at the time of the petition to review was filed and, therefore, we must presume the ALJ's findings are supported by the evidence. Section §8-43-301(2), C.R.S.; *see also Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

The ALJ's order states that the respondents offered to stipulate that Dr. Horiagon would have become the authorized treating physician had McDaniel's claim been found

compensable. Dr. Horiagon refused the stipulation. The ALJ granted the respondents' motion for directed verdict finding that Dr. Horiagon failed to present a prima facie case that he would have been the authorized treating physician or that the respondents had violated a provision of the Workers' Compensation Act subjecting them to penalties. The ALJ, therefore, denied and dismissed Dr. Horiagon's claims.

On appeal Dr. Horiagon contends that the ALJ failed to address the issues and renews his contention that he should have been declared the authorized treating physician. As we understand Dr. Horiagon's argument he also contends that the respondents' actions in this case were taken in bad faith, a term he describes as a "disingenuous and self-serving employer and insurer constituting grounds for consideration of penalties." We are not persuaded the ALJ erred in granting the respondents' motion for directed verdict.

We note initially that it does not appear that Dr. Horiagon has standing in this case. Standing is a threshold issue that must be satisfied in order to decide a case on the merits. *Ainscough v. Owens*, 910 P.3d 851, 855 (Colo. 2004); *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 892 (Colo. 2002). A party has standing if the party has alleged an actual injury to a legally protected or cognizable interest. *O'Bryant v. Public Utilities Commission*, 778 P.2d 648 (Colo. 1989); *Bradley v. Industrial Claim Appeals Office*, 841 P.2d 1071 (Colo. App. 1992). With regard to the issue of authorized treating provider, the Workers' Compensation Act does not provide a legally protected interest to treatment from a particular provider. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994) (the Act does not entitle the claimant to receive medical care from a particular medical provider or to receive a particular type of treatment). See also *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993) (the physician but not the claimant had standing to challenge the retroactive denial of payment for the physician's medical treatment in a medical utilization review proceeding, and the claimant cannot assert the challenge on behalf of the physician).

Dr. Horiagon has not sustained an injury in fact. The issue of authorized treating provider has been rendered moot. An issue is moot when the relief sought, if granted, would have no practical effect. *Brown v. Colorado Department of Corrections*, 915 P.2d 1312 (Colo. 1996). If an issue is moot, a court need not consider it. The issue of authorization is moot if the claimant is not entitled to any medical benefits regardless of the identity of the authorized treating physician. See *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993) (distinguishing issue of authorization from reasonableness and necessity for medical treatment). Here, there are no outstanding medical bills and the workers' compensation claim has been settled full

and final. Thus, the question of whether Dr. Horiagon is authorized can have no practical effect on this case and the issue has been rendered moot. *See Rivale v. Beta Metal Inc.*, W.C. No. 4-265-360 (June 18, 1998). Moreover, insofar as Dr. Horiagon is making a claim for penalties based on the respondents' alleged failure to provide the claimant with the requisite choice of providers, the designated provider provisions in these circumstances apply to the injured worker and do not give Dr. Horiagon a cause of action. Consequently, Dr. Horiagon has not sustained an injury and has no standing with regard to the issue of authorized treating provider.

To the extent Dr. Horiagon has standing to pursue the issue of penalties for alleged bad faith, we also perceive no error in the ALJ's decision to grant the motion for directed verdict. The panel previously has recognized that when a case is tried without a jury, Colorado Rules of Civil Procedure (C.R.C.P.) 41(b)(1) is controlling. *Nova v. Industrial Claim Appeals Office*, *supra*. (C.R.C.P. apply insofar as not inconsistent with the procedural or statutory provisions of the Workers' Compensation Act). C.R.C.P. 41(b)(1) provides that after a plaintiff has completed the presentation of his evidence, the defendant may move for a dismissal on the ground that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (1966); *Blea v. Deluxe/Current, Inc.*, W.C. Nos. 3-940-062 (June 18, 1997) (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the claimant. Rather, the test is whether judgment for the respondent is justified on the claimant's evidence. *American National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (March 23, 1998).

Here, Dr. Horiagon requested the imposition of penalties under §8-43-304(1), C.R.S. , which allows an ALJ to impose penalties of up to \$1000 per day for an party's violation of the Workers' Compensation Act. *See Holliday v. Bestop Inc.*, 23 P.3d 700 (Colo. 2001). The imposition of penalties under § 8-43-304(1) requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of the Act. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, penalties may not be imposed unless the actions which resulted in the violation were objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). In this regard, an insurer's actions are not objectively unreasonable if they are predicated

on a rational argument based in law or fact. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997).

As noted by the ALJ, §8-43-304 (4), C.R.S., requires that the party requesting penalties "shall state with specificity the grounds on which the penalty is being asserted." Failure to state with specificity the grounds on which a penalty is asserted subjects a claim for penalties to dismissal. See *Salad v. JBS USA, LLC*, W.C. No. 4-886-842-04 (March 5, 2014); *Young v. Bobby Brown Bail Bonds, Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Gonzales v. Denver Public School District Number 1*, W. C. Nos. 4-437-328, 4-441-546 (December 27, 2001); *Brown v. Durango Transportation Inc.*, W. C. No. 4-255-485 (October 2, 1996).

We agree with the ALJ that Dr. Horiagon failed to state a basis for the alleged penalty claim. The claimant's application for hearing and response to the motion for directed verdict make reference to a medical billing dispute and an interlocutory order from the Director. The July 27, 2015, Director's order referred the matter to the Office of Administrative Courts due to the fact that the claimant had previously filed an application for hearing on these issues and we do not read it as setting forth a basis for penalties in this matter. Dr. Horiagon otherwise makes general allegations of bad faith in the respondents' actions but did not identify the statute, rule or order allegedly violated by the respondents' alleged bad faith conduct. The imposition of penalties is restricted to the violation of provisions of the Act or orders, while damages for bad faith adjusting are left to the civil law and courts. See *Allison v. Industrial Claim Appeals Office, supra*, *Villa v. Wayne Gomez Demolition and Excavating, Inc.*, W.C. No. 4-236-951 (January 7, 1997). Dr. Horiagon's general allegations of bad faith here do not support an award of penalties under 8-43-304(1), C.R.S. The ALJ, therefore, did not err in granting a directed verdict in favor of the respondent.

IT IS THEREFORE ORDERED that the ALJ's order dated November 23, 2015, is affirmed.

THOMAS HORIAGON
W. C. No. 4-985-020
Page 5

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


Kris Sanko

THOMAS HORIAGON
W. C. No. 4-985-020
Page 7

CERTIFICATE OF MAILING

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

_____ 3/15/2016 _____ by _____ KG _____ .

THOMAS M HORIAGON, 9146 PRINCETON ST, HIGHLANDS RANCH, CO, 80130
(Claimant)

SENTRY INSURANCE, Attn: GABIRELLE SWANN, PO BOX 8032, STEVENS POINT, WI,
54481 (Insurer)

THOMAS M. HORIAGON, 26 W. DRY CREEK CIRCLE, LITTLETON, CO, 80120 (For
Claimant)

RITSEMA & LYON, P.C., Attn: J. P. MOON, ESQ, 999 18TH ST, SUITE 3100, DENVER,
CO, 80202 (For Respondents)

15CA0231 Restaurant Tech v ICAO 02-04-2016

COLORADO COURT OF APPEALS

DATE FILED: February 4, 2016
CASE NUMBER: 2015CA231

Court of Appeals No. 15CA0231
Industrial Claim Appeals Office of the State of Colorado
WC No. 491-542-001

Restaurant Technologies, Inc. and Hartford Fire Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Timothy Fortune,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE NAVARRO
Terry and Freyre, JJ., concur

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

Announced February 4, 2016

Hall & Evans, LLC, Megan E. Coulter, Alyssa L. Levy, Denver, Colorado, for
Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Levine Law, LLC, Patrick A. Barnes, Denver, Colorado, for Respondent Timothy
Fortune

In this workers' compensation action, Restaurant Technologies, Inc., and its insurer, Hartford Fire Insurance Company c/o York Risk Services Group (collectively employer), seek review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) increasing the average weekly wage (AWW) of claimant, Timothy Fortune. The ALJ increased claimant's AWW to include the cost of health insurance. We affirm.

I. Background

Claimant sustained an admitted, work-related injury in March 2013, and became eligible for temporary total disability benefits. Unable to accommodate claimant's work restrictions, employer terminated claimant's employment in August 2013.

Before his termination, employer had been paying approximately two-thirds of claimant's health insurance premium. After terminating claimant's employment, employer sent him information about continuing coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1166 (2012). Under the offered COBRA plan, employer would continue paying about two-thirds of claimant's premium; claimant would pay

the balance. Because claimant could not afford to pay any portion of the premium, however, he did not elect COBRA coverage.

At the hearing and in its subsequent position statement, employer maintained that claimant was not entitled to an increase in his AWW because he had not elected any coverage. Although the ALJ initially agreed with employer, upon reviewing claimant's petition to review, the ALJ ruled that claimant was entitled to an increase in his AWW equivalent to the full cost of covering his health insurance premium under COBRA. The Panel affirmed, and this appeal followed.

II. Analysis

Employer contends that, because claimant failed to elect a particular health insurance plan, he should not receive the equivalent cost of continuing health insurance provided through employer under COBRA. Employer argues that, in the absence of claimant's election of a specific plan, the actual cost of claimant's health insurance premium is unknown and could be less than the cost of COBRA, leaving claimant with a potential windfall. In addition, employer points out that, unless a specific plan has been elected, claimant "may use that increase in any way he pleases"

rather than toward a health insurance plan as the legislature intended. Therefore, employer suggests that claimant should seek to increase his AWW only after he has secured coverage and the cost is known. We are not persuaded by these arguments to set aside the Panel's order.

As pertinent here, the Workers' Compensation Act (Act) defines wages as follows:

(a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. . . . If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

§ 8-40-201(19), C.R.S. 2015. Employer argues that, under this provision, the cost of health insurance should not be included in

claimant's AWW because employer had been paying a portion of claimant's cost before his termination and would have continued to do so had claimant elected a plan.¹

Employer relies on the narrow, and still valid, holding in *Midboe v. Indus. Claim Appeals Office*, 88 P.3d 643, 644 (Colo. App. 2003), *overruled on other grounds by Indus. Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), that “the amount a claimant pays as his share of the premium for group health and dental insurance coverage [is not] included in the calculation of his average weekly wage *when the employer continues to pay its share of the premium.*” *Indus. Claim Appeals Office v. Ray*, 145 P.3d at 667. As the supreme court observed in *Ray*, section 8-40-201(19)(b) “expressly” provides that, when an employer pays a portion of a claimant's health insurance premium, the amount paid by the claimant shall not be included in the AWW. *Ray*, 145 P.3d at 667. Citing this

¹ In its Opening Brief, employer also asserts that it “continued to pay Claimant's health insurance premiums, including his portion of the insurance premiums, even after Claimant's termination.” However, the record does not support this assertion. To the contrary, the evidence cited by employer, a letter it sent to claimant in June 2013, states that while claimant was “on leave” employer was “covering the cost of [claimant's] benefits for the missed payrolls so that [his] benefits remain[ed] active.” This letter predates the termination of claimant's employment.

language, employer essentially argues that, because it *intended* to continue paying a portion of claimant's premium, the amount of the premium should not be included in claimant's AWW.

But *Midboe* is factually distinguishable from the case before us because employer here was *not* paying any portion of a health insurance premium for claimant after his termination. The COBRA policy lapsed because claimant was unable to pay his share and did not elect a plan. Employer downplays this distinction by focusing on claimant's failure to *elect* a plan as the precipitating event which bars inclusion of the cost of premiums in AWW. As we read *Ray*, however, it is the *actual payment* of premiums by an employer that may alleviate its obligation to include health care premiums in AWW. To read the statute otherwise — to exclude those costs from AWW if a claimant fails to elect a coverage plan — incorporates a non-existent provision into the statute, which we are not permitted to do. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (“We have uniformly held that a court should not read nonexistent provisions into the Colorado Work[er]’s Compensation Act.”).

Indeed, a careful reading of *Ray* reveals that the supreme court considered the very scenario posed in this case. Like claimant here, one of the claimants in *Ray*, Jodie Marsh, “chose not to continue her coverage under COBRA or to purchase substitute health insurance.” *Ray*, 145 P.3d at 663. The supreme court rejected the employers’ request “to include the value of an employee’s health insurance as part of the average weekly wage only when an employee *elects* and continues coverage according to the method defined by . . . COBRA, and the equivalent Colorado statute.” *Id.* at 667 (emphasis added). Thus, we disagree that *Ray* is distinguishable from or inapplicable to this case.

Employer also articulates policy reasons for the exclusion of health care insurance costs from AWW if a claimant fails to elect a plan. It argues that, because claimant did not elect a plan, the cost is uncertain and will likely vary from the known cost of the COBRA policy. It points out that, if and when claimant obtains a health insurance policy, the cost could be significantly less than the COBRA premium calculated into AWW, giving claimant a potential windfall. Employer also worries that claimant could use the

increased AWW funds in any manner he chooses, not necessarily for health insurance coverage.

In our view, though, claimant's failure to elect coverage is inconsequential. The policy concerns employer highlights have, in fact, already been rejected. As employer concedes, the statute "does not require proof that the claimant actually purchased the coverage." *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). "When and where to purchase coverage is a decision for the claimant. The statute merely seeks to ensure that the claimant will have funds available to make the purchase." *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546, 549 (Colo. App. 2001). Thus, there is a risk in every case in which a claimant's AWW is increased to cover the cost of health insurance that the claimant might not use the increased AWW funds to purchase a health insurance policy. That risk, however, does not permit us to disregard the statute's directives.

In addition, the purpose of the statute is to enable a claimant, who may not otherwise have the means, to obtain health insurance coverage. *See id.* ("[T]he General Assembly enacted

§ 8-40-201(19)(b) to ensure that the claimant has sufficient funds available to purchase health insurance, regardless of whether the cost is more or less than the employer's cost of providing similar insurance.”) Claimant here testified that he could not afford his portion of the premium with the funds he was receiving. Thus, the increased AWW could accomplish the statute's goal of providing him the means to purchase necessary insurance. In the event that the policy chosen by claimant costs more or less than the calculated cost of insurance under COBRA, either party may seek a readjustment of the AWW. See § 8-43-303, C.R.S. 2015; *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 152 (Colo. App. 2007) (permitting recalculation of AWW in conjunction with reopening for a change in condition), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *Schelly v. Indus. Claim Appeals Office*, 961P.2d 547, 548 (Colo. App. 1997).

Finally, employer's concern that a claimant's failure to purchase coverage could run afoul of the Affordable Care Act is an issue beyond the scope of this appeal. See 26 U.S.C. § 5000A (2012).

Accordingly, we agree with the Panel that claimant's failure to elect coverage is inconsequential to the determination of AWW. The ALJ correctly increased claimant's AWW to include the cost of obtaining health insurance coverage as calculated under COBRA. To the extent employer asserts that the ALJ also improperly ordered it to pay interest, we necessarily reject this contention because we have concluded that the ALJ properly increased claimant's AWW.

III. Conclusion

The order is affirmed.

JUDGE TERRY and JUDGE FREYRE concur.

Court of Appeals No. 15CA1165
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-951-385

DATE FILED: February 25, 2016
CASE NUMBER: 2015CA1165

Youngquist Brothers Oil & Gas, Inc.,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Travis Miner,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE DUNN
Richman and Berger, JJ., concur

Announced February 25, 2016

Treece Alfrey Musat P.C., James B. Fairbanks, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Killian & Davis P.C., Damon J. Davis, Christopher H. Richter, Grand Junction, Colorado, for Respondent Travis Miner

¶ 1 Youngquist Brothers Oil & Gas, Inc., has no business operations in Colorado, but it recruits employees from Colorado to work on its North Dakota oil rigs. Within days of being hired, one of these Colorado recruits, Travis Miner, was injured in North Dakota while working on a Youngquist oil rig. Miner returned to Colorado and sought benefits under the Workers' Compensation Act of Colorado (Act), §§ 8-40-101 to 8-47-209, C.R.S. 2015.

¶ 2 The administrative law judge (ALJ) awarded Miner benefits, concluding he was hired in Colorado and suffered a compensable work-related injury. Because Youngquist did not carry Colorado workers' compensation insurance, the ALJ also imposed a fifty percent penalty against Youngquist. The Industrial Claim Appeals Panel (Panel) affirmed the ALJ's order.

Youngquist contends it is not subject to the Act and therefore the Panel's decision should be set aside. We disagree and affirm.

I. Background

¶ 3 Youngquist is an oil and gas company with operations in North Dakota. It hires workers nationally and internationally, but primarily from Texas, Oklahoma, Indiana, and Colorado. It

maintains workers' compensation insurance in North Dakota, but not in Colorado.

¶ 4 Miner lived in Grand Junction, Colorado. After learning that Youngquist was looking for employees to work on its oil rigs in North Dakota, Miner submitted an online application. Later that day, a Youngquist representative called Miner and conducted a telephonic interview. Miner testified that at the conclusion of the interview, Youngquist offered him a job, which he accepted. Youngquist then arranged for Miner to fly to North Dakota the following day. A Youngquist representative met Miner at the airport and took him to get supplies before driving him to Youngquist's offices.

¶ 5 Once there, Miner completed new employee paperwork and passed a preliminary drug screen. He also provided a hair follicle for a drug test, the results of which were not immediately available. After completing the paperwork and the preliminary drug screen, Miner began his first evening rig shift.

¶ 6 During the following evening shift, Miner slipped and fell down the rig's stairs, hurting his back. Miner did not immediately report

the injury to Youngquist because he did not “want to be that guy that got hurt the second day of work.” Miner worked three more shifts and then reported his injury to his supervisor.

¶ 7 Youngquist agreed to allow Miner to seek medical treatment in Colorado and arranged for Miner to return to Colorado. Miner’s treating physician concluded that although Miner had a pre-existing back injury, the condition was worsened by his work-related fall.

¶ 8 Miner filed a workers’ compensation claim with North Dakota Workforce Safety and Insurance. North Dakota denied his claim without a hearing, apparently due to Miner’s pre-existing back condition.¹

¶ 9 Miner then filed a claim for workers’ compensation benefits in Colorado. After a hearing, the ALJ determined that Miner was hired

¹ Unlike Colorado, North Dakota does not consider injuries attributable to pre-existing conditions to be compensable “unless the employment substantially accelerates its progression or substantially worsens its severity.” N.D. Cent. Code § 65-01-02(10)(b)(7) (2015); *compare id.* (excluding “[i]njuries attributable to a preexisting . . . condition”), *with H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990) (stating that a pre-existing medical condition does not preclude an employee from suffering a compensable injury under the Act).

in Colorado and his claim was therefore subject to the Act. The ALJ further found Miner suffered a compensable work-related injury, awarded him benefits, and imposed a fifty percent penalty on Youngquist for failing to carry workers' compensation insurance in Colorado.

II. Jurisdiction

¶ 10 Youngquist contends it is not subject to the Act because (1) it does not conduct business in Colorado; (2) Miner was not hired in Colorado; and (3) it does not have sufficient contacts with Colorado to establish personal jurisdiction. We disagree.

A. The Extraterritorial Provision

¶ 11 Colorado has jurisdiction to award benefits for out-of-state work-related injuries if an employee was (1) hired or regularly employed in Colorado and (2) injured within six months of leaving Colorado. § 8-41-204, C.R.S. 2015; *see also Hathaway Lighting, Inc. v. Indus. Claim Appeals Office*, 143 P.3d 1187, 1189 (Colo. App. 2006) (Section 8-41-204 “addresses entitlement to compensation for injuries occurring outside Colorado.”).

¶ 12 Youngquist argues that because it has no business operations in Colorado, the extraterritorial provision does not apply to it. But the extraterritorial provision does not require an employer hiring a Colorado employee to have other contacts with Colorado.

§ 8-41-204; *see generally Hathaway Lighting, Inc.*, 143 P.3d at 1190. Nor is the provision limited to Colorado employers or employers who conduct business in Colorado. § 8-41-204. If an employer hires an employee in Colorado, that is enough. *Id.*; *see also State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 592-93, 298 P.2d 963, 968 (1956).

¶ 13 The power to extend protection to workers injured beyond its borders is rooted in Colorado's interest in the welfare and protection of its citizens and their dependents. *Howington*, 133 Colo. at 592-93, 298 P.2d at 968. Such power falls within Colorado's legitimate police powers. *See id.*; *see also Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 542-43 (1935) (upholding California's extraterritorial provision and recognizing California's "legitimate public interest in controlling and regulating" the

employment relationship and “in providing a remedy available” in California).

¶ 14 In light of the strong policy interests underpinning extraterritorial workers’ compensation provisions, Colorado is hardly alone in providing protection to employees hired in state and injured outside its borders. Indeed, most states have some form of extraterritorial workers’ compensation provisions. *See* 1 *Modern Workers Compensation* § 104:16, Westlaw (database updated Nov. 2015) (collecting provisions and cases). Even North Dakota — where Youngquist operates — imposes extraterritorial jurisdiction in certain circumstances. *See* N.D. Cent. Code § 65-08-01 (2015).

¶ 15 We therefore are not persuaded by Youngquist’s contention that it is not subject to the Act because — other than recruiting and hiring employees in Colorado — it conducts no business in this state. The extraterritorial provision means what it says. If an employer hires a Colorado employee in this state and the employee

is injured within six months of leaving Colorado, the employer is subject to the Act.²

B. The Place of Hire

¶ 16 Because it is undisputed Miner was injured within six months of leaving Colorado, the extraterritorial provision applies if Miner was hired in Colorado. Youngquist contends that Miner was hired in North Dakota and that the ALJ erred in finding Miner was hired in Colorado. We disagree.

¶ 17 Where a contract is made is generally determined by the parties' intent. *See Denver Truck Exch. v. Perryman*, 134 Colo. 586, 592, 307 P.2d 805, 810 (1957). “[I]t is considered to be the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed.” *Id.* (citation omitted). As long as the fundamental elements of contract formation are present, however, an employment contract may be

² At oral argument, Youngquist asserted that affirming the ALJ's decision subjects it to unbounded jurisdiction in every state when one of its out-of-state workers is injured in North Dakota. Not true. We offer no opinion on whether Youngquist is subject to jurisdiction in other states. And the Act's extraterritorial provision is not without bounds. It applies to employees hired in Colorado and injured within six months of leaving Colorado.

formed even though not every formality attending commercial contracts is observed. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384, 1387 (Colo. 1994); see generally 13 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 47.10 (2015) (discussing contract of hire principles in the context of workers' compensation acts).

¶ 18 The existence of a contract for hire is a question of fact to be determined by the fact finder. See *Tuttle v. ANR Freight Sys., Inc.*, 797 P.2d 825, 827 (Colo. App. 1990) (it is for the jury to decide whether a contract exists). We uphold an ALJ's factual determination if it is supported by substantial record evidence. § 8-43-308, C.R.S. 2015; see also *Rocky Mountain Dairy Prods. v. Pease*, 161 Colo. 216, 222-23, 422 P.2d 630, 633 (1966) (industrial commission's determination that contract of hire was formed between employer and employee would not be set aside where "supported sufficiently by the record").

¶ 19 Specifically crediting Miner's testimony, the ALJ found that the last act necessary to complete Miner's hire occurred in Colorado when Youngquist telephonically offered Miner a job — and Miner

accepted the job offer — while he was at home in Colorado. The ALJ also found that Youngquist’s actions after the telephone call supported the finding that Miner was offered and accepted employment in Colorado. In particular, Youngquist arranged and paid for Miner’s flight, met him at the airport, transported him to Youngquist’s offices, and had him working on an oil rig shortly after completing paperwork and passing a preliminary drug screen.

¶ 20 To be sure, Youngquist presented testimony from which different inferences could be drawn. Specifically, Youngquist’s office and safety manager testified that all offers of employment are conditional and only become permanent following successful completion of a drug test and a hair follicle test. But in weighing that testimony, the ALJ noted that the office and safety manager also testified that an employee would be removed from the jobsite and “terminated” if he failed to pass his drug screen. The ALJ found that such testimony implied that Miner “at that point” was “under a contract of hire.” The ALJ therefore rejected the position advanced by Youngquist — that Miner was not yet hired when he arrived in North Dakota.

¶ 21 Youngquist disagrees with the ALJ’s findings and asks this court to find that Miner was not hired until he completed paperwork and passed the drug test in North Dakota. To the extent Youngquist generally contends an employment contract cannot be formed until the completion of all employment-related paperwork or drug testing, we disagree. *E.g., Shehane v. Station Casino*, 3 P.3d 551, 555-56 (Kan. Ct. App. 2000) (where employee accepted telephonic job offer while in Kansas, requirement that employee pass drug test before beginning out-of-state employment did not affect formation of the underlying contract); *accord Potter v. Patterson UTI Drilling Co.*, 234 P.3d 104, 108-10 (N.M. Ct. App. 2010); *see also Murray v. Ahlstrom Indus. Holdings, Inc.*, 506 S.E.2d 724, 726-27 (N.C. Ct. App. 1998) (rejecting argument that last act for employment contract occurred outside North Carolina where employee was offered and accepted employment by phone while in North Carolina but completed “requisite paperwork” in Mississippi).

¶ 22 As well, we decline Youngquist’s invitation to reweigh the evidence. We, in fact, are not at liberty to do so. It was for the ALJ to weigh the testimony, assess credibility, and resolve any

competing inferences or disputes in the evidence. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). “If two equally plausible inferences may be drawn from the evidence, we may not substitute our judgment for that of the ALJ.” *Id.*

¶ 23 Because substantial evidence supports the ALJ’s finding that the “last act necessary” to form the employment relationship occurred in Colorado, we may not disturb that finding.

C. Minimum Contacts and Comity

¶ 24 Youngquist next advances two constitutional reasons why it should not be subject to the Act. First, it argues that it lacks sufficient minimum contacts to establish personal jurisdiction in Colorado. Second, it contends that enforcing the Colorado benefits award violates principles of comity because North Dakota denied Miner’s workers’ compensation claim. We reject the first argument and, because it is not developed, do not reach the second.

1. Minimum Contacts

¶ 25 Relying primarily upon non-workers’ compensation cases, Youngquist argues that it does not have sufficient contacts with Colorado to subject it to jurisdiction here. Workers’ compensation

cases, however, are different. *See Alaska Packers*, 294 U.S. at 540-41. And such cases do not require the same extent of contacts as other types of cases, including tort cases. *See id.*

¶ 26 In *Alaska Packers*, a person living in California was hired in California to work in Alaska during salmon canning season. *Id.* at 538. He was injured in Alaska and returned to California, where he filed a workers' compensation claim and received benefits. *Id.* at 538-39. The employer appealed, asserting, among other arguments, a due process bar to the employee's claim. *Id.* at 539. The Supreme Court affirmed, rejecting the due process claim. *Id.* at 543.

¶ 27 The Supreme Court observed that the contacts might have been insufficient to support the exercise of jurisdiction over a tort claim, but it explained that the execution of the employment contract in the state, by a person living in the state, distinguished the case from a tort claim. *Id.* at 540-41 (“[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation, and its sanctions are subject, in some measure, to the legislative control of the state.”). The Court

concluded that objections to a state’s exercise of jurisdiction in this circumstance must be directed “not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process.” *Id.* at 541-42. And the Court could not say that California’s extraterritorial provision “lacks a rational basis or involved any arbitrary or unreasonable exercise of state power.” *Id.* at 543.

¶ 28 Applying the *Alaska Packers* rationale, other courts have concluded that out-of-state employers may be subject to the workers’ compensation laws of those states where they hire employees. See, e.g., *Bowen v. Workers’ Comp. Appeals Bd.*, 86 Cal. Rptr. 2d 95, 105 (Cal. Ct. App. 1999) (holding that California resident injured outside California while working for out-of-state employer was entitled to California workers’ compensation benefits); *Cavers v. Hous. McLane Co.*, 958 A.2d 905, 908 (Me. 2008) (out-of-state employer subject to Maine’s workers’ compensation jurisdiction where it entered into employment contract in Maine and employee was injured outside Maine); *Rodwell v. Pro Football*,

Inc., 206 N.W.2d 773, 780 (Mich. Ct. App. 1973) (out-of-state employer subject to Michigan Workmen's Compensation Act where it hired a Michigan resident in Michigan and injury occurred out of state); *Pierce v. Foley Bros.*, 168 N.W.2d 346, 354 (Minn. 1969) (stating that if Oklahoma employee who was injured in Montana was hired in Oklahoma by Montana employer, employer was subject to Oklahoma's workers' compensation act); *Houle v. Stearns-Rogers Mfg. Co.*, 157 N.W.2d 362, 365-67 (Minn. 1968) (affirming Minnesota benefits award to a Minnesota employee injured in South Dakota while employed by a Colorado employer where employment contract was entered into in Minnesota).

¶ 29 No Colorado case has expressly applied the principles articulated in *Alaska Packers* to out-of-state employers hiring Colorado employees. The principles have been applied, however, to cases involving Colorado employees injured outside Colorado while working for a Colorado employer. *Howington*, 133 Colo. at 595-96, 298 P.2d at 970 (Colorado resident injured in Utah entitled to Colorado workers' compensation benefits); see also *Moorhead Mach. & Boiler Co. v. Del Valle*, 934 P.2d 861, 864 (Colo. App. 1996)

(deciding that Colorado had jurisdiction over employee's workers' compensation claim where a Colorado union member was hired in Colorado but injured in Wyoming), *abrogated on other grounds by Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).³

¶ 30 Because the *Alaska Packers'* jurisdictional analysis hinged on where the employment relationship was entered into and the state's legitimate interest in the protection of its residents, we see no principled reason why the rationale does not apply with equal force to any employer hiring employees in Colorado. And Youngquist points to no case concluding otherwise. Thus, if an employer hires an employee in Colorado and the employee is injured within six months of leaving Colorado, the employee may seek benefits under the Act.

¶ 31 For two reasons, we are not persuaded by Youngquist's assertion that *Alaska Packers* is factually distinguishable because

³ In *Moorhead Machine & Boiler Co. v. Del Valle*, the employer contacted the Denver union hall when it had job openings, and the union provided appropriately skilled employees. 934 P.2d 861, 862-63 (Colo. App. 1996), *abrogated on other grounds by Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The opinion does not say whether the employer was a Colorado employer or an out-of-state employer.

“the injured worker [in *Alaska Packers*] might have been ‘remediless’” if the Supreme Court did not apply California’s workers’ compensation act and “[t]hat is not the situation here.” First, it is the situation here. Miner’s North Dakota workers’ compensation claim was denied without a hearing. If Colorado were unable to exercise jurisdiction, Miner would be left with no remedy for his work-related injury, leaving the very real possibility that he “might become [a] public charge[]” — a matter of “grave public concern” to Colorado. *Alaska Packers*, 294 U.S. at 542. Second, even assuming Miner was not “remediless,” the Supreme Court’s jurisdictional analysis hinged on the location of the employment contract and a state’s interest in protecting the contracting employee. *See id.* at 542-43. Both of these factors support Colorado’s jurisdiction.⁴

⁴ At oral argument, Youngquist repeatedly suggested that we should not follow *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935), because it was decided in 1935 and does not reflect modern employment realities. The age of the decision, however, does not impact its precedential vitality. And that a worker may be hired in one state to work in another state (and is then injured) is far from a dated employment practice.

¶ 32 Finally, to the extent Youngquist argues it was denied due process because it had no notice that it could be subject to the Act’s extraterritorial provision, we do not agree. The Act’s extraterritorial provision is unambiguous and is not limited to Colorado employers. And *Alaska Packers* was decided over seven decades ago. It provided Youngquist with notice that state courts can exercise jurisdiction over work-related injuries occurring outside the state’s territorial boundaries where an employment contract was entered into in the state.

¶ 33 Accordingly, because Youngquist hired Miner in Colorado and Miner was injured within six months of leaving this state, Colorado had jurisdiction over Miner’s workers’ compensation claim.

2. Comity

¶ 34 Youngquist asserts that “dual jurisdiction” in Colorado is “patently unfair and constitutionally inappropriate” under principles of comity. Beyond this general assertion, however, Youngquist does not explain why principles of comity are violated, nor does it cite any relevant supporting legal authority. Because this argument is not sufficiently developed, we decline to address it.

E.g., Middlemist v. BDO Seidman, LLP, 958 P.2d 486, 495 (Colo. App. 1997) (failing to identify specific errors and provide supporting legal authority results in affirmance).

III. Penalty for Failure to Carry Colorado Insurance

¶ 35 Having rejected Youngquist’s argument that it was not subject to the Act, we necessarily reject its argument that the ALJ erred in applying the Act’s penalty provision.

¶ 36 Colorado imposes a fifty percent penalty on employers subject to the Act who fail to carry workers’ compensation insurance. § 8-43-408(1), C.R.S. 2015; *see also Kamp v. Disney*, 110 Colo. 518, 522, 135 P.2d 1019, 1021 (1943). The penalty is mandatory, not discretionary. § 8-43-408(1); *accord Eachus v. Cooper*, 738 P.2d 383, 386 (Colo. App. 1986). Because Youngquist admittedly did not carry Colorado workers’ compensation insurance, the ALJ was required to impose the fifty percent penalty. *Eachus*, 738 P.2d at 386 (“Courts have no discretion in imposing the penalty.”).

IV. ALJ’s Resolution of Evidentiary Conflicts

¶ 37 Last, Youngquist argues the ALJ failed to resolve conflicts in the evidence as required by section 8-43-301(8), C.R.S. 2015. We disagree.

¶ 38 An “ALJ is required to make specific findings only as to the evidence [the ALJ] found persuasive and determinative.” *Gen. Cable Co. v. Indus. Claim Appeals Office*, 878 P.2d 118, 120-21 (Colo. App. 1994). An ALJ has no obligation to address every issue raised or any particular evidence which the ALJ finds unpersuasive. *Id.* Nor are we aware of any requirement that an ALJ must review and discuss the testimony of each and every testifying witness.

¶ 39 The ALJ found that Miner suffered a work-related injury. In so finding, the ALJ expressly credited Miner’s testimony that he fell while working on the oil rig and suffered a back injury. The ALJ also credited Miner’s doctor’s testimony “as being persuasive on the issue of compensability.” Based on the doctor’s testimony, the ALJ found that the work-related fall aggravated Miner’s underlying pre-existing condition and was compensable under Colorado law.

¶ 40 The ALJ’s findings, however, did not comment on the testimony of a Youngquist employee who stated that “there’s

typically a lot of people” on the rigs and it is unlikely that someone could have an accident without being observed. The employee admitted he was “not really” familiar with Miner, and he offered no direct testimony about Miner’s accident or injury.

¶ 41 We perceive no error in the ALJ’s findings. In crediting Miner’s explanation of his fall and injury, the ALJ implicitly rejected the speculation that someone would have seen Miner’s fall because “there’s typically a lot of people” working on the rig. And the ALJ expressly stated that he “ha[d] not addressed every piece of evidence that might lead to a conflicting conclusion and ha[d] rejected evidence contrary” to the findings of fact. The ALJ therefore did consider and reject Youngquist’s employee’s testimony.

¶ 42 The ALJ properly weighed the evidence and provided sufficient and specific reasons for his finding that Miner suffered a compensable work-related injury. The decision is supported by substantial record evidence. Accordingly, we may not disturb the ALJ’s finding.

V. Conclusion

¶ 43 The Panel’s order is affirmed.

JUDGE RICHMAN and JUDGE BERGER concur.

Court of Appeals No. 15CA1210
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-907-349

DATE FILED: April 21, 2016
CASE NUMBER: 2015CA1210

Amerigas Propane and Indemnity Insurance Company of North America,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Victor England,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BERNARD
Furman and Rothenberg*, JJ., concur

Announced April 21, 2016

Lee + Kinder, LLC, Joshua Brown, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

The Elliot Law Officers, Alonit Katzman, Mark D. Elliot, Arvada, Colorado, for
Respondent Victor England

*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 Should an administrative law judge reopen a settlement of a workers' compensation claim on the grounds of mutual mistake of material fact if (1) the worker later discovered an injury that was unknown at the time of the settlement and that was related to the original injury; and (2) the settlement agreement clearly stated that the worker would forever waive his right to ask his employer for compensation for any such unknown injuries? Under the facts of this case, we conclude that the answer to this question is "no."

¶ 2 The worker in this case, Victor England, was injured while working for the employer, Amerigas Propane. (Amerigas's insurer, Indemnity Insurance Company of North America, is also a party to this case. Because the insurer's interests are aligned with Amerigas's interests for the purposes of this appeal, we shall refer to them collectively as "the employer.>"). The worker filed a claim for compensation.

¶ 3 The worker and the employer agreed to settle the claim. The worker later moved to reopen the claim. An administrative law judge (ALJ) agreed with the worker's contentions, and she reopened the claim. The employer appealed the ALJ's order to a panel of the Industrial Claim Appeals Office. The Panel affirmed.

¶ 4 The employer then filed this appeal. We set aside the order because we conclude that the Panel's decision affirming the ALJ's order reopening the claim was not supported by the applicable law.

I. Background

¶ 5 The worker, a truck driver, fell on some ice while he was making a delivery for the employer in December 2012. He seriously injured his right shoulder. The employer admitted that this injury was related to the worker's job.

¶ 6 Surgeons operated on the shoulder twice to repair the injury, once in February of 2013 and once in May of the same year. The February surgery was significant. It was a total shoulder replacement. The worker's shoulder dislocated after the first surgery, so the surgeons operated again in May to correct that problem.

¶ 7 In September 2013, the worker and the employer agreed to settle the worker's claim. The worker had not yet reached maximum medical improvement, so he had not received a permanent impairment rating. He nonetheless decided to settle his claim.

¶ 8 The worker and the employer executed a standard written settlement agreement that the Division of Workers' Compensation had previously approved to be used in all workers' compensation settlements. The worker and the employer were represented by attorneys when they negotiated and then executed the agreement.

¶ 9 The agreement contained several conditions that are pertinent to this appeal.

¶ 10 The introductory paragraph stated that, because the parties wanted "to avoid the expense and uncertainty of litigation," they "wish[ed] to FOREVER" settle the worker's claim.

¶ 11 Paragraph one described the "alleged injuries" that the agreement covered. They were "cervical pain strain sprain"; "bilateral shoulder pain"; "thoracic pain strain sprain"; and "lumbar pain strain sprain." Paragraph one also stated that "[o]ther disabilities, impairments and conditions that may be the result of these injuries . . . but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement."

¶ 12 The employer paid the worker \$35,000.

¶ 13 Paragraph four of the agreement stated: “The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact.”

¶ 14 Paragraph six read:

[The worker] realizes that there may be unknown injuries, conditions, diseases or disabilities as a consequence of these alleged injuries or occupational diseases, including the possibility of a worsening of the conditions. In return for the money paid or other consideration provided in this settlement, [the worker] rejects, waives and FOREVER gives up the right to make any kind of claim for workers’ compensation benefits against [the employer] for any such unknown injuries, conditions, diseases, or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement.

¶ 15 Paragraph seven stated that the worker understood that the settlement would be final. Once it was approved, the settlement would “FOREVER close[] all issues” relating to his claim.

¶ 16 Paragraph eleven stated that the worker had “reviewed and discussed” the settlement’s terms with his attorney, that he had been “fully advised,” and that he understood the rights that he was giving up by settling the claim.

¶ 17 About a month after the ALJ had approved the settlement, the worker decided to see his doctor because he had been experiencing a lot of pain in his shoulder since the May surgery. The doctor x-rayed the shoulder, and the x-ray showed that there was a fracture in the right scapula. Up to this point, no one knew that this fracture existed.

¶ 18 The doctor developed a theory to explain the fracture. He thought that it had been caused by a screw that had been inserted in the shoulder during the second surgery. The screw caused a stress fracture in the bone.

¶ 19 The doctor thought that it would take a couple of months for the fracture to develop. So it could have been in its nascent stages when the worker and the employer executed the settlement agreement.

¶ 20 The worker filed a motion to reopen the settlement. He alleged that the newly discovered stress fracture was a mutual mistake of material fact that would (1) allow him to reinstate his workers' compensation claim; and (2) justify an award of temporary total disability benefits.

¶ 21 The ALJ held an evidentiary hearing on the worker’s motion. She then issued a written order.

¶ 22 The ALJ found that (1) neither the worker nor the employer could have known about the fracture in the worker’s scapula when they settled the worker’s claim; (2) the screw that the surgeons had inserted into the scapula had caused the fracture; and (3) the fracture existed when the worker and the employer settled the claim.

¶ 23 Based on these factual findings, the ALJ concluded that the unknown fracture qualified as a mutual mistake of material fact that justified the worker’s request to reopen the settlement. See § 8-43-204(1), C.R.S. 2015 (approved workers’ compensation settlements can only be reopened on the grounds of fraud or mutual mistake of material fact). So the ALJ awarded the worker temporary total disability benefits starting on the date of the settlement, “and continuing, subject to a credit for the amount paid at the time of settlement and a proper Social Security offset.” A panel of the Industrial Claim Appeal Office affirmed the ALJ’s order on review.

II. The Employer's Contention

¶ 24 The employer raises several contentions on appeal. We only need to address one of them.

¶ 25 The employer directs us to the language of the agreement, and in particular paragraph six. This language states that the worker forever waived his right to compensation for “unknown injuries” that arose “as a consequence of” or “result[ed]” from the original injury. The worker therefore waived his right to file the motion to reopen the settlement because the fracture in his scapula was an unknown injury at the time of the settlement that had been a consequence of, or had resulted from, the original shoulder injury.

¶ 26 We agree.

III. Standard of Review and General Legal Principles

¶ 27 To resolve the employer's contention, we must decide what paragraph six means in light of the language in paragraph four, which allows an ALJ to reopen a settlement on the “grounds of [a] mutual mistake of material fact.” Our interpretation of the language of the settlement agreement is a question of law. *Moland v. Indus. Claim Appeals Office*, 111 P.3d 507, 510 (Colo. App. 2004).

We review such questions de novo. *See Oster v. Baack*, 2015 COA 39, ¶ 35.

¶ 28 We determine the meaning of the language in a settlement agreement by reviewing all of the agreement, not just isolated parts of it. *Moland*, 111 P.3d at 510. If the language of the agreement is “plain [and] clear, and no absurdity is involved,” we must enforce it as written. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117, 119 (Colo. App. 1993).

¶ 29 Our review is limited by section 8-43-308, C.R.S. 2015. As is pertinent to this case, we may only set aside the Panel’s order if “the award or denial of benefits was not supported by applicable law.” *Id.*

IV. Analysis

¶ 30 We conclude, for the following reasons, that the ALJ’s decision to reopen the settlement agreement was not supported by the applicable law.

A. The Language of Paragraphs Four and Six

¶ 31 Paragraph six states that

- the worker “realize[d]” that there could be “unknown injuries . . . as a consequence of” the original injury to his shoulder;
- he “reject[ed], waive[d] and FOREVER g[a]ve up” his right “to make any kind of claim for workers’ compensation benefits against” the employer; and
- this waiver applied to “*any* such unknown injuries . . . resulting from the [original] injur[y] . . . that [was] the subject of this settlement.” (Emphasis added.)

¶ 32 This language is clear and unequivocal. We therefore must enforce paragraph six as it is written. *Cary*, 867 P.2d at 119.

¶ 33 When we read paragraphs four and six together, *see Moland*, 111 P.3d at 510, we conclude that the unknown injuries described in paragraph six are excluded from the scope of the phrase “mutual mistake of material fact.” If the unknown injuries covered by paragraph six *could* be mutual mistakes of material fact, then, contrary to paragraph six, the worker could not “reject[], waive[] and FOREVER give[] up” his right “to make any kind of claim for workers’ compensation benefits against” the employer for such unknown injuries.

¶ 34 Such a result would render paragraph six meaningless. We cannot do that. See *Newflower Mkt., Inc. v. Cook*, 229 P.3d 1058, 1061 (Colo. App. 2010)(“Our primary obligation is to implement the contracting parties’ intent according to the contract’s plain language and meaning by giving effect to *all* provisions so that *none* is rendered meaningless.”)(emphasis added). And we have not found any case that states that a waiver such as the one contained in paragraph six is void as against public policy in workers’ compensation cases.

¶ 35 We therefore conclude that paragraph six covers the scapula fracture. It was an unknown injury at the time of the settlement. The ALJ found that it was a consequence of the original injury because it had been caused by a surgery that had been designed to correct the original injury. And, although unknown, it existed when the worker settled his claim. We therefore further conclude that the worker “reject[ed], waive[d] and FOREVER g[a]ve up” his right “to make any kind of claim for workers’ compensation benefits against” the employer for the scapula fracture.

¶ 36 Our analysis is buttressed by other paragraphs in the settlement agreement. See *Moland*, 111 P.3d at 510.

¶ 37 For example, the introductory paragraph announced the intent of the worker and the employer to settle the claim forever.

¶ 38 Paragraph one described the injuries that prompted the settlement, which included “bilateral shoulder pain.” It added that “[o]ther disabilities, impairments and conditions that may be the result of these injuries . . . but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.”

¶ 39 Paragraph seven stated that, once the agreement was approved, it would “FOREVER close[] all issues” relating to the worker’s claim. And paragraph eleven made clear that the worker understood the entire agreement because he had “reviewed and discussed” its terms with his attorney, who had “fully advised” him about the agreement, and that he understood the rights he was giving up.

B. *Scotton, Gleason, Loper, and Padilla*

¶ 40 The cases upon which the worker relies do not persuade us that we should reach a different result.

1. *Scotton and Gleason*

¶ 41 *Scotton v. Landers*, 190 Colo. 27, 30, 543 P.2d 64, 66-67 (1975), discussed the effect of a mutual mistake of material fact on a release in a personal injury case. Our supreme court concluded that the trial court was not necessarily bound by the language of the release, which referred to “known and unknown, foreseen and unforeseen” injuries. *Id.* But, as the court later made clear in *Gleason v. Guzman*, 623 P.2d 378, 386-87 (Colo. 1981), *Scotton* also stands for the proposition that a “general release . . . will constitute a bar to a claim for an unknown injury [if] ‘it . . . appear[s] from the circumstances surrounding the transaction that such was [the claimant’s] clear intention.’” *Id.* (quoting *Scotton*, 190 Colo. at 31, 543 P.2d at 67).

¶ 42 We think that there are such circumstances in this case. The ALJ made several findings of fact about events that had *preceded* the settlement that are pertinent to our analysis of this language from *Scotton and Gleason*.

- The worker was represented by an attorney when he executed the agreement.

- He “continued to experience severe pain and instability in his shoulder joint and blade” *after* the May 2013 surgery.
- In July 2013, a doctor thought that the worker would reach maximum medical improvement within “two to three months.”
- The worker and the employer thought that the worker was “recovering from his . . . surgery with the expectation that he would soon reach” maximum medical improvement.
- The worker and the employer settled the claim before the worker reached maximum medical improvement.
- The worker understood that, by executing the agreement, “the case that settled his claim was closed.”

¶ 43 The ALJ also made findings of fact concerning events that occurred *after* the settlement.

- The worker continued to have pain and instability in his right shoulder.
- In October 2013, he learned that his scapula was fractured after the doctor x-rayed the shoulder.
- The worker testified that he would not have settled his claim if he had known about the fracture.

- The employer did not know about the fracture before the x-ray.

¶ 44 The ALJ’s findings of fact, which are supported by substantial evidence in the record, make clear that neither the worker nor the employer knew about the fracture in the worker’s scapula before they entered into the agreement. In other words, as we have concluded above, the fracture was an “unknown injury.”

¶ 45 But the court’s findings also point out that (1) even though the worker and the employer thought that the worker would soon reach maximum medical improvement, the worker had not yet arrived at that point when they executed the agreement; (2) the worker was experiencing pain and instability in his shoulder when he settled his claim; and (3) he understood that, when he executed the agreement, his case had been settled.

¶ 46 We recognize that the worker testified later that he would not have settled his claim if he had known of the fracture in his scapula. But we think that this testimony merely emphasizes that the fracture was, in the language of paragraph six, an “unknown injury” when the worker settled his claim. And, during cross-examination at the hearing on his motion to reopen, the worker

admitted that, when he settled his claim, he understood that the settlement included “any conditions resulting from [his] fall” and “anything that had to do with [his] prior surgeries.”

2. *Loper*

¶ 47 *Loper v. Industrial Commission*, 648 P.2d 1092, 1094 (Colo. App. 1982), preceded the legislature’s enactment of section 8-43-204(1). In that case, a referee of the Department of Labor had decided that he would not set aside a settlement after the director of the Industrial Commission had approved it. The division held that “a release may be set aside in a workmen’s compensation case” if the release had been “obtained as a result of a mutual mistake of material fact.”

¶ 48 But section 8-43-204(1) and paragraph four of the agreement make this same point. And *Loper*, which cited *Gleason*, did not refer to *Gleason*’s holding that a general release can bar a claim for an unknown injury if the surrounding circumstances make clear that the claimant clearly intended to do so. See *Scotton*, 190 Colo. at 31, 543 P.2d at 67.

3. *Padilla*

¶ 49 We are also aware that our supreme court held in *Padilla v. Industrial Commission*, 696 P.2d 273, 276 (Colo. 1985), that (1) “claims resolved by settlement agreements remain subject to . . . reopening . . . in the same manner as claims resolved by the granting of an award”; and (2) the parties to an agreement “may not by private agreement modify this strong legislative policy.” *Id.*

¶ 50 But the legislature restricted *Padilla*’s scope when, about two months after the supreme court decided *Padilla*, it amended a predecessor statute to section 8-43-204(1). *See* Ch. 77, sec. 2, § 8-53-105, 1985 Colo. Sess. Laws 355. That amendment reduced the number of potential grounds for reopening a settlement to two: fraud and mutual mistake of material fact. *See Cary*, 867 P.2d at 118 (“[T]he settlement in this case contained language waiving the claimant’s right to reopen her claim on grounds other than fraud or mutual mistake of material fact.”).

¶ 51 *Padilla* did not address the issue whether the parties to an agreement could limit what factors would qualify as a mutual mistake of material fact. And the context of *Padilla*’s statement that the parties to an agreement could not modify “strong legislative

policy” was the supreme court’s conclusion that, for the purposes of reopening a settlement agreement, there was no difference between a settlement agreement and an award. 696 P.2d at 278-79. The court did not consider whether an agreement could define what conditions did or did not qualify as a mutual mistake of material fact. Indeed, the court could not have considered that question because, as we have observed above, section 8-43-204(1) did not exist when the court decided *Padilla*.

¶ 52 And our analysis does not undercut section 8-43-204(1). This statute allows an ALJ to reopen a settlement because of a mutual mistake of material fact. But it does not say anything about whether claimants can agree to waive the right to benefits in an agreement when they, like the worker, clearly intended to give up those benefits, and they were fully aware of the risks that they assumed.

C. The ALJ’s Order and *Gleason*

¶ 53 The ALJ concluded that *Gleason* supported her analysis. She looked to the same language that we looked at above: a general release bars a claim for an unknown injury if the surrounding circumstances show that the claimant intended to bar such claims.

See Gleason, 623 P.2d at 386-87. She then focused on the supreme court’s subsequent observation that (1) the plaintiff in *Gleason* could not have intended to release the defendant “for future unknown injuries or the later consequences of known or unknown injuries”; *if* (2) the claimant had not been fully aware “of the basic character of the primary injury for which the release was sought and executed.” *Id.* at 387.

¶ 54 The ALJ then concluded that the worker “could not have been aware of the scapula fracture — *the basic character of the primary injury* — until October 15, 2013, when the fracture was discovered by x-ray.” (Emphasis added.)

¶ 55 But this conclusion is inconsistent with the ALJ’s factual findings, and that inconsistency leads us to conclude that she misapplied *Gleason*. The ALJ found that the fracture in the scapula did not exist at the time of the original injury. It was caused, instead, by the surgery designed to repair the original injury. And the fracture “exist[ed], undiagnosed and undiscovered” when the worker and the employer settled the worker’s claim. In other words, the scapula fracture *could not have been* part of the primary injury

that occurred when the worker slipped on the ice and fell on his right shoulder and that led to his two surgeries.

¶ 56 So, instead of supporting the ALJ’s analysis, *Gleason* undermines it because the worker was fully aware “of the basic character of the primary injury for which the release was sought and executed.” *See id.* And, being fully aware, the circumstances surrounding the settlement that we have described above showed that he clearly intended to waive his right to benefits for the scapula fracture. *See id.*

¶ 57 The Panel’s order is set aside. We remand this case to the Panel to direct the ALJ to vacate the award of benefits to the worker and to deny his motion to reopen the settlement.

JUDGE FURMAN and JUDGE ROTHENBERG concur.

15CA1481 Sanchez v ICAO 03-17-2016

COLORADO COURT OF APPEALS

DATE FILED: March 17, 2016
CASE NUMBER: 2015CA1481

Court of Appeals No. 15CA1481
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-952-153

Keith Sanchez,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Pinnacol Assurance,
and Honnen Equipment Company,

Respondents.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE FREYRE
Navarro and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 17, 2016

Mark D. Elliot, Alonit Katzman, The Elliot Law Offices, P.C., Arvada, Colorado,
for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Honnen Equipment
Company and Pinnacol Assurance

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

In this workers' compensation action, claimant, Keith Sanchez, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed an order denying and dismissing his claim for benefits. An administrative law judge (ALJ) found that claimant had not established that his injury was caused by his work activities. We disagree and set aside the order affirming the ALJ's decision.

I. Background

Claimant performs general maintenance and in-depth repair to hydraulic crane mechanisms for employer, Honnen Equipment Company. In May 2014, claimant's right knee "pop[ped]" when he stood up from a kneeling position and began "popping and grinding" as he tried to "walk it off." He informed his supervisor of his knee injury and was directed to a clinic for medical attention.

Employer referred claimant to Aviation & Occupational Medicine, where claimant saw Dr. Michael Ladwig. Dr. Ladwig initially diagnosed claimant with a right knee strain and opined there was a 51% chance the injury was work-related. He referred claimant to an orthopedic surgeon, Dr. Mark Failinger, for an MRI. The MRI revealed that claimant suffered a "[s]omewhat complex but

mostly horizontal tear of the body and posterior junctional zone of the medial meniscus.” In addition, the MRI impressions indicated claimant also suffered a “mild MCL sprain and mild posteromedial corner sprains/strains,” and a “mild strain of the popliteus.” Based on these findings, the orthopedic surgeon recommended surgery to repair the tear.

Although Dr. Failinger checked the box indicating that his “objective findings [are] consistent with history and/or work related mechanism of injury/illness,” employer and its insurer contested the claim. A physician retained by employer and its insurer to independently examine claimant, Dr. James Lindberg, concluded that claimant’s injury was not likely work-related because “standing up and feeling the knee pop would not cause an MCL sprain or posterior medial corner sprain and strain.” According to Dr. Lindberg, these findings would be secondary to a much more significant injury, and he opined, “I do not believe that this injury took place standing up at work and feeling a pop.” Dr. Lindberg expounded on his opinion at the hearing, testifying that there was a “ten percent” chance the horizontal meniscus tear would occur as claimant described, and a “zero percent” chance that the corner

sprains/strains could have resulted from mechanism of injury described by claimant.

Although there was no evidence that claimant's knee had exhibited any symptoms prior to the work-related incident, the ALJ found Dr. Lindberg persuasive, crediting his explanation "that the specific tear sustained by [c]laimant is not the type of meniscal tear most commonly associated with acute, work-related injuries." The ALJ also noted Dr. Lindberg's opinion that there "was simply no mechanism of injury described in the medical records that accounted for [c]laimant's injuries." The ALJ concluded that the "temporal proximity" of claimant's symptoms to his work did not establish that claimant suffered a work-related injury. He therefore denied and dismissed claimant's claim.

On review, the Panel affirmed. It rejected claimant's contention that the ALJ had improperly considered testimony concerning his prior drug convictions. The Panel was also unpersuaded by claimant's arguments that the ALJ had misinterpreted Dr. Lindberg's opinion and that the ALJ applied the wrong legal standard when analyzing the cause of his injury. The Panel therefore affirmed the ALJ's order. Claimant now appeals.

II. Applicable Legal Standard

Claimant contends that the ALJ applied the wrong legal standard in concluding that he had failed to establish a causal link between his injury and his work activities. Claimant argues that because the ALJ did not explicitly find his knee injury attributable to a pre-existing condition, the injury “is compensable as a matter of law under settled case law.” Citing *City of Brighton v. Rodriguez*, 2014 CO 7, claimant reasons that his injury was caused by a “neutral risk” and is compensable because it would not have occurred “but for” his work activities. We agree.

A. Applicable Law

A work-related injury may be compensable if it arose out of the course and scope of the injured worker’s employment.

§ 8-41-301(1)(b), C.R.S. 2015. “For an injury to occur ‘in the course of’ employment, the claimant must demonstrate that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions.” *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose out of an employee’s employment, “the claimant must show a causal connection between

the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.”

Id.

A pre-existing condition “does not disqualify a claimant from receiving workers’ compensation benefits.” *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if a work-related injury “aggravates, accelerates, or combines with” a worker’s pre-existing infirmity or disease “to produce the disability for which workers’ compensation is sought.” *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker’s employment simply because it is partially attributable to the worker’s pre-existing condition. See *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Comm’n*, 736 P.2d 1262, 1263 (Colo. App. 1986) (“[I]f a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.”)

Determining whether “an employee’s injuries arose out of an employment relationship depends largely on the facts presented in a particular case.” *In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit*, 759 P.2d 17, 20 (Colo. 1988). The fact finder must examine the “totality of the circumstances . . . to see whether there is a sufficient nexus between the employment and the injury.” *Id.* (quoting *City & Cty. of Denver Sch. Dist. No. 1 v. Indus. Comm’n*, 196 Colo. 131, 133, 581 P.2d 1162, 1163 (1978)). And, the mere fact that an injury occurred at work does not necessarily make it compensable. *Brighton*, ¶ 29.

In *Brighton*, the Colorado Supreme Court abrogated a line of cases that had barred recovery if the cause of a claimant’s injury, often a fall, was “unexplained.” *Id.* at ¶ 35 n.9. The employer in *Brighton* compensated a worker who had fallen down some stairs, even though the worker could not remember what caused her to fall. The supreme court held that because the claimant’s “fall would not have occurred *but for* the fact that the conditions and obligations of her employment — namely, walking to her office during her work day — placed her on the stairs where she fell, her

injury ‘arose out of’ employment and is compensable.” *Id.* at ¶ 36 (emphasis added).

The supreme court explained that workplace injuries fall into one of three categories: “(1) employment risks, which are directly tied to the work itself; (2) personal risks, [or purely idiopathic injuries] which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal.” *Id.* at ¶¶ 19, 22. The court placed unexplained falls in this third category, and held that such injuries arise out of employment and are compensable if, under the positional-risk test, it can be shown the injury “would not have occurred *but for* employment.” *Id.* at ¶¶ 24, 25 (emphasis added).

B. Claimant’s Injury Fell Under the Neutral Risk Category

Claimant asserts that in the absence of a specific causal finding that his injury was attributable to a pre-existing condition the injury’s cause is essentially unexplained and should have been analyzed under *Brighton*. His argument implies that if an ALJ does not identify the precise cause of an injury, the injury is unexplained and must be analyzed under the neutral risk category. But, *Brighton* states that “[d]emanding more precision about the exact

mechanism of a fall is inconsistent with the spirit of a statute that is designed to compensate workers for workplace accidents regardless of fault.” *Brighton*, ¶ 30. Therefore, we do not read *Brighton* as issuing a mandate either that the precise cause of every claimed workers’ compensation injury must be identified by the ALJ or that an injury automatically falls into the third, or neutral, category, simply because a precise cause is not expressly found. Nevertheless, for the reasons set forth below, we agree that claimant’s injury should have been analyzed as a neutral risk. See *id.* at ¶ 31.

The ALJ implicitly found that claimant’s injury was caused by a pre-existing knee condition. The ALJ was persuaded by Dr. Lindberg, who opined that the “horizontal, internal tear, also known as a ‘shear tear,’” claimant exhibited is generally a chronic condition, not acute. Dr. Lindberg also estimated that there was only a “ten percent” chance that the activity described by claimant caused his meniscal tear. Further, he testified that there was a “zero” percent chance that claimant’s knee sprains could have been caused by kneeling and standing. The ALJ expressly credited these opinions. Thus, the ALJ’s unequivocal finding that the work-related

activity to which claimant attributed his injury did not cause his knee condition also amounted to an implicit finding that claimant's condition was chronic and likely pre-existing. Though not explicitly stated in his order, the ALJ effectively placed claimant's injury in the "*purely idiopathic personal*" risk category, for injuries that 'are generally not compensable under the Act, unless an exception applies.'" *Brighton*, ¶ 22.

We review de novo whether the ALJ applied the correct legal standard. *See Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 897-98 (Colo. 2008) ("[W]e review de novo whether the district court applied the correct legal standard to its review of the custodian's determination. . . . We review questions of law de novo. . . . Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law.") (citations omitted); *Visible Voices, Inc. v. Indus. Claim Appeals Office*, 2014 COA 63, ¶ 11 ("[W]hether the Panel applied the correct legal standard or legal test raises a question of law that we review de novo."). Consequently, whether claimant's injury was correctly categorized as resulting from an employment

risk, a personal risk, or a neutral risk is a question of law we review de novo.

It is undisputed that claimant's injury was entirely asymptomatic before he knelt under and arose from working under the crane. Claimant unequivocally stated, and employer does not dispute, that claimant had no knee injuries prior to the May 2014 work-related incident. Indeed, the record is devoid of any medical records or other evidence demonstrating that claimant had any issues whatsoever with his knee before he stood up from kneeling under the crane and feeling it "pop." Claimant consistently conveyed the mechanism and onset of symptoms in testimony and to his various medical treaters and providers.

The evidence establishes that claimant's knee pop occurred at work and while he was engaged in work-related activities. Reviewing claimant's consistent and undisputed explanation of the mechanism of his injury, in our view his knee would not have "popped" *but for* his actions at work. We conclude that this places him in the "neutral risk" category, which should have been analyzed under the positional risk test. *Brighton*, ¶¶ 25-26.

Applying the positional risk test to claimant's injury, we conclude that his injury arose out his employment because it would not have occurred "but for" his kneeling and standing while working on the crane. Working on the crane required him to kneel down and stand up repeatedly and placed him "in the position where he . . . was injured." *Brighton*, ¶ 27.

Accordingly, we conclude that the ALJ applied the wrong legal standard when he determined that claimant's injury was not work-related. Placing claimant's injury in the neutral risk category and applying the positional risk test, we conclude that claimant's injury is compensable.

III. Claimant's Remaining Arguments

Having concluded that the ALJ applied the incorrect legal standard when analyzing the work-relatedness of claimant's injury, we need not reach claimant's remaining issues. We therefore decline to address whether the ALJ erred in permitting questioning about claimant's past criminal conviction or whether the ALJ misinterpreted the opinion of an orthopedic surgeon under *Hall v. Industrial Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988).

IV. Conclusion

The order is set aside and the case is remanded with directions that an order be entered in accordance with this opinion.

JUDGE NAVARRO and JUDGE VOGT concur.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2016 CO 25

Supreme Court Case No. 12SC871
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 10CA1494

Petitioners:

City of Littleton, Colorado; Littleton Fire Rescue; and CCMSI,

v.

Respondents:

Industrial Claim Appeals Office; Julie Christ, surviving spouse and Personal Representative of Jeffrey J. Christ, Deceased; and Michelle Parris, on behalf of Lauren Parris.

Judgment Reversed

en banc

May 2, 2016

Attorneys for Petitioners:

Nathan, Bremer, Dumm & Myers, P.C.

Anne Smith Myers

Timothy Fiene

Denver, Colorado

Attorneys for Respondent Industrial Claim Appeals Office:

Cynthia H. Coffman, Attorney General

Skippere S. Spear, Senior Assistant Attorney General

Alice Q. Hosley, Assistant Attorney General

Denver, Colorado

Attorney for Respondent Julie Christ, surviving spouse and Personal Representative of Jeffrey J. Christ, Deceased:

Law Office of O'Toole & Sbarbaro, P.C.

Neil D. O'Toole

Denver, Colorado

Attorney for Respondent Michelle Parris, on behalf of Lauren Parris:

Wilcox & Ogden, P.C.

Ralph Ogden

Denver, Colorado

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 Littleton firefighter Jeffrey J. Christ was diagnosed with glioblastoma multiforme (“GBM”), a type of brain cancer. After undergoing surgery, chemotherapy, and radiation, he returned to work, but ultimately succumbed to the disease. He (and later his widow and child) sought workers’ compensation benefits to cover his cancer treatment, asserting that his brain cancer qualified as a compensable occupational disease under the “firefighter statute,” § 8-41-209, C.R.S. (2015), of the Workers’ Compensation Act of Colorado, §§ 8-40-101 to -47-209, C.R.S. (2015). At issue here is whether Christ’s employer, the City of Littleton, and Littleton’s insurer, Cannon Cochran Management Services, Inc. (collectively “Littleton”), successfully overcame a statutory presumption in section 8-41-209(2)(a) that Christ’s condition resulted from his employment as a firefighter.

¶2 The firefighter statute applies to firefighters who have completed five or more years of employment as a firefighter. § 8-41-209(1). Section 8-41-209(1) provides that the death, disability, or health impairment of such a firefighter “caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system” shall be considered an “occupational disease” (thus entitling the firefighter to benefits under the Workers’ Compensation Act) if the cancer “result[ed] from his or her employment as a firefighter.” Section 8-41-209(2)(a) then creates a statutory presumption that the firefighter’s condition or health impairment caused by a listed type of cancer “result[ed] from [the] firefighter’s employment” if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or health impairment preexisting his or her

employment as a firefighter. Under section 8-41-209(2)(b), however, the firefighter's condition or impairment "[s]hall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job." This case requires us to determine whether Littleton met its burden under subsection (2)(b) to show by a preponderance of the medical evidence that Christ's GBM condition "did not occur on the job."

¶3 We hold that the presumption in section 8-41-209(2) relieves a qualifying claimant firefighter of the burden to prove that his cancer "result[ed] from his employment as a firefighter" for purposes of establishing his claim to workers' compensation benefits. But the firefighter statute does not establish a conclusive (i.e., irrebuttable) presumption that firefighting duties cause cancers relating to the brain, skin, digestive system, hematological system, or genitourinary system, or that a firefighter's employment caused a particular claimant firefighter's condition. Rather, the statute shifts the burden of persuasion regarding the job-relatedness of the firefighter's condition to the employer. In other words, although the firefighter bears the burden of proving his claim for benefits, section 8-41-209(2) places the burden with the employer to show, by a preponderance of the medical evidence, that the firefighter's condition or health impairment caused by a listed cancer "did not occur on the job." We further hold that an employer can meet its burden by establishing the absence of either general or specific causation. Specifically, an employer can show, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical

occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related.

¶4 In this case, the administrative law judge ("ALJ") applied the statutory presumption in section 8-41-209(2)(a) but ultimately found that Littleton had established by a preponderance of the medical evidence that Christ's GBM condition was not caused by his occupational exposures. A panel of the Industrial Claim Appeals Office ("Panel") reversed, concluding that Littleton's medical evidence was insufficient to overcome the presumption. In a split decision, a division of the court of appeals affirmed the Panel. City of Littleton v. Indus. Claim Appeals Office, 2012 COA 187, ___ P.3d ___. Because we disagree with the court of appeals' interpretation of the breadth of the statutory presumption in section 8-41-209(2)(a) and of the employer's burden to overcome the presumption, we conclude that the court of appeals erroneously evaluated the medical evidence presented by Littleton and erroneously failed to defer to the ALJ's findings of fact, which are supported by substantial evidence. We therefore reverse the judgment of the court of appeals and remand this case with directions to return the matter to the Panel for reinstatement of the ALJ's original findings of fact, conclusions of law, and order.

I. Facts and Procedural History

¶5 Littleton Fire Rescue hired Christ in 1987. Before starting his employment, Christ had a physical examination, which included blood work, chest x-rays, and a general health assessment, but did not include an MRI scan or a tissue biopsy. Christ began his career as an engineer, later became a captain, and then served as a battalion chief for over ten years before filing the claim in this case. As battalion chief, Christ spent twenty percent of his time directly involved with fire calls and eighty percent of his time involved with day-to-day operations. Between 2000 and 2007, he responded to 172 fires and 50 situations involving hazardous substances. In December 2007, Christ was diagnosed with GBM, a type of brain cancer that cannot be diagnosed in the absence of a brain scan or a tissue biopsy. Christ sought temporary total disability benefits under section 8-41-209 of the Workers' Compensation Act for the period of time between his diagnosis and his return to work in March 2008 following treatment.

A. ALJ Findings and Conclusions

¶6 In June 2009, the ALJ denied Christ's claim for workers' compensation benefits. The ALJ concluded that the statutory presumption in section 8-41-209(2)(a) applied because Christ had been employed as a firefighter for more than five years and a physical examination prior to his employment as a firefighter had not revealed brain cancer. However, the ALJ determined that Littleton established, by a preponderance of the medical evidence, that Christ's brain cancer was not caused by his occupational exposures. Littleton presented the testimony of three expert witnesses: Dr. Denise M. Damek (neuro-oncology); Dr. Patricia A. Buffler (epidemiology); and Dr. Javier C.

Waksman (toxicology). The ALJ concluded that, collectively, Littleton's expert witnesses established that the substances to which Christ's expert opined he was likely exposed as a firefighter do not target the brain and do not cause brain cancer.

B. Panel Order

¶7 Christ appealed the ALJ's decision to the Industrial Claim Appeals Office. The Panel reversed the ALJ, concluding that the presumption in section 8-41-209 "represents a legislatively adopted premise that the occupational exposure of firefighters causes cancer," and that this statutory presumption "cannot be rebutted by the opinions of medical experts that there is no causal connection between the occupation in general and the disease in question." The Panel reasoned that Littleton's evidence was insufficient to rebut the presumption in section 8-41-209 because it "merely denied the underlying legislative premise of a causal relationship between the firefighter's occupational exposure and the development of cancer." The Panel remanded the case to the ALJ to determine Christ's entitlement to specific benefits. On remand, the ALJ determined that Christ was entitled to medical benefits and temporary total disability benefits. Littleton appealed the ALJ's order on remand to the Panel, which affirmed the ALJ's determination.¹

¹ Christ passed away on December 30, 2009, while his benefits were being determined. His widow, Julie Christ, was substituted as the claimant, and Michelle Parris, the mother of Christ's biological child, joined the action as an additional claimant. City of Littleton, ¶ 6 n.1.

C. Court of Appeals Ruling

¶8 Littleton then appealed the Panel's final order to the court of appeals, arguing that the evidence it presented to the ALJ was sufficient to sustain its burden of proof under section 8-41-209(2). A division of the court of appeals disagreed and affirmed the Panel's ruling in a 2-1 decision. City of Littleton v. Indus. Claim Appeals Office, 2012 COA 187, ¶ 1, __ P.3d __, 2012 WL 5360912.

1. Majority Opinion

¶9 In a detailed opinion, the division majority examined the firefighter statute through the lens of causation in a toxic exposure case. Id. at ¶¶ 9-47. The division majority observed that courts traditionally evaluate a toxic tort plaintiff's proof of causation by examining both general and specific causation. Id. at ¶¶ 9, 12. To prove general causation, the plaintiff must show that the toxic substance is capable of causing a particular disease. Plaintiffs typically rely on toxicological evidence² or epidemiological studies³ to establish general causation. Id. at ¶¶ 13-14. To prove specific causation, the plaintiff must establish, by particularized evidence, that the alleged exposure caused his specific disease. Evidence about the plaintiff's medical

² Toxicology examines the capacity of chemicals or environmental agents to produce harmful effects in living organisms. Toxicologists study the interaction between chemicals and biological systems, attempt to identify the mechanism of action, and attempt to assess the relationship between doses of chemicals and responses in living systems. Gerald W. Boston, A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience, 18 Colum. J. Env'tl. L. 181, 214 (1993).

³ Epidemiology is the study of the distribution and determinants of disease in human populations; epidemiologists look for unusual incidences of human disease and endeavor to identify those factors that distinguish the affected population group from other groups. Boston, supra, at 231.

history and his particular exposure (including dose, frequency, and duration) will be important. Id. at ¶ 16.

¶10 Applying these general principles to the firefighter statute, the division majority construed section 8-41-209 to presume specific causation—i.e., that the firefighter’s occupational exposures caused his specific cancer—where the firefighter can show: (1) he has worked as a firefighter for at least five years; (2) he suffers from one of the listed types of cancer; and (3) after becoming a firefighter, he underwent a physical exam that revealed no evidence of the current disease. Id. at ¶¶ 21–22. The majority reasoned that, by necessary implication, the statute also presumes general causation—i.e., that a firefighter’s occupational exposures are capable of causing the listed types of cancer. Id. at ¶ 23 (“If one presumes that occupational exposures caused a particular cancer, one necessarily also presumes that those exposures could have caused that type of cancer.”).

¶11 The division majority concluded that this statutory presumption is not the type of rebuttable presumption that merely shifts the burden of going forward with evidence, but rather, “remains in the case as affirmative evidence, creating an inference that must be overcome by contrary evidence.” Id. at ¶ 24.

¶12 Critically, the division majority reasoned that “[t]he statute contains no text that would limit the ways in which a firefighter is presumed to have gotten his cancer,” but simply presumes the cancer “resulted from the firefighter’s employment somehow.” Id. at ¶ 26. Thus, the majority concluded, the presumption is broad in two ways. First, it contemplates a “wide range of potential exposures” and presumes that the listed cancers can be caused by exposure to some “unspecified substance or intangible agent”;

that the claimant was exposed to such unspecified substances or agents while working as a firefighter; and that those exposures caused the firefighter's particular cancer. *Id.* at ¶ 28. Second, it presumes that the unspecified exposure caused the cancer directly or in combination with other genetic or environmental factors, either causing or hastening the onset of a disease. *Id.* at ¶ 29.

¶13 Based on its view of the breadth and nature of the presumption, the division majority construed section 8-41-209 to place a formidable burden on the employer in two ways. *Id.* at ¶ 30. First, it reasoned that the employer cannot overcome the presumption by undermining general causation. *See id.* at ¶¶ 31-33 (noting that the "employer gains nothing by challenging the wisdom or the evidentiary foundation of the legislature's decision"). Rather than "attacking the statute," an employer must affirmatively prove, by a preponderance of the evidence, that the firefighter's cancer did not result from, arise out of, or arise in the course of the firefighter's employment. *Id.* at ¶ 34. Second, because it construed the statute to presume causation by "unspecified means," the division majority reasoned that the employer must exclude "the wide range of potential exposures and biological mechanisms that the statute contemplates" in order to sustain its burden of proof. *Id.* at ¶ 36. In short, the division majority concluded that section 8-41-209(2) requires the employer to prove that "the cancer was not, or could not have been, caused by anything that the firefighter encountered on the job." *Id.* (emphasis added).

¶14 The division majority observed that in some cases, employers may have evidence of alternative causation sufficient to disprove specific causation, but that in general,

employers may be unable to disprove specific causation because it can be difficult to establish which substances a firefighter encountered, let alone the dose, frequency, or duration of such exposures. Id. at ¶¶ 37-38. The division majority further observed that general causation evidence (such as epidemiological studies) is ill-suited to disprove specific causation, particularly given the employer's heavy burden to disprove causation by any of the wide range of substances (known and unknown) to which the statute presumes the firefighter was exposed. Id. at ¶¶ 40-47.

¶15 Turning to the facts of the case, the division majority discussed the expert witness testimony, the ALJ's findings, and the Panel's order. Id. at ¶¶ 48-77. It then concluded that, upon review of the record, Littleton's evidence was insufficient as a matter of law to meet its burden of proof under the statute. Id. at ¶¶ 78, 83, 99-101. Although Littleton's experts "amply undermined claimant's assertion of general causation," Littleton failed to overcome the broad, substantive presumption in section 8-41-209 by disproving either specific or general causation by a preponderance of the evidence. Id. at ¶¶ 82-83.

¶16 The majority observed that Littleton presented no evidence about Christ's workplace exposures; consequently, it did not disprove specific causation. Id. at ¶¶ 87-88. Littleton instead relied on general causation evidence showing that carcinogens commonly associated with firefighting cannot cause GBM or any form of brain cancer.

¶17 Notably, the division majority acknowledged that "Littleton's evidence supports a reasonable inference that claimant's brain cancer was not caused by any of the carcinogens commonly 'associated with firefighting.'" Id. at ¶ 90. Specifically,

Littleton's evidence supported a reasonable inference that if Christ encountered those substances, he probably absorbed them by inhalation or through the skin; that there is no plausible biological pathway by which those substances, so absorbed, could affect the brain; and that those substances do not cause brain cancer. Id. The division majority nevertheless reasoned that this evidence was insufficient to overcome the statutory presumption because "Littleton presented no evidence to support an inference that [Christ's] workplace exposures were limited to that group of substances." Id. at ¶¶ 89-91. A factfinder therefore could only speculate that Christ's exposures were limited to those substances commonly "associated with firefighting." Id. at 91. And such speculation, the division majority concluded, is insufficient to rebut the broad presumption that Christ, while acting as a firefighter, was exposed to some substance or agent that caused his particular cancer. Id. at ¶¶ 91, 95-96.

¶18 Littleton's experts acknowledged, for example, that brain cancer can be caused by exposure to ionizing radiation such as that from an atomic blast or therapeutic brain irradiation. Id. at ¶ 93. The evidence supported a reasonable inference that Christ was not exposed to an atomic blast or therapeutic brain irradiation; however, the division majority reasoned that the evidence did not rule out Christ's occupational exposure to other conceivable sources of ionizing radiation. Id. at ¶ 94. And although the ALJ found, on the basis of Littleton's expert testimony, that "no known or putative carcinogen has been definitely associated with brain tumor development in either humans or animals," the division majority reasoned that this finding did not permit the ALJ to conclude that no such link exists. Id. at ¶ 97. Finally, the division majority

reasoned that the statute also presumes that occupational exposures hastened the onset of a cancer that Christ would have developed later, and that Littleton did not attempt to refute this presumed theory of causation. Id. at ¶ 98. In sum, the division majority concluded that Littleton failed to disprove the “wide and unspecified range of potential causes” of Christ’s GBM. Id. at ¶ 100. Only by speculation, and not reasonable inference, could the ALJ find that the substances to which Christ was exposed did not target his brain or do not cause brain cancer. Id. at ¶ 99. Thus, it concluded that the ALJ’s ultimate findings were unsupported. Id.

2. Dissenting Opinion

¶19 In a similarly detailed dissent, Judge Carparelli applied a different analytic framework. Like the majority, he construed section 8-41-209 to create a presumption that the firefighter’s particular cancer resulted from, arose out of, or was sustained in the course of his or her employment. Id. at *17 (Carparelli, J., dissenting). In his view, the statute requires ALJs to presume that a firefighter’s employment was capable of causing the firefighter’s specific cancer and that the firefighter’s employment did cause that cancer. Id. at *16. Judge Carparelli rejected the view, however, that the statute establishes a broad and conclusive presumption of general causation. Id. at *17. He questioned the division majority’s reference to the “evidentiary” foundation of the legislature’s policy decision, noting that this statement implied that “the General Assembly decided that there is scientific proof that cancers of the brain, skin, digestive system, hematological system, or genitourinary system result from firefighting,” yet “the statute contains no such statement.” Id. at *19. Indeed, he noted, there is “no basis

to conclude that the General Assembly was presented with an evidentiary foundation supporting a conclusion that all variations of cancer of the listed organs result from employment as a firefighter.” Id. He also reasoned that the division majority’s description of the breadth of the statutory presumption implied that the employer has the burden to eliminate “all imaginable possibilities,” and in so doing, rendered “reasonable inferences impermissible and section 8-41-209(2)(b) meaningless.” Id.

¶20 In Judge Carparelli’s view, to overcome the statutory presumption in section 8-41-209(2)(a), an employer must prove that it is more likely that the firefighter’s employment was not capable of causing the firefighter’s specific cancer, or, if his employment was capable of causing the cancer, that it is nonetheless more likely that the firefighter’s employment did not cause that cancer. Id. at *16, *18. He reasoned that in meeting this burden, epidemiology is highly probative evidence “because it considers human physiology and the likelihood that a potential environmental factor is capable of entering the body, traveling to a particular organ, and interacting with that organ in a way that can cause a particular cancer.” Id. at *19.

¶21 Judge Carparelli concluded that the ALJ’s findings were supported by the record and that the Panel therefore erred when it reversed the ALJ’s initial order. Id. at *15, *16, *23. Specifically, he concluded that there was sufficient evidence in the record to support a finding that the only known environmental risk factor for GBM is ionizing radiation, and that the ALJ could reasonably infer that Christ was not exposed to such radiation in his employment. Id. at *21-*22, *23. In his view, the ALJ’s finding of the absence of general causation was sufficient to overcome the statutory presumption by a

preponderance of the evidence without additional proof of the absence of specific causation. Nonetheless, Judge Carparelli concluded that there was also sufficient evidence to overcome the presumption of specific causation. Specifically, the evidence was sufficient to support findings that known and putative carcinogens, as well as other chemicals to which Christ might have been exposed, do not cause GBM, and that no credible biological mechanism exists by which the chemicals to which Christ was likely exposed could target his brain and cause GBM. *Id.* at *23.

¶22 We granted Littleton’s petition for a writ of certiorari to review the court of appeals’ decision.⁴

II. Analysis

¶23 Littleton has asked us to determine whether the court of appeals erred in its interpretation of section 8-41-209; whether it erred in holding Littleton’s medical evidence insufficient as a matter of law; and whether it failed to defer to the ALJ’s

⁴ We granted certiorari review on the following issues:

1. Whether the court of appeals erred in holding petitioners’ medical evidence, while admittedly persuasive and credible, to be insufficient as a matter of law to rebut the statute’s presumption.
2. Whether the court of appeals erred in its interpretation of section 8-41-209, C.R.S., in determining that the statute is effectively irrebuttable, contrary to the intent of the General Assembly and the unambiguous wording of the statute.
3. Whether the court of appeals failed to defer to the Administrative Law Judge’s Findings of Fact, thereby committing reversible error in contravention of the mandates of appellate review.

findings of fact.⁵ We first discuss the Workers' Compensation Act of Colorado generally and interpret section 8-41-209. We then address the evidence presented and the ALJ's findings of fact, conclusions of law, and order.

¶24 We hold that section 8-41-209(2) relieves a qualifying claimant firefighter of the burden to prove that his cancer "result[ed] from his employment as a firefighter" for purposes of establishing his claim to workers' compensation benefits. The presumption in section 8-41-209(2) is substantive in that it remains in the case as a substitute for evidence. But section 8-41-209(2) does not establish a conclusive presumption that firefighting duties cause cancers relating to the brain, skin, digestive system, hematological system, or genitourinary system, or that a firefighter's employment caused a particular claimant firefighter's condition. Instead, the firefighter statute shifts the burden of persuasion regarding the job-relatedness of the firefighter's condition to the employer. Put differently, although the firefighter bears the burden of proving his claim for benefits, section 8-41-209(2) places the burden with the employer or insurer to show, by a preponderance of the medical evidence, that the firefighter's condition or health impairment caused by a listed cancer "did not occur on the job."

⁵ In its briefing to this court, the Industrial Claim Appeals Office ("ICAO") states that its interpretation of section 8-41-209 has evolved since the Panel issued its order in this case, which was the ICAO's first opportunity to consider the statute. Since that time, the ICAO has considered several other cases under this provision. Contrary to its order in this case, the Panel now takes the position that sufficient evidence supported the ALJ's original finding that Littleton successfully proved by a preponderance of the medical evidence that Christ's GBM was not caused by exposures occurring during the course of his employment as a firefighter.

¶25 We further hold that an employer can meet its burden to show that a firefighter's cancer is not job-related by establishing the absence of either general or specific causation. That is, the employer may establish, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related.

¶26 Because we disagree with the court of appeals' interpretation of the breadth of the statutory presumption in section 8-41-209(2)(a) and of the employer's burden to overcome the presumption, we conclude that the court of appeals erroneously evaluated Littleton's evidence and erroneously failed to defer to the ALJ's findings of fact, which are supported by the record. We therefore reverse the judgment of the court of appeals and remand this case with directions to return the matter to the Panel for reinstatement of the ALJ's original findings of fact, conclusions of law, and order.

A. Standard of Review

¶27 "We review de novo questions of law concerning the application and construction of statutes." Hickerson v. Vessels, 2014 CO 2, ¶ 10, 316 P.3d 620, 623. Our purpose in interpreting a statute is to give effect to the legislative intent. Concerned Parents of Pueblo, Inc. v. Gilmore, 47 P.3d 311, 313 (Colo. 2002). To discern the General Assembly's intent, we turn first to the statutory language. Id. A comprehensive regulatory scheme such as the Workers' Compensation Act must be construed as a

whole to give effect and meaning to all its parts, and we avoid interpretations that render provisions superfluous. Wolford v. Pinnacol Assurance, 107 P.3d 947, 951 (Colo. 2005). Where the statutory language is clear and unambiguous, we do not resort to legislative history or other interpretive rules of statutory construction. Smith v. Exec. Custom Homes, Inc., 230 P.3d 1186, 1189 (Colo. 2010).

B. Compensation for Occupational Diseases Under the Workers' Compensation Act of Colorado

¶28 Under the Workers' Compensation Act of Colorado, an employee has a right to compensation for injuries or occupational diseases that "arise out of and in the course of the employee's employment." § 8-41-301(1)(c), C.R.S. (2015). Compensability under the workers' compensation scheme is therefore grounded in establishing the work-relatedness of an employee's injury or occupational disease.

¶29 Before the adoption of the Colorado Occupational Disease Disability Act in 1945, occupational diseases were not compensable unless the disease was viewed as an accident—a condition caused by some unusual or excessive exposure on the job. Anderson v. Brinkhoff, 859 P.2d 819, 822 (Colo. 1993). The rationale for treating occupational diseases differently rested on the difficulty in ascertaining the cause of the claimed occupational disease. Id.

¶30 In 1945, the legislature passed the Colorado Occupational Disease Disability Act, which made certain occupational diseases compensable. Ch. 163, sec. 9, 1945 Colo. Sess. Laws 432, 434. But even for the listed compensable diseases, the employer was not liable unless there was a "direct causal connection" between the occupational disease

and the conditions under which the work was performed; the disease could be seen to have followed as a “natural incident of the work” and as a “result of the exposure occasioned by the nature of the employment”; and the disease could be “fairly traced to the employment as a proximate cause” and not “from a hazard to which workmen would have been equally exposed outside of the employment.” Ch. 163, sec. 10, 1945 Colo. Sess. Laws 432, 435; see also Anderson, 859 P.2d at 822.

¶31 In 1975, the legislature repealed the Colorado Occupational Disease Disability Act but incorporated several of its provisions into the Workers’ Compensation Act, including the definition of “occupational disease,” now codified at section 8-40-201(14), C.R.S. (2015). Drawing nearly verbatim from the original 1945 definition, the Act still defines “occupational disease” as a disease directly resulting from a worker’s employment or work conditions:

“Occupational disease” means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14).

¶32 As we observed in Anderson, by retaining the original test for occupational diseases, the legislature chose to subject occupational diseases to a more rigorous test than accidents or injuries. 859 P.2d at 822. To be compensable, an occupational disease must meet each part of the definition in section 8-40-201(14), which effectively operates as an additional causal limitation to ensure that the occupational disease “arise[s] out of

and in the course of the employment.” Id. at 822–23; see also § 8-41-301(1)(c) (providing for the right to compensation where an “injury or death is proximately caused by an . . . occupational disease arising out of and in the course of the employee’s employment and is not intentionally self-inflicted”). Importantly, the definitional requirements of section 8-40-201(14) serve to limit the scope of occupational diseases to those that “result from working conditions which are characteristic of the vocation.” Anderson, 859 P.2d at 823 & n.4 (citing 1B Larson’s Workmen’s Compensation Law § 41.32 (1993) (explaining that the “important boundary” is that boundary “separating occupational disease from diseases that are neither accidental nor occupational, but common to mankind and not distinctively associated with the employment”). It is this proof of causation – the job-relatedness of an occupational disease – that “ensures that the Workers’ Compensation Act will not become a general health insurance act.” Id. at 823.

C. Section 8-41-209

¶33 In a typical workers’ compensation case, the claimant has the burden of establishing his or her entitlement to benefits by a preponderance of the evidence. § 8-43-201(1); City of Boulder v. Streeb, 706 P.2d 786, 789 (Colo. 1985). However, in 2007, the legislature made it easier for certain firefighters to recover benefits by enacting section 8-41-209, which modifies the burden of proof in a narrow class of cases involving certain types of cancer:

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from

his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

§ 8-41-209.

1. Key Features of Section 8-41-209

¶34 Section 8-41-209 has several key features. As an initial matter, the statute applies to individuals who have been employed as firefighters for five or more years.⁶ § 8-41-209(1). Next, section 8-41-209(1) provides that the death, disability, or health impairment of such a firefighter caused by cancer of the "brain, skin, digestive system, hematological system, or genitourinary system" shall be considered an "occupational disease," if the condition or health impairment "result[ed] from his or her employment as a firefighter." Id. The firefighter's obligation under section 8-41-209(1) to establish that his condition "result[ed] from his or her employment as a firefighter" reflects the

⁶ Firefighters seeking compensation for an occupational disease who do not meet the requirements of section 8-41-209(1)—i.e., those who have completed fewer than five years of employment as a firefighter, or who suffer a job-related condition or health impairment caused by something other than a listed cancer—may proceed under other provisions of the Workers' Compensation Act.

basic requirement in section 8-41-301(1)(c) that, to be compensable, an occupational disease must “aris[e] out of and in the course of the employee’s employment.”

¶35 Section 8-41-209(2)(a) then creates a statutory presumption that the firefighter’s condition or health impairment caused by a listed type of cancer “result[ed] from [the] firefighter’s employment” if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or health impairment preexisting his employment as a firefighter. Thus, if a firefighter who suffers from a listed cancer can show that he meets the requisite years of service and physical exam conditions, then the statute establishes an inference that his cancer “result[ed] from [his] employment.” In effect, the presumption in section 8-41-209(2)(a) relieves a qualifying claimant firefighter of the burden to prove that his cancer “result[ed] from his or her employment as a firefighter” for purposes of establishing under section 8-41-209(1) that his condition is a compensable “occupational disease” under the Act. This statutory presumption logically presumes both specific causation (i.e., that the firefighter’s employment actually caused the firefighter’s specific condition or health impairment), and general causation (i.e., that the firefighter’s employment is capable of causing the firefighter’s condition or health impairment).

¶36 Importantly, however, the presumption of job-relatedness in section 8-41-209(2)(a) is not conclusive, or irrebuttable. Indeed, the General Assembly has established a conclusive presumption in a neighboring provision of the Workers’ Compensation Act. See § 8-41-206, C.R.S. (2015) (providing that any disability beginning more than five years after the date of injury “shall be conclusively presumed

not to be due to the injury,” with certain exceptions (emphasis added)). But it has not done so in the firefighter statute. Rather, section 8-41-209(2)(b) provides that the firefighter’s condition or impairment “[s]hall not be deemed to result from the firefighter’s employment” if the firefighter’s employer or insurer shows by a “preponderance of the medical evidence” that such condition or impairment “did not occur on the job.” In other words, section 8-41-209(2)(b) allows the employer or insurer to overcome the presumption of job-relatedness in section 8-41-209(2)(a) by a preponderance of the medical evidence.

2. Nature of the Presumption in Section 8-41-209(2)

¶37 The language of section 8-41-209(2)(b) shows that the presumption in section 8-41-209(2)(a) is not a “Thayer-Wigmore”⁷ presumption that shifts only the burden of production, as described in CRE 301. See CRE 301 (“In all civil actions and proceedings not otherwise provided for by statute . . . , a presumption imposes . . . the burden of going forward with evidence . . . but does not shift . . . the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.”); see also *Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009)

⁷ Professors Thayer and Wigmore viewed presumptions as merely devices of procedural convenience to allocate the burden of production. Under the Thayer-Wigmore approach, once the opponent of the presumption introduces evidence refuting the existence of the presumed fact, the presumption drops out of the case, and the issue proceeds before the trier of fact without the presumption. See James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 313–89 (1898); 9 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence* §§ 2490–2491 (3d ed. 1940); see also 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5122.1 (2d ed. 2005) (discussing the “Thayer-Wigmore” theory of presumptions).

(discussing presumptions that shift the burden of production but not the burden of proof). Instead, section 8-41-209(2) creates a substantive, “Morgan”-type presumption⁸ that shifts the burden of persuasion to the employer regarding the job-relatedness of the firefighter’s condition or health impairment. In short, although the firefighter bears the overall burden of proving his claim for benefits under the Act, section 8-41-209(2)(b) shifts the burden to the employer to show that the firefighter’s condition is not job-related. Put differently, section 8-41-209(2)(b) allows the employer or insurer to overcome the presumption of job-relatedness in section 8-41-209(2)(a) by showing, by a preponderance of the medical evidence, that the firefighter’s condition or health impairment caused by a listed cancer “did not occur on the job.”

3. Employer’s Burden to Overcome the Presumption

¶38 The employer’s burden does not require an especially high degree of proof. Proof “by a preponderance of the evidence” demands only that the evidence must “preponderate over, or outweigh, evidence to the contrary.” Mile High Cab, Inc. v. Colo. Pub. Utils. Comm’n, 2013 CO 26, ¶ 14, 302 P.3d 241, 246. Without imputing any technical or mathematical meaning to the term “probable,” the widely accepted formula for expressing this burden of persuasion is “more probable than not.” Id. (citing Page v. Clark, 592 P.2d 792, 800 (Colo. 1979); In re Winship, 397 U.S. 358, 371-72 (1970);

⁸ Professor Morgan viewed presumptions to shift the burden of persuasion. Under his view, the presumption does not drop out of the case but remains as affirmative evidence. See Edmund M. Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 906-27 (1931); Wright & Graham, supra, § 5122.1 (discussing Morgan view of presumptions).

2 McCormick on Evidence § 339 (Kenneth S. Broun ed., 6th ed. 2006)). Thus, to meet its burden under section 8-41-209(2)(b), the employer or insurer must show that it is “more probable than not” that the firefighter’s condition or impairment “did not occur on the job.”

¶39 The employer can meet this burden to show that the firefighter’s condition “did not occur on the job” by overcoming either the statute’s presumption that the firefighter’s employment caused the firefighter’s particular condition or health impairment (i.e., specific causation) or that the firefighter’s employment is capable of causing the firefighter’s condition or health impairment (i.e., general causation).⁹ To establish the lack of specific causation, an employer can seek to show, for example, that the firefighter was not exposed to the substance or substances that are known to cause the firefighter’s condition or impairment, or that the medical evidence renders it more probable that the cause of the claimant’s cancer was not job-related. But nothing in section 8-41-209(2)(b) prohibits the employer from seeking instead to establish the lack of general causation by showing, by a preponderance of the medical evidence, that the firefighter’s work exposures are not capable of causing the firefighter’s condition or health impairment.

¶40 Christ contends that an employer is precluded from challenging the presumption in section 8-41-209(2)(a) that a general causal relationship exists between firefighting

⁹ Logically, the absence of general causation forecloses the possibility of specific causation. City of Littleton v. Indus. Claim Appeals Office, 2012 COA 187, ___ P.3d ___, 2012 WL 5360912, at *18 (Carparelli, J., dissenting); see also Norris v. Baxter Healthcare Corp., 397 F.3d 878, 881 (10th Cir. 2005) (“[W]ithout general causation, there can be no specific causation.”).

and cancers of the brain, skin, digestive system, hematological system, or genitourinary system, suggesting that the statute represents a “legislative declaration,” the scientific validity of which cannot be undermined. Relying on a line of out-of-state case law, the division majority similarly remarked that an employer cannot “challeng[e] the wisdom or the evidentiary foundation of the legislature’s decision.” City of Littleton, ¶ 33 (citing City of Frederick v. Shankel, 785 A.2d 749, 755 (Md. 2001); Linnell v. City of St. Louis Park, 305 N.W.2d 599, 601 (Minn. 1981); Robertson v. N.D. Workers Comp. Bureau, 616 N.W.2d 844, 855 (N.D. 2000); Sperbeck v. Dep’t of Indus., Labor & Human Relations, 174 N.W.2d 546, 549 (Wis. 1970)). These out-of-state cases, most of which trace their analysis to Sperbeck, involved differently worded presumptions for firefighters.¹⁰ The Wisconsin statute at issue in Sperbeck provided that, where a

¹⁰ Many states have enacted statutes governing occupational diseases of firefighters and establishing some form of presumption that the particular disease is work-related. A leading commentator notes that, of these various firefighter statutes, “[n]o two are quite identical.” 4 Larson’s Workers’ Compensation Law § 52.07[2]. Many of these statutes apply to heart and respiratory diseases, but not to cancer. See, e.g., Conn. Gen. Stat. § 7-433c (2016). Some states are contemplating legislation to add certain types of cancer to existing statutes. See, e.g., H.B. 5075, 2016 Leg. (Conn. 2016). Some statutes require the firefighter to show he or she was exposed to a known carcinogen. See, e.g., Ala. Code § 11-43-144 (2016). Some statutes require the firefighter to inform the department of his or her exposure to the known carcinogen. See, e.g., Ariz. Rev. Stat. § 23-901.01(B) (2016). The statutes vary considerably with respect to the quantum and level of proof required to rebut or overcome the presumption. See, e.g., Cal. Labor Code § 3212.1 (2016) (“[The presumption] may be controverted by evidence . . . that the carcinogen . . . is not reasonably linked to the disabling cancer.”); Idaho Code § 72-438 (2016) (requiring “substantial evidence to the contrary”); La. Stat. Ann. § 2011 (2016) (“This presumption shall be rebuttable by evidence meeting judicial standards”); Mo. Rev. Stat. § 87.006 (2016) (requiring “competent evidence” to the contrary); Or. Rev. Stat. § 656.802(4) (2016) (requiring “clear and convincing medical evidence that the condition or

qualifying firefighter’s disability or death was found to be caused by heart or respiratory defect or disease, “such finding shall be presumptive evidence that such defect or disease was caused by employment.” 174 N.W.2d at 547 n.2.

¶41 Unlike Colorado’s firefighter statute, the statute in Sperbeck contained no language regarding whether or how the presumption could be rebutted. Although the court in Sperbeck described the presumption there as rebuttable, id. at 549, it nevertheless reasoned that the presumption could not be rebutted by evidence that challenged the presumed general causal relationship between firefighting and heart disease; indeed, it suggested that the presumption could be rebutted only by evidence of specific causation. Id. (“Evidence which only attacks the rationale of the statute, without exposing the cause of death of a particular claimant, does nothing more than question the wisdom of the legislature.”).

¶42 The language of Colorado’s firefighter statute leads us to view the presumption in section 8-41-209(2) differently.¹¹ Although the legislature has established a conclusive presumption in a neighboring provision of the Workers’ Compensation Act,

impairment was not caused or contributed to in material part by the firefighter’s employment”). Some states provide no guidance beyond noting that the presumption is “rebuttable.” See, e.g., 40 Ill. Comp. Stat. 5/4-110.1 (2016). Several states instruct that regular tobacco use will undermine any statutory presumption regarding the work-relatedness of respiratory diseases. See, e.g., Mich. Comp. Laws § 418.405 (2016).

¹¹ We recognize that other states have construed their firefighter statutes differently. But as the Maryland Court of Appeals noted in City of Frederick v. Shankle, 785 A.2d at 756, the statutes around the country vary in their details, and hence, so have the decisions interpreting them. Any detailed analysis of out-of-state cases would require careful explanation of those statutory differences, and thus would be of marginal utility. Id.

see, e.g., § 8-41-206 (“[A]ny disability beginning more than five years after the date of injury shall be conclusively presumed not to be due to the injury.” (emphasis added)), nothing in section 8-41-209 suggests that the legislature intended to establish a conclusive presumption that a general causal link exists between firefighting and the listed types of cancer. And although the legislature has made express findings and declarations in other provisions of the Act, see, e.g., § 8-43-602, C.R.S. (2015) (“The general assembly finds, determines, and declares that insurer performance programs are used in marketing, sales, and other efforts, and, as such, may impact an employer’s selection of an authorized health care provider.”), section 8-41-209 contains no legislative declaration or express finding that cancers of the brain, skin, digestive system, hematological system, or genitourinary system result from occupational exposures associated with firefighting.

¶43 Instead, the legislature expressly provided in section 8-41-209(2)(b) that the firefighter’s condition or impairment “[s]hall not be deemed to result from the firefighter’s employment if the firefighter’s employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.” Thus, the legislative policy judgment reflected in section 8-41-209 was to relieve the claimant firefighter of the burden of proving that his condition “result[ed] from his or her employment,” and to shift the difficulty and expense of that burden to the employer to show that the firefighter’s condition did not occur on the job. See City of Littleton, 2012 WL 5360912, at *24 (Carparelli, J., dissenting). But nothing in the statute precludes the employer from attempting to meet this burden through medical

evidence that establishes that the firefighter's occupational exposures are not capable of causing the firefighter's condition or health impairment.

¶44 In this regard, epidemiological evidence is "highly probative because it considers human physiology and the likelihood that a potential environmental factor is capable of entering the body, traveling to a particular organ, and interacting with that organ in a way that can cause a particular cancer." *Id.* at *19; see also *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882 (10th Cir. 2005) ("While the presence of epidemiology does not necessarily end the inquiry, where epidemiology is available, it cannot be ignored. As the best evidence of general causation, it must be addressed."). An epidemiological cohort study, for example, compares disease rates in a population exposed to a substance with disease rates in a population that has not been exposed. The comparison yields a relative risk ratio expressed as: $\text{Relative Risk} = R1/R2$, where $R1$ = the risk of disease in the exposed population and $R2$ = the risk of disease in a non-exposed population. Gerald W. Boston, A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience, 18 Colum. J. Envtl. L. 181, 234-35 (1993). If the relative risk is greater than 1.0, the risk in the exposed group is greater than in the nonexposed group, and there is a positive association between the exposure and the disease. *Id.* at 235. A relative risk greater than 1.0 reveals only an association between the exposure and the disease, and not necessarily a causal relationship, given that other factors may be at work. *Id.* To determine if an association is causal, epidemiologists have developed criteria that treat the statistical association as

the starting point of the analysis and apply additional, more particularistic, analytical and biological tests before concluding a causal relationship exists. See id.

¶45 We conclude that employers may rely on epidemiological evidence to show the lack of an association or general causal relationship between known or typical substances to which the firefighter is likely to be exposed on the job and the firefighter's particular condition or impairment. The ALJ may then determine whether that medical evidence shows, by a preponderance, that the claimant firefighter's cancer "did not occur on the job." To construe section 8-41-209 otherwise contravenes its plain language and improperly converts section 8-41-209(2)(a) into a conclusive, or irrebuttable, presumption.

¶46 Importantly, we disagree with the court of appeals' conclusion that to overcome the presumption in section 8-41-209(2)(a), the employer must "disprove a wide and unspecified range of potential causes." City of Littleton, ¶ 100. The statute does not require the employer to prove that the cancer "was not, or could not have been, caused by anything that the firefighter encountered on the job." Id. at ¶ 36 (emphasis added). The division majority drew this conclusion because it reasoned that "[t]he statute contains no text that would limit the ways in which a firefighter is presumed to have gotten his cancer," but simply presumes the cancer "resulted from the firefighter's employment somehow." Id. at ¶ 26. But as discussed above, the presumption of job-relatedness in section 8-41-209(2)(a) serves only to establish, for purposes of section 8-41-209(1), that the firefighter's condition qualifies as an "occupational disease" under the Workers' Compensation Act. Thus, the scope of the presumption must be viewed in

light of the statutory definition of “occupational disease” in section 8-40-201(14), which we have previously recognized “limit[s] the scope of occupational diseases to those diseases which result from working conditions which are characteristic of the vocation.” Anderson v. Brinkhoff, 859 P.2d 819, 823 (Colo. 1993) (emphasis added). In other words, to qualify as an “occupational” disease, as distinguished from a disease “not distinctively associated with the employment,” see id. at 823 n.4 (quoting 1B Larson’s Workmen’s Compensation Law § 41.32 (1993)), the employee’s condition or impairment must result from known or typical workplace exposures.

¶47 When viewed in light of the definition of “occupational disease,” we conclude that the presumption in section 8-41-209(2)(a) does not, as the court of appeals reasoned, broadly presume exposure to any “unspecified substance or intangible agent.” City of Littleton, ¶ 28. Consequently, section 8-41-209(2)(b) does not require the employer to disprove causation from every conceivable substance or, as Judge Carparelli phrased it, from “all imaginable possibilities.” Id. at *19 (Carparelli, J., dissenting). If a firefighter’s exposure to a substance is speculative, remote, or illogical, then it is not typical of the occupation. Because the division majority erred in its understanding of the breadth of the presumption, it erred in its conclusion that section 8-41-209(2) requires the employer to prove that “the cancer was not, or could not have been, caused by anything that the firefighter encountered on the job.” Id. at ¶ 36 (majority opinion).

¶48 The burden imposed on the employer remains a formidable one because the employer is tasked with proving a negative. But by erroneously requiring the employer to disprove causation from “anything” to which the firefighter might conceivably have

been exposed, the court of appeals set an impossible bar, and effectively construed section 8-41-209(2) to establish a conclusive presumption.

¶49 In sum, we conclude that an employer can meet its burden under section 8-41-209(2)(b) to show that a firefighter's condition or impairment "did not occur on the job" by establishing, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the substance or substances that are known to cause the firefighter's condition or impairment, or the medical evidence renders it more probable that the cause of the claimant's condition or impairment was not job-related.

D. Sufficiency of the Evidence

¶50 Littleton alleges that the court of appeals erred by concluding that Littleton's medical evidence was insufficient as a matter of law to overcome the statutory presumption in section 8-41-209(2)(a) and failing to defer to the ALJ's findings of fact. We agree.

¶51 Causation is an issue of fact for determination by the ALJ. Univ. Park Care Ctr. v. Indus. Claim Appeals Office, 43 P.3d 637, 640 (Colo. App. 2001). The ALJ has discretion to determine the weight to be accorded an expert medical opinion. Rockwell Int'l v Turnbull, 802 P.2d 1182, 1183 (Colo. App. 1990). The ALJ is the sole arbiter of conflicting medical evidence, and the ALJ's factual findings are binding on appeal if they are supported by substantial evidence or plausible inferences from the record.

Davison v. Indus. Claim Appeals Office, 84 P.3d 1023, 1031 (Colo. 2004); see also § 8-43-308, C.R.S. (2015) (“If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.”).

¶52 “Substantial evidence” is evidence that is probative, credible, and competent, such that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory testimony or inference. City of Loveland Police Dep’t v. Indus. Claim Appeals Office, 141 P.3d 943, 950 (Colo. App. 2006); see also Benuishis v. Indus. Claim Appeals Office, 195 P.3d 1142, 1145 (Colo. App. 2008) (“Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” (citation omitted)). In applying this standard, an appellate court “must view the evidence as a whole and in the light most favorable to the prevailing party, deferring to the ALJ’s credibility determinations and resolution of conflicting evidence.” Benuishis, 195 P.3d at 1145.

¶53 We conclude that the ALJ’s findings in this case are supported by substantial evidence. At the hearing before the ALJ, Christ testified that he had been a firefighter for over twenty-five years and had served as a battalion chief for Littleton Fire Rescue for over ten years. When he was hired by Littleton in 1987, he underwent a physical examination that included blood work and chest x-rays. Christ underwent additional blood testing as part of HAZMAT physicals, and additional checkups through the City of Littleton’s voluntary Fit for Life program. Christ testified he was not aware of any

finding that he was at risk for cancer. He was diagnosed with brain cancer in December 2007 after undergoing an MRI scan and biopsy.

¶54 The expert witness testimony focused on the alleged causal connection between Christ's brain cancer and his exposure to carcinogens commonly associated with employment as a firefighter.

¶55 Christ presented two expert witnesses. The first expert, Dr. Virginia Weaver, an assistant professor at Johns Hopkins University and a physician specializing in occupational and environmental medicine, reported that firefighters are exposed to numerous substances that the International Agency for Research on Cancer ("IARC") categorizes as Group 1 chemicals, known to cause cancer in humans: arsenic, asbestos, benzene, benzo[a]pyrene, formaldehyde, and soot. She reported that firefighters are also exposed to Group 2A chemicals that are probable human carcinogens: 1,3-butadiene, creosote, diesel engine exhaust, and combustion products of wood. Dr. Weaver opined that firefighters have an increased risk of brain cancer and that Christ's "brain cancer is, more likely than not, work-related as a result of the toxic exposures he had experienced during his occupational activities as a professional firefighter." To support her conclusion that a causal link exists between Christ's brain cancer and his employment as a firefighter, Dr. Weaver relied on the LeMasters study, a meta-analysis¹² of cancer risks in firefighters. See Grace K. LeMasters et al., Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies, 48 J. Occupational &

¹² The LeMasters meta-analysis is a study in which the authors compiled and consolidated the information contained in thirty-two other studies.

Envtl. Med. 1189 (2006). This study reported a “summary risk estimate” of 1.32 for brain cancers.

¶56 Dr. Edward Arenson, a neuro-oncologist, also testified on Christ’s behalf as one of his treating physicians. He opined that “it’s more likely than not—in fact, it’s highly probable that there is a relationship between [Christ’s] occupational exposure and the diagnosis of glioblastoma.” His opinion was also based on the LeMasters study, although he acknowledged that the study does not use language of “cause and effect.”

¶57 Littleton presented two expert witnesses at the hearing before the ALJ and submitted a written report by a third expert. All of Littleton’s experts assumed that Christ was exposed to the list of Group 1 and Group 2A chemicals identified by Dr. Weaver as commonly associated with firefighting. These experts testified regarding the extensive investigation and study of carcinogens, the means by which the body absorbs such chemicals, the pathways by which those chemicals target particular organs, and the effects of those chemicals on particular organs.

¶58 The first expert, Dr. Denise Damek, a neuro-oncologist, opined that the LeMasters study, which suggested a possible increased risk of brain tumors in firefighters, was not designed to examine causation, and that “increased risk does not equate to causality.” She testified that nothing in the LeMasters study supports the conclusion that a causal connection exists between firefighter exposures and the development of brain cancer, or that Christ’s occupational exposures caused his brain tumor. She reported that “[n]o known or putative carcinogen has been definitely associated with brain tumor development in either humans or animals.” Although she

acknowledged that firefighters are exposed to carcinogens, it remains unknown if the brain is a target organ for these carcinogens. Moreover, even if the brain was clearly identified as a target organ for the specific carcinogenic exposures common to firefighting, it is unknown whether exposure through inhalation or the skin could reasonably impact the brain. Dr. Damek stated that the two recognized factors for an increased risk in developing brain cancer are ionizing radiation and genetically inherited syndromes, and noted that even Dr. Weaver, Christ's expert, found that Christ "did not have a family history of a tumor syndrome associated with malignant brain tumors and did not have a history of prior radiation treatment to his brain."

¶59 Dr. Javier Waksman, a physician specializing in internal medicine and medical toxicology, testified that to determine causation, one must establish and identify source, exposure, dose, and health effect. He reported that the standard conceptual framework to determine whether an exposure caused a medical effect requires (1) the presence of an unbroken pathway between the source of the contaminant and the point of exposure; (2) a calculation or measurement of the concentration of the chemical(s) at the exposure point; (3) a calculation or measurement of the dose received by the individual at the exposure point; and (4) an analysis of the health effects of the chemicals at such doses and the dose-response relationship of the chemical(s) under investigation. In Christ's case, Dr. Waksman noted that Dr. Weaver did not attempt to determine the exposure pathway or characterize the potential dose to which Christ was purportedly exposed. He nevertheless presumed that the "source" of workplace carcinogens would be the Group 1 chemicals identified by Dr. Weaver as commonly associated with firefighting.

Dr. Waksman then testified that the LeMasters study on which Christ's experts relied was not designed to determine causation. He further opined that current published epidemiological literature does not support an association between these Group 1 chemicals and GBM; indeed, there is no study that shows an association between brain cancer and the duties of being a firefighter.

¶60 Lastly, Littleton presented a report by Dr. Patricia Buffler, a professor of epidemiology. Dr. Buffler evaluated the available epidemiological studies pertaining to occupational exposures associated with firefighting and the possible association of these exposures with brain cancer. She noted that the authors of the LeMasters study classified the likelihood of brain cancer risk among firefighters as "possible," not probable. In her view, available epidemiological data, including the comprehensive review by LeMasters, do not support a conclusion that occupational exposures to chemicals associated with firefighting are causally associated with GBM or any form of brain cancer. Dr. Buffler reported that "[t]o date, ionizing radiation is the only known modifiable or environmental risk factor for glioma," citing exposure to "radiation from the atomic bombs in Hiroshima and Nagasaki" or "therapeutic radiation directed at the cranium" as the level of radiation high enough to increase risk.

¶61 In her "Findings of Fact, Conclusions of Law, and Order," the ALJ reviewed at length the opinions of all the parties' experts. She found and concluded that the testimony and opinions of Littleton's experts were clear, reliable, and well-founded by scientific evidence, and that each expert performed his or her own independent literature search, the completeness of which was not challenged or controverted by

Christ or his experts. The ALJ concluded that collectively, Littleton's expert witnesses established that the substances to which Christ was exposed did not target his brain and do not cause brain cancer. The ALJ concluded that Littleton's experts' opinions supported the conclusion that Christ's GBM condition did not arise out of his employment as a firefighter.

¶62 The ALJ considered and reviewed the opinions of Christ's experts, Dr. Weaver and Dr. Arenson, and noted that both experts relied heavily on the LeMasters meta-analysis as support for their opinions that Christ's GBM was caused by his employment as a firefighter, and that the LeMasters study supports only a possible increased risk of brain cancer for firefighters. The ALJ concluded, based on the testimony of Littleton's experts, that the LeMasters study does not support a causal association between the carcinogens commonly associated with firefighting and GBM. Based on the opinions of Littleton's experts, the ALJ ultimately concluded that Littleton met its burden of proof to establish by a preponderance of the medical evidence that Christ's brain cancer was not related to his employment.

¶63 We conclude that the ALJ's findings are supported by substantial evidence in the record. As the court of appeals recognized, Littleton's evidence supports a reasonable inference that Christ's brain cancer was not caused by any of the carcinogens commonly associated with firefighting. City of Littleton, ¶ 90. Specifically, the ALJ reasonably could have found that, if Christ encountered those substances, he likely absorbed them through inhalation or his skin; that there is no plausible biological pathway by which those substances, so absorbed, could affect the brain; and that those substances do not

cause brain cancer. Id. Thus, Littleton established, by a preponderance of the medical evidence, that Christ's condition "did not occur on the job" because it is more probable than not that his known or typical occupational exposures do not cause GBM, and the record supports a reasonable inference that Christ was not exposed to ionizing radiation in an amount equivalent to an atomic blast or a therapeutic dose directed at his cranium.¹³ Littleton was not required to do more to meet its burden under section 8-41-209(2)(b).

III. Conclusion

¶64 Because we disagree with the court of appeals' interpretation of the breadth of the statutory presumption in section 8-41-209(2)(a) and of the employer's burden to overcome the presumption, we conclude that the court of appeals erroneously evaluated the medical evidence presented by Littleton and erroneously failed to defer to the ALJ's findings of fact, which are supported by substantial evidence in the record. We therefore reverse the judgment of the court of appeals and remand this case with directions to return the matter to the Panel for reinstatement of the ALJ's original findings of fact, conclusions of law, and order.

¹³ We note that Christ does not argue, nor is there any evidence in the record, that he had a preexisting condition that was aggravated by his occupational exposures as a firefighter.

meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2016 CO 26

Supreme Court Case No. 13SC560
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 12CA2190

Petitioners:

Industrial Claim Appeals Office and Mike Zukowski,

v.

Respondents:

Town of Castle Rock and CIRSA.

Judgment Affirmed

en banc

May 2, 2016

Attorneys for Petitioner:

Neil D. O'Toole

John Sbarbaro

Denver, Colorado

Attorneys for Respondents Town of Castle Rock and CIRSA:

Ritsema & Lyon, P.C.

Paul Krueger

Alana S. McKenna

Denver, Colorado

Attorney for Amicus Curiae Colorado Self Insured Association:

Ruegsegger Simons Smith & Stern, LLP

Frank M. Cavanaugh

Denver, Colorado

Attorney for Amicus Curiae Pinnacle Assurance:

Pinnacle Assurance

Harvey D. Flewelling

Denver, Colorado

No appearance by or on behalf of: Industrial Claim Appeals Office

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 Castle Rock firefighter Mike Zukowski was diagnosed with melanoma, a type of skin cancer. He had three excision surgeries to remove the melanoma and was then released to return to work on full duty. He sought both medical benefits and temporary total disability benefits under the “firefighter statute,” § 8-41-209, C.R.S. (2015), of the Workers’ Compensation Act of Colorado, asserting that his melanoma qualified as a compensable occupational disease. At issue here is whether Zukowski’s employer, the Town of Castle Rock, and Castle Rock’s insurer, the Colorado Intergovernmental Risk Sharing Agency (collectively, “Castle Rock”), may seek to overcome a statutory presumption in section 8-41-209(2)(a) that Zukowski’s condition resulted from his employment as a firefighter by presenting risk-factor evidence indicating that Zukowski’s risk of melanoma from other sources is greater than his risk of melanoma from firefighting.

¶2 The firefighter statute applies to firefighters who have completed five or more years of employment as a firefighter. § 8-41-209(1). Section 8-41-209(1) provides that the death, disability, or health impairment of such a firefighter “caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system” shall be considered an “occupational disease” (thus entitling the firefighter to benefits under the Workers’ Compensation Act) if the cancer “result[ed] from his or her employment as a firefighter.” Section 8-41-209(2)(a) then creates a statutory presumption that the firefighter’s condition or health impairment caused by a listed type of cancer “result[ed] from [the] firefighter’s employment” if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal

substantial evidence of such condition or health impairment preexisting his or her employment as a firefighter. Under section 8-41-209(2)(b), however, the firefighter's condition or impairment "[s]hall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job." The question raised in this case is whether, under section 8-41-209, a firefighter's employer or insurer can attempt to meet its burden to show that the firefighter's condition "did not occur on the job" by presenting risk-factor evidence indicating that the firefighter's risk of cancer from other, non-job-related sources is greater than his risk of cancer from firefighting.

¶3 In City of Littleton v. Industrial Claim Appeals Office, 2016 CO 25, ___ P.3d ___, a companion decision issued today, we held that section 8-41-209(2) places the burden of persuasion with the employer to show, by a preponderance of the medical evidence, that the firefighter's condition or health impairment caused by a listed cancer "did not occur on the job." City of Littleton, ¶ 3. We further held that an employer can meet its burden to show a firefighter's cancer "did not occur on the job" by establishing the absence of specific causation. Id. In this case, the employer sought to establish the absence of specific causation by presenting evidence indicating that Zukowski's particular risk of developing melanoma from other, non-job-related sources outweighed his risk of developing melanoma from his employment as a firefighter. We hold that an employer may rely on such evidence in seeking to overcome the presumption in section 8-41-209(2). To meet its burden of proof, the employer is not required to prove a

specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace. Accordingly, we affirm the judgment of the court of appeals and remand this case with directions to return the matter to the administrative law judge ("ALJ") for reconsideration consistent with this opinion and our decision in City of Littleton.

I. Facts and Procedural History

¶4 Petitioner Mike Zukowski was born in 1972. He grew up in Albuquerque, New Mexico, and moved to Colorado in 2000. While he was growing up, he was involved with Cub Scouts and Boy Scouts, and he played soccer and participated in gymnastics and track and field. He had moles and freckles, but no known family history of melanoma.

¶5 Zukowski began employment as a firefighter with the Town of Castle Rock in 2000. He worked as an engineer and paramedic. Before beginning his employment, Zukowski underwent a physical examination by his personal physician, noting a concern with moles at that time. In addition to working as a firefighter, Zukowski also worked part-time doing construction, often outdoors. He eventually opened his own business building decks and furniture and remodeling buildings and basements. When not working, he spent time outside running, hiking, and cycling.

¶6 In 2002, Zukowski had five moles removed and biopsied. In 2008, he developed a mole on his right calf. In 2011, Zukowski was diagnosed with invasive melanoma, a type of skin cancer, on his right outer calf, at the same site of the mole that developed in 2008. He had three excision surgeries to remove the mole, and was released to return to work on full duty. Zukowski sought medical benefits and temporary total disability benefits under section 8-41-209 of the Workers' Compensation Act for the periods of time he received treatment and was recovering from his melanoma.

¶7 In June 2012, the ALJ granted Zukowski's claim for workers' compensation benefits. The parties stipulated that Zukowski was entitled to the presumption in section 8-41-209(2)(a) that his melanoma "result[ed] from [his] employment." Thus, the only issue at the hearing was whether Castle Rock met its burden under section 8-41-209(2)(b) to overcome that presumption by a preponderance of the medical evidence that Zukowski's melanoma "did not occur on the job."

¶8 Castle Rock did not challenge the existence of a general causal link between firefighting and melanoma. Instead, Castle Rock sought to disprove specific causation by presenting evidence of alternate causation. Castle Rock's expert witness, Dr. William Milliken, a physician with expertise in occupational medicine and the causation of industrially related cancers, testified that Zukowski's known risk factors—specifically, Zukowski's history of sun exposure and the presence of dysplastic¹ moles on his

¹ "Dysplastic" is an adjective for "dysplasia," an "abnormal growth or development (as of organs, tissues, or cells)." Webster's Third New Int'l Dictionary 712 (2002).

body—placed him at a much greater risk of developing melanoma than did his firefighting.

¶9 The ALJ held that Castle Rock’s burden under section 8-41-209 is “to prove by medical evidence that a claimant’s cancer comes from a specific cause not occurring on the job.”² The ALJ ruled that Castle Rock’s “[d]iscussion and analysis of various risk factors outside of firefighting exposure is insufficient to sustain [Castle Rock’s] burden of proof where those risk factors cannot be equated with a cause in fact of [Zukowski’s] melanoma.” Accordingly, the ALJ found that Castle Rock “failed to prove by a preponderance of the medical evidence that [Zukowski’s] melanoma did not occur on the job.”

¶10 On review before a panel of the Industrial Claim Appeals Office (“Panel”), Castle Rock argued that the ALJ erroneously required Castle Rock to prove the actual cause of Zukowski’s cancer in order to rebut the presumption in section 8-41-209(2). The Panel rejected Castle Rock’s contention and affirmed the ALJ’s decision, concluding that it could not say that the ALJ’s interpretation of the evidence was erroneous as a matter of law. The Panel concluded that, in its view, “the ALJ plausibly interpreted the experts’ reports, and the other medical evidence, as failing to rebut the presumption that [Zukowski’s] skin cancer was caused by his work as a firefighter.”

² In arriving at his interpretation of section 8-41-209, the ALJ relied on the Industrial Claim Appeals Office panel order underlying our decision today in City of Littleton, 2016 CO 25. At that time, the City of Littleton case was pending before the court of appeals.

¶11 Castle Rock appealed the Panel’s final order to the court of appeals. Castle Rock maintained that an employer is not required to prove the exact cause of a firefighter’s cancer to meet its burden under the statute and that the ALJ misinterpreted section 8-41-209(2)(b) when it determined that Castle Rock’s risk-factor evidence was insufficient to overcome the presumption in section 8-41-209(2)(a). In a unanimous, published opinion, the court of appeals agreed with Castle Rock, and set aside the Panel’s order. Town of Castle Rock v. Indus. Claim Appeals Office, 2013 COA 109, ¶ 1, ___ P.3d ___.

¶12 The court of appeals concluded that the ALJ and the Panel misinterpreted the employer’s burden under section 8-41-209(2)(b). It observed that, under this provision, an employer can overcome the presumption that a firefighter’s cancer “result[ed] from his employment” by establishing “by a preponderance of the medical evidence” that the firefighter’s cancer “did not occur on the job.” Id. at ¶ 21; § 8-41-209(2)(b). The court of appeals reasoned that an employer can overcome the presumption by demonstrating that “another source was more likely or more probably the cause of a firefighter’s cancer.” Town of Castle Rock, ¶ 21. Drawing from cases in other jurisdictions holding that evidence showing a probable alternative cause of the illness can overcome a presumption that a disease is work-related, the court of appeals concluded that an employer may overcome the statutory presumption in section 8-41-209(2)(a) “with specific risk evidence demonstrating that a particular firefighter’s cancer was probably caused by a source outside of work.” Id. at ¶¶ 22-24 (citing Elter v. N.D. Workers Comp. Bureau, 599 N.W.2d 315, 319-20 (N.D. 1999); Burrows v. N.D. Workers’ Comp.

Bureau, 510 N.W.2d 617, 619 (N.D. 1994); Byous v. Mo. Local Gov't Emps. Ret. Sys. Bd. of Trs., 157 S.W.3d 740, 749 (Mo. Ct. App. 2005)).

¶13 The court rejected the view that the firefighter statute requires the employer to “establish that a cancer was specifically caused by a source outside the workplace,” noting that to do so construes the statute to create “a nearly insurmountable barrier over which most employers will not be able to climb,” and converts the provision into a “strict liability statute mandating that every firefighter who develops one of the prescribed cancers is entitled to workers’ compensation coverage.” Id. at ¶ 20. The court of appeals observed that such an outcome “vitiat[e]s the legislature’s intent to provide employers with an avenue to overcome the presumption by a preponderance of the evidence.” Id.

¶14 We granted certiorari review in this case as a companion to City of Littleton, 2016 CO 25.³

³ We granted certiorari review of the following issues:

1. Whether the court of appeals in Town of Castle Rock and CIRSA v. Industrial Claim Appeals Office and Mike Zukowski, 2013CA2190, misconstrued the application of the statutory presumption found at section 8-41-209, C.R.S., by holding that [the] legislative presumption of cancer causation for [fire]fighters “can be overcome by establishing that the risk of cancer from other sources outweighs the risk created by firefighting.”
2. Whether the court of appeals improperly equated “risk” with “cause,” by holding that showing “risk” or “precursor” factors can sufficiently establish a preponderance of the medical evidence that a firefighter’s cancer did not occur on the job, thereby rejecting [the] statutory presumption created by the Colorado Legislature that petitioner’s skin cancer (melanoma) was, in fact, caused by his job.

II. Standard of Review

¶15 “We review de novo questions of law concerning the application and construction of statutes.” Hickerson v. Vessels, 2014 CO 2, ¶ 10, 316 P.3d 620, 623. Our purpose in interpreting a statute is to give effect to the legislative intent. Concerned Parents of Pueblo, Inc. v. Gilmore, 47 P.3d 311, 313 (Colo. 2002). To discern the General Assembly’s intent, we turn first to the statutory language. Id. A comprehensive regulatory scheme such as the Workers’ Compensation Act must be construed as a whole to give effect and meaning to all its parts, and we avoid interpretations that render provisions superfluous. Wolford v. Pinnacol Assurance, 107 P.3d 947, 951 (Colo. 2005). Where the statutory language is clear and unambiguous, we do not resort to legislative history or other interpretive rules of statutory construction. Smith v. Exec. Custom Homes, Inc., 230 P.3d 1186, 1189 (Colo. 2010).

III. Analysis

¶16 We begin with a discussion of section 8-41-209, C.R.S. (2015), and our opinion, announced today, in City of Littleton, 2016 CO 25. We then address whether, under section 8-41-209, a firefighter’s employer or insurer can attempt to meet its burden to show that the firefighter’s condition “did not occur on the job” by presenting risk-factor evidence indicating that the firefighter’s risk of cancer from other non-job-related sources is greater than the risk of cancer from firefighting.

¶17 We hold that an employer can seek to meet its burden under section 8-41-209(2)(b) to show a firefighter’s cancer “did not occur on the job” by presenting particularized risk-factor evidence indicating that it is more probable that the claimant

firefighter's cancer arose from some source other than the firefighter's employment. To meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace.

A. Section 8-41-209

¶18 As discussed in a companion decision announced today, City of Littleton, 2016 CO 25, a claimant in a typical workers' compensation case has the burden of establishing his or her entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. (2015). However, in 2007, the legislature made it easier for certain firefighters to recover benefits by enacting section 8-41-209, which modifies the burden of proof in a narrow class of cases involving particular types of cancer:

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

§ 8-41-209.

¶19 Section 8-41-209(1), which applies to individuals who have been employed as firefighters for five or more years, provides that the death, disability, or health impairment of such a firefighter caused by cancer of the "brain, skin, digestive system, hematological system, or genitourinary system" shall be considered an "occupational disease," if the condition or health impairment "result[ed] from his or her employment as a firefighter." Section 8-41-209(2)(a) then creates a statutory presumption that the firefighter's condition or health impairment caused by a listed type of cancer "result[ed] from [the] firefighter's employment" if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of his condition preexisting his employment as a firefighter. Thus, if a firefighter who suffers from a listed cancer can show that he meets the requisite years of service and physical exam conditions, then the statute establishes an inference that his cancer "result[ed] from [his] employment." In effect, the presumption in section 8-41-209(2)(a) relieves a qualifying claimant firefighter of the burden to prove that his cancer "result[ed] from [his] employment as a firefighter" for purposes of establishing under section 8-41-209(1) that his condition is a compensable "occupational disease" under the Act.

¶20 We held in City of Littleton that this presumption of job-relatedness in section 8-41-209(2)(a) is not a conclusive or irrebuttable presumption. City of Littleton, ¶ 36.

Rather, section 8-41-209(2)(b) provides that the firefighter’s condition or impairment “[s]hall not be deemed to result from the firefighter’s employment” if the firefighter’s employer or insurer shows by a “preponderance of the medical evidence” that such condition or impairment “did not occur on the job.” We concluded that section 8-41-209(2)(a) creates a substantive presumption that shifts the burden of persuasion to the employer regarding the job-relatedness of the firefighter’s condition or health impairment. *Id.* at ¶ 37. Although the firefighter bears the overall burden of proving his claim for benefits under the Act, section 8-41-209(2)(b) shifts the burden to the employer to show that the firefighter’s condition is not job-related. *Id.*

¶21 We observed that the “preponderance of the evidence” standard demands only that the employer show that it is “more probable than not” that the firefighter’s condition or impairment “did not occur on the job.” *Id.* at ¶ 38. We held that an employer can meet this burden to show that the firefighter’s condition “did not occur on the job” by establishing the absence of either general or specific causation. *Id.* at ¶¶ 3, 25, 39. We reasoned that the employer can establish the lack of specific causation by showing, for example, that the firefighter was not exposed to the substance or substances that are known to cause the firefighter’s condition or impairment, or that the medical evidence renders it more probable that the cause of the claimant firefighter’s condition was not job-related. *Id.* at ¶ 39.

B. Castle Rock’s Risk-Factor Evidence

¶22 Castle Rock did not attempt to meet its burden under section 8-41-209(2)(b) by establishing the absence of general causation. It did not seek to show the lack of a

causal link between firefighting and melanoma or otherwise establish that Zukowski's work exposures are not capable of causing melanoma. Instead, Castle Rock sought to show the absence of specific causation, that is, that Zukowski's particular melanoma "did not occur on the job." Castle Rock sought to meet this burden by presenting evidence of alternate causation: that it is more probable that Zukowski's melanoma was caused by something other than his exposures as a firefighter. The question in this case is whether an employer can rely on risk-factor evidence for this purpose.

¶23 We agree with the court of appeals that the ALJ erroneously construed section 8-41-209(2)(b) to require Castle Rock to establish a specific alternate cause of Zukowski's cancer in order to overcome the presumption that the firefighter's condition or impairment "result[ed] from his employment as a firefighter." Town of Castle Rock, 2013 COA 109, at ¶ 19. We further agree with the court of appeals that an employer may meet its burden to show that the firefighter's condition "did not occur on the job" by presenting risk-factor evidence demonstrating that it is more probable than not that a particular firefighter's cancer was caused by something other than the firefighter's employment. Id.

¶24 The employer's burden under section 8-41-209(2)(b) does not require proof of specific alternate causation; rather, the employer need only show, by a preponderance of the medical evidence, that it is more probable that the firefighter's cancer "did not occur on the job." Particularized risk-factor evidence showing that a claimant firefighter's cancer was more probably caused by some source outside of work can be sufficient to meet the employer's burden under section 8-41-209(2)(b).

¶25 Here, Dr. Milliken testified that Zukowski's increased risk of melanoma due to sun exposure "was at least twice normal." In addition, Dr. Milliken opined that Zukowski's increased risk of melanoma due to abnormal moles, four or five of which Dr. Milliken considered to be "atypical nevi," was "6-10 times [higher than] normal." Dr. Milliken concluded that Zukowski's risk of developing melanoma as a result of firefighting was considerably smaller by comparison.⁴ The testimony from Zukowski's retained expert, Dr. Annyce Mayer, actually corroborated Dr. Milliken's risk statistics. The ALJ nevertheless concluded that because relative risk does not establish causation, Castle Rock's evidence failed to rebut the presumption because it did not establish the actual alternate cause of Zukowski's melanoma.

¶26 Because the ALJ erroneously construed section 8-41-209(2)(b) to require the employer to prove a specific alternate cause of Zukowski's cancer, it erroneously determined that the risk-factor evidence presented by Castle Rock was insufficient as a matter of law to overcome the presumption. We conclude that risk-factor evidence can be probative of the absence of a specific causal relationship between the firefighter's health condition or impairment and firefighting and therefore should be considered by the ALJ in evaluating whether the employer or insurer has met its burden of proof to show, by a preponderance of the medical evidence, that the firefighter's condition "did not occur on the job."

⁴ For purposes of this comparison, Dr. Milliken pointed to the LeMasters study "summary risk estimate" of 1.32 for malignant melanoma. See Grace K. LeMasters et al., Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies, 48 J. Occupational & Env'tl. Med. 1189, 1199 tbl. 5 (2006).

IV. Conclusion

¶27 We hold that an employer can seek to meet its burden under section 8-41-209(2)(b) to show a firefighter's cancer "did not occur on the job" by presenting particularized risk-factor evidence indicating that it is more probable that the claimant firefighter's cancer arose from some source other than the firefighter's employment. To meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's particular cancer because the firefighter's particular risk factors rendered it more probable that the firefighter's cancer arose from a source outside the workplace. Accordingly, we affirm the judgment of the court of appeals and remand this case with directions to return the matter to the ALJ for reconsideration consistent with this opinion and City of Littleton v. Industrial Claim Appeals Office, 2016 CO 25, ___ P.3d ___.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2016 CO 27

Supreme Court Case No. 14SC123
C.A.R. 50 Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA858
Industrial Claim Appeals Office, WC4873594

Petitioners:

City of Englewood and Colorado Intergovernmental Risk Sharing Agency,

v.

Respondents:

Delvin Harrell and Industrial Claim Appeals Office.

Order Set Aside and Case Remanded

en banc

May 2, 2016

Attorneys for Petitioners:

Ritsema & Lyon, P.C.

Paul Feld

Paul Krueger

Alana McKenna

Denver, Colorado

Attorney for Respondent Delvin Harrell:

Law Office of O'Toole & Sbarbaro, P.C.

Neil D. O'Toole

Denver, Colorado

No appearance by or on behalf of: Industrial Claim Appeals Office

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 We accepted transfer of this case from the court of appeals pursuant to section 13-4-109, C.R.S. (2015) and C.A.R. 50 because the issues raised involve matters of substance not previously determined by this court, and because this court granted certiorari in two cases raising similar issues.¹ In City of Littleton v. Industrial Claim Appeals Office, 2016 CO 25, ___ P.3d ___, and Industrial Claim Appeals Office v. Town of Castle Rock, 2016 CO 26, ___ P.3d ___, both announced today, we set forth our interpretation of section 8-41-209, C.R.S. (2015), of the Workers' Compensation Act of Colorado, which provides workers' compensation coverage, under certain conditions, for occupational diseases affecting firefighters.

¶2 In City of Littleton, 2016 CO 25, and Town of Castle Rock, 2016 CO 26, we held that section 8-41-209(2)(a) establishes a presumption that a qualifying firefighter's cancer "result[ed] from his employment as a firefighter," and that section 8-41-209(2)(b) shifts the burden of persuasion to the employer or insurer to show, by a preponderance of the medical evidence, that the firefighter's condition "did not occur on the job." We

¹ We accepted transfer of this case under C.A.R. 50 to address the following issues:

1. Whether the Administrative Law Judge incorrectly applied the law set forth in § 8-41-209, C.R.S. by finding that respondents cannot meet their burden of proof in overcoming the statutory presumption through medical evidence of non-occupational risk factors that were the more likely cause of claimant's condition or impairment.
2. Whether the Administrative Law Judge incorrectly applied the law set forth in § 8-41-209, C.R.S. by applying a heightened burden of proof in requiring the employer to prove the actual cause of claimant's cancer in order to sufficiently rebut the statutory presumption of compensability of claimant's melanoma.

further held that an employer can meet its burden by establishing the absence of either general or specific causation. Specifically, an employer can show, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue, or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related. City of Littleton, ¶¶ 3, 25, 39. In Town of Castle Rock, ¶¶ 3, 17, 27, we further held that to meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace. Id. at ¶¶ 17, 27.

¶3 In this case, Englewood firefighter Delvin Harrell was diagnosed with melanoma. He underwent surgery to remove the melanoma and sought workers' compensation benefits under section 8-41-209, asserting that his melanoma qualified as a compensable occupational disease. As in Town of Castle Rock, the City of Englewood and its insurer, the Colorado Intergovernmental Risk Sharing Agency (collectively, "Englewood") sought to overcome the presumption that the claimant's melanoma resulted from his employment as a firefighter by presenting risk-factor evidence indicating that the claimant's risk of melanoma from other sources is greater than his

risk of melanoma from firefighting. Relying on the court of appeals' analysis in City of Littleton v. Indus. Claim Appeals Office, 2012 COA 187, ___ P.3d ___, the ALJ concluded that Englewood failed to overcome the presumption in section 8-41-209(2)(a). A panel of the Industrial Claim Appeals Office ("Panel") affirmed the ALJ's order.

¶4 Because the ALJ and the Panel in this case did not have the benefit of our analysis in City of Littleton and Town of Castle Rock, we set aside the Panel's order affirming the ALJ and remand this case to the Panel with directions to return the matter to the ALJ for reconsideration in light of our decisions announced today in City of Littleton and Town of Castle Rock.