Division of Workers' Compensation
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April Case Law Update

Presented by Judge John Sandberg and Judge David Gallivan

This update covers ICAO and COA decisions issued from March 9, 2019 to April 11, 2019

Court of Appeals

Yeutter v. ICAO 2
Bolton v. ICAO 32

Industrial Claim Appeals Office

*Grant v. Walmart Associates Inc. 25
Schniedwind v. Rite of Passage Inc. 52
Davoli v. University of Colorado 62
Dresselaers v. Federal Express 67
Martin v. Jack in the Box 74
Colorado v. Gilbert 83
Chaussignand v. West Lake Creek Co LLC 99

*Included for informational purposes but not covered.

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DATE FILED: April 11, 2019
CASE NUMBER: 2018CA498

SUMMARY
April 11, 2019

2019COA53

No. 18CA0498, *Yeutter v. ICAO* — Labor and Industry — Workers' Compensation — Benefits — Permanent Partial Disability — Medical Impairment Benefits — Permanent Total Disability — Maintenance Medical Benefits — Division-Sponsored Independent Medical Examination

A division of the court of appeals considers whether section 8-42-107(8)(b)(III), C.R.S. 2018, which provides that a division-sponsored independent medical examination (DIME) physician's opinions concerning maximum medical improvement and impairment are given presumptive weight, also requires deference to a DIME physician's opinion as to causation. The division concludes that no such deference is due under the statute and that the question of causation should be reviewed de novo.

COLORADO COURT OF APPEALS **2019COA53**

Court of Appeals No. 18CA0498
Industrial Claim Appeals Office of the State of Colorado
WC No. 489-594-003

Joseph Yeutter,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; CBW Automation, Inc.; and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE GROVE
Terry and J. Jones, JJ., concur

Announced April 11, 2019

Eley Law Firm, LLC, Scott Eley, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Pinnacol Assurance and CBW Automation, Inc.

¶ 1 Claimant, Joseph Yeutter, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the decision of an administrative law judge (ALJ) denying and dismissing his claims for permanent total disability (PTD) and maintenance medical benefits. We affirm.

I. Background

¶ 2 Claimant worked as a controls engineer for employer, CBW Automation, Inc. In August 2012, he sustained admitted, serious injuries in a work-related accident when he was struck in the head and shoulder and knocked to the ground by a robotic arm. His injuries included "a skull fracture, vestibular ear and inner ear nerve damage, slap tear in [the] shoulder, broken arm," and fractures to "both of his orbital sockets." He returned to work after two weeks but voluntarily resigned two months later; he then commenced employment as a mechanical engineer for BW Container Systems, a position he held until February 2015. At BW Container, he typically worked nine or ten hours per day "with weekends and sometimes evenings after work."

¶ 3 More than a year after the incident, claimant's physical injuries had "stopped hurting so much," but he felt fatigued. In

July 2014, one of his authorized treating physicians, Dr. Carol Newlin, prescribed Adderall and Ritalin as stimulants to help him "get through [his] day." A sleep study conducted one month later by another treating physician, Dr. Mark Neagle, revealed sleep patterns consistent with narcolepsy. A professor of psychiatry at the University of Colorado, Dr. Martin Reite, corroborated the narcolepsy diagnosis, stating that "as a result of my evaluation I have concluded that [claimant] has a sleep disorder consisting of Type 1 Narcolepsy, most likely post-traumatic in origin." Dr. Reite went on to note that "the cause of narcolepsy is varied, can be idiopathic (onset with no obvious cause), familial (genetic influence and running in families), or triggered by viral infection or head trauma (as in [claimant's] case)." Finally, Dr. Reite opined that claimant "is seriously disabled as a result of his narcolepsy and other trauma related conditions, and his prognosis at this time is guarded."

¶ 4 On August 26, 2015, claimant was placed at maximum medical improvement (MMI) by his primary authorized treating physician, Dr. Kevin O'Toole. Although claimant's skull and facial fractures had healed, Dr. O'Toole assessed claimant as suffering

from “narcolepsy, hypersomnolence, probably related to traumatic brain injury, managed with stimulant medication.” He recommended that claimant “continue his current medications.” Dr. O'Toole also opined that claimant could not work and should be off work indefinitely. He rated claimant's permanent impairment at 67% of the whole person, which he calculated by combining impairment ratings for claimant's mental health, sleep and arousal disorders, and vision impairment.

¶ 5 Three mental health and medical experts retained by employer disagreed with Dr. O'Toole's assessment, however. Psychiatrist Dr. Susan Rosenfeld opined that the “reported symptoms, clinical findings and treatment plan do not support functional impairment from a psychiatric condition which translates into restrictions or limitations.”

¶ 6 Similarly, Dr. Stephen Selkirk, who is board certified in both psychiatry and neurology, reported that claimant

> has extensive subjective complaints that are not supported by objective data in the medical record. . . . The complaint of cognitive dysfunction has not been confirmed by a formal neuropsychological battery. Finally, the report of fatigue is subjective. The result of sleep study evaluations and multiple sleep

> latency tests are not available for review and therefore the presence of narcolepsy or post-traumatic narcolepsy cannot be objectively confirmed.

Based on his review of the medical records, Dr. Selkirk concluded that claimant had "no impairments from a neurological perspective, and thus, no restrictions or limitations are supported."

¶ 7 Finally, Dr. Kathleen D'Angelo, who specializes in occupational medicine, independently examined claimant and conducted a thorough medical records review. She expressly noted that a second sleep study confirmed claimant's narcolepsy diagnosis, but she was skeptical that it was work-related because available medical literature had not demonstrated a causative connection between head trauma and narcolepsy. To further support her conclusion that claimant's narcolepsy was not related to his work injury, she explained that the lengthy temporal gap between claimant's injury and the onset of his narcolepsy substantially lessened the likelihood of a causal connection between the two.

¶ 8 After employer obtained these independent medical examination reports, claimant underwent a division-sponsored independent medical examination (DIME) with Dr. Albert Hattem.

Dr. Hattem agreed with Dr. O'Toole that claimant reached MMI on August 26, 2015. But, he assigned claimant a lower impairment rating — 39% of the whole person — than Dr. O'Toole had assigned because he felt the brain impairment calculated by Dr. O'Toole was too high given that claimant "does not require assistance with activities of daily living." Dr. Hattem was less certain about the cause of claimant's narcolepsy, though, and deferred to claimant's treating physicians on the question. He stated as follows:

> This is a very difficult case in terms of causation because the examinee's condition (post traumatic narcolepsy) is very rare and did not become evident until more than one year after the August 24, 2012 injury. After the injury and prior to first reporting fatigue in November 2013 the examinee had been working full duty as an engineer for two different employers sequentially – work that would be considered very cognitively demanding. . . .
>
> Because I have no prior experience with this type of condition, I must defer to all of the specialists who previously evaluated [claimant]. . . . All of these physicians opined that the examinee's narcolepsy is related to the August 2012 work injury despite the latency between the injury and the onset of this disorder.

¶ 9 Employer did not contest Dr. Hattem's DIME opinions. Rather, it filed a final admission of liability (FAL) accepting Dr. Hattem's MMI date of August 26, 2015, and admitting claimant's entitlement to permanent partial disability (PPD) benefits based on the 39% whole person impairment rating, which it calculated to equal $127,502.69. However, employer did not admit liability for any continuing post-MMI maintenance medical benefits.

¶ 10 Thereafter, claimant filed an application for a hearing seeking PTD benefits and future maintenance medical benefits.

¶ 11 At the ensuing hearings, the parties offered contradictory evidence of claimant's need for PTD benefits. Katie Montoya, a vocational consultant, testified on claimant's behalf. She opined that although claimant had no work restrictions "from a physical standpoint," she agreed with Dr. O'Toole's opinion that claimant's issues with "wakefulness, the capacity to be productive day in and day out and what would be necessary pharmacologically" for him to maintain employment, made him incapable "of returning to work at this time."

¶ 12 In contrast, employer's retained vocational rehabilitation counselor, Roger Ryan, opined that claimant "is able to work and

earn a wage." Mr. Ryan cited to claimant's computer adeptness, mechanical engineering experience, and military background as transferable skills upon which claimant could draw to find gainful employment. Mr. Ryan identified several occupations matching claimant's abilities, including mechanical drafter, information clerk, salesperson, cashier, telephone solicitor, tutor, appointment clerk, dispatcher, night auditor, collection clerk, unarmed security guard, and production assembler.

¶ 13 Employer also introduced the opinions of two additional independent medical examiners to support its position that claimant was neither permanently totally disabled nor required ongoing maintenance medical care. These independent medical examiners, psychiatrist Dr. Robert Kleinman and psychologist Dr. Susan Kenneally, both questioned the necessity of claimant receiving PTD and maintenance medical benefits. Dr. Kleinman, in particular, doubted the severity of claimant's narcolepsy, and suggested that claimant was exaggerating the extent of his disability. He also opined that claimant "does not have restrictions or limitation" that would impede his ability to work.

¶ 14 Dr. Kenneally, in turn, questioned the causal connection between claimant's admitted work-related injury and his accurately diagnosed narcolepsy. She testified that there is a dearth of medical research linking narcolepsy and traumatic brain injury (TBI), noting that there is a lack of "reliable, repeatable markers for narcolepsy, and we certainly have no way to discriminate if it is caused by traumatic brain injury, it is caused by genetic history, it is caused by other trauma." In addition to "the science [being] out" on this question, she explained that the "late onset" of claimant's narcoleptic condition made it "highly atypical and would argue against it being caused by or related to the TBI." Moreover, the battery of tests Dr. Kenneally administered to claimant revealed that although he "clearly" suffered a TBI as a result of his workplace accident, "current testing found no pattern of persistent deficits consistent with the brain injury findings at the time of the injury."

¶ 15 After two days of hearings, and the admission of hundreds of pages of medical records, the ALJ found that claimant failed to demonstrate that it was "more probably true than not that his narcolepsy was caused by his August 24, 2012 industrial accident while working for [e]mployer." The ALJ was persuaded by Dr.

D’Angelo’s testimony that “[b]ecause traumatic brain injuries are acutely symptomatic, the delayed onset of [c]laimant’s narcolepsy symptoms suggests an attenuated causal relationship between his accident and the development of narcolepsy.” The ALJ also found that the “bulk of the medical evidence supports Mr. Ryan’s determination that [c]laimant has the ability to earn wages in some capacity.” Accordingly, the ALJ denied and dismissed claimant’s claims for PTD and maintenance medical benefits. A divided Panel affirmed the ALJ’s order. The majority rejected claimant’s contention that the ALJ was bound by the DIME’s conclusion that claimant’s narcolepsy was related to the work accident. The Panel noted that neither MMI nor impairment was at issue before the ALJ. Thus, the Panel held, the DIME physician’s causation determination held no presumptive weight and claimant bore the burden of proving his entitlement to PTD benefits by a preponderance of the evidence. Similarly, the DIME physician’s opinion that claimant would require maintenance medical treatment did not relieve claimant of the burden to prove the reasonableness, necessity, and relatedness of the requested continuing treatment. Because substantial evidence supported the

ALJ's factual findings on these issues, *see* § 8-43-301(8), C.R.S. 2018, the Panel found "no basis to disturb the order." Claimant now appeals.

II. ALJ Was Not Bound by the DIME's Causation Analysis

¶ 16 Claimant first contends that the ALJ erred in requiring him to prove his entitlement to PTD benefits and maintenance medical benefits by a preponderance of the evidence. He asserts that the ALJ should have given Dr. Hattem's DIME opinion presumptive weight as to the cause of his injury and that employer should have been required to overcome the DIME's causation opinion with clear and convincing evidence. We disagree.

A. Standard of Review

¶ 17 Because the question claimant raises involves the application of the governing law and construction of statutes, we review it de novo. *See City of Littleton v. Indus. Claim Appeals Office*, 2016 CO 25, ¶ 27 ("We review de novo questions of law concerning the application and construction of statutes." (quoting *Hickerson v. Vessels*, 2014 CO 2, ¶ 10)).

B. Analysis

¶ 18 A DIME physician's opinions concerning MMI and impairment are, by express statutory edict, afforded presumptive weight. *See* § 8-42-107(8)(b)(III), C.R.S. 2018. The statute states that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." § 8-42-107(8)(b)(II). Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight.

¶ 19 The claims claimant asserted in this case involved neither MMI nor permanent impairment — those issues had already been conceded by employer in its FAL. Rather, claimant sought PTD benefits and maintenance medical benefits in his application for hearing. He bore the burden of establishing his entitlement to these benefits because a claimant "shall have the burden of proving

entitlement to benefits by a preponderance of the evidence." § 8-43-201(1), C.R.S. 2018.

¶ 20 Claimant attempts to circumvent this statutory structure by arguing, essentially, that a DIME's opinion on causation also carries presumptive weight. He cites to *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005), and *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002), as well as several Panel decisions and the opinion of the dissenting Panel member in this case, to support his contention. He asserts that, from these cases, a general principle can now be extracted that — like MMI and impairment — a DIME's causation opinion universally carries presumptive weight. He characterizes as "exceptions" cases that limit a DIME opinion's presumptive weight to MMI and impairment.

¶ 21 Notwithstanding claimant's characterization, the principle that a DIME's opinion carries presumptive weight only with respect to MMI and impairment, but not as to causation, is not an "exception." It is the statutory rule. *See* § 8-42-107(8)(b)(III); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) (DIME opinion concerning causation need not be overcome by clear and

convincing evidence where dispute involved the "threshold requirement" that the claimant establish a compensable injury); *Story v. Indus. Claim Appeals Office*, 910 P.2d 80, 81 (Colo. App. 1995) (DIME determination of MMI did not preclude change of physician order where claimant is entitled to post-MMI treatment).

¶ 22 The cases claimant cites do not convince us otherwise. First, although we defer to the Panel's interpretation of the Act, *see Keel v. Indus. Claim Appeals Office*, 2016 COA 8, ¶ 31, "we are not bound by the Panel's decisions in other workers' compensation cases," *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). Nor do we give precedential weight to unpublished decisions of other divisions of this court. *See Bittle v. Brunetti*, 750 P.2d 49, 52 n.2 (Colo. 1988). And, the published opinions of other divisions of this court on which claimant relies do not support the position he advances. Indeed, as the Panel majority noted, "[w]hen . . . a party is not challenging a DIME physician's MMI determination or impairment rating, the Courts have repeatedly held that the heightened burden of proof required by § 8-42-107(8) does not apply."

¶ 23 For example, in *Leprino Foods*, the division held that the DIME's causation opinion carried presumptive weight because it was inextricably tied to MMI. There, the employer was seeking "to avoid the finality of the DIME physician's opinion regarding MMI." 134 P.3d at 482. The division noted that MMI and/or impairment are often inextricably linked to causation because "[b]oth determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury." *Id.* This is true because no claimant achieves MMI until all conditions related to the workplace injury have reached their maximum improvement. *See Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 433 (Colo. App. 2010) ("[T]he legally significant date, that is, the date of MMI for purposes of ending a claimant's temporary disability, is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. . . . MMI is not 'divisible and cannot be parceled out among the various components of a multi-faceted industrial injury.'" (quoting *Parra v.*

Haake Farms, W.C. No. 4-396-744, 2001 WL 470646, at *2 (Colo. I.C.A.O. Mar. 8, 2001))).

¶ 24 Moreover, *Leprino Foods* explicitly recognized that although "a DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect," in contrast, "the threshold question of whether the claimant has sustained a compensable injury in the first instance is one of fact that the ALJ must determine, if contested, under the preponderance of the evidence standard." 134 P.3d at 482-83. Thus, *Leprino Foods* does not stand for the proposition that a DIME's opinion on causation always carries presumptive weight.

¶ 25 Similarly, *Cordova* declined to extend any presumptive weight to a DIME's opinion beyond MMI and impairment. The division rejected the claimant's attempt to extend the DIME opinion's presumptive weight to worsened conditions. Instead, it reiterated the governing statutory standard:

> Claimant attempts to characterize the present dispute as one involving MMI. However, the pertinent and necessary inquiry is whether he has suffered a deterioration in his condition that justifies additional benefits. Although medical evidence bearing on whether he has remained at MMI would be relevant to that

> inquiry, the original MMI determination may not be questioned. We therefore agree with the Panel that the opinion of a DIME physician as to whether a claimant's condition has worsened carries no special weight and need not be overcome by clear and convincing evidence. . . .
>
> The Panel correctly observed that the opinions of a DIME physician have only been given presumptive effect when expressly required by the statute.

Cordova, 55 P.3d at 190 (citation omitted). Thus, like *Leprino Foods*, *Cordova* does not stand for the proposition claimant advances.

¶ 26 Here, the only issues before the ALJ were PTD and maintenance medical benefits. Neither of these inquiries required examination of the DIME physician's MMI or impairment determinations. A claimant is permanently and totally disabled, and therefore entitled to PTD compensation, if he or she "is unable to earn any wages in the same or other employment." § 8-40-201(16.5)(a), C.R.S. 2018. In determining whether a claimant is permanently and totally disabled, the ALJ may consider "human factors." *See Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). "Human factors" include such elements as

the claimant's "education, ability, and former employment," *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 703 (Colo. App. 1999); "the claimant's age, work history, general physical condition, and prior training and experience," *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001); and "the community where [the] claimant resides," *Brush Greenhouse Partners v. Godinez*, 942 P.2d 1278, 1279 (Colo. App. 1996), *aff'd sub nom. Bymer*, 955 P.2d 550. None of these factors bear on whether a claimant has reached MMI.

¶ 27 Likewise, a claimant is entitled to post-MMI maintenance medical benefits if he or she shows that future medical treatment will be "reasonably necessary to relieve the claimant from the effects of the industrial injury or occupational disease even though such treatment will not be received until sometime subsequent to the award of permanent disability." *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988). An employer, in turn, "may contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury or occupational disease." *Id.* at 712. As with PTD, this analysis does not necessitate inquiry into MMI or impairment.

¶ 28 Because section 8-42-107(8) only grants presumptive weight to a DIME's opinions concerning MMI and impairment, *see Faulkner*, 12 P.3d at 846, we decline to extend the statute's presumptive reach to causation. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (The appellate courts of this state have "uniformly held that a court should not read nonexistent provisions into the . . . Act."); *see also Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 16. Accordingly, the ALJ was not bound by Dr. Hattem's causation determination and committed no error when he denied and dismissed claimant's claims for PTD and maintenance medical benefits.

III. No Due Process Violation

¶ 29 Claimant also asserts that he was deprived of his property rights without due process. He contends that by requiring him to "apply for further permanency and medical benefits," employer was able to "avoid" the burden of overcoming the DIME's opinion by clear and convincing evidence, and instead improperly shifted the burden to him "to prove the cause of his narcolepsy without the presumptive effect from Dr. Hattem's DIME opinion." We are not persuaded claimant suffered any constitutional deprivation.

¶ 30 As we set forth above, claimant's request for PTD and maintenance medical benefits raised issues separate and apart from MMI and impairment, the two areas in which a DIME opinion is granted presumptive weight. *See* § 8-42-107(8). No improper burden shifting occurred here because, under the Act, claimant bears the burden of proving his entitlement to these benefits. *See* § 8-43-201.

¶ 31 Regardless, we perceive no due process violation here. To establish a due process claim, a claimant must demonstrate that he or she has been deprived of a protected right to liberty or property without due process of law.

> The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." It is necessary to consider whether a property right has been identified, whether government action with respect to that property right amounted to a deprivation, and whether the deprivation, if one is found, occurred without due process of law.

Whatley v. Summit Cty. Bd. of Cty. Comm'rs, 77 P.3d 793, 798 (Colo. App. 2003) (citation omitted). "A protected interest in property exists when a person has a legitimate claim of entitlement to the property." *Id.*

¶ 32 Here, employer did not admit that claimant was entitled to PTD and maintenance medical benefits and the ALJ did not award them. Because no order entitled claimant to these benefits (and no statutory provisions applied), he had no protected property interest in them.

¶ 33 To the extent claimant implies that the ALJ's order finding no causal link between his work injury and his narcolepsy deprived him of receiving any benefits, the record suggests otherwise. Employer filed a FAL *admitting* to Dr. Hattem's MMI date and permanent impairment rating and calculating the PPD benefits to which claimant was entitled. Nothing in the ALJ's order limited or even addressed claimant's PPD award, and, as we review the record, claimant should receive it.

¶ 34 Nor can claimant establish the inadequacy of the process provided him. Due process does not guarantee that claimants will always receive the benefits they request. Rather, due process ensures that those benefits — once admitted to or awarded — will not be taken away without "notice and the opportunity to be heard by an impartial tribunal." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). Because claimant had two hearings

on his request for PTD and maintenance medical benefits — at which he testified, presented witnesses on his behalf, and introduced hundreds of pages of documentary evidence in support of his claim — we cannot say that he was denied an opportunity to be heard.

¶ 35 Accordingly, we conclude claimant was not deprived of his right to due process. *See Whatley*, 77 P.3d at 798; *Wecker*, 908 P.2d at 1188.

IV. Conclusion

¶ 36 The order is affirmed.

JUDGE TERRY and JUDGE J. JONES concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-905-009-06

IN THE MATTER OF THE CLAIM OF:

MATTHEW GRANT,

Claimant,

v.

FINAL ORDER

WALMART ASSOCIATES INC,

Employer,

and

ILLINOIS NATIONAL INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Margot Jones (ALJ) dated August 20, 2018, that ordered the respondents to provide the claimant permanent total disability benefits. We affirm the order of the ALJ.

The claimant was injured at work on July 22, 2012, when he slipped on spilled detergent in an aisle of the employer's warehouse. He described doing the splits when he fell. The claimant reported injury to his left hip, lower back and buttocks. The claimant worked for the employer as a forklift operator moving pallets of merchandise to designated locations. Following his injury, the claimant performed a light duty job for the employer until December 2012, when the employer was no longer able to accommodate his restrictions.

The claimant was treated primarily by authorized physician Dr. Wunder. Following conservative care, Dr. Wunder placed the claimant at maximum medical improvement (MMI) on June 5, 2013, with a 15% permanent medical impairment rating of the left leg. The claimant requested review of the MMI determination by a Division sponsored Independent Medical Examiner (DIME). Dr. Larson completed the DIME review. Finding the claimant was not at MMI; Dr. Larson recommended a total left hip arthroplasty surgery. Dr. Wunder referred the claimant to Dr. Snyder for a surgical evaluation. Dr. Snyder agreed an arthroplasty surgery was appropriate and performed the total hip replacement surgery on May 20, 2015.

The claimant continued to complain of hip and leg pain following the surgery. At various times the claimant used a walker or a cane. Dr. Snyder rechecked the surgical apparatus inserted in the hip and found no irregularities. He suggested the claimant be evaluated by a back surgeon. The respondents declined to authorize the evaluation. Following a hearing, an ALJ authorized a lumbar MRI and an intra-articular lidocaine injection recommended by Dr. Wunder. The doctor read the MRI to rule out the lumbar spine as a source of the claimant's leg pain. The claimant's response to the intra-articular injection led Dr. Wunder to conclude there was an intra-articular hip pain generator involved. The respondents denied further requests for specialist evaluation.

After a follow up DIME review, Dr. Larson found the claimant was at MMI as of April 6, 2016. Dr. Larson assigned a 37% permanent impairment rating of the left leg and concluded there was no "ratable impairment of the lumbar spine." Dr. Larson also determined no maintenance medical care was required. Dr. Wunder disagreed the claimant was at MMI. He assigned the claimant activity restrictions featuring no lifting greater than 10 pounds and performance of only a "sit down job." A functional capacity exam (FCE) on March 15, 2017, indicated the claimant could safely lift 58 pounds, safely carry 12 pounds, could sit for 15 minutes and could walk for 13 minutes with an assistive device. The respondents awarded permanent disability benefits through a Final Admission of Liability on December 21, 2016, adopting the DIME's impairment rating and denying authorization for maintenance medical benefits. The claimant filed an application for hearing concerning the issues of medical benefits and permanent total disability benefits.

The claimant obtained a vocational report from William Hartwick, while the respondents presented a report from Gail Pickett. Both reports indicated the claimant was 56 years old, had dropped out of school in the tenth grade and found his previous work experience was limited to unskilled labor. Mr. Hartwick's report concluded the claimant's restrictions and vocational skills rendered the claimant unable to earn any wages. Ms. Pickett believed the claimant was employable and suggested jobs involving the manufacture of small parts. She did agree the claimant had a lower educational level with limited skills or experience in the workforce.

Following a hearing on February 12, 2018, the ALJ entered an order on August 21. The ALJ found the claimant had demonstrated he was unable to earn wages at either his job with the employer or in other employment. The injury to his left hip was determined a significant causative factor to the claimant's status of permanent total disability. The ALJ determined the vocational opinion of Mr. Hartwick was persuasive and his testimony indicated that due to the claimant's pain and physical limitations the

claimant did not retain the ability to work on a sustained basis. The ALJ awarded the claimant permanent total disability benefits. The ALJ also denied the claimant an award of maintenance medical benefits.

On appeal, the respondents assert the ALJ was in error in finding the claimant sustained a work injury not only to his left hip but also to his low back. The respondents assert that this determination of involvement of the low back represented a challenge to the DIME's finding of the cause of the claimant's impairment. The respondents contend overcoming the determination of the DIME physician was not endorsed as an issue for hearing. Accordingly, they argue the ALJ ignored the respondents' rights to procedural due process when she decided this issue without providing the respondents adequate notice. The respondents also insist the ALJ erred by reviewing the DIME's causation determination through the application of a preponderance of the evidence standard rather than one using clear and convincing evidence. The respondents contend the ALJ's award of permanent and total disability benefits was premised on the claimant's complaints of pain, which were not accompanied by findings of any anatomic or physiologic correlation. It is argued such a correlation is required by § 8-42-101(3.7).

The respondents mischaracterize the causation findings of both the DIME physician and of the ALJ. The initial complaints of the claimant recorded in the medical records include his description of pain in his low back along with that in his left leg. The records reveal the back complaints slowly resolved over the space of several months. A FCE, completed on May 31, 2013, indicated the claimant had sustained a 15% permanent impairment of the lumbar spine pursuant to the AMA Guides. However, when Dr. Wunder first placed the claimant at MMI on June 5, 2013, he stated the claimant "did not have a ratable lumbar condition." The subsequent DIME report of Dr. Larson dated November 9, 2013, also concluded, "He does not have a ratable impairment of the lumbar spine." A finding that the claimant's back did not produce the measurements sufficient to justify an impairment rating of the spine does not necessarily also require a determination by either doctor that the claimant did not earlier, or even contemporaneously, have injury symptoms in his low back.

In addition, while the ALJ stated the claimant "suffered injuries to his left hip and lower back," the ALJ makes no further indication that the low back resulted in any contribution to the claimant's functional restrictions. The ALJ referenced the depiction of the claimant's limitations in the March 15, 2017, FCE, and in the claimant's testimony. The FCE report describes pain complaints from the claimant limited to left hip pain. There are no pain reports attributed to the claimant's low back. In his testimony, the claimant only described pain in his left hip and leg. Tr. at 19, 36-37, 43. He made no

reference to his back except to identify it as the location of pain shortly after his work accident. Tr. at 11. The finding by the ALJ that the claimant sustained an injury to his low back at least initially is supported by substantial evidence in the record. Moreover, that finding is not in conflict with the determination by either the treating doctor or the DIME physician that the claimant did not have a ratable impairment of the low back. The ALJ's reference to the low back also does not implicate that part of the body in the claimant's long-term work restrictions.

The characterization by the ALJ of the claimant's injuries as including the low back, even just initially, does not represent a challenge to the causation determination of the DIME physician. The DIME doctor, Dr. Larson, found the claimant's permanent impairment was limited to 37% of a loss of the leg at the hip. Sections 8-42-107(7)(b)(I) and (8)(a) C.R.S. provide that impairments listed on the schedule of disabilities, § 8-42-107(2), including (2)(w), (loss of a leg at the hip joint), are not controlled by the statutory provisions related to DIME reviews. However, § 8-72-107(8)(a), calls for DIME reviews of the decision pertaining to the date of MMI regardless of the location of the impaired body part. *See Cole v. Dish Network*, W.C. No. 4-918-651-02 (Jan. 15, 2016) *affd*. 16CA0205 (Dec. 22, 2016)(applying preponderance of evidence standard when determining whether claimant is entitled to PTD benefits regardless of DIME determination or absence of causal link to injuries not on the schedule of disabilities). The parties agree the claimant is at MMI. If the DIME determination pertinent to the cause of permanent impairment in this case, or the body parts involved, is not accorded any statutory significance, then there was no challenge to the DIME determination involved in the February 12 hearing. This would be due to the absence of authority attributed to the DIME. The respondents' contention therefore, that such an issue was determined and required advance notification is of no avail.

It is also not clear from the ALJ's conclusions of law that the preponderance of evidence standard was actually applied to the determinations of causation. The ALJ found:

> Here, Claimant provided substantial evidence that he suffered injuries to his left hip and lower back. The consequences of the injuries have limited Claimant's ability to sit or stand on a sustained basis and have affected his stamina. … Claimant has proven by a preponderance of the evidence that he is unable to earn a wage. … Claimant further established by a preponderance of the evidence that the consequences of the injuries have limited Claimant's ability

> to sit/stand on a sustained basis and have affected his stamina." Concl. of Law, ¶ 8, 11 & 12.

This application of the preponderance standard by the ALJ is related to proof of the claimant's symptoms and to a demonstration of the ultimate issue that the claimant is unable to earn any wages. § 8-40-201(16.5)(a). As noted above, the ALJ does not reference any symptoms that the record does not ascribe specifically to the claimant's left leg injury. The determination of the claimant's ability to earn a wage is not an issue the DIME physician is authorized by the statute to address.

Insofar as the respondents assert the ALJ was in error for relying on the claimant's complaints of pain that were not the subject of correlation by anatomic or physiologic evidence, such a standard is not applicable here. The requirement for anatomic or physiologic correlation is located in § 8-42-101(3.7). That section states it relates to the determination of "a medical impairment rating." There is no indication a finding of an inability to earn wages is similarly subject to such a test. In addition, the respondents point to the medical opinions of Dr. Larson and the respondents' IME, Dr. Klajnbart, that they describe as verifying the claimant's total hip arthroplasty procedure revealed no cause for pain symptoms. However, Dr. Larson did assign a 37% impairment rating for the left leg, presumably with the need for anatomic and physiologic correlation in mind. More significantly, Dr. Wunder testified he recommended and the claimant received an intra-articular injection. This procedure was designed to reveal whether or not there was an intra-articular pain generator in the claimant's hip. Dr. Wunder testified in a post-hearing deposition that the results of the injection were diagnostic for the presence of such a pain generator in the hip. Depo. at 8-9. This procedure and Dr. Wunder's appreciation of the procedure, represents physiologic correlation for the claimant's descriptions of his leg pain. The respondents' contention notwithstanding, the ALJ was not in error for placing weight on the claimant's description of his pain limitations.

The ALJ did hold that even when some work restrictions may be attributable to other conditions, "the claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages." (¶ 7, Conclusions of Law). Reference is made to *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Although the claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages, the claimant must nonetheless demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried supra.* This means the claimant must establish a "direct causal relationship" between the industrial injury and the permanent total disability. *Id; Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995), *reversed on other grounds,*

Askew v. Industrial Claim Appeals Office, 927 P.2d 1333 (Colo. 1996). Under this test, the ALJ must determine the residual impairment caused by the industrial injury, and determine whether it was sufficient to result in permanent total disability without regard to the effects of subsequent intervening events or preexisting conditions. Resolution of the causation issue is one of fact for the ALJ. In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

As we read the ALJ's order, the effects of the industrial injury were significant and bore a direct causal relationship between the precipitating event and the resulting disability. This is consistent with *Seifried* and we perceive no basis to disturb the ALJ's order on appeal. The claimant testified he experienced pain in his left leg and hip such that "It's like being kicked by a mule between the legs without the man parts there." Tr. at 19. He stated he felt pain when placing weight on his left leg. This also occurred when he sat longer than 15 minutes. Tr. at 25. Lifting items required the claimant to rest for 30 minutes before lifting again, as did attempts at walking for five minutes. Tr. at 23, 26. It was to relieve pain in his leg that led him to recline several times during the FCE. The record contains substantial evidence to support the ALJ's findings the functional restrictions implicated in the claimant's inability to earn wages were directly related to the admitted left hip injury.

Accordingly, we find no basis to question the ALJ's Order awarding permanent total disability benefits.

IT IS THEREFORE ORDERED that the ALJ's order issued August 21, 2018 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_________3/18/19______________ by _____TT_____________ .

RING & ASSOCIATES PC, Attn: BOB L RING ESQ, 2550 STOVER STREET BUILDING C, FORT COLLINS, CO, 80525 (For Claimant)
LEE & BROWN LLC, Attn: M FRANCES MCCRACKEN ESQ, 3801 EAST FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

DATE FILED: March 21, 2019
CASE NUMBER: 2018CA888

SUMMARY
March 21, 2019

2019COA47

No. 18CA0888, *Bolton v. ICAO* — Labor and Industry — Workers' Compensation — Settlement and Hearing Procedures

The division holds that employers seeking to discontinue maintenance medical benefits once an employee has reached maximum medical improvement after a claim has otherwise closed need not first seek to reopen the claim. This is so because a claim remains open to the extent maintenance medical benefits will be disbursed in the future, and therefore the claim is not closed as to those future benefits and reopening is unnecessary to discontinue them.

COLORADO COURT OF APPEALS **2019COA47**

Court of Appeals No. 18CA0888
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-935-211

Jennifer Bolton,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Cherry Creek School District, and Joint School District C/O CCMSI,

Respondents.

ORDER AFFIRMED

Division I
Opinion by JUDGE BERGER
Taubman and Tow, JJ., concur

Announced March 21, 2019

The Merkel Law Firm, LLC, Penny M. Merkel, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Nathan Dumm Mayer, PC, Bernard R. Woessner, Kaitlin M. Akers, Denver, Colorado, for Respondents Cherry Creek School District and Joint School District C/O CCMSI

¶ 1 Claimant, Jennifer Bolton, seeks review of a final order of the Industrial Claim Appeals Office (Panel), affirming the decision of an administrative law judge (ALJ) discontinuing her maintenance medical benefits. She contends that the only permissible procedural avenue for discontinuing her maintenance medical benefits was reopening the claim under section 8-43-303(1), C.R.S. 2018. Because her employer did not seek to reopen the claim, claimant contends we must set aside the Panel's order. We disagree that under the circumstances of this case reopening was required. Because we also conclude that the ALJ's factual findings are supported by the record, we affirm the Panel's order.

I. Background

¶ 2 Claimant teaches in the Cherry Creek School District (employer). On November 15, 2013, she sustained admitted work-related injuries when she fell backwards to the ground, suffering low back pain, headache, and dizziness. Physicians who treated her the day of the incident diagnosed a concussion as well as cervical and lumbar strains.

¶ 3 Within a few months, though, claimant developed "clinically significant depression" related to the work injury. Although her

psychologist suggested the “depression may be long-standing in nature,” employer admitted the compensability of claimant’s depression treatment.

¶ 4 In October 2015, a physician who performed a division-sponsored independent medical examination placed claimant at maximum medical improvement (MMI) with an impairment rating of nine percent of the whole person.

¶ 5 Under the terms of a settlement agreement the parties reached in February 2016, which was approved by an ALJ, employer paid claimant a lump sum for her permanent partial disability award. In addition, employer agreed to continue paying for “maintenance care through authorized providers that is reasonable, necessary and related to this compensable injury.” Initially, claimant’s maintenance medical treatment included chiropractic care, but that was discontinued. Within months of reaching the agreement, the primary maintenance medical treatment claimant was receiving was psychological and/or psychiatric services.

¶ 6 Several months later, employer retained the services of a psychiatrist, Dr. Robert Kleinman, to examine claimant to determine if the psychological and psychiatric benefits continued to

be “reasonable, necessary and related to [her] compensable injury.” According to his report, claimant told Dr. Kleinman that “prior to 2010, she had never been depressed and had not been treated for depression.” But, at the hearing on discontinuation of the maintenance benefits he testified that he later learned that claimant inaccurately self-reported her history, and that, in fact, she had been treated for depression as early as 2008 and had been diagnosed with “longstanding depression.” After reviewing additional medical records predating the work injury, Dr. Kleinman opined that claimant continued to be at MMI and that she “has a history of depression accompanied by anxiety. This injury did not cause any permanent changes. This injury caused a temporary exacerbation in her major depression and anxiety disorder, with features of post-traumatic stress disorder. She has returned to baseline.” Dr. Kleinman therefore concluded that claimant required no further maintenance medical care related to the work injury.

¶ 7 Several health care providers echoed Dr. Kleinman’s opinion. Claimant’s authorized treating physician, Dr. Alisa Koval, wrote in December 2016, “[a]t this point in time, [claimant] is being treated primarily for her mental health conditions. She is very close to

reaching the baseline at which she lived prior to the incident, and I am optimistic that with continued psychotherapy and medication management, she will get there." And, two neuropsychologists who examined claimant, Dr. Suzanne Kenneally and Dr. Rebecca Hawkins, opined that claimant sustained an "uncomplicated" concussion at work, but that her profile indicated longstanding depression.

¶ 8 Based on Dr. Kleinman's opinion, as well as those of the treating health care providers who noted claimant's pre-existing depression, employer petitioned to terminate claimant's maintenance medical benefits. Employer argued that it was only required to cover *related* medical expenses, and that, because claimant had reached her pre-injury baseline, any psychological or psychiatric care required from that time forward was unrelated to the work-related injury and therefore noncompensable.

¶ 9 The ALJ agreed. The ALJ found that claimant had minimized the extent of her pre-existing depression. The ALJ was persuaded by Dr. Kleinman's testimony that claimant's continuing need for maintenance care for her depression was no longer related to the work injury but was instead necessitated by her longstanding

depression. The ALJ therefore concluded that employer had met its burden of establishing "that previously admitted medical maintenance benefits are not causally related to the occupational injury that occurred on November 15, 2013," and that "based on the totality of the evidence, . . . [c]laimant functions at the same baseline level she functioned at before the work injury." The ALJ consequently terminated employer's liability for claimant's ongoing maintenance treatment.

¶ 10 The Panel affirmed. It rejected claimant's contention that her maintenance medical benefits could be terminated only if the employer had first successfully reopened the claim. The Panel held instead that because employers retain the right to challenge the relatedness of any medical maintenance treatment, reopening is not required to challenge future medical benefits.

II. Reopening Is Not Necessary to Discontinue Future Maintenance Medical Benefits

¶ 11 Claimant first contends that employer was required to seek reopening of the claim to terminate all future maintenance medical benefits. She argues that although reopening is not required to challenge a particular medical treatment, when, as here, the

employer seeks to terminate all future medical benefits, reopening is the only permissible procedure. We conclude that the Panel correctly applied the applicable statutes.

A. Rules of Statutory Construction and Standard of Review

¶ 12 When we interpret a provision of the Workers' Compensation Act of Colorado (Act), such as the reopening statute, "we interpret the statute according to its plain and ordinary meaning" if its language is clear. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). In addition, "when examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

¶ 13 We review questions of statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). Although we usually defer to the Panel's reasonable interpretations of the statute it administers, *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006), we are not

bound by the Panel's interpretation or its earlier decisions. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). We will set aside the Panel's legal interpretation "if it is inconsistent with the clear language of the statute or with the legislative intent." *Town of Castle Rock v. Indus. Claim Appeals Office*, 2013 COA 109, ¶ 11 (quoting *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998)), *aff'd*, 2016 CO 26.

B. The Statute Was Correctly Applied

¶ 14 Claimants are entitled to seek maintenance medical benefits post-MMI, *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), but employers retain the right to challenge the "need for continued medical benefits," *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Employers bear the burden of proof to modify future maintenance medical benefits. § 8-43-201(1), C.R.S. 2018.

¶ 15 Although these are well-established doctrines, claimant asserts her situation is unique (presumably because of the

stipulation and final admission of liability)[1] and requires an additional procedural step before her maintenance medical benefits could be terminated. She argues that because her claim had closed, employer could only modify her maintenance medical benefits by first seeking to reopen the claim. Either party may seek to reopen a closed claim "on the ground of fraud, an overpayment, an error, a mistake, or a change in condition." § 8-43-303(1).

¶ 16 We reject claimant's attempt to distinguish her situation from others in which post-MMI maintenance is ordered by an ALJ. The stipulation entered into by claimant is consistent with these legal principles and does not support her uniqueness argument. The stipulation (which was approved by an ALJ) specifically provided that "Respondent additionally agrees to file a Final Admission referencing this Stipulation and resolution of the current claims for [permanent partial disability], and admitting for maintenance care through authorized providers that is *reasonable, necessary and related to this compensable injury*." (Emphasis added.)

[1] The stipulation and the ALJ order approving it are in the appellate record, as is the final admission of liability.

¶ 17 In *Grover*, the supreme court recognized two different methods to challenge maintenance medical benefits. Employers have the right to "contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury or occupational disease." *Grover*, 759 P.2d at 712.

¶ 18 An employer may also challenge future claims for medical treatment by reopening the claim. The court explained:

> [T]he reopening provision of section 8-53-113 [now codified at section 8-43-303] is designed to address those situations in which, because of an error, mistake, or change in the injured worker's condition, further review of a previously entered award is necessary in the interest of basic fairness. At the time a final award is entered, available medical information may be inadequate, a diagnosis may be incorrect, or a worker may experience an unexpected and unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, section 8-[43-303] provides recourse to both the injured worker and the employer by giving either party the opportunity to file a petition to reopen the award.

Grover does not, however, resolve whether the employer may choose which alternative to take, or whether, under some circumstances, the employer must reopen the award.

¶ 19 Having reviewed the pertinent statutory provisions, we agree with the Panel's interpretation that reopening is not necessary in this case.

¶ 20 Issues or claims that are not closed need not be reopened. The Act, in fact, anticipates that claims may not fully close. Specifically, the Act does not state that an *entire claim* is closed by a decision or final admission of liability (FAL). Rather, the Act discusses the closure of *issues*. As claimant herself points out, the Act provides that "[a]n admission of liability for final payment of compensation must include . . . notice to the claimant that the case will be automatically closed *as to the issues admitted* in the final admission." § 8-43-203(2)(b)(II)(A), C.R.S. 2018 (emphasis added). Further, "[o]nce a case is closed pursuant to this subsection (2), *the issues closed* may only be reopened pursuant to section 8-43-303." § 8-43-203(2)(d) (emphasis added). Thus, under the express language of the statute claimant cites, a FAL does not necessarily close an entire claim; some issues may remain open and litigable. But, *issues* which have closed can only be addressed later through reopening.

¶ 21 The reopening statute uses slightly different language, permitting the reopening of "any *award* on the ground of fraud, an overpayment, an error, a mistake, or a change in condition . . . . If an award is reopened on grounds of error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased." § 8-43-303(1) (emphasis added).

¶ 22 We must reconcile, to the extent possible, these different provisions of the Act. *See Lombard*, 187 P.3d at 571; *Berthold v. Indus. Claim Appeals Office*, 2017 COA 145, ¶ 30 ("[W]e must view the Act as a whole and strive to harmonize its provisions because '[a] comprehensive statutory scheme should be construed in a manner which gives consistent, harmonious, and sensible effect to all parts of the statute.'" (quoting *Salazar v. Indus. Claim Appeals Office*, 10 P.3d 666, 667 (Colo. App. 2000))).

¶ 23 Notably, the reopening statute does not address "claims," either; rather, it pertains to "awards." "Award" is defined as "[a]n order, whether resulting from an admission, agreement, or a contested hearing, which addresses benefits and which grants or denies a benefit." *Burke v. Indus. Claim Appeals Office*, 905 P.2d 1,

2 (Colo. App. 1994). An award does not necessarily encompass every facet of a claim. To the contrary, an order may expressly reserve issues to be decided later. *See Hire Quest, LLC v. Indus. Claim Appeals Office*, 264 P.3d 632, 634 (Colo. App. 2011) (entitlement to future medical benefits not waived where issue was not decided by ALJ and ALJ's order expressly reserved undecided issues for future determination). Further, because issues may remain open, an order can be final even though "it does not dispose of all issues raised" so long as it grants or denies the payment of a benefit. *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). Thus, the Act as a whole anticipates that issues within a claim may remain open and subject to further litigation.

¶ 24 Because future maintenance medical benefits are, by their very nature, not yet awarded, those benefits remain open and are not closed by an otherwise closed FAL. *See Hire Quest*, 264 P.3d at 634; *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 866 (Colo. App. 2003).

¶ 25 Because claimant was entitled to receive future ongoing maintenance medical benefits for her depression, that issue was not

closed, and reopening was not required to assess the relatedness and necessity of claimant's continuing depression treatment.

¶ 26 The Panel's order recognizes this distinction between open and closed issues. The Panel has long held that an employer need not reopen a claim "before seeking to terminate its liability for maintenance medical benefits for the same reason." *Arguello v. Colorado*, W.C. No. 4-762-736-04, 2016 WL 2619514, at *3 (Colo. I.C.A.O. May 3, 2016). The *Arguello* panel noted that while a claim "may be closed by a 'final award'" and therefore must be reopened to pursue further litigation, ongoing medical maintenance claims necessarily leave open that issue for future determination. The Panel also cited the well-established principle that employers retain the right to challenge maintenance as unrelated[2] to the work injury, unreasonable, or unnecessary. In our view, this analysis is consistent with the legislative intent, and we therefore perceive no reason to stray from it. *See Town of Castle Rock*, ¶ 11.

[2] For maintenance benefits to be "related" they must have "an inherent connection" to the work injury. *See Horodyskyj v. Karanian*, 32 P.3d 470, 476 (Colo. 2001) (Incidents which are "inherently related to employment[] are those that have 'an inherent connection with employment and emanate from the duties of the job.'" (quoting *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991))).

¶ 27 Claimant sidesteps the distinction between open and closed issues by characterizing the ALJ's decision as overturning the original causation determination. While there is troubling language in the ALJ's order regarding claimant's minimization of her psychiatric history that long predated the petition to terminate the maintenance benefits, in the end, we do not read the ALJ's order as revisiting the causation admission inherent in the stipulation and resulting FAL.[3] The ALJ's order is devoid of findings that claimant did not suffer a compensable injury or that her injuries were not caused by her work-related fall. Nor did the ALJ find or employer even contend that treatment claimant had already received was unreasonable or not causally related to her work injury. In short, there was no repudiation of the earlier causation determination.

¶ 28 Rather, the ALJ found that claimant's condition had improved to her pre-injury level and that, consequently, any future treatment was no longer work-related. As discussed above, even when

[3] We agree with claimant that any prior minimization of her psychiatric history was irrelevant to the question whether the maintenance benefits were reasonable, necessary, and related to the compensable injury. Before entering into the stipulation and filing its FAL, the employer could have challenged this causal relationship. But it did not, and it is bound by its stipulation.

causation is admitted, an employer does not forfeit the right to challenge the relatedness of treatment, which is precisely what employer did here. *See Snyder*, 942 P.2d at 1339 ("An employer who has admitted liability for medical benefits can dispute a claimant's need for continued medical benefits.").

¶ 29 We therefore conclude that the Panel correctly determined that employer was not required to reopen the claim to challenge claimant's need for continuing medical care.[4]

C. Substantial Evidence Supported the ALJ's Decision

¶ 30 Whether the requested continued maintenance medical care is related, reasonable, and necessary is a question of fact for the ALJ's determination. *See id.*

¶ 31 Here, the ALJ found credible and persuasive the opinions of several physicians and health care providers who concurred that claimant had reached her pre-injury level of functioning and that

[4] We also note that the burden and standard of proof remain the same whether a challenge to maintenance benefits is made as here, or in a reopening proceeding. In both circumstances, the employer has the burden of proof and in both the burden is preponderance of the evidence. Claimant does not explain how or why the result would have been different even if employer was required to reopen the claim.

any subsequent treatment would not be work-related. Most notably, Dr. Kleinman reported that claimant had suffered from depression for many years prior to the 2013 work injury. He opined that although claimant would need continued medical intervention to keep her condition under control, the effects of the work injury had dissipated and she had "returned to baseline," alleviating the need for work-related medical care. As early as 2016, Dr. Koval likewise opined that claimant would soon return to her baseline. And, Doctors Kenneally and Hawkins, both neuropsychologists, concluded that claimant had suffered longstanding depression which predated her work injury.

¶ 32 This evidence amply supports the ALJ's factual finding that claimant's continuing need for medical care was no longer work-related. Consequently, we cannot set aside the Panel's order affirming the ALJ's termination of ongoing maintenance medical care. *See id.*

III. Intervening Cause

¶ 33 Claimant also contends that the Panel improperly attributed her need for continuing treatment to "the presence of an efficient intervening cause." She argues that "no such intervening accident

or injury ever occurred" and that the Panel read into the case facts and arguments that no party had introduced. This error, she contends, is a misapplication of the law that requires us to set aside the Panel's decision. We conclude that any error committed by the Panel in discussing intervening cause is harmless and does not provide a basis for setting aside its order.

¶ 34 "Intervening cause is a negligence concept that relieves a defendant from liability if the intervening cause was not reasonably foreseeable. It is not a defense to a strict liability claim." *White v. Caterpillar, Inc.*, 867 P.2d 100, 109 (Colo. App. 1993). The term is also used in the definition of "but for" causation:

> The test for causation is the "but for" test — whether, but for the alleged negligence, the harm would not have occurred. The requirement of "but for" causation is satisfied if the negligent conduct in a "natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred."

N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct, 914 P.2d 902, 908 (Colo. 1996) (quoting *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987)). As claimant implies, the definition suggests that the term is most frequently used to describe

an event or action that causes a new injury, thereby interrupting the original negligent party's liability.

¶ 35 We agree that the Panel erred by addressing the concept of intervening cause. However, any error was harmless. It is clear from the Panel's order that it found record support for the ALJ's conclusion that claimant had returned to baseline and that any further treatment was related to claimant's pre-injury condition, not to her work-related injury. Even though claimant's pre-injury depression was not an "efficient intervening cause," this was not the basis of the Panel's decision. Instead, the Panel held that the record supports the ALJ's finding that claimant's future need for care related exclusively to her pre-existing condition.

¶ 36 Because substantial evidence in the record supports the ALJ's finding that future treatment was no longer work-related, we cannot set aside the order affirming the decision to terminate future maintenance medical benefits. *See Snyder*, 942 P.2d at 1339.

IV. Conclusion

¶ 37 The order is affirmed.

JUDGE TAUBMAN and JUDGE TOW concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-051-507-03

IN THE MATTER OF THE CLAIM OF: LAURA SCHNIEDWIND, Claimant, v. RITE OF PASSAGE INC, Employer, and REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, Insurer, Respondents.	FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Nemechek (ALJ) dated September 18, 2018, that determined that the claimant failed to prove she suffered a compensable injury while working for the employer. We affirm.

The ALJ conducted the merits hearing over two sessions; the first took place on March 6, 2018, and the second took place on May 4, 2018. The pertinent issue before the ALJ was whether the claimant proved she sustained an injury arising out of and in the course of her employment.

The employer is a licensed residential child care facility. The facility houses troubled males between the ages of 12 and 21 years. The employer provides treatment services, educational services, vocational services, and athletic activities to the residents/students. The students are not voluntarily at the facility; rather, they are sentenced to be at the facility by a court upon adjudication of a crime. The facility is not a closed campus, but rather is staff secured. The students are not allowed to come and go as they please. The employer is mandated to follow a regulation that requires one staff member to be present for every ten students when the students are off campus engaging in an athletic activity. If this supervisory ratio is not present, the activity can still take place but must take place on campus. If a member of the staff is engaged in the activity, she is obligated to supervise the students at all times.

Students are required to participate in a sporting activity and get to choose from a variety of activities. Bicycling is one of the sponsored activities. The cycling team practices on campus, as well as riding off campus on occasion. The employer hires "direct care" professionals, who are primarily responsible for supervising the students (and for maintaining the supervisory ratio of 1 to 10) when they are engaged in off campus activities such as cycling. Mr. Townsend was the head coach of the cycling team and is employed as a direct care professional. Mr. Cox was the assistant head coach.

Claimant was and remains a licensed therapist at the facility, working in a salaried, full-time position. Her schedule was generally 8 a.m. to 5 p.m., but it can vary or be adjusted. She specifically worked as an intake specialist, and evaluated new students when they came to the facility. Claimant also worked with students in other settings, such as well crisis intervention and leading treatment groups. Her position was not directly connected to the athletic activities.

On June 26, 2017, the claimant was injured while riding a bicycle while accompanying the cycling team on an off campus ride.

The ALJ found that the claimant was never required to ride with the cycling team as part of her job functions as a therapist. However, when therapists such as claimant went on the rides, they were in a position to supervise the students and expected to perform the essential job functions while on the ride. Such functions include: ensuring the safety, health and welfare of staff and students; providing encouragement, guidance and resources when needed; modeling and ensuring all program norms are upheld without compromise; acting as a positive role model and mentor; treating everyone with respect; confronting negative behavior; and providing support during confrontations. Such functions were universal to all of the employees.

On June 26, 2017, the claimant volunteered to accompany the cycling team on an off campus ride which included the Aurora Reservoir as a destination. Her presence was not required to meet the required staff to student ratio, as such was already covered by the head and assistant coaches.

The claimant and other witnesses testified that participation in an athletic activity was voluntary but encouraged. The claimant had received a 90-day performance evaluation on August 13, 2016, which positively referenced her work with the cycling team. Her supervisor, Mr. Glick, testified that he discussed participation in the cycling team when the claimant was evaluated. This was a positive aspect of claimant's review.

Mr. Hays, a former employee, testified that therapists were encouraged to participate in extracurricular activities, and such participation was good for a therapist's career path.

Mr. Cox, the assistant cycling coach, testified that he did not ask the claimant to participate in cycling on the date of the injury. Mr. Cox testified that the claimant often rode with the cycling team when there were already enough staff to meet the supervisory ratio requirement.

The human resources manager, Ms. Doyle, testified that claimant was expected to work a 40-hour weekly schedule. Further, participation in extracurricular activities did not count toward the 40-hour requirement. Further, exempt employees, such as the claimant, were not required to participate in any extracurricular activities and there were no negative implications on those that did not participate. An ability to participate in extracurricular activities was not a job requirement for new hires. Ms. Doyle testified that participation in extracurricular athletic activities was not part of the employee evaluation process and any reference to it should not have been included in claimant's evaluation. Any such reference is normally redacted by the HR department. The claimant did not receive additional pay for engaging in extracurricular athletic activities.

The ALJ credited the testimony of the employer and inferred that the claimant's participation in the cycling excursion on June 26, 2017, was not considered to be within her normal working hours.

Claimant testified that she felt it was part of her job to participate in athletic activities. Therapists were supposed to help out other departments when they were short-staffed. She believed that employees had to participate in athletic activities to move up within the company. Employees had discretion as to which extracurricular activities they chose. She also felt the hours riding with the cycling team counted as part of her overall work hours.

The ALJ noted that the claimant was a cycling enthusiast that engaged in bicycling activity when she was not working. She competes in competitive rides such as Elephant Rock and also trains for such activities outside of work and away from the cycling team. Claimant testified that she went on between 10 and 25 rides off campus with the cycling team in the summer of 2016. In the spring of 2017, she rode with them one to two times per week. Claimant would check with the cycling coach to find out when the team would be riding off campus.

On the date of her injury, the claimant was riding at the back of a group of student cyclists. The cycling team coach and assistant coach were present on the ride, which went off campus that day. As there were approximately 15 students on the ride, the presence of the coach and assistant coach satisfied the supervisory ratio. During the ride the claimant broke up a fight between students. She was injured at the Aurora Reservoir site when she fell from her bike due to a collision with a student's bike. The claimant testified that while accompanying the cycling team, she continued to perform her job duties as a supervising staff member.

The ALJ found that the cycling excursion was a recreational activity and that claimant's participation was voluntary. The ALJ found that the claimant's participation in the June 26, 2017, ride conferred a benefit on the employer.

In his conclusions of law, the ALJ determined that the employer sponsored and initiated the cycling activity; the cycling activity took place outside of claimant's work hours; that the activity occurred off employer's premises; and that although participating in athletic activities was mandatory for students, claimant's participation was voluntary. The ALJ also concluded that the claimant continued to exercise her job responsibilities of supervision of the students during the voluntary activity. The ALJ was not persuaded that riding with the cycling team was a direct part of the claimant's job duties as a therapist. The claimant's participation that day was not necessary to meet the 1:10 supervisor to student ratio for an off campus activity.

While having an additional employee on the ride was of some benefit to the employer, as was the fact claimant broke up an altercation; the ALJ concluded that this standing alone did not make the claim compensable. The ALJ stated, "Based on a totality of the evidence, claimant's participation in this activity on the date of her injury was voluntary. Therefore, the injuries she received as a result of participation in this activity were not compensable …." The ALJ denied and dismissed the claim for compensation.

On appeal to the Panel, the claimant contends that the ALJ erred in his reliance on § 8-40-201(8), C.R.S. 2016. This statutory subsection states:

> 'Employment' … shall not include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program.

The claimant points us to other facts—some of which are contested—that, she contends, show that the activity was in the course of employment. Specifically, the claimant asserts that her supervisor and the program director encouraged the claimant and all of the therapists to help other departments when the facility was short on staff. Claimant believed that it was important to her success on the job to assist in the athletic activities at the facility. The assistant coach testified that the coaches would recruit from other departments to assist with athletic activities and that claimant was authorized to work with the cycling team and was expected to supervise the students while cycling. When accompanying the team, the claimant was able to provide informal counseling in her role as a therapist and mentoring as she was riding with the students. When claimant was presented with the "employee of the month" award in May 2017, the presenter specifically mentioned her work with the cycling team as a reason for receiving the award. Claimant believed she could include her time with the cycling team as part of her work week, and was never told by her supervisor that that was not appropriate. Claimant would check in with the cycling coaches from time to time to see if she was needed by the team for an off campus ride. On June 26, 2017, the cycling coach was in front of the students on the ride, the claimant was in the rear, and the assistant coach followed along in a support van. Claimant took a fall while riding around the Aurora Reservoir. When the group entered the Aurora Reservoir land, the support van had to stay off property as they did not have a parks pass for the van. Thus, claimant argues, the assistant coach could not accompany the 15 riders around the reservoir and thus claimant's participation was necessary to maintain the supervisory ratio of 1:10. Despite her injuries, the claimant remounted her bicycle and completed the ride, knowing that she had to continue so as to maintain the proper staff to student ratio.

The claimant specifically argues that, "Although the ALJ considered the factors for recreational activities found in *White* [*v. Industrial Claim Appeals Offic*e, 8 P.3d 621 (Colo. App. 2000)], the ALJ failed to analyze and determine that claimant was not relieved of and was in fact performing duties of employment while she supervised the student's bicycle ride on the date of injury, thus her injury was compensable."

The claimant cites § 8-40-301(1)(a), C.R.S., which deals with the definition of "employee." This paragraph pertinently states:

> 'Employee' excludes any person employed by [an] employer, while participating in recreational activity, *who at such time is relieved of and is not performing any duties of employment* … (Emphasis added by claimant.)

Claimant argues that the ALJ did not analyze whether the claimant was relieved of and not performing any duties of her employment when the accident occurred. That while the claimant volunteered to assist the cycling team on the date of the injury, she was still performing her essential job functions while she was on the ride. Further, the claimant advocates that she was encouraged to participate and was rewarded for such participation. Lastly, the claimant argues that because she was performing her duties of employment while she was on the cycling ride, "she fits within the definition of an 'employee' as defined in § 8-40-301(1)(a), C.R.S."

We note that the ALJ relied upon *Price v. Industrial Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). In *Price,* the Supreme Court held that a court should look to the following factors to determine whether an injury is compensable: (1) whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the recreational program; (4) whether the employer exerted any control or direction over the recreational program; and (5) whether the employer stood to benefit from the employee's participation in the recreational program. In our view, the factors set forth by the court in *Price* provide an appropriate framework for analysis of the present case.

The *Price* court determined that the first two factors carry greater weight than the other factors because the time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment. *Id.* at 211. See Larson, Workmen's Compensation Law § 22.24(b).

Looking at the first factor under *Price,* the ALJ found that the claimant's participation in the cycling excursion was not during the claimant's work hours. There was conflicting evidence as to whether the claimant could or could not use hours involved in this activity to substitute for her regular 40 hours of work. The ALJ resolved the conflicting evidence in the employer's favor.

On the second *Price* factor*,* the ALJ found the activity in which claimant engaged at the time of her injury did not occur on the employer's premises. This fact was not disputed.

On the third *Price* factor, it is uncontroverted that the employer initiated the cycling program *for its students*. Other than for "direct care professionals," the ALJ found that participation in this activity was not required of other staff member such as the claimant. Claimant did not have to seek permission of her superiors to volunteer for the activity.

On the fourth *Price* factor of whether the employer exerted any control or direction over the employee's participation in the program, the ALJ made the following findings. Although the ALJ found it was encouraged (promoted), the employer did not mandate participation in athletic programs by its therapists. If the claimant chose not to engage in any athletic activity, it would not have led to any negative evaluations, discipline, or failure to advance. The ALJ credited the employer's testimony that participation is not a factor in positive evaluations, employee awards, wage increases, or promotions. The ALJ's findings were entered despite the fact that one of the claimant's evaluations notated her assistance with the cycling team and it may have been mentioned when she received a performance award.

The fifth *Price* factor is whether the employer stood to benefit from the employee's participation in the cycling program. While the claimant was voluntarily engaged in the bike ride, the employer benefited by the additional supervision from the claimant (a 1:5 rather than a 1:7.5 ratio), even if such supervision was redundant in regard to the required staff/student supervisory ratio. Claimant's argument that her presence may have been required to satisfy the ratio when the group entered the Aurora Reservoir property is not dispositive in our view. Had the claimant not been part of the group that day, there was sufficient supervision to ride off campus and the coach could have simply changed the planned route to avoid the reservoir portion of the trip and bike elsewhere. Claimant's presence merely provided the small benefit of an additional route option.

To be compensable under the WC Act, an injury incurred by an employee must arise out of and in the course of the employee's employment. *Id.* Pursuant to § 8-40-201(8), C.R.S., the term "employment" does not include "an employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity. *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000). The ALJ concluded that the claimant's participation in the cycling activity was voluntary and the activity was recreational.

The claimant contends that the *White* and the *Price* cases are distinguishable and thus inapplicable to this claim. The claimant argues that she was not relieved of and was performing her job duties (primarily that of supervision) when she was injured. In *White,* the claimant was a high school substitute teacher who was injured while weightlifting in the high school's weight room during a free period. It was undisputed that the activity was voluntary, the court only addressed whether the activity was "recreational." Claimant argues that the employee-weightlifter, unlike the claimant, was relieved of his

job duties at the time of the injury. In *Price*, a prison guard was injured while exercising at home in response to his supervisor's request that he lose weight. The claimant argues that the guard was also relieved of his job duties at the time of the injury.

Here the ALJ determined, with record support, that the claimant's cycling activity was voluntary. Because the activity itself was voluntary, the claimant essentially self-imposed the employer's supervisory expectations. Such self-imposition of duties was thus part and parcel of claimant's voluntary choice.

We view § 8-40-301(1)(a), as an exclusory, not an inclusive provision. Assuming arguendo, that the claimant may not be excluded from the definition of an "employee" by the application of § 8-40-301(1)(a); that status is not conclusive as to whether the "employee's" injury arose out of and in the course of employment. Rather, § 8-40-201(8) mandates that "employment' … shall not include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." The fact that the claimant volunteered to engage in the activity and thereby acquiesced to the employer's job function requirements should not work to the detriment of her employer.

Ultimately, the determination of whether the claimant's participation in a recreational activity was voluntary, or conversely involved a duty or incident of the employment, is one of fact for determination by the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). Consequently, the Panel must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's resolution of conflicts in the evidence, credibility determination and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003). Further, the ALJ need not make findings concerning every piece of evidence provided the bases of the order are clear from the findings which are entered. We may also consider the findings that are necessarily implied by the order. *Magnetic Engineering, Inc. v. Industrial Claim Appeal Office,* 5 P.3d 385 (Colo. App. 2000).

The findings made by the ALJ are substantially supported in the evidence as are his reasonable inferences from the evidence. In our estimation, considering the totality of the circumstances, the ALJ's determination that the injury resulted from the claimant's voluntary recreational activity is correct. Even if considered an "employee" at the time of her injury, the claimant's activity was such to statutorily remove it from the course of employment.

We have considered all of the claimant's arguments and are not persuaded that the ALJ committed error.

IT IS THEREFORE ORDERED that the ALJ's order issued September 18, 2018 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

__________3/12/19______________ by _____TT__________ .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-068-419-001

IN THE MATTER OF THE CLAIM OF: LAURA DAVOLI, Claimant, v. UNIVERSITY OF COLORADO, Employer, and UNIVERSITY RISK MANAGEMENT, Insurer, Respondents.	REMAND ORDER

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated August 8, 2018, that denied and dismissed the claimant's "claim for benefits not covered in W.C. No. 5-009-471." We set aside the ALJ's order and remand the matter for further findings and a new order.

This matter went to hearing on the issues of compensability, reasonable, necessary and authorized medical providers, and the respondents' contention that the "accident or injury claimed was fully compensated in W.C. No. 5-009-471." After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted work-related injury on March 3, 2016, when she struck her head on a counter. The respondent admitted liability in W.C. No. 5-009-471. The claimant was treated by Dr. McIntyre.

On November 9, 2016, the claimant struck the left side of her head and neck on an x-ray machine while at work. The claimant experienced an increase in symptoms because of the November 9, 2016, event.

The ALJ found that the claims representative advised the claimant that because the November 9, 2016, incident involved the same body part and Dr. McIntyre stated that it was an aggravation, the November 9, 2016, incident would continue to be handled under

the current claim. The ALJ further found that the claim representative was under the impression that the claimant understood this to be the case.

Dr. McIntyre testified by deposition. Dr. McIntyre stated that he was aware of both event dates and that the November 9, 2016, head contusion occurred to the same general posterior aspect of the skull and that both events shared the following four elements: the strain of muscle, fascia and tendon at neck level, post concussive syndrome, concussion without loss of consciousness, and claimant's head striking against a stationary object. Dr. McIntyre testified that the diagnosis for both incidents was the same and that he did not treat the November 9, 2016, event as a completely new injury but that they were "continuing the same vein of treatment from her previous injury and the November 9, 2016, event resulted in a "slight increase in symptomology."

Dr. McIntyre placed the claimant at maximum medical improvement (MMI) on April 4, 2017, and released the claimant to full duty work with ongoing maintenance care. Dr. McIntyre testified that he felt the claimant was at MMI for the March 3, 2016, injury and the November 9, 2016, event. The respondents filed a final admission of liability in W.C. No. 5-009-471, consistent with Dr. McIntyre's MMI date and no impairment.

On January 19, 2018, the claimant filed a new workers' claim for compensation for the November 9, 2016, event. The respondents filed a notice of contest taking the position that the November 9, 2016, event was "subsumed within W.C. No. 5-069-471 and that the case was closed." The claimant continued to treat with her private physician at Kaiser Permanente, continuing to complain of neck pain and headaches in those records.

The ALJ found that the claimant did not lose any time from work or experience a permanent medical impairment that was not addressed in the final admission for W.C. No. 5-009-471. The ALJ, therefore, found that the respondents administrated the November 9, 2016, event as a component of W.C. No. 5-009-471, and denied the claim for compensability in W.C. No. 5-068-419.

On appeal the claimant contends that the ALJ erred as a matter of law in finding that the respondents did not have to file a new claim when the claimant suffered a new injury resulting in additional medical treatment and physical restrictions. We agree that the ALJ misapplied the law, and the findings of fact are conflicting and insufficient to permit appellate review. We therefore remand the matter for further findings and a new order. Section 8-43-301(8), C.R.S.

We are unable to determine whether the ALJ found that the claimant actually sustained a compensable injury on November 9, 2016. Although the ALJ appears to determine that the claimant did not sustain a compensable injury based on the fact that the November 9, 2016, event did not cause the claimant to miss more than three days from work or result in permanent impairment, the ALJ also finds that the claimant received all reasonable and necessary medical treatment and appropriate disability for the November 9, 2016, event as part of W.C. No. 5-009-471. ALJ Order at 6.

To the extent that the ALJ determined that the claimant did not sustain a compensable injury because she did not miss more than three days of work or the injury did not result in permanent disability, the ALJ misapplied the law. As the claimant argues, she was not seeking disability compensation but instead was seeking a determination that the November 9, 2016, incident was compensable.

A claimant suffers a compensable injury if employment related activities aggravate, accelerate, or combine with a preexisting condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990); *see also, Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The existence of a pre-existing injury or disease does not preclude the claimant from suffering a compensable injury. *H & H Warehouse v. Vicory, supra*. Rather, the claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. Section 8-41-301(1)(c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988).

For example, pain is a typical symptom from the aggravation of a pre-existing condition. Insofar as the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). Further, the claimant is entitled to medical benefits so long as the pain is proximately caused by the industrial aggravation and not the underlying pre-existing condition. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986), *overruled on other grounds, Allee v. Contractors, Inc*., 783 P.2d 273 (Colo. 1989)(claimant's preexisting permanent disability from a prior industrial back injury did not preclude the claimant from recovering workers' compensation benefits for a second, separate compensable back injury with the same employer); *see also Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970)(issue of whether

the claimant's condition is the natural and proximate progression of the original industrial injury or a new injury is one of fact for resolution by the ALJ).

In contrast, the claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate consequence of a prior industrial injury, without any contribution from a separate, intervening causative factor. The issue of whether the claimant's condition is the natural and proximate progression of the original industrial injury or a new injury is one of fact for resolution by the ALJ based upon the evidentiary record. *Id.; F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Whether the claimant's condition was a logical and recurrent consequence of the original injury, rather than an aggravation of that injury, is a question of fact for resolution by an ALJ. *See Id.* Similarly, the question of whether the claimant has proven a causal relationship between an industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Thus, we must uphold the ALJ's pertinent findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. The ALJ, however, must make sufficient findings of fact and conclusions of law to indicate the basis of the order and support meaningful appellate review. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *George v. Industrial Commission*, 720 P.2d 624 (Colo. App. 1986).

The findings here are contradictory and insufficient to ascertain the basis of the ALJ's conclusion. Although the ALJ need not enter findings concerning every piece of evidence, the findings must be sufficient to indicate the factual and legal basis of the ALJ's determination, and purely conclusory findings are inadequate. Section 8-43-301(8); *Womack v. Industrial Commission*, 168 Colo. 364, 451 P.2d 761 (1969). The ALJ found that the claimant struck the left side of her head and neck and experienced increased symptomology because of the November 9, 2016, event that necessitated additional treatment. Based on these findings, the claimant's pain and need for medical treatment appear to be caused by a new injury on November 9, 2016, which is contrary to the ALJ's determination to deny the claim. *H & H Warehouse v. Vicory supra*. There is also evidence from which the ALJ could infer that the November 9, 2016, event did not result in a need for additional medical treatment. Because the ALJ's order does not resolve the conflict in these contradictory findings concerning the cause of the claimant's symptoms, it is impossible for us to ascertain the basis of the ALJ's conclusion. While the record might support either the inference that the aggravation was caused by the November 9, 2016, event or the natural progression of the claimant's original March 2016

CERTIFICATE OF MAILING

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

__________3/15/19__________ by __________TT__________ .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-034-457-02

IN THE MATTER OF THE CLAIM OF:

PATRICIA DRESSELAERS,

Claimant,

v.

FEDERAL EXPRESS,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

REMAND ORDER

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated November 18, 2018, granting the respondent's motion for summary judgment determining the claim is closed by the August 15, 2018, final admission of liability. We set aside the ALJ's order and remand for further proceedings.

This matter came before the ALJ on the respondent's motion for summary judgment. The following facts are not in dispute. The claimant sustained an admitted work-related injury on December 20, 2016. The claimant was placed at maximum medical improvement (MMI) on December 15, 2017. The respondent requested a Division Independent Medical Examination (DIME) which was performed on March 20, 2018. The DIME physician placed the claimant at MMI and provided the claimant with a 16 percent whole person rating. The respondents filed an application for hearing to overcome the DIME. The claimant filed a response to the application for hearing on April 20, 2018, listing the issues of medical benefits, TTD/TPD/PPD, AWW, overcome DIME and relatedness of fall and post-fall care. A hearing was scheduled for July 17, 2018.

On June 29, 2018, the respondent filed an unopposed motion to continue the hearing for 60 days. The motion was granted and a new hearing was scheduled for September 4, 2018. The respondent then withdrew the application for hearing and filed a final admission of liability dated August 16, 2018, consistent with the DIME physician's

opinions and denying maintenance medical care. The September 4, 2018, hearing was cancelled.

On September 14, 2018, the claimant objected to the August 16, 2018, final admission. The objection was faxed to the Division of Workers' Compensation, Sedgwick and respondent's counsel, Paul Krueger, Esq. The claimant's objection indicates that she will be filing an application for hearing.

In the response to the motion for summary judgment, the claimant asserts that Susan Calvert, paralegal to claimant's counsel, Adam McClure, prepared an application for hearing, endorsing the same issues previously endorsed on the claimant's April 20, 2018, response to application for hearing. The claimant contends that this application for hearing was signed by the claimant's counsel's office and the certificate of mailing was signed by Ms. Calvert on September 14, 2018. The claimant states that Ms. Calvert's normal procedure in filing application for hearing forms is to email the form to the Office of Administrative Courts and to opposing counsel. The claimant further states that it is Ms. Calvert's belief that she e-mailed the application for hearing as indicated on the certificate of mailing.

The claimant further states that on September 28, 2018, Ms. Calvert was advised that the respondent's counsel had received the objection, but had not received an application for hearing. Ms. Calvert contacted the Office of Administrative courts and was advised that they had not received the application for hearing. Ms. Calvert emailed the respondent's counsel indicating that it appeared the email did not go through and a new application for hearing would be prepared and refiled. The claimant's counsel filed a new application for hearing on October 2, 2018, endorsing the same issues. The respondent filed a response to the application for hearing on October 19, 2018, endorsing the issues that the claim is closed pursuant to §8-43-203 and motion to strike application for hearing and issues endorsed therein as not raised within 30 days of final admission of liability. A hearing was scheduled for January 29, 2019.

On October 29, 2018, the respondent filed a motion for summary judgment seeking a determination that the claim was closed by the claimant's failure to timely file an application for hearing to contest the August 15, 2018, final admission of liability. The claimant filed a response contending that there was a disputed issue of material fact as to whether the claimant substantially complied with the requirements of §8-43-203 (2) (b) (II), to file an application for hearing based on the facts described above. The respondent filed a reply stating that the claimant failed to demonstrate a disputed issue of fact.

In a conclusory order dated November 9, 2018, the ALJ granted the respondent's motion for summary judgment stating only that the claim is closed pursuant to the August 15, 2018, final admission of liability and striking the application for hearing.

On appeal the claimant renews her contention that there is a disputed issue of material fact. The claimant asserts that the application for hearing was filed as indicated in the certificate of mailing. The claimant also argues that there was substantial compliance with the requirement to file an application for hearing. We agree with the claimant that a disputed issue of material fact exists as to whether the application for hearing was filed and, therefore, set aside the ALJ's order and remand the matter for further proceedings.

On its face the ALJ's order does not appear to grant or deny a benefit or penalty. We nevertheless consider the ALJ's order final for purposes of our review. We have no authority to review an order that does not satisfy the finality criteria of § 8-43-301(2), C.R.S., which provides that any dissatisfied party may seek review of an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty. . . ." *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003). We previously have held, however, that an order which determined that a claim was closed by a final admission of liability was final and subject to immediate review under § 8-43-301(2), C.R.S. This was true because the final admission effectively denied benefits by requiring the claimant to file a petition to reopen and prove the requisite elements before additional benefits could be awarded. *See Maloney v. Ampex Corp.*, W.C. No. 3-952-034 (February 27, 2001); *Stinson v. Duck Co.*, W.C. No. 4-271-437 (January 26, 1998) (where ALJ struck application for hearing on grounds the claim was closed by a final admission, order was not interlocutory where claimant alleged claim had not been properly closed and, therefore, it was unnecessary for him to file a petition to reopen to obtain additional benefits). Accordingly, we conclude that we have jurisdiction to review the ALJ's order. *See Valenzuela v. Best Car Buys*, W.C. No. 4-664-544 (January 23, 2007).

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See* OACRP 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (the

Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo,* 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987).

In the context of summary judgment, we review the ALJ's legal conclusions *de novo*. *See A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). Pursuant to § 8-43-301(8), C.R.S., however, we have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law. The ALJ’s findings here are insufficient to permit appellate review.

Section 8-43-203(2)(b)(II), C.R.S., provides that a case will be automatically closed as to the issues admitted in the final admission if the claimant does not, “within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing…” The overall purpose of § 8-43-203(2) (b) (II), C.R.S., is to establish a mechanism for administrative closure of claims, without the necessity of litigation, in cases presenting no legitimate controversy. *Cibola Construction v. Industrial Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998).

The claimant here asserts that her counsel’s office timely e-mailed the application for hearing dated September 14, 2018, and does not know why it was not received. There is a presumption that a document, which is properly addressed and mailed, is received by the addressee. *See Olsen v. Davidson*, 142 Colo. 205, 350 P.2d 338 (1960). Further, the certificate of service on a document creates a presumption of delivery. *See Allred v. Squirrel*, 37 Colo. App. 84, 543 P.2d 110 (1975). The panel previously has held that pursuant to Office of Administrative Courts Rule of Procedure 4 (B), an application for hearing is considered to have been filed on the date of the certificate of mailing. *See Lehmann V. Aurora Public School*, W.C. No. 4-426-778 (March 19, 2001); *Mitchell v. Office Liquidators Inc.,* W.C. No. 4-409-905 (December 29, 2000) (formerly Rule VIII

(F)). The respondent may rebut this presumption but then the question of whether the application for hearing was actually mailed to and received by the parties become issues of fact for the ALJ based on her assessment of the weight of the evidence. *See EZ Building Components v. Industrial Claim Appeals Office*, 74 P.3d 516 (Colo. App. 2003); *Denver v. East Jefferson County Sanitation District*, 771 P.2d 16 (Colo. App. 1988).

It was the respondent's burden to prove there was no genuine issue of material fact concerning the proper filing of the application for hearing. *See Continental Air Lines Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002) (respondents have burden to establish overpayment). A "material fact" is simply a fact that will affect the outcome of the case. *In re Water Rights Dominquez Reservoir Company v. Feil*, 854 P.2d 791 (Colo. 1993). Where there are disputed issues of material fact, due process requires the parties be afforded a reasonable opportunity to present evidence and confront adverse evidence. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990). The claimant's response to the motion for summary judgment in this case included arguments and documents, which, if credited, could support her contentions concerning the filing of the application for hearing. *Kaiser Foundation Health Plan v. Sharp, supra*. (determining whether summary judgment was proper, the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts). Under these circumstances, the ALJ erred in determining that there was no disputed issue of material fact. *See Moses v. Moses*, 180 Colo. 397, 505 P.2d 1302 (1973) (summary judgment should not be granted where there is the slightest doubt as to the facts); *Jafay v. Board of County Comm'rs of Boulder County*, 848 P.2d 892 (Colo. 1993) (where reasonable persons could disagree on pertinent issue summary judgment is not appropriate).

Since the ALJ's order granting the respondent's motion for summary judgment contains no findings of fact, conclusions of law, or any indication that the ALJ considered the presumption that the application for hearing was actually mailed, it is necessary for us to remand this matter for additional findings and entry of a new order. *See Charnes v. Norwest Leasing, Inc*., 787 P.2d 145 (Colo. 1990) (facts in each particular case provide the basis for determining whether there has been substantial compliance); OAC Rule of Procedure 17(indicates an order concerning summary judgment must include findings of fact, conclusions of law, and an order).

We also note that the claimant asserts that she substantially complied with § 8-42-203(2)(b)(II), C.R.S. by giving the respondents actual notice of her objection to the final admission of liability and notice that she intended on litigating certain issues at hearing. The Colorado Court of Appeals and various panels have held that substantial compliance with § 8-43-203, C.R.S. can be sufficient to prevent closure of a claim. *See Stefanski v. Industrial Claim Appeals Office*, 128 P.3d 282 (Colo. App. 2005) (any pleading which adequately notifies employer that claimant does not accept final admission of liability constitutes substantial, if not actual, compliance with statutory obligation to provide written objection), *aff'd Sanco Industries v. Stefanski*, 147 P.3d 5 (Colo. 2006); *see also EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office*, 74 P.3d 516 (Colo. App. 2003) (concept of substantial compliance has been applied to various notice requirements in workers' compensation proceedings). The concept of substantial compliance, however, has not been extended to include the actual failure to file an application for hearing. *See Olivas-Soto v. Industrial Claim Appeals Office, 143 P.3d 1178 (Colo. App. 2006)*; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004); *Coxen v. Laidlaw Transit Inc.*, W.C. No. 4-674-208 (April 10, 2012).

On remand, the ALJ should enter findings of fact, conclusions of law, and an order sufficient to permit review of the issue of whether the application for hearing was filed. As noted above, 'filing' is accomplished by serving the document on the OAC and the parties through mailing or transmission, and the absence of receipt does not necessarily mean the document was not 'filed'. The ALJ may conduct such further proceedings, as in her discretion, she considers appropriate to comply with this remand. Nothing in this order should be construed as dictating any particular outcome on remand.

IT IS THEREFORE ORDERED that the ALJ's order dated November 9, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

3/22/19 by TT .

THE FRICKEY LAW FIRM, Attn: ADAM MCCLURE ESQ, 940 WADSWORTH BLVD 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)
RITSEMA & LYON PC, Attn: PAUL KRUEGER ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-968-114-01

IN THE MATTER OF THE CLAIM OF:	
ALLEN MARTIN, Claimant, v. JACK IN THE BOX d/b/a QDOBA MEXICAN GRILL, Employer, and ACE AMERICAN INSURANCE COMPANY, Insurer, Respondents.	FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated August 14, 2018, that denied and dismissed the claimant's claim and ordered that the Final Admission of Liability (FAL) was *void ab initio*. We affirm.

Hearing was held over three sessions on December 20, 2017; March 12, 2018; and April 23, 2018. The claimant's claim was admitted by the respondents and ultimately a Final Admission of Liability was filed on June 16, 2017. Thereafter, the claimant filed an application for hearing on the issue of permanent total disability. The Respondents counter-endorsed compensability and withdrawal of their admission of liability. The issues were bifurcated and only Respondents' issues were adjudicated by the court. The pertinent findings of fact established by the ALJ are summarized below.

Claimant was assaulted outside of the restaurant where he worked as a cook on November 28, 2014. Claimant reported that he was performing his job duty of taking out the garbage at the time of the assault and that he did not know his assailants. Based on the claimant's representations, the respondent admitted the claim and paid benefits.

Respondents sought to withdraw their admission based on additional information that became available to them. Respondents contended the assault was personal in nature and not work related.

Video surveillance taken the night of the assault from inside the employer's location showed three men enter the restaurant. All three sat at a table across from the cash register and looked into the back, by the kitchen, where claimant was working. Within moments, the claimant approached the register and leaned toward the table where the three men were sitting. At that point, the three men walked out of the restaurant. Claimant left the restaurant a few minutes later. The claimant was assaulted outside the restaurant.

After the assault, while still at the hospital, the claimant reported to Investigator Robison from the Arapahoe County Sheriff's Office that he "was taking the trash out to the dumpsters behind the business." He provided the same report on several occasions to his treating physicians and his mental health counselor. At a later meeting with another investigator, Investigator Johnston, claimant reiterated that he was taking the trash out and that he believed it was the four (sic) men in the restaurant earlier that had attacked him. At the December 20, 2017, hearing the claimant testified that he told the investigator that he was taking out the trash.

Videotape of claimant leaving the restaurant was reviewed and the ALJ found that it established that claimant did not take trash with him when he left the restaurant. Rather, the video showed the claimant leaving the restaurant with empty hands. While leaving the restaurant, the claimant walked within inches of a full trash can without removing the bag from the container.

The ALJ also found that the claimant testified inconsistently about taking out the trash. Claimant testified that his manager, Mr. Reiners, told him to take the trash out. At another point, claimant testified that there was a "mountain of trash in the back" and he told Mr. Reiners he was going to take out the trash. Claimant testified that Mr. Reiners usually "took out the trash with me, but for some reason he didn't that night." At another point, claimant testified, "Ben [Reiners] never took out the trash with me."

Investigator Johnston testified that she reviewed the video of the assailants running away after the assault and identified them as the same three men who appeared in the interior restaurant video. After Investigator Johnston confronted the claimant about having nothing in his hands when he left the restaurant, claimant changed his story. He then claimed that he went out to smoke a cigarette, to break down boxes, or to clean up the trashcans. Mr. Reiners testified that the employee smoking area was not where the assault occurred.

Prior to and after the assault, the claimant treated with Mr. Neujahr, for psychotherapy related to anxiety, paranoia, and depression. On December 4, 2014, one or two hours before he first met with Investigator Johnston, claimant met with Mr. Neujahr. Claimant told Mr. Neujahr that while he was taking out the trash, four men attacked and assaulted him. Claimant told Mr. Neujahr that he vaguely knew the four men from approximately two years before when he assisted them in purchasing marijuana with his medical marijuana card. Claimant also told Mr. Neujahr that he suspected they attacked him because of his association with a friend of his who was in jail. Mr. Neujahr testified that claimant thought the assailants were rivals of a gang that he had been involved with years before. Claimant testified that he had "never been in a gang in his whole life." The ALJ found Mr. Neujahr credible and persuasive. The ALJ found that claimant admitted to Mr. Neujahr that he knew his assailants and they attacked him for personal reasons unrelated to work.

The ALJ found that claimant has a history of using and selling illicit drugs. Medical records documented amphetamine abuse, cannabis abuse, heroin addiction, and "other substance-induced psychotic disorder with delusions." Claimant reported to his provider that his main problem was "nightly dreams about his life as a drug dealer and user." His provider described him as having "severe and chronic drug addiction problems." The provider also noted that claimant appeared to "like the rush" he got selling meth and buying alcohol for his underage friends. Claimant testified that at the time of the assault, he was receiving Methadone for a heroin addiction. Claimant's testimony, wherein he denied selling any drugs other than marijuana, is belied by the contrary medical records. Claimant admitted during cross-examination that he "jacked" (injured) some people when he was selling drugs.

Investigator Johnston testified that when she told claimant that the video showed him leaving the restaurant without trash, claimant volunteered, without any questioning on the subject, "This was not a drug deal." The investigator's report notes that claimant told her: "He knows I think this is a drug deal gone badly because of his past." "Allen brought this up on his own, at no time did I ask him if this was a drug deal."

The ALJ found that the claimant gave contradictory reports about whether he knew the assailants and whether they took money from him during the assault. At the hospital, claimant told Investigator Robison that he did not know whether he was missing any cash. According to the investigator, claimant had $260 in his wallet at the hospital on November 24, 2014. Claimant later reported to Investigator Johnston that $400 was taken from him. Then claimant increased the missing amount to $500.

Claimant testified that he had a large sum of money on him because he drew down his account so that it could not be garnished by a payday loan company to which he owed money. Based on the testimony of Investigator Johnston, the ALJ found it highly unlikely that claimant had $500 in his wallet before the assault and $260 after the assault. The ALJ found it highly unlikely that the assailants took part but not all of claimant's money.

The ALJ cited *In re Question by the U.S. Court of Appeals for the Tenth Cir.,* 759 P.2d 17 (Colo.), holding that assaults in Colorado workers' compensation claims are divided into three different categories: (1) assaults that result from the duties of the job (i.e. inherently work related); (2) assaults that are personal in nature or due to a personal dispute or connection (inherently non-work related); and (3) neutral assaults where "nothing connects it with the victim privately; neither can it be shown to have a specific employment origin" (deemed to be work related).

The ALJ credited the testimony of Investigator Johnston, Mr. Neujahr, and Mr. Reiners. The ALJ found that the video evidence, as well as the testimony of Mr. Neujahr, supported a finding that the claimant knew his assailants. The ALJ concluded that the respondents proved by a preponderance of the evidence that claimant's November 28, 2014 injury was a personal assault and not a work-related compensable incident.

The ALJ concluded that the claimant supplied material false information to the employer and its insurer, upon which they relied in filing its FAL. The ALJ cited to *Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981) to rule that the respondents' FAL was *void ab initio* and therefore withdrawn retroactively.

The ALJ denied and dismissed the claimant's claim with prejudice and ruled that respondents' admission of liability was *void ab initio.*

The claimant filed a petition to review and asserted that the findings of fact are insufficient to permit appellate review; substantial evidence in the record does not support the ALJ's findings of fact; and the findings of fact do not support the order. In his brief on appeal, the claimant advances two contentions of error on the part of the ALJ:

1. The ALJ erred in finding the admission of liability was filed pursuant to materially false information provided by claimant and was *void ab initio.*
2. The ALJ erred in not allowing claimant to present additional testimonial evidence as to the loan documents which were admitted into evidence.

I.

We initially note that the claimant does not challenge the ALJ's determination that the assault was personal to the claimant and not work related.

In his brief, claimant poses the rhetorical question "whether *Vargo* remains good law." Claimant suggests that *Vargo* "has received negative treatment by appellate tribunals on the basis that there is no statutory authority to permit an admission to be retroactively withdrawn or revoked." Claimant cites *Kraus v. Artcraft Sign Company*, 710 P.2d 480 (Colo. 1985) and *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905 (Colo. App. 1995) in support of his proposition. The claimant concedes that the *Kraus* and *Lewis* courts distinguished the *Vargo* opinion, but goes on to state, "this does not change the negative commentary toward *Vargo* as it relates to the jurisdiction of the ALJ to order retroactive withdrawal based on fraud[1]…. "

In *Kraus,* the claimant failed to answer questions about prior injuries on an application for employment, and the interviewer did not probe into his failure to answer. The claimant sustained a back injury. His failure to answer the employer's question on prior injuries was insufficient to permit the insurer's admission to be vacated. *Kraus* stands for the proposition that fault in completing a job application is no basis for forfeiture of workers' compensation benefits for a legitimate injury. 17 Douglas R. Phillips & Susan D. Phillips, *Colo. Practice Series: Colorado Workers' Comp. Practice & Procedure* § 14.9 at 625 (2d ed. 2005).

In *Lewis,* the underlying claim had been closed by a FAL for over four years. The respondents filed a motion to withdraw the admission of liability. The court stated that such a motion would be appropriate if the case had remained open, but that the claim had been closed. Thus, the only remedy for the respondents was to seek a reopening under § 8-43-303 (the reopening statute). The court concluded that the ALJ could properly reopen the claim on the basis of fraud and that he could terminate any future benefits because of such fraud. However, the reopening provisions did not authorize the ALJ to order reimbursement for past benefits. Section 8-43-301(1) explicitly provides, "No such reopening shall affect the earlier award as to moneys already paid." The *Lewis* court stated, "*Vargo* is inapposite because it was not necessary in that case to reopen any final award." The same is true here. The respondents' FAL was contested and was not final when the ALJ adjudicated the claim. Accordingly no reopening was necessary here.

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[1] We are unable to find the word "fraud" in the ALJ's order.

Vargo simply states: "Where, as here, the evidence supports the referee's finding that claimant supplied materially false information upon which his employer and its insurer relied in filing an admission of liability, the referee is justified in declaring the admission *void ab initio.*" We thus conclude that the *Vargo* case remains "good law."

Claimant argues that the issue of fraud and/or material representation was never raised or pleaded by the respondents until their post-hearing position statement. We disagree. During preliminary discussions of counsel at the commencement of the hearing, the issues before the court were agreed to be compensability and withdrawal of admission of liability. Dec. 20, 2017 hearing tr. at 4-5. In the respondents' opening argument, counsel stated: "We believe that the claim should be denied. My client has paid an extremely large amount of money on this case … based on a misrepresentation from the claimant as to what happened in this case." Dec. 20, 2017 hearing tr. at 25. As early as a prehearing conference on October 7, 2017, the claimant was aware of the respondents' position and information which supported their contentions for withdrawal. Claimant made no objection during the hearing to considering the issue of misrepresentation. Thus, we conclude this argument is unfounded.

A party has the right to procedural due process, which generally requires that the party be provided with notice and an opportunity to be heard. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990). The essence of procedural due process is that the proceedings be fundamentally fair. Due process also requires that a party have advance notice of the issues to be adjudicated at the hearing. Due process contemplates that the parties will be apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *Id*.

We conclude that the claimant had adequate advance notice of the issue of withdrawal of admission of liability and the alleged bases for the withdrawal. We further conclude that the proceedings were fundamentally fair.

II.

Claimant contends that the ALJ erred in not allowing claimant to present additional testimonial evidence as to the loan documents which were admitted into evidence. After the record was closed in the hearing, claimant submitted records from ACE Cash Express which show transactions identified as "pay day advance" and "credit

card transact." The ALJ reopened the record and accepted the documents as claimant's exhibit 10. Thereafter, claimant filed a motion to permit additional testimony from the claimant to explain the relationship between the ACE Cash transactions and the claimant's actions on the date of injury in making multiple ATM withdrawals prior to this work-related assault.

Respondents objected to additional testimony on the grounds that the claimant violated discovery requests regarding the anticipated testimony that the claimant was expected to give. A detailed search of the record does not reveal an order from the court regarding the claimant's motion. However, it is known that the ALJ did not conduct another evidentiary hearing, thus we infer that the motion was denied (on unknown grounds). Claimant did not renew his argument in his position statement but instead referenced the ACE Cash Express documentation. Claimant stated therein, "These documents were admitted into evidence. These documents suggest confirmation of claimant's loan on October 29, 2014 … The documentation indicates a payment on 12/4/14 …" We cannot conclude from this limited statement that additional testimony would add material and relevant information that was not otherwise provided to the ALJ. In ¶ 28 of the ALJ's findings of fact, the ALJ noted the claimant's inconsistency in reporting whether and how much cash the assailants took from him. It is clear from the ALJ's order that the fact that claimant had a large sum of cash on him at the time of the assault was not determinative. Rather, the ALJ focused on claimant's credibility in his inconsistent reporting that he did not know if he was missing any money, then later reporting that he was only robbed of a portion of his money; somewhere between $400 and $500, leaving him with $260. The ALJ essentially found that the claimant's report of a partial robbery was incredible.

"Under section 8-43-207(1) ... the ALJ is vested with wide discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009); *see also IPMC Transp. Co. v. Indus. Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (same). In matters of evidence, the Act imbues ALJs with a great deal of latitude. Section 8-43-207(1)(c) and (d), C.R.S. (ALJ is "empowered to ... [m]ake evidentiary rulings")(ALJ is "empowered to limit or exclude cumulative or repetitive proof or examination"). Because "[e]videntiary decisions are firmly within an ALJ's discretion, [such decisions] will not be disturbed absent a showing of abuse of that discretion." *Youngs v. Indus. Claim Appeals Office*, 316 P.3d 50, 58 (Colo. App. 2013); *see also Kilpatrick v. Indus. Claim Appeals Office*, 356 P.3d 1008, 1019 (Colo. App. 2015). "An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law." *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). We see

no error by the ALJ regarding her denial of additional testimonial evidence in supplementation of the ACE Cash Express records.

We determine that the findings of fact are sufficient to permit appellate review; the findings of fact are supported by substantial evidence in the record; and the findings support the order. We have considered all of the claimant's arguments and are not persuaded to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order issued August 14, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Kris Sanko

CERTIFICATE OF MAILING

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

_________3/15/19______________ by _____ TT ______________ .

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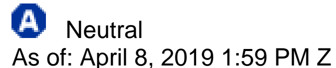
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People of Colo. v. Gilbert

Supreme Court of Colorado, Presiding Disciplinary Judge

January 14, 2010, Decided

Case Number: 10PDJ067

Reporter
2010 Colo. Discipl. LEXIS 79 *

Complainant: THE PEOPLE OF THE STATE OF COLORADO, Respondent: ROBERT EDWARD GILBERT

Notice: THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

Prior History: *People v. Gilbert, 173 P.3d 1113, 2007 Colo. Discipl. LEXIS 35 (Colo., 2007)*

Core Terms

bias, violates, sanctions, fax, attorney's, rules of professional conduct, disciplinary, courtroom, administration of justice, misconduct, profession, censure, gender, recuse, engaging, vacate, engender, district attorney, court clerk, negotiating, proceedings, appearance, discipline, recording, telephone, exhibits, words, clear and convincing evidence, statement of facts, legal system

Case Summary

Overview

Attorney's language referring to a female judge by use of a derogatory term for female genitalia while negotiating with a deputy district attorney was inappropriate in the courthouse setting and in the context of discussions with opposing counsel. His choice of words were gratuitous, as his words neither advanced his client's cause nor furthered his own ends. Because his insulting language served no purpose other than to demean and degrade a female judge based upon her gender, the attorney violated the clear language of *Colo. R. Prof. Conduct 8.4(g)*. The attorney was publicly censured.

Outcome

The attorney was found to have committed professional misconduct by violating *Colo. R. Prof. Conduct 8.4(g)* and was subject to a public censure.

LexisNexis® Headnotes

Legal Ethics > Professional Conduct > Nonlawyers

HN1[] **Professional Conduct, Nonlawyers**

Colo. R. Prof. Conduct 4.4(a) proscribes a lawyer, in the course of representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third party.

Legal Ethics > Professional Conduct > Nonlawyers

HN2[] **Professional Conduct, Nonlawyers**

Colo. R. Prof. Conduct 4.4(a) focuses on the substantial purpose of a lawyer's actions and not on the effect that conduct might have upon a third person.

Legal Ethics > Professional Conduct > Tribunals

HN3[] **Professional Conduct, Tribunals**

Colo. R. Prof. Conduct 3.5(d) forbids attorneys from engaging in conduct intended to disrupt a tribunal.

Legal Ethics > Professional Conduct > Tribunals

HN4[] **Professional Conduct, Tribunals**

Under *Colo. R. Prof. Conduct 3.5*, a lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Legal Ethics > Professional Conduct > Tribunals

HN5[] **Professional Conduct, Tribunals**

Colo. R. Prof. Conduct 8.4(d) prohibits an attorney from engaging in conduct prejudicial to the administration of justice.

Legal Ethics > Professional Conduct > General Overview

HN6[] **Legal Ethics, Professional Conduct**

Under *Colo. R. Prof. Conduct 8.4(g)*, it is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether the conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN7[] **Disciplinary Proceedings, Hearings**

In attorney discipline proceedings, the hearing board is charged with making findings of fact and reaching a decision in accordance with the Colorado Rules of Professional Conduct and the Colorado Rules of Civil Procedure. The hearing board is vested with the limited responsibility of applying the facts, as it finds them, to the framework established by those governing authorities.

Legal Ethics > Professional Conduct > General Overview

HN8**[ ] Legal Ethics, Professional Conduct**

Under *Colo. R. Prof. Conduct 8.4(g)*, it is misconduct to engage in conduct that violates accepted standards of legal ethics.

Legal Ethics > Sanctions > Reprimands

Legal Ethics > Sanctions > Suspensions

HN9**[ ] Sanctions, Reprimands**

ABA Standard 7.2 provides that suspension is generally appropriate when a lawyer knowingly engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. ABA Standard 7.3 establishes reprimand, or public censure, as the appropriate sanction when a lawyer negligently engages in conduct that violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. ABA Standard 7.4, calling for private admonition, applies when a lawyer engages in an isolated instance of negligence that violates a duty owed as a professional, but which causes little or no actual or potential injury to a client, the public, or the legal system.

Judges: [*1] WILLIAM R. LUCERO, PRESIDING DISCIPLINARY JUDGE. TERRY F. ROGERS, HEARING BOARD MEMBER. BOSTON H. STANTON, JR., HEARING BOARD MEMBER.

Opinion

DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO *C.R.C.P. 251.19(b)*

On October 25 and 26, 2010, a Hearing Board composed of Terry F. Rogers and Boston H. Stanton, Jr., members of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a hearing pursuant to *C.R.C.P. 251.18*. Elizabeth E. Krupa appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Frederick P. Bibik appeared on behalf of Robert Edward Gilbert ("Respondent"). The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to *C.R.C.P. 251.19(b)*."

I. ISSUE AND SUMMARY

This case requires us to consider whether Respondent's lack of civility to court staff, intemperate behavior during a hearing, or use of a repugnant gender-based epithet in the course of representing his client violate the Rules of Professional Conduct. While Respondent's rudeness and lack of common courtesy has, no doubt, contributed to tarnishing the image of the bar in the eyes of the public, the Hearing Board cannot find, under the facts presented **[*2]** at the hearing, that Respondent violated *Colo. RPC 4.4(a)* or *3.5(d)*.

Nor does the Hearing Board find that Respondent violated *Colo. RPC 8.4(d)* by referring, in the course of negotiating a plea deal with prosecutors, to a female judge as a "c**t;" Respondent's subjective opinion, however uncouth, did not prejudice the administration of justice. However, the Hearing Board does find that Respondent's use of this slur violated *Colo. RPC 8.4(g)*, which specifically proscribes a lawyer from engaging in conduct that exhibits bias or prejudice in the course of representing a client.

II. PROCEDURAL HISTORY

On June 21, 2010, the People filed a complaint, and Respondent filed an answer on August 9, 2010. An at-issue conference was held on August 24, 2010. At the October 25-26, 2010, hearing, the Hearing Board heard testimony and the PDJ admitted the People's exhibits 1-4. At the request of Respondent, to which the People did not object, the PDJ also re-opened the evidence following the trial to allow the Hearing Board to consider an audio recording of Respondent's April 21, 2009, court appearance in Clear Creek County Court.

III. FINDINGS OF FACT AND RULE VIOLATIONS

The Hearing Board finds the following **[*3]** facts and rule violations have been established by clear and convincing evidence.

Jurisdiction

Respondent took the oath of admission and was admitted to the Bar of the Colorado Supreme Court on August 19, 1984. He is registered upon the official records, Attorney Registration No. 13603, and is thus subject to the jurisdiction of the Hearing Board in these disciplinary proceedings. [1] Respondent's registered business address is P.O. Box 740712, Arvada, Colorado 80006.

The Hearing of March 17, 2009

On the morning of March 17, 2009, Respondent, attorney of record for Eli Curry-Elrod, telephoned the Clear Creek County Court to advise the court of a resolution of the DUI case *People v. Eli Curry-Elrod*, Case No. 08T1524, and to further advise the court that the hearing scheduled for that afternoon could be vacated. Respondent spoke with Assistant Court Clerk Kimberly Devlin, who put Respondent on hold to confirm the court's procedures with Clerk of Court Kim Hill. Having conferred with Hill, Devlin resumed her conversation with Respondent, conveying to him that he was required to fax to the court a motion and a proposed order, with a fax charge of $1.00 per page. Respondent **[*4]** became agitated and responded, "Who the hell made that rule [governing fax charges], Judge Ruckriegle?" He also protested that every other court he had dealt with would vacate a motions hearing based on a verbal request. Devlin testified that it was clear Respondent was angry, and although she was bothered Respondent "would say something like he did about the judge," she was neither embarrassed nor upset by Respondent's behavior.

Following Devlin's instructions, Respondent drafted a cursory motion to vacate the hearing, which he faxed to the Clear Creek court at approximately 1:49 p.m. that afternoon [2] — forty minutes in advance of the scheduled 2:30 p.m. hearing. The Honorable Rachel J. Olguin-Fresquez quickly reviewed and denied the motion, commenting that "Def[endant] has given no reason to vacate the hearing." [3]

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[1] *See* C.R.C.P. 251.1(b).

[2] People's exhibit.

[3] *Id.*

Assistant Court Clerk Debbie Dhyne then called Respondent prior to the scheduled hearing to alert him to the judge's basis for denial and to advise Respondent to submit a more detailed motion memorializing his verbal request to vacate. Respondent, who was practicing in another court, was not in a position to fax another pleading, and he demanded Dhyne **[*5]** transfer his call to Judge Olguin-Fresquez to discuss the matter. Dhyne demurred, since the judge was in trial and, in any event, court policy dictated that "calls don't go to the judge." Respondent became irate and impolite; his voice changed, becoming "curt, short, and louder," and his "tone was condescending and angry." He berated Dhyne for not understanding her job and not knowing proper procedure, after which he abruptly hung up. Dhyne testified that Respondent's conduct "made me feel belittled," and "his telephone call made me antsy for the rest of the day." Nevertheless, Dhyne said Respondent's insults did not prevent her from doing her job and, on the whole, merely caused her frustration.

At 2:30 p.m., Respondent failed to appear for the scheduled motions hearing. Although Respondent had advised the court staff verbally that the matter was resolved, Judge Olguin-Fresquez nonetheless issued a bench warrant for Curry-Elrod's arrest, with execution of the warrant stayed until a court date of March 24, 2009. [4] Less than an hour later, at 3:20 p.m., Respondent faxed in a more thorough motion articulating his reasons for seeking to vacate the hearing. [5] By then, however, the time **[*6]** for the hearing had already passed.

Clerk of Court Kim Hill testified that she could not locate Respondent's fax number and thus decided to telephone Respondent soon thereafter to notify him of the bench warrant and the March 24, 2009, hearing date. When she reached Respondent, she requested his facsimile number so she could fax to him a copy of the order. [6] Respondent replied that Hill would have to pay him $5.00 to use his facsimile machine, so Hill asked Respondent whether she could instead read the order to him. Before she could deliver the substance of the order, Respondent hung up on her. Respondent acknowledged this was discourteous but explained he did so to avoid causing further harm: he testified, "I hung up before I said something I would regret."

Prior to leaving the court that evening, Judge Olguin-Fresquez telephoned Respondent directly to confront him about his behavior with the court clerks. She left a message for him, and he attempted to return her call that night, but the two never spoke with one another. Nonetheless, Respondent telephoned Dhyne the following day to apologize for his behavior, acknowledging he treated her unfairly. Also the next day, Judge Olguin-Fresquez wrote a letter to Respondent in which she instructed him to submit all subsequent communications to the court in writing and explicitly forbade him from initiating telephone contact with the court clerks. [7]

Two days later, on March 19, 2009, **[*8]** Judge Olguin-Fresquez formally denied Respondent's second more detailed motion to vacate, noting that "Matter is moot having been filed after B[ench]W[arrant] had issued. BW is stayed to court date on 3/24/09." [8] Hill testified that because she could not locate Respondent's fax number, she mailed the order on Friday, March 20, 2009. Respondent testified that he did not receive the order until the night of

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[4] People's exhibit 4.

[5] *Id.*

[6] Testimony at the hearing created significant ambiguity as to which document Hill wished to fax Respondent. Hill initially testified she hoped to fax Judge Olguin-Fresquez's second order. On cross-examination, however, she acknowledged that she could not have possibly faxed the court's order ruling on Respondent's second motion on March 17, 2009, because it formally issued only two days later, on March 19, **[*7]** 2009. We have no choice but to conclude Hill sought to fax the court's order denying Respondent's first motion but are left to surmise, with no satisfactory explanation, why she would have done so, since Hill also testified that she was aware Dhyne had communicated to Respondent the court's disposition of that first motion.

[7] The Hearing Board makes these findings based only on Respondent's testimony that he had been contacted by Judge Olguin-Fresquez, since a copy of the judge's letter was not introduced into evidence.

[8] People's exhibit 4.

Tuesday, March 24, 2009, after the hearing had already taken place and during which Judge Olguin-Fresquez lifted the stay on the bench warrant for Curry-Elrod's arrest. [9]

The People contend Respondent's conduct violated ***HN1***[] *Colo. RPC 4.4(a)*, which proscribes a lawyer, in the course of representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third party. Pointing to the asperity with which he treated court staff while representing Curry-Elrod, **[*10]** the People argue that Respondent's conduct served no purpose other than to embarrass, delay, or burden court personnel, and thus is sanctionable under the Rules of Professional Conduct. Respondent disagrees. He maintains that his calls with the court clerks were intended to vacate a needless hearing and, while he was "not on his best behavior that day," his conduct was not designed to embarrass, delay, or burden anyone.

HN2[] *Colo. RPC 4.4(a)* focuses on the "substantial purpose" of a lawyer's actions and not on the effect that conduct might have upon a third person. [10] But the People failed to present clear and convincing evidence that Respondent's rude and indecorous remarks to court personnel were substantially fueled by his motive to embarrass, delay, or burden them. Rather, we credit Respondent's testimony that he was focused on vacating what he considered to be an unnecessary hearing, and although he was "feeling extreme frustration," his comments were primarily intended to communicate his view that the court's procedure was irregular and to encourage the staff to resolve the situation more to his liking. For this reason, we cannot find that Respondent violated *Colo. RPC 4.4(a)*. But **[*11]** we hasten to add that we do not condone Respondent's ill-mannered treatment of the court's clerks; while such impolite behavior may not violate our ethical rules, it both corrodes the profession's reputation and potentially compromises clients' interests.

The Hearing on April 21, 2009

On April 21, 2009, Respondent appeared at the Clear Creek County courthouse for a scheduled hearing. That morning, before his court appearance, Respondent met with Deputy District Attorney Michael W.V. Angel to discuss a possible plea agreement in Curry-Elrod's case. Respondent and Angel met in the jury deliberation room, a small chamber directly adjacent to Judge Olguin-Fresquez's courtroom, where Assistant District Attorney Scott W. Turner was also working.

In the course of negotiating a plea agreement, Respondent told Angel that he planned to file a motion seeking to recuse Judge Olguin-Fresquez from Curry-Elrod's case. Respondent listed his reasons for seeking her recusal, chief among them his belief that the judge was biased against him and his client, after which he launched into a discussion of his history with Judge Olguin-Fresquez. **[*12]** Respondent told the prosecutors the judge had appeared before him as a district attorney when he sat as a magistrate, referring to her as an "idiot," and he recalled attending en banc meetings of the judiciary with Judge Olguin-Fresquez during which, he opined, she asked "stupid questions." Respondent went on to impugn Judge Olguin-Fresquez's legal acumen, challenge her

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[9] Although not germane to the issues before us, we are nonplussed by Respondent's behavior following his receipt of the court's order denying his second motion. Respondent discovered via mail on March 24, 2009, that not only had his second motion to vacate been denied, but that he had also missed a hearing that same day, subjecting Curry-Elrod to possible arrest. Notwithstanding the court's order, Respondent failed entirely to inquire with the court about the status of his motion to vacate or attempt to rectify his failure to appear at the March 24, 2009, hearing. Even more curious, Respondent never **[*9]** alerted Curry-Elrod to the fact that a bench warrant had issued for his arrest, although Respondent had ample opportunity to do so, since Curry-Elrod was arrested on April 7, 2009—a full twelve days after the court's bench warrant issued. Had the People pled in their complaint Respondent's failure to notify Curry-Elrod of these developments—or his failure to otherwise take affirmative steps to avert Curry-Elrod's arrest—the Hearing Board would have had no trouble finding a violation of *Colo. RPC 8.4(d)*. But we cannot infer these facts into the People's present *Colo. RPC 8.4(d)* claim, as Respondent was afforded no notice or opportunity to defend against them. *See* *In re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968)* (stating due process requires disciplinary proceedings to afford notice of charges made and opportunity for explanation and defense).

[10] *Accord* *Idaho State Bar v. Warrick, 137 Idaho 86, 44 P.3d 1141, 1145 (Idaho 2002)*.

intelligence, and derisively refer to her as a "c**t." Angel said he and Turner exchanged "shocked and incredulous" glances, but neither chose to "make an issue of it" with Respondent. [11] In the course of this diatribe, Respondent inquired whether the district attorney's office would object to a motion to recuse Judge Olguin-Fresquez, and Angel said he would have no objection. At the end of the discussion, Angel completed the paperwork necessary for the negotiated disposition and transferred the file to the court staff.

Immediately following Respondent's discussion with Angel, Respondent appeared before Judge Olguin-Fresquez in Curry-Elrod's case. Respondent immediately stated that he and Angel had resolved the matter but that **[*13]** he planned to file a motion to recuse the judge from the case. Judge Olguin-Fresquez inquired as to the grounds of Respondent's motion in order to determine whether or not she should even accept Curry-Elrod's plea. Because Respondent refused to provide grounds, the judge set the matter over for a plea and sentencing two weeks thereafter and attempted to conclude the hearing with, "All right, gentlemen, if you will proceed up to the front window, the clerks will give you setting slips, bond and all bond conditions will continue . . . ." [12]

Respondent then pressed Judge Olguin-Fresquez to vacate the bond, which she refused to do, and he complained that "never in 35 years" had he been required, as he had on March 17, 2009, "to file a motion to vacate a hearing for a motion to suppress." The hearing thereafter digressed; Judge Olguin-Fresquez upbraided Respondent for mistreating her clerks, while Respondent criticized the court's earlier failure to consult him when setting a date for jury trial in the matter. The exchange ended abruptly when Judge Olguin-Fresquez ordered Respondent out of her courtroom, saying, "Mr. Gilbert, go waste someone else's time," and "I'm frustrated **[*14]** with your arrogance to this court. Go get your assignment and go." [13]

Although the Hearing Board has reviewed the transcript of the April 21, 2009, hearing and listened to the audiotaped recording of the interaction, [14] accounts nonetheless differ as to the tone, mood, and aspect of the colloquy between Respondent and Judge Olguin-Fresquez. While no one present during the hearing would characterize their dialogue as cordial, reactions otherwise run the gamut. Respondent contends he represented his client zealously by making a necessary record, even if his conduct may have been unpleasant. Clear Creek County Deputy Sheriff Reggie Wilson, who was supervising inmate detainees in the courtroom during the hearing, noted Respondent got "louder and louder" and his tone "escalated" while at the podium, but Wilson otherwise noted nothing unusual. Turner testified the exchange "got heated and loud on both sides," but he did not observe any safety concerns. Angel said Respondent was "extremely disrespectful to the court," which was "unexpected and out of the ordinary." And Hill asserted that the argument reached a "fever pitch" **[*15]** when Respondent allegedly made menaging gestures. Hill claimed—although the evidence presented indicates that no other person shared Hill's alarm—that Respondent grabbed his briefcase, placed it on the podium, aggressively thrust his hand into the briefcase, and left his hand inside the case for several minutes. Hill said Respondent's behavior "scared me to death" and she "feared for my life," since she "was afraid that [Respondent] was going to shoot the judge or me." In response, Hill remotely unlocked the judge's chambers to facilitate a "faster exit," and she gestured to another clerk to call for additional security coverage.

Sergeant Chris Bridges, of the Clear Creek County Sheriff's Office, responded to the call for assistance made at Hill's behest. As he approached **[*16]** the courtroom, Bridges passed within eighteen inches of two gentlemen rounding a corner in the otherwise empty hallway; he overheard the older of the two men, who was carrying a

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[11] Nor did either prosecutor feel compelled to report Respondent's behavior to his superiors.

[12] People's exhibit 2.

[13] *Id.*

[14] Videotape of the courtroom interaction was destroyed, per court procedure, shortly after Respondent's appearance, and the audio recording of the encounter is all but inaudible: both Respondent and the People declined to play the recording for the Hearing Board. However, the PDJ later granted Respondent's October 27, 2010, motion to re-open the evidence to submit the audio recording, to which the People did not object.

briefcase, say to the other, "She's such a f**** c**t." [15] Bridges conceded he could neither identify the speaker nor confirm the subject of the speaker's invective. By the time Bridges arrived in the courtroom, the hearing had concluded and Respondent had left the area. But Bridges checked in with Judge Olguin-Fresquez and court personnel, who assured him that everything was fine and that no safety issues were present.

The People first argue that Respondent's argumentative and, at least in Hill's eyes, threatening approach during the April 21, 2009, hearing violates ***HN3***[] *Colo. RPC 3.5(d)*, which forbids attorneys from engaging in conduct intended to disrupt a tribunal. They postulate that Respondent's irritation with the court intensified following Judge Olguin-Fresquez's **[*17]** denial of his second motion to vacate, engendering in Respondent a desire to confront and berate the judge on April 21, 2009.

We do not interpret the transcript or the audiotape of the April 21, 2009, hearing in the same way, and we find the People failed to marshal clear and convincing evidence demonstrating Respondent intended to disrupt the tribunal in violation of *Colo. RPC 3.5(d)*. While bystanders agree that Respondent disrespectfully raised his voice while at the podium, there is nothing in the transcript or the recording to reveal that Respondent's principal aim was to disrupt the proceedings. To the contrary, these sources suggest that Respondent was intent on *continuing* the hearing so that he might present his case and make a record for subsequent review, which he was entitled to do. [16]

We also cannot credit **[*18]** Hill's testimony that Respondent made threatening gestures while he stood at the podium. Rather, the balance of the evidence indicates that Respondent never made such gestures or caused anyone else in the courtroom to fear for their safety. Indeed, no other witness recalled Respondent reaching into his briefcase in a threatening manner. Thus, we cannot find that Respondent possessed the requisite conscious objective to interrupt or otherwise throw into disorder the April 21, 2009, hearing. [17]

The People next allege Respondent prejudiced the administration of justice in violation of *Colo. RPC 8.4(d)* by using gender-specific profanity in reference to Judge Olguin-Fresquez while in the courthouse, by treating the court clerks and Judge Olguin-Fresquez disrespectfully, and by failing to appear for hearings on March 17 and 24, 2009.

With respect to Respondent's treatment of the court clerks and his demeanor during the April 21, 2009, hearing, we have already found no violation of the Rules of Professional Conduct. Because these same operative **[*19]** facts do not lend themselves to sanctions under other, more specific, rules, the Hearing Board finds no cause to impose discipline under *Colo. RPC 8.4(d)*. As regards Respondent's failure to appear at the March 17 and 24, 2009, hearings, the Hearing Board has not been persuaded by clear and convincing evidence that Respondent's absences impeded or subverted the process of resolving Curry-Elrod's case. [18] Further, we consider Respondent's failure to attend the second hearing understandable, if not excusable, when viewed in the context of his belated receipt of notice.

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[15] Respondent, in contrast, testified that while standing twenty to thirty feet from the courtroom, he remarked to his client, "the judge is treating us like a c**t." However, he claimed that the expletive referred to *him and his client*, rather than the judge.

[16] ***HN4***[] *Colo. RPC 3.5, cmt. 4* ("A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

[17] *See* *In re Attorney C, 47 P.3d 1167, 1173 (Colo. 2002)* (noting intent requires a conscious objective or purpose to accomplish a particular result).

[18] *See* *In re Friedman, 23 P.3d 620, 628 (Alaska 2001)* (finding the Alaska rule of professional conduct barring conduct prejudicial to the administration of justice "contemplates conduct which impedes or subverts the process of resolving disputes; it is conduct which frustrates the fair balance of interest or 'justice' essential to litigation or other proceedings").

Thus, the Hearing Board turns to a key issue in this matter: whether Respondent's use of a gender-specific profanity in reference to Judge Olguin-Fresquez while meeting with Angel [19] prejudiced the administration of justice. Respondent asserts his comment to the **[*20]** prosecutors is opinion expressed as rhetorical hyperbole, which constitutes free speech protected by the *First Amendment*

The Hearing Board's analysis begins and ends with the Colorado Supreme Court's decision in *In re Green*. [20] In that case, Green, an African-American lawyer, filed a C.R.C.P. 97 motion to recuse a trial court judge, who was reconsidering the reasonableness of Green's attorney's fees following remand from appeal. In his motion, Green lambasted the judge "for bias and prejudice" and "callous indifference and impatience with [Green's] oral **[*21]** arguments as reflected in [the judge's] facial grimaces." [21] Over the course of the next several months, while the judge reconsidered Green's fee award, Green wrote three letters and an additional motion to recuse in which he insinuated the judge possessed a "bent of mind" that was not "free of all taint of bias and impartiality." [22] He also denounced the judge as "a racist and bigot for racially stereotyping me as unable to be an attorney because I was black." [23] 20-23fn

Disciplinary counsel charged Green with violating ***HN5***[] Colo. RPC 8.4(d) by engaging in conduct prejudicial to the administration of justice, but the Colorado Supreme Court dismissed the charge, premising its decision on "the accepted legal principle that if an attorney's activity or speech is protected by the *First Amendment*, disciplinary rules governing the legal profession cannot punish the attorney's conduct." [24] The court determined that sanctioning an attorney for criticizing a judge is analogous to a defamation action by a public official for the purpose of a First Amendment analysis and therefore applied the *New York Times Co. v. Sullivan* test, **[*22]** which provides:

> [The *First Amendment*] prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [25]

The court also noted, however, that a "crucial distinction exists between false statements of fact which receive no constitutional protection in defamation cases and ideas or opinions which by definition can never be false so as to constitute false statements which are unprotected." [26] On this basis, the court held that Green's allegations against the judge did not involve false statements of fact and instead were protected subjective opinions.[27]

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[19] The People have not presented clear and convincing evidence that Bridges's testimony establishes a Colo. RPC 8.4(d) violation. Bridges testified that an older man carrying a briefcase in the courtroom hallway referred to an unidentified woman as a "f**** c**t." Yet Bridges could not identify the speaker, and he acknowledges he did not know whom the speaker was referencing; as such, Bridges's testimony neither implicates Respondent nor confirms that Judge Olguin-Fresquez was being discussed by the man in the hallway. To the extent the People's Colo. RPC 8.4(d) and 8.4(g) claims are premised on Bridges's testimony, we must reject them.

[20] *11 P.3d 1078 (Colo. 2000)*.

[21] *Id. at 1081*.

[22] *Id. at 1082*.

[23] *Id.*

[24] *Id. at 1083* (citing *In re Primus, 436 U.S. 412, 432-33, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978)*; *Bates v. State Bar of Ariz., 433 U.S. 350, 355, 365, 384, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)*; *State v. Porter, 1988 OK 114, 766 P.2d 958, 966-70 (Okla. 1988))*.

[25] *376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)*.

[26] *Green, 11 P.3d at 1084* (citing *Bucher v, Roberts, 198 Colo. 1, 3, 595 P.2d 239, 241 (1979)*; *Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974))*.

[27] *Id. at 1086*.

In **[*23]** light of the holding in Green, Respondent argues that his remark was not a statement of fact, but rather an idea or an opinion that is incapable of being proved false. [28] The Hearing Board agrees with Respondent that his remark did not involve a statement of fact, since the profanity he used to describe Judge Olguin-Fresquez is, for all intents and purposes, void of real meaning and thus can be proved neither true nor false. Indeed, Respondent's slur was nothing more than emotive language designed to convey disgust, disdain, and loathing—the essence of subjective opinion.

The People urge us to distinguish *Green*, arguing that the factual context here merits differentiation. They reason that insofar as *Green* involved a lawyer's obligation to provide a statement of pertinent facts to the trial judge in support of his motion **[*24]** to recuse, Green's accusations served some practical purpose. The People also contend that while Green's criticism was considered in the context of "the principal purpose of the *First Amendment* [which is] safeguarding public discussion of governmental affairs," [29] Respondent's comment cannot be considered political speech and is thus not entitled to the full panoply of First Amendment protections.

We acknowledge that Respondent's statement occurred in a context radically different from that in Green. While *Green* was required to provide reasons for recusal, it is difficult to envision how Respondent's utterance to the district attorneys could have served any proper function in defending Curry- Elrod. We also recognize, as does Respondent, that his use of profanity in this instance does not constitute political speech.

Nevertheless, the People's efforts to distinguish *Green* fail to sway us, since the Colorado Supreme Court's decision in that case was founded on an element held in common with the one before us. Specifically, we are guided by the court's finding of a "somewhat less compelling government interest in disciplining Green than existed in other cases dealing **[*25]** with attorney discipline for criticism of judges, all of which involved disparaging comments about judges made to a public audience." [30] Because "Green's statements were directed to a limited audience—the judge in question and opposing counsel—and not to the general public," the court held that "the possible adverse effect on the administration of justice appears to have been minimal." [31] Likewise, in this case, Respondent's statement was restricted to Angel and Turner, thereby limiting the likelihood of real prejudice to the administration of justice. [32] Because we cannot materially distinguish the matter here from the Colorado Supreme Court's decision in *Green*, we are bound to follow that authority. Accordingly, we do not find Respondent violated *Colo. RPC 8.4(d)*.

Finally, the Hearing Board turns to the People's fourth claim for relief—that Respondent's remark to the prosecutors violated ***HN6***[] *Colo. RPC 8.4(g)*, which provides it is **[*26]** professional misconduct for a lawyer to:

> engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether the conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Comment 3 to *Colo. RPC 8.4* explains that "[a] lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon . . . gender . . . violates paragraph (g)."

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[28] Respondent relies on *Gertz, 418 U.S. at 339-40* ("Under the ***First Amendment*** there is no such thing as a false idea.") and *U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995)* ("[S]tatements of 'rhetorical hyberbole' aren't sanctionable, nor are statements that use language in a loose, figurative sense.") (internal citations omitted).

[29] *Green, 11 P.3d at 1085*.

[30] *Id. at 1086*.

[31] *Id. at 1086-87*.

[32] *Cf. In re Spivey, 345 N.C. 404, 480 S.E.2d 693, (N.C. 1997)* (finding district attorney, who loudly and repeatedly referred to an African-American as a "n****r" while at a bar, constituted conduct prejudicial to the administration of justice).

This is a matter of first impression; Colo. RPC 8.4(g) has not yet been interpreted by any Colorado tribunal, nor has its predecessor, Colo. RPC 1.2(f). [33] At first blush, Respondent's conduct appears to fit squarely within the parameters of the rule. Respondent's use of "c**t," a gender-based epithet, was made in reference to Judge Olguin-Fresquez, a female judge, during the course of representing Curry-Elrod in a plea negotiation with Angel. [34] The only outstanding question is whether Respondent's use of this slur "exhibit[ed] **[*27]** or [was] intended to appeal to or engender bias" against Judge Olguin-Fresquez on account of her gender.

The evidence presented does not clearly and **[*28]** convincingly militate in favor of finding that Respondent "intended to appeal to or engender bias" in his audience. Although we can envision a scenario in which Respondent purposely referred to Judge Olguin-Fresquez as a "c**t" in order to create an atmosphere in which the male prosecutors might sympathize with him or provide him ammunition in his quest to recuse Judge Olguin-Fresquez, such conjecture is not solidly grounded in the People's evidence.

However, the People have shown by clear and convincing evidence that Respondent engaged in conduct that exhibited bias by "knowingly manifest[ing] by word" [35] gender prejudice against Judge Olguin-Fresquez. The only definition ascribable to "c**t"—"the female pudenda, or the female external genital organ"—inherently exhibits bias on the basis of gender and is "usually considered 'obscene.'" [36] One court has noted that "'c[**]t,' referring to a woman's vagina, is the essence of a gender-specific slur." [37] This highly pejorative, taboo term "is properly deemed more offensive to women than men by virtue of its intrinsically degrading nature to women." [38] The Hearing Board therefore concludes Respondent's conduct falls within the ambit of Colo. RPC 8.4(g).

Although decided prior to enactment of our current Rules of Professional Conduct, the Hearing Board considers *People v. Sharpe* [39] as persuasive authority in support of our finding. In that case, Sharpe, a deputy district attorney in a death penalty case, conferred with the two defendants' counsel in a hallway outside the courtroom. During the conversation, Sharpe announced, "I don't believe either one of those chili-eating bastards," which was perceived as motivated **[*30]** by prejudice against Hispanics. [40] Sharpe stipulated, and the Colorado Supreme Court agreed,

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[33] Repealed 2007 and replaced with Colo. RPC 8.4(g), effective January 1, 2008.

[34] The authority available supports the conclusion that Respondent's statement was made while "representing" Curry-Elrod. "Representing a client" is generally read broadly to encompass any transaction in which an attorney is dealing with others on a client's behalf, whether or not the client approves of the attorney's action. *See, e.g.*, Colo. RPC 4.1, cmt. 1 (suggesting that "in the course of representing a client" equates to any interaction "dealing with others on a client's behalf"); In re Aitken, 787 N.W.2d 152, 160 (Minn. 2010) (finding that an attorney's forgery of a client's signature on a document submitted to district court was done in the course of representing the client). Here, Respondent called Judge Olguin-Fresquez a "c**t" in the midst of discussing a plea deal with Angel, his opponent, on behalf of his client. He did so in a small room adjacent to the courtroom in the Clear Creek County courthouse on the date set for his appearance before the court.

[35] Colo. RPC 8.4, cmt. 3 **[*29]** .

[36] Smith v. Exxon Mobil Corp., No. Civ.A. 02-4425, 2005 U.S. Dist. LEXIS 14965, 2005 WL 1712023, *13 n.33 (D.N.J. July 19, 2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 554 (1993)).

[37] Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d. 798, 812 (11th Cir. 2010); *see also* Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 271 (6th Cir. 2009) (noting use of term "c**t" and other "patently degrading" terms "evinces anti-female animus"); Forrest v. Brinker Int'l Payroll Co., LP., 511 F.3d 225, 229 (1st Cir. 2007) (describing "c**t" and other words as "sexually degrading, gender-specific epithets").

[38] Kendel v. Local 17A United Food & Commercial Workers, F.Supp.2d , No. 5:09 CV 1999, 748 F. Supp. 2d 732, 2010 U.S. Dist. LEXIS 96971, 2010 WL 3665424, *5 (N.D. Ohio Sept. 16, 2010).

[39] 781 P.2d 659 (Colo. 1989).

[40] Id. at 660.

that his remark "was highly inappropriate, offensive, and brought disrepute upon the legal profession in general." [41] Sharpe was publicly censured for conduct adversely reflecting on his fitness to practice law.

Decisions of sister jurisdictions, based on similarly worded rules of professional conduct, also support the Hearing Board's finding. *In re Thomsen*, [42] decided by the Indiana Supreme Court, is instructive. There the court addressed application of *Indiana Professional Conduct Rule 8.4(g)*, which prohibits a lawyer from engaging in a professional capacity in conduct that manifests by words or conduct bias or prejudice based on race or gender. [43] Thomsen, who represented a husband in an action for dissolution of marriage, filed a petition for custody that alleged the wife associated herself "in the presence of a black male, and such association is causing and is placing the children in harm's way." [44] At a bench trial, Thomsen continued to make disparaging remarks about "the black guy" and the "black man [the wife] had at [her] house." [45] The **[*31]** court found that Thomsen's comments did "not meet the standards for good manners and common courtesy, much less the professional behavior we expect from those admitted to the bar," concluding that such misconduct "serve[s] only to fester wounds caused by past discrimination and encourage future intolerance," which constitutes "a significant violation [that] cannot be taken lightly." [46]

The Hearing Board also looks to *Idaho State Bar v. Warrick*, [47] a case that construes *Idaho Rule of Professional Conduct 4.4(a)*, which proscribes conduct intended to appeal to or engender bias against a participant in court proceedings. In that case, Warrick visited a jail housing a defendant whom Warrick was prosecuting for felony trafficking of methamphetamine. [48] While there, Warrick wrote the words "waste of sperm" and "scumbag" next to the criminal defendant's name on the inmate control board. [49] The Idaho Supreme Court concluded Warrick's conduct was inappropriately aimed at a party he was prosecuting in a pending action. [50] The court also found that "[d]espite the fact that [the defendant] did not see the words, nor were the words conveyed to [the defendant], their purpose could only have been to demean [the defendant] in the eyes of others" and "had no substantial purpose other than to embarrass [the defendant] and was intended to engender bias in the local law enforcement

[41] *Id.*

[42] *837 N.E.2d 1011 (Ind. 2005)*. *See also* *In re McCarthy, 938 N.E.2d 698, WL 5178048 *1 (Ind. 2010)* (finding violation of *Indiana Professional Conduct Rule 8.4(g)*, which prohibits engaging in conduct in a professional capacity that manifests bias or prejudice when, in course of representing a client, attorney chastised secretary of opposing counsel that he was not her "n****r"); *In re Kelley, 925 N.E.2d 1279 (Ind. 2010)* (finding violation of *Indiana Professional Conduct Rule 8.4(g)* when attorney gratuitously asked a company representative if he was "gay" or "sweet"); ***In re Campiti, 937 N.E.2d 340 (Ind. 2009)*** (finding violation of *Indiana Professional Conduct Rule 8.4(g)* when attorney, while representing father at child support modification hearing, made repeated disparaging **[*32]** references to fact that mother was not a citizen and was receiving free legal services).

[43] *Id.*

[44] *Id.*

[45] *Id. at 1012*.

[46] *Id.*

[47] *137 Idaho 86, 44 P.3d 1141 (Idaho 2002)*.

[48] *Id. at 1142-43*.

[49] *Id. at 1143*.

[50] *Id. at 1146*.

personnel." [51] These decisions bolster our conclusion that Respondent's similar conduct **[*33]** violates *Colo. RPC 8.4(g)*.

Respondent advances the argument that the *First Amendment* and Green preclude application of *Colo. RPC 8.4(g)*. ***HN7***[] The Hearing Board, however, takes heed of its charge to make findings of fact and to reach a decision [52] in accordance with the Colorado Rules of Professional Conduct and the Colorado Rules of Civil Procedure. [53] We are vested with the limited responsibility of applying the facts, as we find them, to the framework established by these governing authorities. This framework includes *Colo. RPC 8.4(g)*, which was drafted by the Colorado Supreme Court Committee on the Colorado Rules of Professional Conduct, reviewed through a public notice and comment period, and approved by the Colorado Supreme Court. As such, it is not within our purview, as Respondent urges, to find that *Colo. RPC 8.4(g)* is trumped by Respondent's First Amendment rights as articulated in Green: the Colorado Supreme Court alone "has the power to determine the law of this jurisdiction as applied in disciplinary proceedings," [54] and it alone reserves plenary authority to regulate the practice of law. [55]

Accordingly, we apply the language of *Colo. RPC 8.4(g)* as written. When we do so, we conclude that Respondent's conduct while negotiating with the deputy district attorney was inappropriate in the courthouse setting and in the context of discussions with opposing counsel. His choice of words was gratuitous; it neither advanced his **[*36]** client's cause nor furthered his own ends. Simply put, his use of this insult served no purpose other than to demean and degrade Judge Olguin-Fresquez based upon her gender. We therefore conclude Respondent violated the plain language of *Colo. RPC 8.4(g)*.

SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law govern the selection and imposition of sanctions for lawyer misconduct. ABA *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board must consider the duty

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[51] *Id.*

[52] *C.R.C.P. 251.19(a)*.

[53] *See* **[*34]** *C.R.C.P. 251.16(c)*; *C.R.C.P. 251.17(a)*.

[54] *In re Roose, 69 P.3d 43, 48 (Colo. 2003)*.

[55] The Hearing Board does, however, perceive a tension between *Colo. RPC 8.4(g)* and *Green*. In *Green*, the respondent was charged with violating: *Colo. RPC 8.4(d)* (1993 Version) (stating it is misconduct to engage in conduct that is prejudicial to the administration of justice); ***HN8***[] *Colo. RPC 8.4(g)* (1993 Version) (stating that it is misconduct to engage in conduct which violates accepted standards of legal ethics); and *Colo. 8.4(h)* (1993 Version) (stating that it is misconduct to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law). The Colorado Supreme Court ruled explicitly that "[t]he question we decide in this case is whether the ***First Amendment*** allows us to discipline Green for expressing a contrary conclusion. We believe it does not. We therefore dismiss the charges that Green violated *Colo. RPC 8.4*." *11 P.3d at 1087*. Ultimately, the Colorado Supreme Court concluded that "the ***First Amendment*** prohibits disciplining Green on the basis of his communications with the judge because the communications did not make or imply statements of fact." *Id. at 1080*. *Green* thus **[*35]** appears to provide very broad protections for attorneys' criticism of judges unless the criticism is, or implies, a false statement of fact. The tension between *Green* and *Colo. RPC 8.4(g)* arises because the current language of *Colo. RPC 8.4(g)*, which earlier was found in *Colo. RPC 1.2(f)* (1993 Version), was never addressed in *Green*. Following the Green decision, the Colorado Rules of Professional Conduct were re-enacted, effective January 1, 2008. The new rules moved the language at issue to *Colo. RPC 8.4(g)* without comment regarding how the ruling in *Green* might affect its application. Accordingly, Hearing Board members Stanton and Rogers resolve this tension by recognizing that *Colo. RPC 8.4(g)* was re-enacted subsequent to *Green* and by assuming that the Colorado Supreme Court must therefore have intended the rule to be an exception to its opinion in *Green*.

breached, Respondent's mental state, the injury or potential injury caused, and the aggravating and mitigating evidence.

ABA *Standard* 3.0 — Duty, Mental State, and Injury

Duty: Respondent violated his duty to the legal system and the legal profession, since he failed to "demonstrate respect for the legal system and for those who serve it." [56] By exhibiting bias against Judge Olguin-Fresquez on account of her gender while representing a client, Respondent neglected his duty to "scrupulously avoid statements as well as deeds that could be perceived as indicating that [his] actions are motivated to any extent **[*37]** by [gender] prejudice," [57] thereby abandoning certain standards of conduct expected of all officers of the court.

Mental State: The Hearing Board concludes Respondent knowingly called Judge Olguin-Fresquez a "c**t" during his negotiations with the prosecutors. Respondent testified, "I did call her that word, and I regret it; I was extremely frustrated." We interpret this comment as evidencing Respondent's conscious awareness of the nature of his conduct. As discussed above, however, we cannot conclusively find that Respondent intended to engender bias in the prosecutors or otherwise possessed a conscious objective to accomplish any particular result.

Injury: The practice of law demands an elevated standard of conduct from its members, as it relies on mutual civility and respect to ensure the public's confidence and trust in our system of justice. Lawyers help to shape and mold public opinion of our courts, and their behavior reflects upon the quality, integrity, and evenhandedness of our adversarial system. Thus, Respondent's misconduct cast a pall on a fundamental value of the legal profession and the legal system—namely, that prejudice **[*38]** and bias have no place in a profession committed to justice and the rule of law.

ABA *Standard* 3.0 — Aggravating Factors

Aggravating circumstances are any factors that may justify an increase in the degree of discipline to be imposed. The Hearing Board considers evidence of the following aggravating circumstances in deciding the appropriate sanction. [58]

Prior Disciplinary Offenses — 9.22(a): Respondent was publicly censured in 2007 for conduct violative of the Colorado Code of Judicial Conduct while serving as a magistrate in Denver County Small Claims Court. In that case, Respondent made four ex parte telephone calls to a pro se litigant and then failed to consider her request that he recuse himself from her case.

Substantial Experience in the Practice of Law — 9.22(i): Respondent was admitted to the Bar of Colorado in 1984. As such, we consider in aggravation that Respondent has been licensed as an attorney in this jurisdiction for twenty-six years.

Sanctions Analysis Under ABA *Standards* and Case Law

Our **[*39]** sanctions analysis begins with the observation that no binding authority exists to guide our determination in this matter. The Colorado Supreme Court has never addressed sanctions for violations of *Colo. RPC 8.4(g)*. Likewise, the ABA *Standards* contain no corollary to *Colo. RPC 8.4(g)* and thus do not prescribe presumptive

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[56] Colo. RPC Preamble, ¶ 5.

[57] *Sharpe, 761 P.2d at 661*.

[58] ABA *Standard* 3.0 also calls for consideration of factors that mitigate Respondent's conduct, but Respondent failed to present any evidence in mitigation, and the Hearing Board finds none.

sanctions for such misconduct. In the absence of governing guidelines, we look to comparable ABA *Standards* and analogous cases from this and other jurisdictions in imposing a sanction.

HN9[] ABA *Standard* 7.2 provides that suspension is generally appropriate when a lawyer *knowingly* engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. ABA *Standard* 7.3 establishes reprimand, or public censure, as the appropriate sanction when a lawyer *negligently* engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. And ABA *Standard* 7.4, calling for private admonition, applies when a lawyer engages in an *isolated instance of negligence* that violates a duty owed as a professional, but which causes little or **[*40]** no actual or potential injury to a client, the public, or the legal system.

The Hearing Board finds ABA *Standard* 7.2 the appropriate starting point in our analysis because Respondent *knowingly* referred to Judge Olguin-Fresquez as a "c**t" during the course of his negotiations with Angel. Nevertheless, the Hearing Board cannot conclude, in light of the sanctions levied in similar cases, that suspension is appropriate in this instance. In particular, the Colorado Supreme Court in *Sharpe*, which is most influential in our sanctions decision, imposed public censure when an attorney's utterance while representing his client gave rise to a perception he was motivated by racial prejudice. [59]

Likewise, the Indiana Supreme Court publicly reprimanded attorneys in *Thomsen*, [60] *Kelley*, [61] and *Campiti* [62] for engaging in conduct in a professional capacity that manifested bias or prejudice. Although a case could be made that the *McCarthy* decision, where the Indiana Supreme Court ordered suspension, is most on point here in light of Respondent's prior disciplinary history and the absence of mitigating factors, [63] we consider that case somewhat distinguishable insofar as Respondent has **[*41]** admitted his conduct. Given that distinction, as well as our desire to hew closely to available Colorado precedent, the Hearing Board finds it would be more appropriate to follow Sharpe and impose public censure. We are also swayed by the commentary to ABA Standard 7.3, which urges public reprimand as a method of helping to "educate the respondent lawyer and deter future violations," as well as to "inform[] both the public and other members of the profession that this behavior is improper."

We add that we cannot, in good conscience, conclude that private admonition is the most suitable sanction for Respondent's conduct, since no parallel cases support a private **[*42]** admonition. [64] Respondent's use of the slur was not an isolated instance of negligence, a slip of the tongue, or a phatic expression, but rather a knowing use of a charged term to demean Judge Olguin-Fresquez. Moreover, Respondent's conduct caused actual injury to the legal system; as discussed above, his obloquy sullied the public's perception of the profession and flouted the justice system's core values of fairness and respect for all participants in the system, untainted by bias or prejudice. Accordingly, the Hearing Board concludes public censure is most fitting in this case.

IV. CONCLUSION

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[59] *781 P.2d at 661*.

[60] *837 N.E.2d at 1012*.

[61] *925 N.E.2d at 1279*.

[62] ***937 N.E.2d at 340***.

[63] *938 N.E.2d 698, 2010 WL 5178048 at *1*. In *McCarthy*, the Indiana Supreme Court rejected public reprimand and ordered a period of suspension, since McCarthy vehemently denied committing any misconduct, offered no apology or other indication or remorse, and had a prior disciplinary suspension; it contrasted that case with *Kelley* and *Campiti*, where the attorneys admitted their misconduct, consented to discipline, had no prior disciplinary history, and apologized to the aggrieved person.

[64] *See* *Warrick, 44 P.3d at 1148* (rejecting board's recommendation of informal admonition for conduct intended to appeal to or engender bias and imposing thirty-day suspension for violations of *Idaho Rules of Professional Conduct 4.4(a)* and *3.3(a)(4)*).

Respondent's impolite treatment of court personnel and his discourteous behavior during a hearing do not rise to the level of violating the Rules of Professional Conduct, although his conduct falls woefully short of the standards to which we hope every lawyer in this jurisdiction aspires. Indeed, conduct such as Respondent's should be entirely foreign **[*43]** to any honorable profession and is worthy of our opprobrium.

We conclude that Respondent's use of a gender-based epithet to refer to Judge Olguin-Fresquez does not constitute conduct prejudicial to the administration of justice. But the Hearing Board finds his use of this insult exhibited bias or prejudice against Judge Olguin-Fresquez on the basis of her gender in violation of *Colo. RPC 8.4(g)*. As such, we find it appropriate to publicly censure Respondent, underscoring for both the public and fellow members of the bar that our profession cannot tolerate, in the performance of an attorney's duties, expressions of bias or prejudice directed at participants in the legal process.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **ROBERT EDWARD GILBERT**, Attorney Registration No. 13603, is hereby **PUBLICLY CENSURED**. The censure **SHALL** become public and effective thirty-one (31) days from the date of this order upon the issuance of an "Order and Notice of Public Censure" by the PDJ and in the absence of a stay pending appeal pursuant to *C.R.C.P. 251.27(h)*. Respondent **SHALL** file any post-hearing motion or application for stay pending appeal **on or before Friday, January 28, 2011**. No extension of **[*44]** time will be granted.

2. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

DATED THIS 14TH DAY OF JANUARY, 2011.

Originally Signed

WILLIAM R. LUCERO

PRESIDING DISCIPLINARY JUDGE

Originally Signed

TERRY F. ROGERS

HEARING BOARD MEMBER

Originally Signed

BOSTON H. STANTON, JR.

HEARING BOARD MEMBER

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-053-906-001

IN THE MATTER OF THE CLAIM OF:

AARON CHAUSSIGNAND,

Claimant,

v.

WEST LAKE CREEK CO LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Sidanycz (ALJ) dated October 22, 2018, that denied and dismissed his claim for workers' compensation benefits. We affirm.

The ALJ made the following pertinent findings. The claimant began working for the respondent employer on June 6, 2017, when he was 14 years old. The respondent employer has both farm operations and ranch operations. The claimant originally worked for the respondent employer as a seasonal farm laborer. However, on June 23, 2017, the claimant's position was changed to ranch operations.

The clamant alleged that he injured his back at work on July 28, 2017, when he was moving tree branches, stumps, and rocks. This job duty involved loading the items onto a flatbed pickup truck and then unloading the same items into the employer's burn pile. The claimant explained that to reach and lift the materials off the truck bed it was necessary for him to stand on his toes. While he was lifting a log off the truck in this way, the claimant explained that he turned and felt pops in his upper, middle, and lower back.

The claimant treated with Dr. Kovacevich on July 28, 2017. Dr. Kovacevich diagnosed the claimant with a sprain of the ligaments in the lumbar spine and a sprain of

the ligaments in the thoracic spine. Dr. Kovacevich prescribed medication and referred the claimant to physical therapy. He also restricted the claimant from all work.

The claimant subsequently requested a change of physician, and Dr. Olson with Colorado Mountain Medical became the claimant's authorized treating physician. The claimant first was seen on August 10, 2017, by Andrea Hutchinson, NP-C. The claimant reported that following the July 28, 2017, incident, he had swelling along his spine. He also reported he was having numbness and tingling in his lower extremities with weakness in his arms and legs. Ms. Hutchinson diagnosed acute midline back pain and noted that the claimant had muscular spasm in the right thoracic paraspinous area. She also recommended MRIs of the claimant's cervical, thoracic, and lumbar spine as well as continuation of physical therapy.

Thereafter, the claimant saw Dr. Olson. The claimant reported pain in the upper thoracic, lower thoracic, and lumbar spine. The claimant also reported numbness in the feet, with tingling in his toes. Dr. Olson opined it was "highly unlikely that there is a discogenic injury" but agreed that MRIs were reasonable.

The MRI of the claimant's lumbar spine showed mild lateral neural foraminal and lateral recess stenosis at the L4-5 level secondary to a mild circumferential disc bulge with mild contact of the descending left L5 nerve roots in the lateral recess. The MRI of the claimant's thoracic spine showed no evidence of degenerative disc disease, facet arthropathy, or stenosis.

The claimant returned to Dr. Olson and reported sharp pain in the upper back and difficulty walking more than 200 feet. Dr. Olson noted that the claimant's MRI results showed minimal changes and very mild changes at the L4-L5 level. Dr. Olson also noted the claimant's main discomfort was in his thoracic region.

The claimant ultimately was referred to a pediatric orthopedic surgeon. He was seen at Children's Hospital by Dr. Sumeet. Dr. Sumeet noted that the claimant rated his pain at 8/10 on a daily basis. Dr. Sumeet opined the claimant's MRI findings were likely chronic in nature. He also opined the claimant's symptoms were related to a muscle sprain/strain. He recommended the claimant could improve his overall conditioning by engaging in activities such as walking, bicycling, swimming, yoga, and general free play. He further recommended a guided physical therapy program. If the claimant's pain did not improve with conservative treatment, then Dr. Sumeet recommended the claimant undergo evaluation for chronic pain.

A subsequent MRI of the claimant's cervical spine showed straightening of the normal cervical lordotic curvature, and normal appearance of the cervical discs and facet joints without evidence of fracture or stenosis.

The claimant returned to Children's Hospital Colorado on January 2, 2018. Dr. Eisdorfer opined the claimant's pain was consistent with chronic pain syndrome and myalgia. The records do not reference a work injury or any acute incident or injury.

The claimant has been a competitive skier for many years. The medical records indicate that the claimant has sought medical treatment a number of times related to skiing. Additionally, on April 29, 2016, more than one year prior to the incident at issue, the claimant sought treatment with Mountain Family Health Centers for back pain. On that date, the claimant was seen by Diane Purse, PNP. The claimant reported the onset of back pain four months prior. He also reported the pain was in his upper, middle, and lower back. The claimant denied any injury. Heat and acetaminophen were recommended.

Further, on March 9, 2017, several months before he began working for the respondent employer, the claimant received physical therapy treatment at Joint Worx. The claimant was seen for symptoms consistent with sacroiliac joint dysfunction.

At the request of the respondents, the claimant attended an independent medical examination with Dr. Hattem. Dr. Hattem opined the claimant's pain complaints are not related to the July 28, 2017, incident. Dr. Hattem noted the claimant's MRIs are essentially negative. He further opined the claimants' subjective complaints are due to behavioral issues.

The ALJ ultimately determined the claimant failed to demonstrate he suffered an injury that arose out of and in the course and scope of his employment. The ALJ did not find the claimant's testimony persuasive or credible. She found the medical records instead showed that the claimant had a history of injuries related to skiing. In particular, she relied on the April 29, 2016, medical record which showed the claimant complained of symptoms virtually identical to those he now asserts were caused on July 28, 2017. The ALJ further determined there was no aggravation or acceleration of a preexisting condition on July 28, 2017, and no activity the claimant engaged in on that date while at work that combined with a preexisting condition to necessitate medical treatment. The ALJ credited Dr. Hattem's opinion that the claimant's pain complaints are not related to the July 28, 2017, alleged injury. She denied and dismissed the claimant's claim for workers' compensation benefits.

The claimant has petitioned to review the ALJ's order. The claimant argues that the ALJ's determination regarding compensability is not supported by the evidence. The claimant contends that the respondents' IME physician, Dr. Hattem, testified that the claimant sustained a low back muscle strain on July 28, 2017, and needed medical treatment as a result. However, we perceive no error.

To recover workers' compensation benefits, the claimant must prove he suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b)-(c), C.R.S. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The determination of whether the claimant proved causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. Thus, if the industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

We must uphold the ALJ's factual determinations if supported by substantial evidence in the record. *Christie v. Coors Transportation Co.,* 919 P.2d 857 (Colo. App. 1995), *aff'd,* 933 P.2d 1330 (Colo. 1997). Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *See Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992).

Additionally, we may not reweigh the evidence. *See Gelco Courier v. Industrial Commission*, 702 P.2d 295 (Colo. App. 1985)(if two equally plausible inferences may be drawn from the evidence, we may not substitute our judgment for that of the ALJ). Further, the ALJ's credibility determinations are binding unless the testimony of a particular witness, although direct and unequivocal, is "so overwhelmingly rebutted by hard, certain evidence directly contrary" that a fact finder would err as a matter of law in believing the witness. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986);

Further, inconsistencies and contradictory evidence are not uncommon in workers' compensation claims, and it is the ALJ's sole prerogative as the fact finder to resolve any

inconsistencies in the testimony. In resolving inconsistencies, the ALJ may credit all, part, or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Here, it is true, as the claimant argues, that during Dr. Hattem's deposition, he testified that the claimant sustained at least a muscle strain on July 28, 2017. Dr. Hattem explained that he deferred to, and had no reason to disagree with, Dr. Kovacevich's diagnosis of a muscle strain on the date of the alleged injury. Depo. of Dr. Hattem at 40-41. However, as explained above, it is well settled that when resolving inconsistencies, the ALJ may credit all, part, or none of the expert's testimony. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. The ALJ clearly did that here when she did not credit Dr. Hattem's deposition testimony in this regard. Rather, in determining that the claimant did not sustain an injury on July 28, 2017, the ALJ credited the claimant's prior medical records which showed he has a history of injuries related to skiing. The ALJ found, with record support, that in April 2016, the claimant complained of symptoms virtually identical to those he now asserts were caused on July 28, 2017. The Mountain Family Health Centers medical records from April 29, 2016, state that the onset of the claimant's back pain was four months ago, and the location of pain was upper back, middle back, and lower back. Ex. M at 96. Further, several months before the claimant's alleged injury, and before the claimant started working for the respondent employer, the claimant received physical therapy treatment from Joint Worx. That is, on March 9, 2017, the claimant was seen for sacroiliitis dysfunction and pain. The onset date is listed as February 1, 2017. Ex. R at 173. Moreover, the ALJ expressly stated she did not find the claimant's testimony persuasive or credible. Order at 7 ¶34. Section 8-43-301(8), C.R.S.

Essentially, the claimant is asking us to reweigh the evidence to reach a different result than that of the ALJ. However, we may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990). The ALJ's order here resolves conflicts in the evidence, and her determination that the claimant failed to prove a compensable injury is supported by the record. Section 8-43-301(8), C.R.S. Accordingly, the ALJ properly denied the claimant's request for benefits. Consequently, we have no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated October 22, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

CERTIFICATE OF MAILING

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

3/21/19 by TT .

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