COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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August Case Law Update

Presented by Judge Laura Broniak and Judge David Gallivan

This update covers ICAO and COA decisions issued between July 3, 2018 to August 3, 2018

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COLORADO COURT OF APPEALS

DATE FILED: July 19, 2018
CASE NUMBER: 2017CA1959

Court of Appeals No. 17CA1959
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-709-616

Old Dominion Freight Line, Inc.; and New Hampshire Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado; and Daniel Sanchez,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE KAPELKE*
Berger and Davidson*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 19, 2018

Pollart Miller L.L.C., Brad J. Miller, Kendra Garstka, Greenwood Village, Colorado, for Petitioners

No Appearance for Industrial Claims Appeals Office

The Webster Law Firm LLC, David J. Webster, Colorado Springs, Colorado, for Respondent Daniel Sanchez

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this workers' compensation action, employer, Old Dominion Freight Line, Inc., and its insurer, New Hampshire Insurance Company (collectively employer), seek review of a final order of the Industrial Claim Appeals Office (Panel) upholding an award of permanent total disability (PTD) benefits to claimant, Daniel Sanchez. Because we agree with the Panel that substantial evidence supports the findings of the administrative law judge (ALJ), we affirm.

I. Background

¶ 2 Claimant worked for employer as a truck driver from 2005 through 2006. On December 30, 2006, claimant was involved in a motor vehicle accident on I-80 near Ogallala, Nebraska. Claimant was not wearing his seat belt "and was thrown into the windshield." Emergency responders reported that claimant was outside the vehicle and walking when they arrived. At the emergency room, claimant was diagnosed with a "Le Fort II fracture of the basal skull and a significant right facial trauma," but the emergency physicians reportedly were unable to obtain claimant's medical history "secondary to his confusion." Because of the severity of his injuries, flight for life transported claimant to Regional West

Hospital in Scottsbluff, Nebraska. There, physicians determined claimant had sustained "multiple facial fractures including frontal sinus fracture, maxillary fracture on the right, septal fracture and lateral fractures of the nose." Open reduction surgery to internally fixate and repair the fractures revealed claimant had sustained Le Fort II/III fractures to his face.

¶ 3 Claimant's recovery was slow and complicated, involving numerous physicians. He was diagnosed with acute mild traumatic brain injury (TBI) and evidence of a "coup contrecoup" brain injury, which occurs when the brain strikes the front and the back of the skull, as well as cognitive disorder and depression. He also experienced symptoms of double vision, headaches, neck pain secondary to a cervical displacement, lack of balance, tinnitus, and, beginning in 2008, seizures.

¶ 4 In February 2009, a clonic tonic seizure required claimant to be hospitalized for three days. He was eventually referred to Dr. Laura Strom, an epileptologist, because he had "an episode of status epilepticus." In light of this history, Dr. Strom questioned the accuracy of an electroencephalogram (EEG) reading performed on February 2, 2009, "which did not show epileptiform

discharges . . . given the abnormalities on his EEG upon admission here." Under Dr. Strom's care, though, his seizures continued and he was even brought to the emergency room a year later "in status epilepticus" having been actively seizing for "1.5 hours . . . with intermittent episodes without return of normal mental status in between."

¶ 5 Claimant's primary treating physician, Dr. Thomas Higginbotham, placed claimant at maximum medical improvement (MMI) with an impairment rating of 95% of the whole person as of July 1, 2011, which incorporated impairment caused by injuries to claimant's shoulder and central nervous system, cognitive difficulties, and seizure disorder. He also opined that claimant "is incapable of return to gainful employment."

¶ 6 In response, employer requested a division-sponsored independent medical examination (DIME). The selected DIME physician, Dr. Alexander Jacobs, spent over 100 hours reviewing claimant's extensive medical records and physically examined claimant. He agreed with Dr. Higginbotham that claimant had reached MMI on July 1, 2011, for injuries to his "shoulder, neck, diplopia, and carpal tunnel syndrome" but not with respect to his

"brain, central nervous system, and psychiatric" injuries. Because claimant was not fully at MMI, his treatment continued.

¶ 7 In 2016, claimant underwent a second DIME performed by a different physician, Dr. Allison Fall. Dr. Fall "flipped through the entire box" of records provided to her, "read about five hours' worth of records," and conceded she spent "six hours reviewing medical records in this case." Ultimately, she agreed with Dr. Jacobs that claimant reached MMI for his cervical, shoulder, and spine injuries in July 2011. She calculated an impairment rating of 12% of the whole person for these injuries.

¶ 8 However, Dr. Fall disagreed that claimant suffered any permanent impairment from a brain injury, an injury to the central nervous system, or psychiatric issues as a result of the December 2006 accident. She concluded instead that although claimant may have suffered a mild TBI after the accident, any symptoms associated with a TBI should have resolved long before. She also rejected Dr. Strom's opinion that claimant suffered from a related seizure disorder. Rather, she opined that claimant's seizures were caused by a factitious disorder precipitated by a psychiatric condition unrelated to the accident. Dr. Fall's opinions were shared

by several doctors employer retained, including Dr. Henry Roth, Dr. Barbara Philips, and Dr. Stephen Moe.

¶ 9 Drs. Strom and Higginbotham strenuously disagreed with Dr. Fall's conclusions, as well as with the comparable opinions of Drs. Roth, Philips, and Moe. Although Dr. Strom discontinued claimant's epileptic medication by 2017 because she determined that his seizures were by then all non-epileptic, contrary to Dr. Fall, she concluded that claimant's non-epileptic seizures were caused by a nonvolitional conversion disorder, not a volitional factitious disorder. Dr. Strom therefore disagreed with Drs. Fall, Roth, Philips, and Moe that claimant was "faking his seizures." She noted that because several seizures had been captured on EEGs and at least one of them bore the signature stamp or footprint of an epileptic seizure, she believed claimant *had* suffered epileptic seizures in the years after his accident, even if he no longer suffered from them by the time of the hearing.

¶ 10 Relying on Dr. Strom's and Dr. Higginbotham's opinions, claimant applied for a hearing to overcome the DIME opinion. After reviewing the voluminous medical records, reading numerous deposition transcripts, and conducting a hearing, the ALJ ruled

that claimant had overcome Dr. Fall's DIME opinions, that he was permanently and totally disabled, and that he was entitled to continued medical maintenance benefits. The ALJ also adopted "Dr. Higginbotham's recently revised 47% whole person impairment rating," which Dr. Higginbotham disclosed at the hearing. In reaching his conclusions, the ALJ found that Dr. Fall "erred in concluding that [c]laimant's neck was the only work-related condition associated with" his accident, and "clearly erred when she opined that [c]laimant's non-epileptiform seizures and possible conversion or factitious disorder are not work-related and that there was no permanent impairment for a traumatic brain injury." He further criticized Dr. Fall's "abbreviated review of the medical records generated in this case." In addition, the ALJ expressly credited the opinions of Drs. Higginbotham and Strom over those of Drs. Fall, Moe, Roth, and Philips. He noted that "when the evidence is considered as a whole," the latter physicians' opinions "are simply not persuasive."

¶ 11 The Panel concluded that substantial evidence supported the ALJ's findings and therefore upheld the ALJ's award of benefits to claimant.

II. Overcoming the DIME

¶ 12 Employer first contends that the ALJ erred in finding that claimant had overcome the DIME's impairment rating. Although employer acknowledges that claimant introduced evidence countering Dr. Fall's impairment rating, it argues that these "simply represent differences of opinion" and consequently do not constitute the clear and convincing evidence necessary to overcome a DIME opinion on impairment. We disagree.

A. Standard of Review for Overcoming DIME Decisions

¶ 13 A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. 2017. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Thus, a party seeking to overcome a DIME's impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's rating is incorrect. Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. Such

evidence must be unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) (citation omitted).

¶ 14 Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414. Consequently, we may not set aside the ALJ's determination that a party has or has not overcome the DIME if the finding is supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2017.

B. Substantial Evidence Supports the ALJ's Finding that Claimant Overcame the DIME

¶ 15 Here, Dr. Fall opined that claimant had reached MMI on July 1, 2011, and rated his permanent impairment at 12% of the whole person. Claimant's primary treating provider, Dr. Higginbotham did not disagree with the July 1, 2011, MMI date.

¶ 16 However, the 12% impairment rating Dr. Fall gave claimant varied drastically from Dr. Higginbotham's original 95% impairment rating and was significantly lower than Dr. Higginbotham's revised rating of 47%. As Dr. Higginbotham pointed out and Dr. Fall acknowledged, the wide disparity in ratings resulted from Dr. Fall's

exclusion of any brain injury or seizure disorder, which she concluded were either not work related or should have fully resolved. Thus, claimant unquestionably presented evidence that sharply contrasted with Dr. Fall's opinions and provided the ALJ with a plausible, alternative impairment rating.

¶ 17 Importantly, though, the ALJ found that Dr. Fall's opinions simply were not credible when closely examined. A DIME opinion can be overcome with "evidence demonstrating it is 'highly probable' the DIME physician's rating is incorrect." *Leming*, 62 P.3d at 1019 (quoting *Metro Moving & Storage*, 914 P.2d at 414). Claimant established, and the ALJ observed, that Dr. Fall's "abbreviated review" of claimant's medical records was significantly briefer than other physicians' reviews. The ALJ contrasted Dr. Fall's admission of having spent five to six hours "flipping through" the records with both (1) Dr. Jacobs' lengthy 100 hours of review, which, notably, occurred five years earlier than Dr. Fall's DIME and thus necessarily included fewer records; and (2) Dr. Higginbotham's twenty hours of record review preparing for the hearing, his having examined claimant more than one hundred times as his primary treating physician, and his knowledge of claimant's medical history.

¶ 18 The ALJ also reiterated Dr. Higginbotham's observation that Dr. Fall's records review relied almost exclusively on doctors retained by employer, including Drs. Roth, Philips, and Moe. Dr. Fall's unfamiliarity with the records of claimant's multiple treating providers during her deposition further advanced this impression.

¶ 19 Taken together, these factors support the ALJ's conclusion that Dr. Fall erred in her medical assessment of claimant and demonstrate that it is "highly probable" that Dr. Fall's DIME opinions were incorrect. *See Leming*, 62 P.3d at 1019. Showing that a DIME's opinions were incorrect constitutes the necessary clear and convincing evidence to overcome a DIME. *See* § 8-42-107(8)(b)(III); *Metro Moving & Storage*, 914 P.2d at 414. Thus, because substantial evidence supports the ALJ's finding that claimant overcame Dr. Fall's DIME opinions, the Panel did not err in affirming this decision, and we, too, may not set it aside. *See* § 8-43-308; *Metro Moving & Storage*, 914 P.2d at 414.

III. Permanent Total Disability

¶ 20 Employer next contends that the ALJ erred in finding claimant permanently and totally disabled. It argues that the finding rests squarely on claimant's self-reporting of pain and poor functioning.

Questioning the veracity of claimant's complaints, employer argues that claimant's credibility is the linchpin of his permanent total disability claim. It further observes that the ALJ "found that [c]laimant was not a credible witness." We are not persuaded that the ALJ or the Panel erred.

A. Law Governing Permanent Total Disability

¶ 21 A claimant is permanently and totally disabled, and therefore entitled to disability 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. 2017. 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.

¶ 22 Whether a claimant is permanently and totally disabled — i.e. whether he or she "is able to earn wages in the same or other employment" — is a question of fact for determination by the ALJ. *See Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194, 1197 (Colo. App. 1995). Consequently, an ALJ's determination concerning a PTD award "may be set aside only if the factual findings in each case are unsupported by substantial evidence." *Bymer*, 955 P.2d at 558.

B. Substantial Evidence Supports the ALJ's PTD Determination

¶ 23 Here, the ALJ determined, with record support, that claimant is permanently and totally disabled. The ALJ relied upon the reports and opinions of Drs. Higginbotham and Strom, as well as claimant's psychologist, Dr. Anthony Ricci. Drs. Higginbotham and Ricci testified at the hearing that claimant still has significant, limiting work restrictions, and is "unable to be entirely independent." Dr. Higginbotham and Dr. Strom both indicated that claimant suffered a brain injury in the accident, specifically a coup contrecoup injury, that rendered "[c]laimant mildly to moderately

brain injured"; that he sustained shearing of the axons in his brain; and that he experiences ongoing seizures, all as a result of the work-related accident. Finally, Dr. Higginbotham emphasized in one report that because of his condition, claimant is "incapable" of returning to gainful employment.

¶ 24 Based on their testimony and opinions, the ALJ was

> persuaded that a traumatic brain injury and a rekindling of [c]laimant's prior [post-traumatic stress disorder] result[ed] in the manifestation of a separate psychological condition, i.e. a factitious disorder and/or conversion disorder [that] best explains the enormity of his ongoing symptoms, especially his profound psychological dysfunction.

The ALJ then expressly credited the opinions of Drs. Strom, Higginbotham, and Ricci, while rejecting the contrary opinions of claimant's retained medical experts, Drs. Moe, Roth, and Philips, as well as the opinion of Dr. Fall, the DIME physician.

¶ 25 A vocational rehabilitation specialist retained by claimant, Michael Fitzgibbons, synthesized claimant's medical providers' opinions and testified that claimant's physical and medical restrictions precluded him from entering the labor market in any capacity. Employer's vocational rehabilitation expert, Katie

Montoya, did not squarely contradict Mr. Fitzgibbons. Instead, she surmised that claimant's case came down to an assessment of his medical condition. In other words, she explained, "[t]his is a case where the medical opinion really is the deciding factor as there are not the typical limitations for consideration, but instead opinion of either no work or no limitations."

¶ 26 Even so, claimant's math and reading comprehension showed a low-level skill set. Conducting a battery of tests, Mr. Fitzgibbons calculated that claimant read at a 7.5 grade level and could only do math at a 4.3 grade level. The ALJ's personal observation of claimant at the hearing corroborated Mr. Fitzgibbons' report: "The ALJ was able to observe difficulty reading as [claimant] placed a blank sheet of paper below every line to keep from losing his place and the longer he read the document, a noticeable shake of his extremities was observed."

¶ 27 Although evidence indicated that claimant's condition had improved and that he no longer required round-the-clock care — a development which led Dr. Higginbotham to dramatically reduce claimant's impairment rating from 95% to 47% — the evidence discussed above amply supports the ALJ's conclusion that claimant

was permanently and totally disabled. *See Bymer*, 955 P.2d at 558. "We are bound by the ALJ's factual determinations, even when the evidence is conflicting and would have supported a contrary result." *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001).

¶ 28 Accordingly, we find no basis for setting aside the Panel's decision affirming the ALJ's award of PTD benefits to claimant. *See Bymer*, 955 P.2d at 558.

IV. Medical Maintenance

¶ 29 Employer's finally contends that the ALJ improperly awarded claimant medical maintenance benefits. Employer argues that because several doctors concluded that claimant's seizures, brain injury, and other current medical conditions are unrelated to the December 2006 accident, he should not receive continuing medical maintenance benefits. We have already determined that substantial evidence supports the ALJ's findings that claimant sustained a brain injury and seizure disorder as a result of the accident and that he overcame Dr. Fall's conclusion to the contrary. We therefore disagree with this contention.

A. Standard of Review for Medical Maintenance Benefits

¶ 30 A claimant may receive compensation for medical treatment post-MMI to maintain his or her MMI level. *See Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988) (An employer may be required to pay a claimant's "medical expenses for any future treatment 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."). In *Grover*, the supreme court reinstated an ALJ's order awarding a claimant open-ended care to relieve the claimant of her ongoing symptoms. *Id.*

¶ 31 A division of this court later clarified the burden a claimant bears to establish entitlement to *Grover* medical benefits. In particular, a claimant must show that substantial evidence in the record demonstrates the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992). Such treatment becomes reasonably necessary "if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far." *Id.*; *see also Hanna v. Print*

Expediters Inc., 77 P.3d 863, 865 (Colo. App. 2003) ("[A] claimant is entitled to future medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of an industrial injury or prevent further deterioration of the claimant's condition."). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866.

B. Substantial Evidence Supports the ALJ's Award of Medical Maintenance Benefits

¶ 32 Here, Dr. Strom testified in her deposition that claimant would require "ongoing treatment for these nonepileptic seizures" and headaches. Dr. Higginbotham similarly testified that he believed claimant would require continuing medication, monitoring of his medications, and ongoing physician care from him and Dr. Strom, plus the care of a dentist, urologist, rehabilitation specialist, cardiologist, and psychologist. Their opinions were echoed by Dr. Ricci, claimant's psychologist, who testified unequivocally that

claimant will "need continuing management of medication circumstances." These doctors' recommendations thus amply support the ALJ's award of medical maintenance benefits, and we therefore must uphold it. *See Holly Nursing Care Ctr.*, 992 P.2d at 704 ("Because the award of [*Grover*] medical benefits was supported by substantial evidence, it may not be set aside on review.").

V. Request for Attorney Fees

¶ 33 Last, we address claimant's request for attorney fees under C.A.R. 38(d) and section 8-43-301(14), C.R.S. 2017. Claimant contends that employer's appeal asks this court to reweigh the evidence and rule in its favor. Although claimant concedes that employer's request "likely do[es] not rise to the level of frivolous," claimant maintains that in its brief employer "misrepresent[s] medical diagnoses, witness testimony and the findings made by the ALJ." Claimant implies that employer is either intentionally misleading this court or causing delay. Employer responds that it is not merely seeking re-evaluation of the evidence, but instead asserting that claimant could not have met his burden of proof based on the evidence presented.

¶ 34 We note that even when a contention is rejected, an appeal is not automatically frivolous and request for sanctions may be denied. *See Price v. Conoco, Inc.*, 748 P.2d 349, 351 (Colo. App. 1987).

> A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. This test . . . does not apply to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law.

W. United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984). Because we cannot conclude that employer's contentions presented "no rational argument based on the evidence or the law to support" them, or that the claims were "not supported by any credible evidence," and because claimant essentially concedes that employer's arguments are not frivolous, we decline to award any attorney fees. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 151 (Colo. App. 2003); *see also Adams v. Land Servs., Inc.*, 194 P.3d 429, 434 (Colo. App. 2008) (rejecting request for attorney fees because claims were not frivolous).

VI. Conclusion

¶ 35 For the foregoing reasons, the Panel's order is affirmed.

JUDGE BERGER and JUDGE DAVIDSON concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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COLORADO COURT OF APPEALS

DATE FILED: July 19, 2018
CASE NUMBER: 2017CA1647

Court of Appeals No. 17CA1647
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-981-338

Donald Turner,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; and Sunrise Transport, d/b/a Pinzgauer Breeders, Ltd.,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE FOX
Webb and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 19, 2018

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., Melissa Loman Evans, Steven G. York, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Treece Alfrey Musat P.C., James B. Fairbanks, Denver, Colorado, for Respondent Sunrise Transport

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this workers' compensation action, claimant, Donald Turner, seeks review of a final decision of the Industrial Claim Appeals Office (Panel) affirming the dismissal of his claim on jurisdictional grounds. Claimant contends that he established "substantial employment" in the State of Colorado warranting a finding that Colorado had subject matter jurisdiction over his claim. We disagree and therefore affirm the Panel's decision.

I. Background

¶ 2 Claimant is a resident of British Columbia and a Canadian citizen. In 2013, he was hired in Canada and worked as a long haul truck driver for employer, Sunrise Transport, a Canadian based company, doing business as Pinzgauer Breeders, Ltd. He hauled goods throughout Canada and in the western United States.

¶ 3 In December 2013, claimant was dispatched to haul lumber from Salmo, British Columbia, to Henderson, Colorado. While removing tarps covering the lumber in Henderson, claimant slipped and fell on ice, striking his head and losing consciousness. Claimant also suffered injuries to his hips, shoulders, and neck, and was hospitalized for two and a half days in Colorado. He

received benefits for his injuries from Canada's workers' compensation system.

¶ 4 Claimant later applied for benefits in Colorado. Employer contested the claim, arguing that Colorado lacked jurisdiction over it.

¶ 5 After conducting two hearings and reviewing the parties' briefs, an administrative law judge (ALJ) dismissed the claim, ruling that Colorado lacked jurisdiction to adjudicate it. The ALJ explained that although claimant sustained injuries in Colorado, because he did not reside in the state, he was only entitled to benefits under Colorado law if he established that a "substantial portion" of his employment was performed in Colorado. Summarizing the evidence, including claimant's daily logs, the ALJ found that

> Claimant spent a maximum of 4.34% of his time making deliveries to Colorado, according to [employer's] exhibits, and according to the Claimant's summary, 6.2% of his time making deliveries to Colorado. Indeed, . . . the claimant spent more of his time driving to California. There is no magic number of time spent in Colorado to equate to "substantial employment" in Colorado, however, reason and common sense dictates that 6.2% of the time out of a year is not "substantial."

In addition, the ALJ noted, whether a claimant was "substantially employed" in this state is a question of fact for the ALJ to determine. Because 90% to 95% of claimant's working hours were spent outside of Colorado, the ALJ determined that he lacked jurisdiction to hear claimant's claim.

¶ 6 The Panel concluded that the ALJ properly applied the law. And, because substantial evidence supported the ALJ's factual findings, the Panel affirmed the ALJ's decision.

II. Analysis

¶ 7 Claimant challenges the ALJ's application of the law. Although he concedes that he spent only a fraction of his time in Colorado, he contends that his "nine trips to various locations in Colorado, in eight different months of a single year . . . evinces 'routine and regular' work done in Colorado," which should have been sufficient to satisfy the jurisdictional "substantial portion" test. He argues that Colorado should employ a qualitative, rather than a quantitative, measure of the work a person performs in this state when evaluating jurisdiction. We are not persuaded to adopt such a rule.

A. Governing Law

¶ 8 "[T]o be entitled to benefits under the Colorado Work[ers'] Compensation Act (Act), a person must be an employee under the statutory definition." *Loffland Bros. Co. v. Indus. Comm'n*, 714 P.2d 509, 510 (Colo. App. 1985). A claimant must also establish that Colorado has jurisdiction over the claim. *See U.S. Fid. & Guar. Co. v. Indus. Comm'n*, 99 Colo. 280, 282, 61 P.2d 1033, 1034 (1936), *superseded by statute as stated in State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 594, 298 P.2d 963, 969 (1956). "[J]urisdiction cannot be conferred by consent nor lack of jurisdiction waived." *Id.* "The jurisdictional prerequisites to recovering benefits under the Act are that a substantial portion of the employee's work must be performed in Colorado, combined with either an injury in Colorado or an employment contract entered into in Colorado." *Monolith Portland Cement v. Burak*, 772 P.2d 688, 689 (Colo. App. 1989). Among the factors an ALJ may consider to arrive at this determination is the location and scope of the employee's "usual and regular employment." *RCS Lumber Co. v. Worthy*, 149 Colo. 537, 541, 369 P.2d 985, 987 (1962).

¶ 9 Whether a claimant has shown that a substantial portion of his or her work is performed in Colorado is a question of fact for the ALJ to determine. *See id.* at 542, 369 P.2d at 987 ("[T]here being competent evidence to sustain [the Commission's] findings that decedent's services were to be performed in New Mexico, the trial court and this court are bound thereby."); *see also Monolith Portland Cement*, 772 P.2d at 689 (holding that evidence was sufficient to sustain a finding that the decedent performed a "substantial" portion of his work in Colorado). We are bound by the ALJ's factual findings if they are supported by substantial evidence in the record. *RCS Lumber*, 149 Colo. at 542, 369 P.2d at 987; *Monolith Portland Cement*, 772 P.2d at 689.

¶ 10 If, however, the ALJ misapplied the legal standard, we may set aside the order. "We review the ALJ's conclusions of law de novo." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006).

B. Did the ALJ Apply the Proper Test?

¶ 11 Claimant contends that the ALJ applied the incorrect test to assess whether he conducted a substantial portion of his employment in Colorado. The ALJ calculated the percent of time

claimant spent in Colorado, using different calculation methods, which yielded different results. Giving claimant the benefit of the doubt, the ALJ made the following alternative findings:

- In calendar year 2013, claimant spent 15.5 days working in Colorado, which equated to 4.25% of the year.
- Based on the number of working hours in a year, the ALJ determined that claimant worked 65 out of 2000 working hours in Colorado in 2013, or 3.25% of his time.
- Examining the total number of hours claimant was physically in Colorado during 2013, the ALJ calculated that claimant spent 380 out of 8760 hours of the year in Colorado, which constituted 4.34% of his time.
- Looking at the number of miles claimant drove in Colorado, the ALJ determined that of the 222,089 miles claimant drove in 2013, 6325.9 were driven in Colorado, which amounted to only 2.77% of claimant's driven miles.
- Finally, when the ALJ relied on the driving summary claimant's counsel prepared, he determined that claimant spent, at most, 21 out of 338 days reflected in the summary in Colorado, or 6.2% of his time.

By way of comparison, the ALJ calculated that claimant spent 5.43% of his total yearly hours in California, and 8.86% of his working hours in California. Based on these calculations, and considering the evidence in the light most favorable to claimant, the ALJ found that claimant's time in Colorado was "insubstantial" and consequently did not meet jurisdictional minimums.

¶ 12 Claimant urges us to hold that the ALJ's method for calculating "substantial employment" for jurisdictional purposes is flawed. He advocates for a qualitative test, but fails to direct us to qualitative evidence in the record that would meet that unspecified test. And the "course and scope of employment" test claimant's counsel advocated for during oral argument is essentially meaningless in guiding us to what amounts to "substantial portion of employment" for Colorado to find jurisdiction over a workers' compensation claim.

¶ 13 Like the Panel, we know of no strict formula or method for applying the "substantial portion of employment" test. Definitions of "substantial" provide some guidance. "'Substantial' is defined as 'real,' 'not imaginary,' 'sturdy,' or 'solid.'" *Commonwealth v. Coggeshall*, 46 N.E.3d 19, 22 (Mass. 2016) (quoting Webster's Third

New International Dictionary 2280 (1961)). "In law, the term 'substantial' is defined as follows: 'Of real worth and importance; of considerable value; valuable. * * * Something worth while as distinguished from something without value or merely nominal.'" *Rodriguez v. Bd. of Parole & Post-Prison Supervision*, 67 P.3d 970, 974 (Or. Ct. App. 2003) (quoting Black's Law Dictionary 1597 (rev. 4th ed. 1968)). These definitions make clear that there is not one proper method of measuring "substantial."

¶ 14 Indeed, our supreme court adhered to this notion when it observed that "the test of place of performance of the 'principal' portion of such services . . . is indefinite and the measure indeterminate." *Home Ins. Co. v. Hepp*, 91 Colo. 495, 499, 15 P.2d 1082, 1083 (1932), *superseded by statute as stated in State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 594, 298 P.2d 963, 969 (1956). Because the ALJ is entrusted with the authority to weigh the evidence to determine whether a worker has "substantially performed" his or her services in the State of Colorado, how to assess that evidence is necessarily within the ALJ's discretion. *See RCS Lumber*, 149 Colo. at 542, 369 P.2d at 987.

¶ 15 Relying on *Hepp* and *United States Fidelity & Guaranty*, claimant nevertheless urges us to steer the analysis of these cases to a "qualitative" measure, focusing on the "routineness" and "regularity" of a claimant's work, rather than a quantitative percentage of a claimant's total work. Claimant contends that he regularly traveled through Colorado and that the "routineness" and "regularity" of his work in this state suffice to confer jurisdiction over his claim.

¶ 16 But, neither *Hepp* nor *United States Fidelity & Guaranty* mandate a different outcome than that reached by the ALJ or the Panel, nor do they adopt a specific test. The court in *Hepp* expressly observed that there is no "determinate" test for assessing "substantial employment." Instead, *Hepp* iterated the existing rule: "where the contract was made in Colorado *and a substantial portion of the services thereunder were to be, and were, performed in this state*, recovery under the act has been upheld." *Hepp*, 91 Colo. at 499-500, 15 P.2d at 1083 (emphasis added).

¶ 17 Likewise, *United States Fidelity & Guaranty* repeated the rule, citing *Hepp*, and gave no indication what method the court favored to assess "substantial portion of employment." Although the

claimant there drilled only one well in Colorado, *United States Fidelity & Guaranty* did not elaborate further, never stating how much time the claimant spent drilling in Colorado. Regardless, the court deemed the amount of time the claimant spent in Colorado as sufficient to constitute a "substantial portion" of his employment contract and affirmed the commission's award of benefits.

¶ 18 Nor do the extra-jurisdictional cases claimant cites support his position. Although the Washington case noted that a "substantial part" of one's overall work "may be less than half of the total amount," it did *not* adopt a purely qualitative measure. Instead, it noted that "'substantial part' is not susceptible to a precise quantitative definition," and that the amount of work may qualify "if it is not insubstantial, immaterial, or nominal." *Chelan Cty. Deputy Sheriffs' Ass'n v. Chelan County*, 745 P.2d 1, 6 (Wash. 1987). Thus, the Supreme Court of Washington expressly declined to adopt a stringent formula to measure "substantial employment."

¶ 19 Claimant also cites *Holman v. Bulldog Trucking Co.*, 428 S.E.2d 889 (S.C. Ct. App. 1993), for its description of the "substantial employment" rule, which it summarizes as "the worker's employment is located in any state in which his employer

conducts substantial business and he spends a substantial part of his working time in the service of the employer." *Id.* at 892. Applying the "base of operation" rule to transient workers such as over-the-road truckers, the South Carolina Court of Appeals upheld the commission's finding that South Carolina lacked jurisdiction over the claim because the claimant's employment was Georgia-based,

> where he reported to his employer's place of business for duty, where he picked up and returned his company truck, where he received his work assignments and from which he was dispatched, where he called in during the course of his work, and where he returned weekly when he had completed his work for the employer.

Id. at 893. Applying *Holman*'s rule and reasoning, British Columbia would be claimant's primary place of employment and he could not receive Colorado benefits.

¶ 20 Finally, and perhaps most tellingly, an Illinois case, *Patton v. Industrial Commission*, 498 N.E.2d 539 (Ill. App. Ct. 1986), declined to extend jurisdiction over a trucker's Illinois claim because "[a]lthough he spent a good deal of his time making deliveries in Illinois, this activity still constituted less than half of his total

mileage in the employ of the respondent." *Id.* at 544. The Illinois Appellate Court applied a quantitative measure in refusing to reverse the fact finder's determination that the over-the-road trucker's work "was not principally localized in Illinois." *Id.*

¶ 21 Accordingly, we perceive no errors in the ALJ's use of a quantitative method to analyze whether claimant was "substantially employed" in Colorado for jurisdictional purposes. *See Hepp*, 91 Colo. at 499, 15 P.2d at 1083.

C. Substantial Evidence Supports the ALJ's Factual Findings

¶ 22 Having determined that the ALJ appropriately assessed substantial employment, we turn our attention to the sufficiency of the evidence. We have summarized the ALJ's many calculations illustrating the amount of time claimant spent in Colorado. Taking a generous view of the evidence — evidence that claimant concedes is not disputed — the ALJ calculated that, at most, claimant spent 6.2% of his time in Colorado. The ALJ's figures were supported by claimant's 2013 travel logs, the summary of travel to Colorado claimant's counsel prepared, and the Driver/Vehicle Examination reports employer submitted. The ALJ carefully and thoroughly

analyzed all of this evidence to arrive at his calculations. In our view, this evidence substantially supports the ALJ's findings.

¶ 23 Because substantial evidence supports the ALJ's factual finding that claimant was not "substantially employed" in Colorado, we are bound by the finding and may not set it aside. *See RCS Lumber*, 149 Colo. at 542, 369 P.2d at 987; *see also Patton*, 498 N.E.2d at 544.

III. Conclusion

¶ 24 The Panel's order is affirmed.

JUDGE WEBB and JUDGE MÁRQUEZ concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* *http://www.cba.cobar.org/repository/Access%20to%20Justice/AppelateProBono/CBAAppProBonoProg_PublicInfoApp.pdf*

COLORADO COURT OF APPEALS

DATE FILED: July 26, 2018
CASE NUMBER: 2017CA1546

Court of Appeals No. 17CA1546
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-947-921

Schwan's Home Service, Inc.; and Hartford Insurance Company,

Petitioners-Appellants,

v.

Industrial Claim Appeals Office of the State of Colorado and Owen D. Goff,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE WEBB
Fox and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 26, 2018

Pollart Miller LLC, Brad J. Miller, Jacqui D. Condon, Greenwood Village, Colorado, for Petitioners-Appellants

No Appearance for Respondent Industrial Claim Appeals Office

McDivitt Law Firm, Aaron S. Kennedy, Colorado Springs, Colorado, for Respondent Owen D. Goff

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this workers' compensation action, employer, Schwan's Home Service, Inc., and its insurer, Hartford Insurance Company, seek review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed the decision of an administrative law judge (ALJ) awarding medical benefits to claimant, Owen Goff. The ALJ rejected Schwan's contention that a prior ALJ's decision finding Goff did not suffer from complex regional pain syndrome (CRPS) precluded any subsequent award of medical benefits. Because we conclude that issue preclusion does not apply and because substantial evidence supports the ALJ's award of medical benefits, we affirm.

I. Background

¶ 2 Goff worked as a delivery driver for Schwan's. On April 4, 2014, he tripped, fell, and injured his right knee as he was walking down a customer's driveway to his truck after making a delivery. Drs. Bart Keller and Jack England of Plum Creek Medical initially treated the injury and diagnosed acute knee strain. In September 2014, Dr. David Oster performed an arthroscopic repair of Goff's right knee and diagnosed synovitis, an inflammation of the covering "that holds the knee and . . . fluid."

¶ 3 Goff's knee pain did not improve post-surgery and Dr. England later referred Goff to Dr. Gretchen Brunworth, a specialist in physical medicine and rehabilitation, for further treatment. Unable to pinpoint the cause of Goff's continuing pain, Dr. Brunworth became concerned that she "was missing something," which led her to present Goff's case to her colleagues for evaluation. Because Goff's pain complaints were "out of proportion to objective findings on an MRI," Dr. Brunworth and her colleagues suspected Goff suffered from complex regional pain syndrome (CRPS). Positive thermogram and quantitative sudomotor tests performed by Dr. Brunworth's colleague, Dr. Tashof Bernton, confirmed her CRPS suspicions. Dr. Bernton recommended a topical analgesic cream and a sympathetic block to treat the CRPS.

¶ 4 Although the sympathetic block resulted in "100% resolution of [Goff's] erythema and edema," it did not completely alleviate his pain. Consequently, Schwan's denied Dr. Brunworth's request for a second block.

¶ 5 A hearing was subsequently held before ALJ Donald Walsh to determine whether the recommended CRPS treatment was reasonable and necessary. Dr. Brunworth advocated for the

treatment and Schwan's medical expert, Dr. Marc Steinmetz, maintained that, because not all tests were positive for CRPS, Goff did not have the syndrome, his symptoms could be attributed to other causes, and he did not need the recommended treatment. Finding Dr. Steinmetz's opinions more persuasive and credible than those of Dr. Brunworth, ALJ Walsh ruled that Goff failed to establish by a preponderance of the evidence that he suffered from CRPS and denied his request for additional CRPS treatment.

¶ 6 The day after ALJ Walsh issued his order, Schwan's requested a twenty-four-month division-sponsored independent medical examination (DIME) pursuant to section 8-42-107(8)(b)(II), C.R.S. 2017, because neither Dr. Brunworth nor Goff's other treating physicians had placed him at maximum medical improvement (MMI). The selected DIME physician, Dr. Shimon Blau, agreed with Dr. Brunworth's assessment. Dr. Blau concluded that Goff was not at MMI, opined that he "very likely does have a diagnosis of CRPS," disagreed with Dr. Steinmetz that Goff's symptoms could be attributed "to chondromalacia and/or synovitis," and recommended a triple phase bone scan and another sympathetic block, also suggesting that the option of a "spinal cord

stimulator trial . . . should be kept on the table." After receiving Dr. Blau's report, Schwan's applied for a hearing to overcome the DIME findings.

¶ 7 ALJ Patrick Spencer conducted the second hearing. He heard testimony only from Goff, but admitted into evidence the transcript of the prior hearing before ALJ Walsh, at which Drs. Brunworth and Steinmetz had testified. ALJ Spencer also admitted over 600 pages of documentary evidence — including the medical reports of Drs. Steinmetz, Keller, England, Brunworth, Blau, Bernton, and Timothy Hall, a physician retained by Goff — some of which post-dated the first hearing.[1] Schwan's objected to the hearing, arguing that ALJ Walsh's determination that Goff did not suffer from CRPS precluded ALJ Spencer from ruling on the issue. But, citing several prior Panel decisions, ALJ Spencer held that a prior ruling does not constrain a later DIME determination. Consequently, ALJ Spencer found issue preclusion inapplicable.

¶ 8 ALJ Spencer held that Dr. Steinmetz merely expressed a difference of opinion with Drs. Blau and Brunworth, which did not

[1] Although the documentary evidence admitted at the second hearing is part of the record before us, the transcript of that second hearing before ALJ Spencer is not included.

constitute clear and convincing evidence to overcome Dr. Blau's DIME report. ALJ Spencer also found that the opinions of Dr. Brunworth, Dr. Bernton, and Dr. Hall, all corroborated Dr. Blau's assessment that Goff met the criteria for CRPS. He found their opinions more credible and persuasive than those of Dr. Steinmetz. Based on these credibility findings, ALJ Spencer ruled that Schwan's failed to overcome Dr. Blau's DIME opinions. And, because ALJ Spencer concluded Goff suffered from CRPS, he ordered Schwan's to cover the recommended CRPS treatment.

¶ 9 The Panel affirmed on review. It held that because the burdens of proof applicable at the two hearings differed, issue preclusion did not apply. It also affirmed ALJ Spencer's decision that Schwan's had not overcome the DIME determination and was liable for Goff's CRPS treatment because substantial evidence supported the finding.

II. Issue Preclusion

¶ 10 Schwan's first contends that because ALJ Walsh decided Goff did not suffer from CRPS, issue preclusion prevented ALJ Spencer from further considering the CRPS question. It argues that whether Goff suffered from CRPS was a critical issue in the hearing before

ALJ Walsh and that before ALJ Spencer. Because ALJ Walsh decided Goff did not have CRPS, Schwan's contends, ALJ Spencer was bound by that decision. We disagree.

A. Law Governing Issue Preclusion

¶ 11 Under the doctrine of issue preclusion, "once a court has decided an issue necessary to its judgment, the decision will preclude relitigation of that issue in a later action involving a party to the first case." *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007). Issue preclusion completely bars relitigation of an issue if the following four criteria are established:

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Sunny Acres Villa, Inc. v. Cooper, 25 P.3d 44, 47 (Colo. 2001). This doctrine applies in administrative proceedings, including workers' compensation claims. *See Red Junction, LLC v. Mesa Cty. Bd. of*

Cty. Comm'rs, 174 P.3d 841, 844 (Colo. App. 2007); *Holnam, Inc. v. Indus. Claim Appeals Office*, 159 P.3d 795, 797 (Colo. App. 2006).

¶ 12 The party seeking to preclude an issue from relitigation bears the burden of establishing the elements of the doctrine. *See Allen v. Martin*, 203 P.3d 546, 560 (Colo. App. 2008).

¶ 13 "Issue preclusion, also known as collateral estoppel, presents a question of law that we review de novo." *Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶ 17.

B. Issue Preclusion Is Inapplicable

¶ 14 The parties agree that the second, third, and fourth *Sunny Acres Villa* criteria are satisfied. They dispute, however, whether the issues raised in the two hearings were identical. Schwan's maintains that because the crux of the issue — whether Goff suffers from CRPS — was determinative in both hearings, issue preclusion applies.

¶ 15 "If two proceedings present different legal issues," issue preclusion may apply if the hearings "involve the same underlying factual issue." *Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 54 (quoting *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 506-07 (Colo. App. 2009)). But, differences between the facts

presented at the two hearings preclude Schwan's from establishing the first *Sunny Acres Villa* element.

¶ 16 Although whether Goff suffered from CRPS was central to both hearings, different evidence was presented at the two hearings. At the time of the first hearing, the DIME had not been completed. The DIME provided new facts and another doctor's perspective for ALJ Spencer to consider. In addition, Drs. Brunworth and England examined Goff after the first hearing, and ALJ Spencer admitted their ensuing reports into evidence. Thus, we conclude that because the evidence presented at the two hearings differed, the identity of issues element of issue preclusion was not satisfied.

¶ 17 True, rather than looking at the evidentiary differences, the Panel focused on the different burdens of proof governing the two hearings in declining to apply issue preclusion. In the first hearing, Goff had to establish by a preponderance of the evidence that the recommended CRPS treatment was reasonable and necessary. In contrast, at the second hearing, Schwan's had to show by clear and convincing evidence that Dr. Blau's opinion was incorrect. *See Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) ("[T]o overcome the DIME physician's opinion, the

evidence must establish that it is incorrect. Such evidence must be unmistakable and free from serious or substantial doubt.").

¶ 18 However, an appellate court may affirm "on any ground supported by the record, whether relied upon or even considered by the trial court." *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006). Thus, because we review issue preclusion de novo and the record shows that materially different evidence was presented, we need not accept Schwan's invitation to disregard the differences in the burdens of proof because, according to Schwan's, "[t]here is no requirement that differing burdens of proof absolutely bars the defense of issue preclusion." The same is true of Schwan's assertion at oral argument that the differing burdens of proof are irrelevant because it risked the same exposure at both hearings and therefore "had the same incentive to vigorously defend itself in the previous action" as it did at the second hearing. *Sunny Acres Villa*, 25 P.3d at 47.

¶ 19 For these reasons, we hold that issue preclusion did not bar ALJ Spencer from considering whether Schwan's overcame the DIME's conclusion that Goff suffered from CRPS.

III. Overcoming the DIME Determination

¶ 20 Having determined that ALJ Walsh's order did not preclude ALJ Spencer from considering whether Schwan's overcame the DIME's findings, we turn to the sufficiency of the evidence supporting ALJ Spencer's findings. Schwan's contends that the weight of the evidence favors its position and that it therefore amply established the inaccuracy of Dr. Blau's DIME report. It argues that "there was no new evidence" obtained after ALJ Walsh's order "that would support a diagnosis of CRPS." Relying primarily on Dr. Steinmetz's opinions and testimony at the first hearing, Schwan's asserts that Goff does not exhibit classic symptoms of CRPS and that Dr. Blau's call for more testing falls short of establishing that Goff actually suffers from CRPS and needs the treatment Dr. Brunworth recommended. We are not persuaded.

A. Standard of Review for Overcoming DIME Decisions

¶ 21 A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from

serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Thus, a party seeking to overcome a DIME's impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's rating is incorrect. Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. Such evidence must be unmistakable and free from serious or substantial doubt." *Leming*, 62 P.3d at 1019 (citations omitted).

¶ 22 Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414. Consequently, we may not set aside the ALJ's determination that a party has or has not overcome the DIME if the finding is supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2017.

B. Substantial Evidence Supports ALJ Spencer's Finding That Schwan's Failed to Overcome the DIME Determination

¶ 23 Here, Schwan's questioned Dr. Brunworth's recommendation for additional treatment and her opinion that Goff was not yet at MMI. It therefore requested a twenty-four-month DIME to challenge her conclusions. But Dr. Blau, who performed the DIME,

concluded Goff "very likely does have a diagnosis of CRPS," found Goff was not at MMI, and agreed with Dr. Brunworth's treatment recommendations.

¶ 24 At the hearing challenging the DIME results, Schwan's introduced no new evidence, instead relying on Dr. Steinmetz's report and testimony before ALJ Walsh. ALJ Spencer found, though, that Dr. Steinmetz's conclusions merely differed with Dr. Blau's opinions and consequently were insufficient to clearly and convincingly overcome the DIME decision. Citing several Panel decisions, ALJ Spencer reiterated that "'mere differences of opinion' do not constitute clear and convincing evidence that the DIME's determination is incorrect." He also noted that Drs. Brunworth, Bernton, and Hall all corroborated Dr. Blau's opinions. Finally, ALJ Spencer observed that Dr. Blau's DIME report "provides critical new and persuasive evidence regarding [Goff's] diagnosis that was not available to ALJ Walsh."

¶ 25 Although Dr. Steinmetz's opinions could support the conclusion that Goff does not suffer from CRPS, ALJ Spencer found that Dr. Steinmetz's opinion, even when combined with the other evidence Schwan's presented, did not rise to the clear and

convincing level required to overcome the DIME. We cannot set aside that determination if it is supported by substantial evidence in the record. *See* § 8-43-308; *Metro Moving & Storage*, 914 P.2d at 414. And, here, as ALJ Spencer found, Dr. Blau based his opinion on a thorough examination of Goff and a review of Goff's medical history. In addition, several physicians, including Drs. Brunworth, Bernton, and Hall, corroborated Dr. Blau's DIME conclusions.

¶ 26 Because this evidence amply supports ALJ Spencer's finding that Schwan's failed to overcome Dr. Blau's DIME opinion, the Panel correctly held that ALJ Spencer's order could not be set aside. Accordingly, the Panel did not err in affirming the order awarding Goff medical benefits for CRPS treatment. *See* § 8-43-308; *Metro Moving & Storage*, 914 P.2d at 414.

IV. Conclusion

¶ 27 The Panel's decision is affirmed.

JUDGE FOX and JUDGE MÁRQUEZ concur.

Court of Appeals

STATE OF COLORADO
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Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

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BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-053-962

IN THE MATTER OF THE CLAIM OF:

DOUGLAS TEW,

Claimant,

v.

ZACHS TRANSMISSION & 4X4 LLC,

Employer,

and

MILBANK INSURANCE CO,

Insurer,
Respondents.

FINAL ORDER

The respondents seek review of two orders of the Director of the Division of Workers' Compensation (Director) dated November 17, 2017, and February 13, 2018,[1] which assessed penalties against the respondents. We affirm the orders.

This claim involves a work-related injury that occurred on July 26, 2017. The claimant reported his injury to the respondent employer on July 28, 2017. The employer's First Report of Injury (FROI) was completed on the same date and was filed with the Division via electronic data interchange (EDI) on August 10, 2017. The respondents contend that they filed a Notice of Contest (NOC) via EDI on August 17, 2017.

Upon referral from the claims management unit, the Director issued an order on October 5, 2017, finding that the FROI was filed on August 10, 2017, but that the respondent insurer had failed to file a position statement either admitting or contesting liability as required by §8-43-203, C.R.S. and Rule 5-2(C), Workers' Compensation Rules of Procedure, 7 Colo. Code Reg. 1101-3. On October 5, 2017, the Director entered an order directing the respondent insurer to, within 15 days, either file the required position statement or provide a written explanation as to why a position statement is not required. The certificate of mailing showed that the order was mailed to all of the parties, but, as pertinent to our review, was specifically mailed to the insurer at the following

[1] The order and the certificate of mailing were both mistakenly dated as February 13, 2017. However, the date of the order and the service thereof was actually February 13, 2018.

address: Milbank Insurance Co., c/o Royal Insurance Co., PO Box 6506 Englewood, CO 80155.

The Director received no response from the insurer, which prompted him to enter a second order on November, 17, 2017, finding that the insurer had not filed a position statement or an explanation as to why such a position statement was not required. In addition, the order imposed penalties of $40 per day from October 23, 2017, and continuing until the insurer's position statement or explanation was filed. The certificate of service showed that the order again was mailed to Milbank Insurance Co., c/o Royal Insurance Co., PO Box 6506 Englewood, CO 80155. This order was returned by the U.S. Postal Service to the Division on or about November 25, 2017, as "not deliverable as addressed—unable to forward." The Division investigated further and apparently emailed the insurer on December 4, 2017, and explained the situation. The respondent insurer contends that this contact was its first notice 1) that the October 5, 2017, order had been issued, 2) that the November 17, 2017, order had been issued, and 3) that the August 17, 2017, EDI filing of the NOC had been rejected by the Division.

Once notified of these events by the Division, the insurer took immediate steps to fulfill the Division's directives. The insurer first informed the Division's investigator of its change of address. On December 6, 2017, the respondents filed a petition to review the Director's November 17, 2017 order. The respondents also filed a written request for reconsideration of the Director's November 17, 2017, penalty order on December 7, 2017. The respondents attempted to refile the NOC via EDI on December 7, 2017, but it was rejected for reasons that are not reflected in the record. On December 12, 2017, the filing of the NOC via EDI was finally accepted.

The respondents requested a prehearing conference on their request for reconsideration of the Director's penalty order. A prehearing conference was held on December 21, 2017, before PALJ Barbo. PALJ Barbo denied the request for reconsideration of the Director's penalty order on the bases that the order was final and he did not have statutory authority to reconsider such an order. The request for reconsideration was held in abeyance pending the briefing by the parties related to the petition to review.

The Director entered a supplemental order on February 13, 2018, addressing both the request for reconsideration and the petition to review. The Director confirmed that both prior orders were mailed to the Englewood, CO post office box set forth above. The respondents do not dispute that the Englewood address was the address that they previously had supplied to the Division as the appropriate mailing address for the respondent insurer in accordance with Rule 5-14. The Director further found that the

respondents "did not provide an updated address to the Division until after the penalty order had been returned as undeliverable and Division staff began an investigation." The Director also found in paragraph 8 of the order:

> Respondents also argue that the correct address was supplied in their FROI (acronym in the original) and that the Division should have used that address rather than the primary address already on file. The address supplied to the Division on the FROI is 518 E. Broad St. in Columbus, Ohio. While that is not the address used by the Division, neither is it the address supplied by Respondents in the pleadings.

On appeal, the respondents argue that the Director's November 17, 2017, and February 13, 2018, orders should be set aside because they did not have actual notice of them through no fault of their own. However, we conclude this argument is refuted by the record. The Division mailed the orders to the address of record for the insurer—Milbank Insurance Co., c/o Royal Insurance Co., PO Box 6506 Englewood, CO 80155. The respondents do not dispute that that address had been provided to the Division as the "address of record," and that it remained the respondent insurer's address of record when the Division's orders were served.

Rule 5-14 states in pertinent part as follows:

> CORRESPONDENCE FROM THE DIVISION
> (A) Every insurer and self-insured employer shall provide a mailing address for the receipt of communication from the division. All correspondence from the division regarding the claim will be sent to the address provided by the insurer or self-insured employer. Mailing to the address provided is deemed good service.
> (B) An insurer or self-insured employer may designate a third party administrator (TPA) to handle specific claims by noting the designation on the first report of injury or an admission of liability. No correspondence will be sent to the TPA unless such a designation is made.
>
> * * *
>
> (2) The insurer or self-insured employer remains responsible for ensuring compliance with these rules of procedure as well as the workers' compensation act regardless of any designation of a third party administrator.

The rule makes clear that the onus is on the insurer to adequately and accurately notify the Division of any changes of address. This is underscored by Rule 5-14(A), which states that mailing to the address provided (the address of record) is "deemed good service." The fact that the Division did not also mail the orders to the TPA, as suggested by the respondents in their brief, does not eliminate or excuse the insurer's responsibility to provide proper notice of its current address to the Division in the first instance. We do not view Rule 5-14(B) as an exception to this requirement.

The respondents are presumed to know their right to notice is dependent on compliance with the rules of the Division. They may not now assert that they are denied the right to notice if they are themselves responsible for failure to receive the notice. *Klingbeil v. State*, 668 P.2d 930 (Colo. 1983); *see also Maryott v. J&H Properties,* W.C. No. 4-157-363 (April 28, 1997). Consequently, we perceive no error in the Director's determination that the right to actual notice was foreclosed by respondents' failure to comply with the rules applicable to a proper notification of address and other contact information.

IT IS THEREFORE ORDERED that the Director's orders dated November 17, 2017 and February 13, 2018, are 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

7/3/18 by TT .

DOUGLAS TEW, PO BOX 80540, LYONS, CO, 80540 (Claimant)
MCCOLLUM CROWLEY MOSCHET MILLER & LAAK LTD, Attn: JESSICA M EDISMOE ESQ, 1999 BROADWAY STE 1425, DENVER, CO, 80202 (For Respondents)
DIVISION OF WORKERS COMPENSATION, Attn: TAYLOR DURAN, 633 17TH STREET STE 400, DENVER, CO, 80202 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-714-01

IN THE MATTER OF THE CLAIM OF:

DAMIAN VALLE,

Claimant,

v.

REMAND ORDER

PRECISION DRILLING,

Employer,

and

ZURICH AMERICAN INSURANCE CO,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Goldman (ALJ) dated January 8, 2018, that ordered the respondents to pay the claimant temporary total disability benefits after the claimant refused an offer of modified employment. We set aside the ALJ's order and remand for further findings and a new order.

This matter went to hearing on the issue of temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as a floorhand. The claimant's job duties included throwing tongs, pulling slips weighing up to 300 pounds, and general rig clean up. The claimant sustained a compensable upper extremity injury on June 7, 2017, while pulling slips with a co-worker. The claimant initially received medical care onsite with Axiom, an online nursing service. The claimant was seen on June 8, 2017, at Banner Health by Dr. Hebard. Dr. Hebard released the claimant to return to modified duty on June 8, 2017, with restrictions of using the left hand and arm. The claimant was to remain on modified duty until at least the next appointment scheduled on June 22, 2017.

The claimant returned to the jobsite after this appointment and went to sleep in the company-provided crew quarters. After the claimant woke up at approximately midnight he was directed to find the rig supervisor to discuss modified job duties that the employer had available for the claimant. On June 8, 2017, the claimant received a job offer from

corporate headquarters based on the restrictions assigned by Dr. Hebard. The modified job offer was addressed to the claimant and included a transitional work plan based on the restrictions assigned by Dr. Hebard. The position was a "Modified Floorhand" at full wages and full-time hours for the claimant to perform general administrative and other duties assigned within the claimant's restriction. The modified job was for a limited period of time, June 8, 2017 through June 22, 2017, and indicated that "after each appointment with an Examining Physician or Treating Physician, a new Bona Fide Offer of Employment will be generated by Human Resources for your signature."

The claimant met with the rig supervisor around midnight on June 8, which was during the claimant's regular work shift. The rig supervisor went through the modified job offer with the claimant point by point, informing him that he would receive a full rate of pay, full time hours and that the company was offering him a modified position within the work restrictions assigned by Dr. Hebard. The claimant was advised that he would be reviewing company documents such as prior safety alerts, training manuals, the new employee orientation handbook and other documents located in the safety room. The claimant verbally declined the modified job offer and told the rig supervisor that he did not want to read books for 12 hours a day for two weeks. The claimant then initialed the job offer document on the line which stated "I have read and declined this Bona Fide Offer." The claimant also signed and dated the document. At the claimant's request, he was then given a ride home.

The claimant argued at hearing that he did not understand what he was signing and was being treated like a child by the rig supervisor. The ALJ did not find the claimant credible in this regard. Relying instead on the testimony of the rig supervisor, the ALJ determined that the offer was presented to the claimant in a straightforward manner and that the claimant fully understood the document.

The claimant returned to Banner Occupational Health Clinic on July 17, 2017, and was evaluated by Dr. Vlahovich. Dr. Vlahovich continued to restrict the claimant to modified duty but modified the claimant's restrictions to no lifting of more than five pounds with his left upper extremity and restricted the claimant from doing any overhead work with his left arm. The ALJ credited Dr. Vlahovich's report as it related to restrictions and the claimant's inability to perform his regular job from June 8, 2017 thorough at least July 17, 2017.

The ALJ found that the claimant's industrial injury was disabling and prevented the claimant from performing his regular job duties as a floorhand and that the claimant's disability and inability to perform his regular job duties as a floorhand lasted more than

three work shifts. The ALJ determined that the claimant's injury and disability is the cause of his actual wage loss.

The ALJ went on to determine that even though the claimant refused an offer of modified employment for a limited period of time, his refusal occurred on June 8, 2017, which is before the claimant missed three work shifts and became entitled to temporary disability benefits. Citing to *Archuletta v. Industrial Claim Appeals Office,* 381 P.3d 374 (Colo. App. 2016), the ALJ held that although the refusal of an offer of modified employment can be the basis for the termination of temporary total disability benefits under §8-42-105(3)(d)(1), C.R.S., the respondents here were not terminating disability benefits because the claimant was neither entitled to nor receiving temporary disability benefits when the job offer was made. The ALJ, therefore, determined that the claimant is entitled temporary total disability benefits from June 8, 2017, and continuing.

On appeal, the respondents contend that the ALJ erred in applying *Archuletta* to the facts of this case. The respondents contend that even though the §8-42-105(3)(d), C.R.S. does not apply to terminate temporary disability benefits because the benefits had not been started yet, the ALJ was still required to address whether the claimant's voluntary refusal to accept the offer of modified duty was the cause of his subsequent wage loss. The respondents contend that that the only legal basis the ALJ gave for disregarding the claimant's refusal of modified duty as the cause of the wage loss was that the timing of the offer came before temporary benefits had commenced. Because the ALJ's findings of fact are insufficient to permit appellate review on this issue, we must remand the matter for further findings.

In *Archuletta*¸ the claimant sustained an injury and immediately returned to modified duty. The claimant was eventually released to full duty with no restrictions. The claimant, however, maintained that he was unable to work full duty. An ALJ awarded temporary total disability benefits finding that the claimant was unable to perform his full job duties as a result of the industrial injury and that the claimant established that his wage loss was directly attributable to his industrial injury. The Industrial Claim Appeals Office set aside the ALJ's order and determined that under §8-42-105(3)(c), the ALJ was not free to disregard the full duty work release by the attending physician. The court of appeals disagreed and reinstated the ALJ's order awarding temporary disability benefits. The court reasoned that §8-42-105 (3)(c), C.R.S., which provides for the termination of temporary disability benefits upon a release to full duty, did not apply to the claimant because this statute applies to the termination of benefits and in a situation such as here where no benefits had started when the attending physician had release the claimant to work, the case should have been analyzed under §8-

42-103, C.R.S. and §8-42-105(1), C.R.S., which applies to the commencement of benefits. The court noted that those sections did not expressly bar the commencement of temporary disability benefits if an attending physician had released the claimant to full duty.

Similarly, in the present case, under *Archuletta*, the claimant's refusal of an offer of modified duty cannot conclusively operate to terminate temporary disability benefits under §8-42-105(3)(d), C.R.S. because no benefits had been started. The ALJ was instead required to address the claimant's initial entitlement to temporary disability benefits pursuant to §8-42-103(1), C.R.S. Under this statute, a claimant must first establish a causal connection between the work related injury and any subsequent wage loss. *Champion Auto Body v. ICAO*, 95 P.2d 671, 673 (Colo. App. 1997). Refusal of an offer of modified employment may affect the claimant's initial entitlement to temporary disability if it is determined that the claimant is responsible for his wage loss. As noted 8-42-103, C.R.S. sets forth the threshold conditions that must apply before a claimant becomes entitled to temporary total disability benefits. Pursuant to Section 8-42-103(1)(g), threshold entitlement to temporary total disability benefits is precluded where the employee is responsible for the termination of employment. The court of appeals has noted "the wide range of circumstances" the General Assembly sought to address when it enacted §8-42-103(1)(g), C.R.S. *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 1061, 1063 (Colo. App. 2002). Thus, the refusal of a modified job offer is a relevant factor for the ALJ to consider in making the initial determination of the claimant's entitlement to temporary disability benefits.

The ALJ here found that the claimant's work restrictions precluded him from performing his regular job duties and that he subsequently lost wages. Although the ALJ found that the claimant was offered a modified duty position with the employer that was within the claimant's work restriction at the time and the claimant refused that offer because he did not want to perform those duties, the ALJ does not appear to have addressed the respondents' contention that the claimant's refusal to accept the offer of modified employment could have been *the cause* of his wage loss. To the extent the ALJ disregarded the claimant's refusal of modified duty as the cause of the claimant's wage loss simply because the offer came before the temporary disability benefits had commenced is a misapplication of the holding in *Archuletta*.

Because we are unable to determine whether the ALJ considered the effect of the claimant's refusal of the offer of modified employment on the cause of his wage loss, we necessarily remand the matter to the ALJ. On remand, the ALJ must address the effect of the claimant's refusal of the offer of modified employment on the claimant's entitlement

to temporary disability benefits. Section 8-43-301(8), C.R.S. (remand appropriate for findings insufficient to permit appellate review).

IT IS THEREFORE ORDERED that the ALJ's order dated January 8, 2018, is remanded for entry of further findings and a new order.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

7/23/18 by TT .

BACHUS & SCHANKER LLC, Attn: JAMES W OLSEN ESQ, 1899 WYNKOOP STREET SUITE 700, DENVER, CO, 80202 (For Claimant)
RITSEMA & LYON PC, Attn: DAVID R BENNET ESQ, C/O: ELIOT J WIENER ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-054-125-01

IN THE MATTER OF THE CLAIM OF:

ALEX WILLHOIT,

Claimant,

v.

FINAL ORDER

MAGGIE'S FARM,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Edie (ALJ) dated March 14, 2018, that denied temporary total disability benefits (TTD) from September 11, 2017 and ongoing. We affirm the ALJ's order.

An evidentiary hearing on the matter took place on February 1, 2018, on whether the claimant had justifiably refused an offer of modified employment and whether the respondents' liability for TTD accordingly ended on September 11, 2017. After the hearing, on February 20, 2018, the respondents filed a contested motion to submit additional documentary evidence. Specifically, the respondents sought to add a patient questionnaire from the medical file of Dr. Primack. Ex. A to the motion to submit post-hearing evidence. The ALJ granted the motion on February 21, 2018, without permitting time for the claimant to file either a written objection or a brief in response to the motion. We determine that the admission of the patient questionnaire without permitting the claimant time to file an objection thereto, is in error under Rule 16(E) of the rules of procedure of the Office of Administrative Courts (O.A.C.R.P.), 1 Code Colo. Reg., 104-3 at 7, but based on the findings below, such error is harmless.

In his order, the ALJ established findings of fact, which are summarized below. The claimant was employed as a cultivation technician for a marijuana farm. The claimant performed outdoor manual labor. One week after he began his employment, the claimant sustained an injury to his right knee on July 31, 2017, when it just "gave out."

The claimant reported that he did not fall, twist or hyperextend the knee. The claimant's authorized treating physician (ATP) was stipulated by the parties as Dr. Bradley. After medical evaluation on the day of the injury, Dr. Bradley assigned work restrictions of no lifting, carrying, pushing or pulling more than 5 pounds; no walking or standing for more than 1 hour total per day (5 to 10 minutes at one time); and 7 hours sitting per day (55 minutes per hour). The claimant was instructed to wear a brace, and use crutches. The claimant was unable to work in his regular job and TTD benefits were instituted.

After follow-up appointments on August 4 and 21, 2017, the physical restrictions remained in place with minimal changes (sitting for 50 minutes over 7 hours). An orthopedic specialist, Dr. Simpson, evaluated the claimant and diagnosed a patellar subluxation with bone contusion and mild strain of the medial collateral ligament, and concluded that the injury could be managed without surgery.

The respondents identified a modified duty position for the claimant that they felt would accommodate the restrictions and on August 25, 2017, sent a letter to Dr. Bradley explaining the modified position. The letter stated that the modified position would require "sitting in a room trimming the leaves off of plants using scissors. Involves sitting, reaching, handling and no lifting/carrying/push/pulling over 5 lbs." The job required the employee to trim buds from marijuana plants with tiny scissors, shorter than the length of a pen, and equivalent to a cuticle scissor. The buds are the size of a quarter and weigh a few ounces. The job can be performed while sitting or standing. Dr. Bradley approved the modified duty position on August 29, and further delineated the physical restrictions as "l/c [lifting/carrying] less than 5 lbs., sit 50 minutes per hour, stand/walk 10 minutes per hour." In conformity with Dr. Bradley's approval of the position, on August 30 the employer formally offered the claimant, in writing, the modified position with a starting date of September 11, 2017.

Coincidentally on August 29, the claimant had a follow-up appointment with Dr. Bradley. Dr. Bradley outlined restrictions of lifting, carrying, pushing/pulling five pounds; walking for one hour per day; standing for one hour per day; and sitting for seven hours per day. By signature, the claimant acknowledged these restrictions. These restrictions were similar but not identical to the restrictions assigned by Dr. Bradley in response to the respondent's letter. The ALJ determined that the medical restrictions which were in place on September 11 were: "no lifting, carrying, pushing/pulling more than five pounds; walking for one hour a day at a rate of 10 minutes per hour; standing for one hour a day at a rate of 10 minutes per hour; and sitting for seven hours a day or 50 minutes per hour."

The claimant did not return to work on September 11 or thereafter. During his employment, the claimant had never worked in and had never even seen the trim station. The claimant testified that he believed he had restrictions beyond the restrictions Dr. Bradley had assigned on August 29. The claimant believed that he had additional restrictions that included applying a warm moist compress to his knee, stretching hourly, and resting, icing, and elevating his knee. Parenthetically, these recommendations were contained in Dr. Bradley's August 29 report under the heading "Assessment/Plan." The ALJ discounted the claimant's testimony regarding his perceived additional restrictions, stating that they were "treatment recommendations," not "work restrictions."

Confusing the situation, the claimant saw Dr. Bradley in follow-up on September 11, four hours after he did not appear for the modified job. During this evaluation, the claimant complained of lower back tenderness (a new complaint). Without indicating that the lower back condition was work related, Dr. Bradley added a new diagnosis of "strain of muscle, fascia and tendon of lower back, initial encounter." The doctor also recommended applying ice or heat to the low back for 20 minutes, three times per day; no heavy lifting, carrying, pushing, pulling; rest on a firm surface flat on the back with a pillow underneath the knees; apply warm compresses to the low back for 15-20 minutes, 4 times per day; perform home exercises [to include] stretches hourly while awake. He stated, "This is essential for your recovery." However, Dr. Bradley did not otherwise alter the physical job restrictions from those given on August 29.

On December 15, 2017, the claimant complained additionally of neck pain. Dr. Bradley opined that the neck condition as well as the low back condition was not work related, but continued to recommend therapy to deal with the conditions. The ALJ credited Dr. Bradley's opinion and determined that neither the neck nor the low back condition was work related.

The ALJ was not persuaded that the treatment recommendations of August 29 or September 11 should have been characterized as work restrictions. The ALJ credited the testimony of Ms. Northern, the employer's human resources director, that even if the treatment recommendations were considered to be work restrictions, the employer could and would have further modified the job to accommodate them.

The claimant was terminated from the employment after he failed to return to work and failed to call in for three consecutive days after he was scheduled to return to work. Claimant's actions were in violation of the employer's attendance policies as stated in the employment handbook that the claimant concededly had been given on the date of hire.

Dr. Bradley referred the claimant to Dr. Primack for further evaluation, which took place on November 14, 2017. Dr. Primack indicated that there was no specific mechanism of injury or injury to the lumbar spine since the patient was just standing and felt his knee buckle. In addition, the doctor stated that the mechanism of the knee injury was "suspicious regarding causality." However, he did not provide a medical-legal opinion in that regard. After the hearing, a patient questionnaire from Dr. Primack's file was entered into evidence by the ALJ, contrary to Rule 16(E), O.A.C.R.P. In this questionnaire, the claimant self-reported his physical restrictions as "lifting, pushing, and pulling five pounds." The ALJ noted that the claimant did not include his self-perceived restrictions from his back or knee conditions.

The ALJ concluded that the employer had satisfied the three-part test for the termination of TTD benefits under § 8-42-105(3)(d)(I), C.R.S.: "1) the attending physician gives the employee a written release to return to modified employment; 2) such employment is offered to the employee in writing, and 3) the employee fails to begin such employment."

The ALJ further concluded that the claimant was responsible for his termination from employment and consequently was not entitled to receive benefits for his wage loss after the date of termination. The ALJ held that claimant's failure to return to work in a position that was within his work restrictions and his failure to call in to work to explain his non-attendance was a volitional act and directly led to his termination. The ALJ denied and dismissed TTD benefits from September 11, 2017 and ongoing.

The claimant has appealed, first arguing that the claimant was justified in not reporting for the proffered modified duty job, as it required the claimant to violate his medical restrictions. The basis for this argument is that the modified job offer did not allow the claimant to take a break every three to four hours to apply warm, moist compresses to his right knee or his low back for 15 to 20 minutes at a time. It did not allow him to do exercises, including stretches, every hour. It did not allow him to use ice, and elevate his right knee. It did not allow him to apply either ice or heat to his back for 20 minutes at a time. It did not allow him to rest on a firm surface flat on his back with a pillow underneath his knees. It did not allow him to take a 10 minute break every 50 minutes. The claimant contends that the ALJ erred in differentiating these activities as "treatment recommendations" as opposed to "physical restrictions." The claimant essentially argues that the ALJ wrongfully concocted a new legal construct of "treatment recommendations" that do not have to be followed by the employer in crafting modified duty employment. The claimant asserts that the term "treatment recommendations" is

vague, undefined, novel, and does not follow established case law. The claimant cites the ICAO cases of *Lennon v. South Valley Drywall*, W.C. No. 4-357-330 (November 26, 1999) and *Schwanz v. Artex, Inc.*, W.C. No. 4-519-781 (July 11, 2002) in support of his argument.

As a second basis, the claimant argues that the ALJ erred in finding that the Claimant's self-perceived restrictions were simply a matter of "personal opinion." Rather, he argues it is self-evident that the job offer did not accommodate both the treatment recommendations and physical restrictions contained within Dr. Bradley's August 29 or September 11 medical reports.

Third, the claimant argues that the ALJ erred in discounting any recommendations or limitations that arose from the low back condition because the parties could not have known that they were not work-related at the time they were assigned.

Fourth, the claimant contends that the ALJ erred in relying on testimony from Ms. Northern regarding other job accommodations that could have been made because all such accommodations were not offered in writing in the job offer.

Fifth, the claimant contends that the ALJ erred in finding that the claimant was at fault for his termination. Again, the claimant advances that the ALJ has "literally found that the claimant was at fault for not accepting a job that would have required him to violate his work-restrictions." In addition, the claimant states that he was not at fault for his termination because he "had a good-faith basis for believing that the modified job offer violated his restrictions."

Lastly, the claimant argues that the ALJ erred in admitting post-hearing evidence without giving the claimant a chance to object to the evidence, which he contends was a violation of his due process rights.

The issues that we address are whether substantial evidence and the applicable law support the ALJ's determination that the claimant is not entitled to TTD benefits after September 11, 2017, due to his failure to begin an offer of modified employment under § 8-42-105(3)(d)(I), C.R.S., and his resulting termination from employment under § 8-42-103(g) and 8-42-105(4)(a), C.R.S.

Under § 8-42-105(3)(d)(I), C.R.S., TTD benefits shall terminate when the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. The term "fails to begin" is defined as "a failure to start the modified employment in the first instance." *Liberty Heights at Northgate v. ICAO,* 30 P.3d 872, 874 (Colo. App. 2001). Termination of TTD benefits is mandatory once the requirements of § 8-42-105(3)(d)(I) are satisfied. *Laurel Manor Care v. ICAO*, 964 P.2d 589, 590 (Colo. App. 1998). The legal test is whether the offered employment is reasonably available to the claimant under an objective standard and determination of this issue is one of fact for the ALJ. *Villa v. Harvest Select*, W.C. No. 4-694-064 (ICAO, Oct. 3, 2008).

The term "modified employment" means employment within the restrictions established by the attending physician. *See Flores-Arteaga v. Apple Hills Orchard Juice Co.,* W.C. No. 3-101-024 (ICAO, Feb. 15, 1996). If there is a conflict in the record regarding a claimant's release to return to work, the ALJ has discretion to resolve the conflict. *Imperial Headware, Inc.v. ICAO,* 15 P.3d 295, 296 (Colo. App. 2000). The modified employment must be reasonably available to the injured worker under an "objective standard." *Ragan v. Temp Force*, W.C. No. 4-216-578 (ICAO, June 7, 1996). An injured worker's subjective beliefs about his ability to perform a modified job are legally irrelevant, and do not provide a basis to refuse to begin modified employment. *Burns v. Robinson Dairy,* 911 P.2d 661, 663 (Colo. App. 1995).

It was the burden of the Respondents to prove that the claimant failed to begin modified employment while claimant had the burden to show that the modified employment exceeded his physical restrictions or was unreasonable. *Bull v. Dynalectric,* W.C. No. 4-654-356 (ICAO, Nov. 18, 2006); *Loya v.Colorado Roofing Contractors, Inc.,* W.C. No. 4-530-597 (ICAO, July 22, 2004). The questions of whether the attending physician released the claimant to modified employment, and whether the proffered employment falls within the restrictions, are questions of fact to be determined by the ALJ. *Chavez v. TTC Illinois, Inc.,* W.C. No. 4-296-456 (ICAO, July 31, 1997).

Because the issue is one of fact, we must uphold the ALJ's findings if they are supported by substantial evidence in the record. § 8-43-301(8), C.R.S.; *City of Durango v. Dunagan*, 939 P.2d 496, 498 (Colo. App. 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. *Monfort, Inc. v. Rangel,* 867 P.2d 122, 125 (Colo. App. 1993). This standard of review requires us to defer to the ALJ's resolution of the conflicts in the evidence, credibility

determinations, and the plausible inferences drawn therefrom. *Id.* In this regard, the scope of our review is exceedingly narrow. *Metro Moving & Storage Co., v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

In his order, the ALJ differentiated between "treatment recommendations" and "physical limitations." As if by rote, in every medical report authored by Dr. Bradley, he recommended that the claimant rest, apply ice or heat, compress, stretch, and elevate his knee. On September 11, the doctor extended virtually the same recommendations for the back problem. These recommendations mimic the first-aid method of "RICE" (a mnemonic for four elements of treatment for soft tissue injuries: rest, ice, compression, and elevation). RICE is a self-care technique recommended to help reduce swelling, ease pain, and speed up healing. *Webmd.com website*.

In our view, the ALJ is not inventing a new legal doctrine by differentiating between the doctor's RICE recommendations and his separate physical restrictions. Rather, we see the discussion as a window into the ALJ's thinking regarding his fact-finding function of determining whether the claimant could perform the job that was offered.

It cannot be disputed that Dr. Bradley was aware of his treatment (RICE) recommendations and the claimant's physical limitations when he approved the modified job that the employer was offering. The ALJ reasonably inferred that regardless of the treatment recommendations in Dr. Bradley's August 29 and September 11 medical reports, the job that was offered to the claimant was medically approved. The claimant knew that Dr. Bradley had approved the job duties. The employer properly notified the claimant of the job offer, in writing, and the job's starting date. The claimant determined that he could not perform the job, a conclusion in direct contradiction with the medical approval of Dr. Bradley.

We find that substantial evidence supports the ALJ's finding that the respondents proved each of the § 8-42-105(3)(d)(I) factors. Dr. Bradley, the claimant's attending physician, provided him with a written release to return to modified employment on August 29, 2017. Ms. Northern sent the claimant a letter offering him the modified position in the trim station to begin on September 11, 2017. Claimant conceded he received this letter, but failed to begin the offered job. These findings are legally sufficient to support the ALJ's order denying the claimant's request for temporary benefits subsequent to September 11, 2017. *McCloud v. Progressive Insurance*, W.C. No. 4-980-200-01 (April 1, 2016).

As we held in *McCloud, supra.*, an alternative basis for terminating eligibility for temporary benefits lies in the respondents' contention the claimant was responsible for his termination of employment through his refusal to accept an of modified employment as provided in § 8-42-105(4)(b), C.R.S. Having failed to begin the job or call-in over a three day period, the employer consequently terminated the claimant's employment. The ALJ's finding that the claimant was "at fault" for his termination is supported by substantial evidence and will not be disturbed.

It was within the ALJ's discretion to discredit claimant's testimony that the modified position exceeded Dr. Bradley's restrictions. An ALJ may credit all, part, or none of a witness's testimony. *Monfort, Inc. v. Rangel, supra*.

The cases cited by the claimant in support of his argument, *Lennon v. South Valley Drywall, supra.*, and *Schwanz v. Artex, Inc., supra.*, are of no avail and are easily distinguished. In *Lennon,* the claimant was offered a modified duty job that was approved by his attending physician. He attempted to perform the job but found, after one hour, he was not able to perform the duties and left the job. The ALJ determined that the claimant proved the offer of modified employment was unreasonable and the offer exceeded the claimant's medical restrictions. ICAO affirmed as the findings were supported by substantial evidence.

In *Schwanz*, the claimant (a Colorado resident) was offered modified employment in Nebraska. The employer offered transportation to accommodate the travel. The claimant's attending physician restricted the claimant from long distance travel. The ALJ determined that the modified employment was not objectively reasonable as it required long distance travel. ICAO affirmed because the facts and law supported the ALJ's order. Both cases rely on the discretion of the fact-finder, and in each case the ALJ found in favor of the claimant. Here, the ALJ resolved the conflicts in the evidence in favor of the employer and found that the offer was within the claimant's medical restrictions.

The ALJ discounted the claimant's self-perceived restrictions and called them "personal opinions." Claimant submits that this is reversible error, essentially arguing that the ALJ wrongfully credited the actual physical restrictions rather than the claimant's understanding of the restrictions in conjunction with the doctor's medical recommendations. We find no error. It was within the ALJ's discretion to resolve conflicts in the evidence. *Imperial Headware, Inc.v. ICAO, supra*.

The ALJ found that the low back condition was not work related. Claimant argues that the ALJ erred by not including the treatment recommendations for the low back as

part of the overall physical restrictions. This argument is no different than the same argument involving the knee injury. The result is the same, we find no error.

In his fourth allegation of error, the claimant argues that the ALJ wrongfully relied on testimony from Ms. Northern regarding the employer's ability to accommodate the claimant's restrictions even if they included the treatment recommendations. We need not address this contention because the ALJ, with record support, found that the job, as offered, was within the claimant's physical restrictions. The ALJ's reliance on hypothetical accommodations was not dispositive.

The claimant argues that he was not at fault for his termination because he "had a good-faith basis for believing that the modified job offer violated his restrictions." The claimant does not develop this argument further. Instead, the claimant iterates and reiterates his original proposition that the physical restrictions must include the treatment recommendations. The ALJ determined that the claimant had no reasonable basis justifying his failure to begin the modified employment. While the claimant may subjectively feel that he acted in good faith, the ALJ determined otherwise. The ALJ's determination is supported in the record and we will not alter it.

Lastly, the claimant argues that the post-hearing evidence was wrongfully accepted by the ALJ. We agree that the evidence should not have been permitted into evidence as such was contrary to Rule 16(E), O.A.C.R.P. The ALJ stated that the claimant's credibility was further undermined because he gave Dr. Primack a self-description of his job restrictions that did not include the medical treatment recommendations. ALJ Order, ¶¶ 34-35. The ALJ noted Dr. Bradley did include in his reports recommendations for compresses, periodic stretching, rest and elevation. However, the ALJ also observed that the doctor nevertheless approved the employer's proposed job offer. Regardless of the claimant's testimony concerning the importance of these recommendations, the ALJ reasonably concluded Dr. Bradley did not believe they would prevent the claimant from performing the leaf trimming job. The ALJ also determined the testimony of Ms. Northern that all of the treatment suggestions could be implemented without limiting the claimant's ability to do the job was a credible statement. We therefore find this error to be harmless in that other substantial compelling evidence supports the ALJ's determinations even after the questionnaire is stricken from the evidence.

Thus, we have no basis for disturbing the ALJ's determination that the claimant is not entitled to TTD benefits after September 11, 2017, due to his failure to begin an offer of modified employment and his resulting termination from employment.

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

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

David G. Kroll

CERTIFICATE OF MAILING

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

7/26/18 by TT .

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 3-830-846-10

IN THE MATTER OF THE CLAIM OF

BETTE A. KOKOSKA,

Claimant,

v.

FINAL ORDER

TENET HEALTH,

Employer,

and

SEDGWICK CLAIMS MANAGEMENT,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated September 15, 2017, that ordered the respondents to provide specific maintenance medical benefits. We affirm the ALJ's order.

This matter has previously been before us. In an order dated June 12, 2017, we remanded the case for the ALJ to determine whether specific medical benefits had been awarded. On remand the ALJ entered a decision dated September 15, 2017, ordering the respondents to provide certain prescription medications as maintenance medical benefits, including OxyContin, 40 mg, three times each day. The respondents appealed and the matter was again remanded to determine whether a petition to review had been timely filed in this case. By order dated May 23, 2018, the ALJ determined that the respondents' petition to review had been timely filed and the matter was transmitted to the panel to address the respondents' substantive arguments.

The ALJ made the following findings of fact: The claimant sustained a work-related injury on September 17, 1986, while she was transferring a patient from a cart to a bed. The claimant's authorized treating physician, Dr. Parry, diagnosed the claimant with an SI joint injury and sciatic nerve contusion. The claimant underwent conservative care and several surgical procedures. The claimant was placed at maximum medical improvement (MMI) on May 6, 1994, with a 64 percent whole person permanent impairment rating. The respondent-insurer filed a final admission of liability on August

11, 1994, admitting for permanent total disability benefits but did not specify that the claimant was entitled to receive medical maintenance benefits. The claimant, however, continued to receive medical maintenance benefits even when she moved to New Hampshire in the late 1990s. Dr. Parry continued to maintain contact with the claimant via telephone and refilled prescriptions as necessary.

There is a gap in the medical records from November 2002 through August 2012. In an August 2012 teleconference summary, Dr. Parry noted that the claimant suffered a permanent sciatic nerve injury with restrictions and the claimant's need for medications had not changed over time and included Baclofen, Ambien, muscle relaxers, Soma and OxyContin. According to Dr. Parry the claimant was doing extremely well with her medical regime and independent exercise program.

The parties entered into a stipulation that was approved by an ALJ on January 15, 2013, which provided that Dr. Parry remained the claimant's authorized treating physician and that the treatment she had provided had been reasonable and necessary. The stipulation further provided that a local New Hampshire physician would monitor the claimant's maintenance treatment and the claimant would undergo blood work in New Hampshire for review by Dr. Parry.

Dr. Ogin performed a medical records review on August 14, 2014. According to Dr. Ogin the claimant suffers from an inherited connective tissue disorder that causes a collagen defect known as Ehlers-Danlos Syndrome. The only conditions that were possibly related to the 1986 work related injury were an SI joint strain with laxity that required surgical stabilization, myofascial pain syndrome and sciatic nerve entrapment along the piriformis muscle. Dr. Ogin summarized that the claimant's current complaints are not related to the 1986 injury and in his opinion do not require any maintenance medications.

Dr. Parry performed a records review in January of 2016 and concluded that the claimant's industrial injury was completely independent of the claimant's childhood polio or Ehlers-Danlos Syndrome because the claimant's persistent problems do not involve motor pathways or musculoskeletal conditions. Dr. Parry also stated that the claimant's medication regime is stable and that the medications have decreased her pain and maximized her level of function in accordance with the Worker's Compensation Medical Treatment Guidelines. Dr. Parry, therefore, disagreed with Dr. Ogin and concluded that the claimant requires medical maintenance benefits.

The ALJ credited Dr. Parry's opinions and concluded that the claimant had shown that she is entitled to receive reasonable, necessary and related medical maintenance benefits. The ALJ also found that the claimant's medications have decreased her pain and maximized her level of function pursuant to the Guidelines. In addition to other prescription medication, the ALJ specifically ordered the respondents to provide the claimant with OxyContin, 40 mg three times per day.

The respondents only appeal the ALJ's award of OxyContin and argue that the ALJ failed to address the Treatment Guidelines regarding the opioid prescription issue and to enforce the parties' 2013 stipulation. We are not persuaded the ALJ committed reversible error.

We initially note that the claimant points out that the respondents did not designate the transcript of the hearing in the petition to review. The transcripts, however, are in the record transmitted to the panel on appeal. Although § 8-43-301(2), C.R.S. requires that that a transcript be requested to be prepared at the same time the petition to review is filed, we do not read the statute to preclude consideration of the transcript where the transcript has already been prepared and is in the record transmitted to the panel. Consequently, we have reviewed the transcript in this case. *See Pavleko v. Southwest Heating and Colling LLC*, W.C. No. 4-897-498 (September 4, 2015)

A claimant may receive maintenance medical benefits if she is able to prove that the medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition., *Grover Industrial Commission*, 759 P.2d 705 (Colo. 1988); *See Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether the claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *see* § 8-42-101(1)(a), C.R.S. 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. Under the substantial evidence standard of review, we must view the evidence in the light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *See Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The ALJ here relied on Dr. Parry's testimony that the claimant's OxyContin use was reasonable, necessary and related to relieve the claimant from the effects of her

injury. Dr. Parry explained that the claimant's work-related injury was independent of polio or Ehlers-Danlos Syndrome and that the claimant's injury involves neurogenic pain. Dr. Parry also testified that the claimant's current medication regime is stable over the last 20 years and should be continued. The respondents' argument notwithstanding, we may not interfere with the ALJ's credibility determinations except in the extreme circumstances where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000). We may not interfere with the ALJ's assessment of an expert witness's testimony because where, "as here, expert testimony is presented, the weight to be accorded . . . the testimony is a matter exclusively within the discretion of the [ALJ] as fact-finder." *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

We are not persuaded by the respondents' contention that the ALJ failed to consider the Treatment Guidelines or that the Treatment Guidelines mandate a different result. The Treatment Guidelines specifically address the use of opioids and, as the respondents point out, recognize that they are the most powerful analgesics and their use should be clearly linked to improvement of function, not just pain control. There are also provisions in the Treatment Guidelines stating that patients on chronic opioid medication dosages need to sign an appropriate contract with the physician and the patients must be strictly monitored on the maintenance program. WCRP 17 Exhibit 9, Section (h) [now Section (I), (6)]. The respondents argue that Dr. Parry's prescriptions are in violation of these Guidelines and in violation of a 2013 stipulation between the parties because there is no opioid contract between the claimant and Dr. Parry, the claimant has not had the proper blood monitoring since 2014, and the claimant has not had functional improvement.

Dr. Parry addressed the Treatment Guidelines in her testimony noting that the claimant's medications have decreased her pain and maximized her level of function. Tr. at 35-37. In any event, it is well settled that while it is appropriate for an ALJ to consider the Treatment Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition, the ALJ's consideration of the Treatment Guidelines may include deviations from them where there is evidence justifying the deviations. Rule 17-4 (A), *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011); *see Cordova v. Walmart Stores, Inc.*, W.C. No. 4-926-520 (March 14, 2017); *Hieb v. Devereux*, W.C. No. 4-626-898 (March 15, 2017). Additionally § 8-43-201(3), C.R.S. was amended effective July 1, 2014, to provide that while an ALJ must consider the Guidelines, the ALJ is "not required" to use the Treatment Guidelines as the sole basis for a determination that a medical treatment is reasonable or necessary.

Nor do we find any discrepancy with the ALJ's order as it relates to the parties' 2013 stipulation. The parties stipulated in 2013 that the claimant's treatment was required to be reasonable and necessary and as noted in the ALJ's order the parties stipulated that the medical treatment provided by Dr. Parry had been reasonable and necessary. ALJ Order Findings of Fact at 10.

We may not substitute our judgment for that of the ALJ concerning the inferences to be drawn. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *See Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) (if two equally plausible inferences may be drawn from medical evidence, we may not substitute our judgment for that of ALJ). The claimant's and Dr. Parry's testimony provide substantial evidence and valid support for the ALJ's determination to award the requested treatment. Because the ALJ's order is supported by the evidence and applicable law, we have no basis to disturb the ALJ's order in this regard. § 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 15, 2017, 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

7/31/18 by TT .

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ETHICAL DUTY OF ATTORNEY TO DISCLOSE ERRORS TO CLIENT

Adopted November 19, 2005. Modified July 18, 2015 solely to reflect January 1, 2008 changes in the Rules of Professional Conduct.

Syllabus

As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, Colo. RPC 1.4. including those developments resulting from the lawyer's own errors. As part of this broad duty to report, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material. A material error is one that will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error, which may include advice regarding the statute of limitations on a claim for legal malpractice. Colo. RPC 1.4(b).The lawyer need not and should not inform the client that a legal malpractice claim against the lawyer actually exists or has merit, or of the desirability of terminating the lawyer's representation. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(a) and (b). In many, if not most, circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation. Continued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

This opinion addresses the lawyer's ethical duty to advise the client of relevant developments resulting from the lawyer's own errors. This opinion does not address whether the failure to disclose an error itself gives rise to a cause of action against the lawyer. See Colo. RPC, Scope, ("Violation of a Rule should not in and of itself give rise to a cause of action nor should it create a presumption that a legal duty has been breached.").

The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Analysis

Basis for the Duty in the Rules of Professional Conduct

Lawyers must keep clients "reasonably informed about the status of a matter." Colo. RPC 1.4(a)(2). The lawyer's explanation must be "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b). The ethical duty to inform the client extends to keeping the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation. Comment, Colo. RPC 1.4. Additionally, "[a] lawyer may not withhold information to serve the lawyer's own interests…" Comment, Colo. RPC 1.4. Significant developments include matters adverse to the client's interests and those resulting from the lawyer's own actions, if the lawyer's actions are likely to result in prejudice to a client's rights or claim. In addition, failing to disclose an error to a client may rise to the level of conduct involving dishonesty, fraud, deceit or misrepresentation under Colo. RPC 8.4(c). Colo. RPC 8.4(c) may apply if the lawyer actively and intentionally conceals the facts and circumstances of the error from the client,[1] or misrepresents facts about the error, and the client loses a valuable right, such as a right of appeal,[2] or releases a claim against the lawyer for legal malpractice.[3]

In the context of this opinion, a breach of a duty of care that will likely result in prejudice to a client's right or claim will be referred to as an "error," and disclosing an error to a client will mean drawing a client's attention to an error and not simply relying on the flow of paperwork sent to the client in the ordinary course of a representation. When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client. "Error," as used in this opinion, is not meant to include an act or omission that a reasonable lawyer would conclude would not likely result in prejudice to a client's right or claim.

Various jurisdictions that have considered the issue have reached similar conclusions.[4] Some legal authorities rely on the lawyer's obligation under the equivalent of Colo. RPC 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b).[5] Other authorities cite the lawyer's obligation under the conflict of interest rules to obtain the client's informed consent to continued representation, on the basis that the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client.[6] The conflict of interest rules would not apply, obviously, if the representation does not continue following the error.

Nature of Conduct that Triggers the Duty to Disclose

The more difficult determination is whether a particular error triggers an ethical duty to disclose it to the client. This determination is important because an overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship.[7] Also, the ethical duty to disclose should remain primarily a basis for a lawyer's self-assessment, not

another arrow in the quiver of tactics employed in legal malpractice cases.[8] Whether a particular error gives rise to an ethical duty to disclose depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error. The failure to disclose an error does not (and should not), in and of itself, give rise to a cause of action against the lawyer, nor does it (or should it) create a presumption that a legal duty has been breached.

Professional errors exist along a spectrum. At one end are errors that, as stated above, will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.[9] Another example is the loss of a right of appeal for failure to file a timely notice of appeal. However, as discussed more fully below, the lawyer should be given an opportunity to remedy the error before disclosing it to the client.

At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice. For example, missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client. As one commentator remarked regarding similar circumstances, "Unless there are steps that can be taken now to avoid the possibility of future harm, there is probably no immediate duty to disclose the mere possibility of lawyer error or omission."[10] Lawyers should be given the opportunity to remedy any error before disclosing the error to the client. The later assertion of a legal malpractice claim does not mean that the allegedly negligent lawyer breached a duty to disclose the error to the client. Nor should the failure to disclose the error be construed as an independent claim against the lawyer.[11] Whether a lawyer has an ethical duty to disclose depends on the facts and circumstances known to the lawyer once he or she has realized the error, not those that appear only through the prism of hindsight.

In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on an individual basis. For example, it is ordinarily not necessary to disclose questions of professional judgment where the law was unsettled on an issue or the attorney "made a tactical decision from among equally viable alternatives."[12] Under the doctrine of "judgmental immunity," these types of decisions are not, as a matter of law, considered errors, below the applicable standard of care, or negligent conduct. When reasonable lawyers may disagree about whether the state of the law was unsettled or the available alternatives were equally viable, however, the lawyer should err on the side of discussing the available alternatives with the client before pursuing a course of action.[13] The lawyer's choice between equally viable alternatives should not be considered an error as defined in this opinion. Examples of potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute. The Committee agrees with the New York State Bar Association that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or

omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim."[14]

What to Tell the Client

Although it can be difficult to determine whether a lawyer must call a client's attention to an error, it is relatively easy to describe what to say to the client when the lawyer has made the decision to disclose. Candor is a given. The result may be a surprisingly appreciative and understanding client. The lawyer need not advise the client about whether a valid claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so.[15] The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

It may be advisable, however, to inform the client that it may be prudent to consult with independent counsel regarding the statute of limitations on a claim for legal malpractice, especially if, notwithstanding the disclosure, the attorney-client relationship continues in the matter giving rise to the potential claim. The lawyer need not, however, advise the client of the viability of a legal malpractice claim, but simply inform the client that it may be appropriate to seek independent advice from a disinterested lawyer.

The Rules of Professional Conduct do not require the disclosure to be in writing, but failing to make a written record of it is imprudent and potentially defeating of one of the purposes of the disclosure: protection of the lawyer. The letter informing the client of the error should also recommend that the client consult independent counsel to discuss the consequences of the error. This notice may itself trigger the accrual of a legal malpractice claim and, hence, the relevant statute of limitations.[16] Even if the lawyer genuinely believes that it is in the client's best interests to continue the representation despite the error, the lawyer's own interests prohibit him or her from advising the client on this issue.[17] The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Conflicts of Interest in Continuing the Representation

Continuing the representation is not an option if (a) the client terminates it, (b) the error effectively concludes it, or (c) the lawyer withdraws because the error creates a nonwaivable conflict of interest. If both lawyer and client desire to continue the representation, Colo. RPC 1.7(a)(2) requires the lawyer to consider whether the lawyer's own interests in avoiding liability may materially limit the representation. If the lawyer concludes that the lawyer's own interests may materially limit the representation, continued representation is permissible only if the lawyer "reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client." Colo. RPC 1.7(b)(1).[18] Additionally, in order for representation to continue, each affected client must give "informed consent, confirmed in writing." Colo. RPC 1.7(b)(4).

Whether or not continued representation is permissible, either because there is no potential conflict or the potential conflict is waivable, depends on the nature of the error. In many, if not most, circumstances the

interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation.[19] Withdrawal is typically not required if the error likely can be corrected during the course of the representation; the error is not likely to result in harm to the client's cause; the error does not prejudice the client's right or claim, or the error does not necessarily constitute an error at all.[20] As one court stated:

> Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.[21]

In any event, a lawyer may not procure a release of liability from the client except in compliance with Colo. RPC 1.8(h). That rule prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in association therewith."[22] Colo. RPC 1.8(h)(1) and (2). Colo. RPC 1.8(h) would be applicable, for example, if a lawyer agreed to handle the client's appeal free of charge in exchange for a release of liability.[23]

In other situations, a client cannot give informed consent, confirmed in writing, within the meaning of Colo. RPC 1.7(b)(4), because the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client, within the meaning of Colo. RPC 1.7(a)(2)), by influencing the lawyer's strategy. For example, in a personal injury case arising from an automobile accident involving a Regional Transportation District bus, the plaintiff's lawyer fails to give RTD timely notice of a potential claim against it as required by the Colorado Governmental Immunity Act. The plaintiff's lawyer files an action against another driver, who is uninsured. The uninsured driver files a notice of nonparty at fault, identifying RTD. At trial, the plaintiff's lawyer emphasizes the evidence against the uninsured driver and downplays the evidence against RTD. The jury returns a verdict assigning 75% fault against the uninsured driver and 25% against RTD. The judgment against the uninsured driver is uncollectible, and the plaintiff's lawyer's liability to his client is limited to 25% of the total damages. Another lawyer representing the plaintiff might have emphasized the evidence against RTD or proceeded directly to an action against the plaintiff's lawyer for malpractice.

The plaintiff's lawyer thus violated Colo. RPC 1.7(a)(2). His interest in limiting his liability to the client in a future legal malpractice claim caused him to adopt a litigation strategy that emphasized evidence that increased the fault attributable to the uninsured driver, thereby reducing the lawyer's liability exposure to the client and increasing the uncollectible portion of the judgment. Another lawyer representing the plaintiff would have emphasized evidence that decreased the fault attributable to the uninsured driver,

thereby increasing the lawyer's liability exposure to the client and decreasing the uncollectible portion of the judgment. Under the circumstances, the plaintiff's consent to the conflict was not validly obtained.

It is seldom so clear that a lawyer's independent judgment is materially limited by his or her interest in avoiding or reducing liability to a client. Indeed, the opposite problem may be more likely. To avoid the appearance of self-interest, a lawyer may be hesitant to adopt strategies that could leave that impression, including strategies that the lawyer genuinely believes to be in the client's best interests. A lawyer should consider this complication in deciding whether or not he or she wishes to continue the representation. If the representation continues, the lawyer may be able to avoid the appearance of self-interest by conferring with another lawyer about strategies that may, in the hindsight of a legal malpractice action, be labeled self-serving. The lawyer may also suggest the retention of co-counsel.

Notes

[1] CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).

[2] *E.g., Kentucky Bar Ass'n v. Cowden*, 727 S.W.2d 403, 404-05 (Ken. 1987).

[3] CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995). Accord *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982); *see also People v. Good*, 576 P.2d 1020, 1022 (Colo. 1978) (finding violation of former Code equivalent of Colo. RPC 1.8(h) where lawyer refunded retainer with check containing restrictive endorsement releasing claims against lawyer).

[4] *See Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995), *relevant holding confirmed but decision abrogated on other grounds*, *Olds v. Donnelly*, 696 A.2d 633, 642 (N.J. 1997); *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982); New Jersey Supreme Court Advisory Committee on Professional Ethics 684 (March 9, 1998); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000); Association of the Bar of the City of New York Formal Opinion 1995-2 (Feb. 22, 1995).

[5] *See Circle Chevrolet, supra* (New Jersey Rule 1.4); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000) (New York equivalent of Colo. RPC 1.4); Pennsylvania Bar Association Informal Opinion 97-56 (June 6, 1997) (Pennsylvania equivalent of Colo. RPC 1.4). *Accord* Restatement (Third) of the Law Governing Lawyers § 20, Comment c; American Bar Association Informal Opinion 1010 (Nov. 18, 1967).

[6] *E.g., Circle Chevrolet, supra*, 662 A.2d at 514.

[7] *See* N. Moore, "Implications of *Circle Chevrolet* for Attorney Malpractice and Attorney Ethics," 28 *Rutgers L.J.* 57, 75 n. 85 (Autumn 1996) (suggesting that clients of lawyer, like patients of physician, do not want to "know every time the physician has doubts or second thoughts about any aspect of some ongoing treatment") (hereinafter "Moore").

[8] *See* Preamble, Scope and Terminology, Colo. RPC (purpose of Rules of Professional Conduct "can be subverted when they are invoked by opposing parties as procedural weapons"; "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty"); Colo. RPC 4.5(a) (lawyer shall not threaten or present, or participate in presenting, disciplinary charges to gain advantage in a civil matter); *see also Weiss v. Manfredi*, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (N.Y. 1994) (attorney's failure to disclose malpractice does not give rise to fraud claim separate from customary malpractice action).

[9] Moore, *supra* n. 7, at 73. *See Cowden*, supra, 727 S.W.2d at 404-05 (lawyer's failure to advise client of dismissal of action for failure to file prior to expiration of statute of limitations was particularly important because dismissal may have been erroneous).

[10] Moore, *supra* n. 7, at 74.

[11] E.g., *In re Knappenberger*, 90 P.3d 614 (Ore. 2004) (attorney had no immediate duty to alert client regarding potential malpractice claim arising from opposing party's filing of motion to dismiss appeal as untimely where lawyer reasonably believed motion had little chance of success).

[12] *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300, 304 (D. Colo. 1995); *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985).

[13] *See* Cmt., *Withholding Information*, Colo. RPC 1.4 (lawyer "may not withhold information to serve the lawyer's own interest or convenience").

[14] N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

[15] New York City Opinion 1995-2 (Feb. 22, 1995); S. O'Neal, "If You Make a Mistake, When and What Should You Tell Your Client?," *2000-FEB W. Va. Law.* 24, 25 (Feb. 2000) (hereinafter, "O'Neal").

[16] O'Neal, *supra* n. 15, at 25; *see* New York State Opinion 275 (1972) (upon withdrawing from representation, lawyer should recommend that client obtain other counsel) (cited with approval in New York State Opinion 734 (Nov. 1, 2000).

[17] O'Neal, *supra* n. 15, at 25.

[18] *See In re Lawrence*, 31 P.3d 1078, 1084 (Or. 2001) (lawyer violated conflict of interest rule by failing to inform client in writing of potential conflict of interest caused by continuing representation of client in domestic relations matter following entry of default against client due to attorney's neglect).

[19] *See* D. Karpman, "A Twilight Zone of Inharmonic Convergence," *California Bar Journal* 20 (February 2004) ("it is doubtful that any other lawyer in the entire world would be as motivated to make sure the client is successful" than the one who commits malpractice and continues the representation); Pennsylvania Informal Opinion No. 97-56 (June 6, 1997) (law firm's interest and motivation in trying to win appeal from dismissal of case based on law firm's negligence are same as client's interest and motivation in trying to win appeal).

[20] N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

[21] *In re Knappenberger*, 90 P.3d 614, 622 (Or. 2004).

[22] Colo. RPC 1.8(h).

[23] Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).