COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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August Case Law Update

Presented by Judge Michelle Sisk and Amy Kingston, Manager of Compensation Services

This update covers COA and ICAO decisions issued from
July 9, 2019 to July 17, 2019

Court of Appeals

Industrial Claim Appeals Office

ABA Formal Opinions

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COLORADO COURT OF APPEALS

DATE FILED: July 11, 2019
CASE NUMBER: 2018CA1367

Court of Appeals No. 18CA1367
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-050-687

Rifle Tequilas, Inc. and Truck Insurance Exchange,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Javier Pena Alvarez,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE DAVIDSON*
Bernard, C.J., and Miller*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 11, 2019

Law Office of Robert B. Hunter, Joe M. Espinosa, Oklahoma City, Oklahoma, for Petitioners

No Appearance for Respondents

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 In this workers' compensation action, employer, Rifle Tequilas, Inc., and its insurer, Truck Insurance Exchange (collectively employer) seek review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) awarding benefits to claimant, Javier Pena Alvarez. We affirm.

I. Background

¶ 2 Claimant, Javier Pena Alvarez, worked as a dishwasher at Tequila's in Rifle, Colorado. On April 29, 2017, claimant sustained injuries in an altercation at work involving another employee, Jose Arellano. Claimant and Mr. Arellano both testified that the altercation was precipitated by their previous interactions.

¶ 3 Claimant asserted that Mr. Arellano flung a beer bottle cap at him and repeatedly insulted him. He also alleged that Mr. Arellano was intoxicated. Mr. Arellano denied engaging in this behavior.

¶ 4 Mr. Arellano, in turn, alleged that claimant had "punched [him] in the genital area." It is unclear whether claimant disputed this allegation. However, Tequila's manager, Pedro Gomez, told both Mr. Arellano and claimant to "behave" after hearing of the alleged interactions, which Mr. Arellano corroborated.

¶ 5 Later that evening, after Mr. Arellano had finished his shift, he enjoyed a beer with his meal courtesy of Tequila's. Mr. Gomez testified that it was his practice to allow employees to have a beer on the house after closing the restaurant for the evening. All sides agree that when Mr. Arellano got up from the table where he was enjoying his late-night dinner, claimant hid his beer and would not return it. This provoked Mr. Arellano, who found claimant washing dishes in the kitchen, grabbed him from behind, assaulted him, and choked him. Mr. Arellano admitted to attacking claimant and was charged with misdemeanor assault and battery.

¶ 6 Claimant sustained facial trauma as a result of the altercation. After the assault, a physician restricted claimant from heavy lifting; claimant also described difficulty standing and bending over. Claimant returned to work "for a couple days" but soon thereafter stopped working at Tequila's.

¶ 7 Claimant sought workers' compensation benefits for his injuries, but employer challenged causation, questioned whether claimant's actions were within the course and scope of his employment, and argued that claimant's and Mr. Arellano's actions constituted non-compensable horseplay. After conducting a

hearing, the ALJ concluded that the claim was compensable and awarded claimant medical and temporary total disability (TTD) benefits. Although the ALJ agreed that claimant's and Mr. Arellano's actions "amounted to horseplay and eventually progressed to willful assault," he concluded that the behavior was "an inherent part of the workplace." The ALJ found the behavior an accepted part of the work environment at Tequila's because "while Mr. Gomez had warned claimant and Mr. Arellano about their actions prior to the assault, there was no write up[] or other disciplinary action taken against either party prior to the assault and, no credible evidence that Mr. Arellano faced any disciplinary action after the assault from [Tequila's.]" Further supporting his conclusion that Tequila's workplace culture tolerated horseplay, the ALJ noted that

> Mr. Gomez testified credibly at hearing that he would provide one beer to employees after the restaurant closed. This policy is a perk to employees and the conflict in this case arose out of a confrontation involving this perk to employees which presents additional evidence that the horseplay and subsequent assault in this case arose out of the employment with employer.

Based on these factual findings, the ALJ concluded that "the injury in this case arose out of and in the course of claimant's employment with employer."

¶ 8 On review, the Panel affirmed the ALJ's order. The Panel rejected employer's contention that the ALJ had misapplied the compensability test. The Panel noted that contrary to employer's argument, not every factor of the test must be explicitly weighed. Moreover, the Panel observed, the ALJ's factual findings implicitly addressed each of the factors.

II. Analysis

¶ 9 Employer raises the same contention here. It argues that the assault was a private act, "did not occur out of a workplace dispute," provided no benefit to Tequila's, and was consequently not connected to claimant's work. Employer further argues that the ALJ misapplied the compensability test because he failed to consider whether claimant deviated from his work prior to the assault. We find no error in the ALJ's analysis and are therefore not persuaded that the Panel erred in affirming the ALJ's decision.

A. Law Governing Compensability of Horseplay and Standard of Review

¶ 10 An injured worker bears the burden of establishing by a preponderance of the evidence that an injury is compensable. *See* § 8-43-201(1), C.R.S. 2018. To be compensable, a worker's injury must both arise out of and in the course of employment. § 8-41-301(1)(b), C.R.S. 2018; *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). Injuries fall within the course of employment when "the injury occurred within the time and place limits of [a worker's] employment and during an activity that had some connection with [the worker's] work-related functions." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). For an injury to arise out of employment, a "claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Id.* An injured worker can prove this connection between activities and functions by showing that the activities are reasonably incidental to the conditions and circumstances of employment; it is "not essential"

that such activities emanate from an obligatory job function or that they provide some benefit to the employer. *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985).

¶ 11 Nevertheless, an injury may be non-compensable if the injured worker deviated from the conditions and circumstances of employment immediately prior to the injury. To determine whether a claimant's horseplay deviated so substantially from the worker's job functions as to remove the activity from the employment relationship, the fact finder applies the following four-part test: (1) What is the extent and seriousness of the deviation? (2) How complete was the deviation, i.e., was it commingled with the performance of a duty or did it involve an abandonment of the employee's job duty? (3) To what extent has horseplay become an accepted part of the employment? (4) To what extent is horseplay expected to be included in the nature of the employment? *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 718 (Colo. App. 1995).

¶ 12 The existence and magnitude of a deviation — i.e. whether a "claimant's conduct constituted such a deviation from the circumstances and conditions of the employment" — is a question

of fact for the ALJ's determination. *Panera Bread*, 141 P.3d at 972. We, like the Panel, therefore cannot set aside the ALJ's determination if it is supported by substantial evidence in the record. This standard requires us to consider evidence in the light most favorable to the prevailing party, *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002), and to "defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record." *Panera Bread*, 141 P.3d at 972.

B. Substantial Evidence Supports the ALJ's Findings

¶ 13 Employer does not dispute that claimant's injury arose out of his employment. Instead, it challenges compensability on the ground that claimant's horseplay so deviated from his job as to remove it from the course and scope of his employment.

¶ 14 But, several of the ALJ's factual findings support his conclusion that claimant was acting within the course and scope of his employment because his and Mr. Arellano's horseplay had become an accepted part of the work environment. Notably, the ALJ found, with record support, that (1) it was Mr. Gomez's practice to give employees a beer after closing the restaurant ; (2) claimant's

hiding of Mr. Arellano's beer immediately precipitated the assault ; and (3) there was "no credible evidence" that Tequila's disciplined either Mr. Arellano or claimant for their respective behavior or actions. Based on these findings, the ALJ concluded that horseplay was "an inherent part of the workplace" at Tequila's. Because substantial evidence in the record supports these factual findings, we, like the Panel, may not set them aside. *See* § 8-43-308, C.R.S. 2018; *Panera Bread*, 141 P.3d at 972.

¶ 15 Employer contends that in reaching this conclusion, though, the ALJ misapplied the deviation test. Employer argues that the ALJ failed to consider or address whether claimant's actions benefited employer ; the "extent, nature, seriousness, and completeness" of the actions ; or whether claimant "deviated from his work duties when he struck Mr. Arellano in his genitals." We disagree.

¶ 16 The ALJ identified and included the four-part *Lori's Family Dining* test to determine whether horseplay is compensable in his conclusions of law discussion. As paraphrased by the ALJ, the four factors to be considered are "(1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e. whether it was

commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay."

¶ 17 Reviewing the ALJ's factual findings makes clear that he considered each of the factors. He addressed the first factor when he described the assault, claimant's injuries, claimant's need for treatment, and Mr. Arellano's misdemeanor assault charge for the attack. All these highlight the seriousness of the attack. Similarly, the ALJ found that Mr. Arellano approached claimant from behind while claimant was "facing the dishwasher" and was engaged in his work as a dishwasher for Tequila's. This finding shows that the ALJ considered the second factor — i.e. whether the incident was comingled with claimant's work. Last, the ALJ's finding that Tequila's failed to discipline Mr. Arellano or claimant amply supports his conclusion that "horseplay . . . was an inherent part of the workplace," in turn supporting the third and fourth *Lori's Family Dining* factors.

¶ 18 Moreover, the ALJ implicitly analogized the situation at Tequila's to that described in *Lori's Family Dining*. He explained that although the claimant in *Lori's Family Dining* was also engaged in horseplay — the claimant fell, breaking his arm, while attempting to kick a coworker who caught the claimant's leg mid-kick — a division of this court affirmed the compensability of the claim because the employer effectively condoned such behavior and the incident "was neither prolonged nor geographically distant for the [claimant's] employment." *See Lori's Family Dining*, 907 P.2d at 718-19. In making this observation, the ALJ connected the compensable situation in *Lori's Family Dining* to the case before him.

¶ 19 Finally, even if the ALJ did not address each factor as thoroughly as possible, he was not obligated to do so. First, the precedential caselaw does not anticipate such comprehensive analysis. Indeed, in *Panera Bread* a division of this court held that "nothing in the *Lori's Family Dining* decision suggests that the claimant must prove the existence of every element of the four-part test to prove a compensable claim or that any particular element is decisive." *Panera Bread*, 141 P.3d at 973. And, second, an "ALJ

operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive." *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000). An ALJ "is not held to a crystalline standard in articulating his findings of fact"; findings are sufficient if "we are able to discern from the order the reasoning which underlies" it. *Id.* at 388. Here, as the above discussion demonstrates, the ALJ's reasoning is both sound and readily discernible.

¶ 20 Accordingly, we conclude that the Panel did not err in affirming the ALJ's decision that claimant's injuries arose out of compensable horseplay which occurred within the course and scope of claimant's employment. *See Panera Bread*, 141 P.3d at 973; *Lori's Family Dining*, 907 P.2d at 718-19. The Panel thus properly affirmed the award of medical and TTD benefits to claimant.

III. Conclusion

¶ 21 The order is affirmed.

CHIEF JUDGE BERNARD and JUDGE MILLER concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-009-761

IN THE MATTER OF THE CLAIM OF:

LARRY E WEBSTER,

Claimant,

v.

FINAL ORDER

CZARNOWSKI DISPLAY SERVICE INC,

Employer,

and

TRUMBULL INS CO,

Insurer,
Respondents.

The claimant appeals an order of the Director of the Division of Workers' Compensation (Director) dated February 25, 2019, that denied his motion for a change of physician, that denied the respondents' motion for attorney fees and sanctions, and that imposed additional case management procedures. We affirm.

In his order, the Director noted that the claimant's case has an extensive procedural history that includes multiple applications for hearing, concurrent appeals, and repeated motions for sanctions. The following is a summary of the Director's factual findings pertinent to the history of the claimant's case and the issues on appeal.

In March 2016, the claimant sustained an admitted injury when he tripped while working. The claimant eventually was placed at maximum medical improvement (MMI) on October 21, 2016, with no impairment. The claimant requested a Division-sponsored independent medical examination (DIME). The DIME physician concurred with the findings of MMI and assigned a 7% whole person impairment rating for the lumbar spine and a 1% psychiatric impairment. The respondents filed a final admission of liability (FAL) consistent with the DIME physician's findings and admitted for maintenance medical benefits.

The claimant objected to the respondents' FAL and sought a hearing. The claimant endorsed permanent total disability (PTD) benefits as an issue to be heard at the

hearing but that issue was held in abeyance. Following the hearing, ALJ Cayce determined that the claimant failed to overcome the findings of the DIME physician and declined to award any additional benefits. The claimant appealed, and the Panel affirmed. *Webster v. Czarnowski Display Service, Inc*., W.C. No. 5-009-761-08 (April 2, 2018). The claimant again appealed, and the Colorado Court of Appeals dismissed his appeal. *Webster v. Industrial Claim Appeals Office*, 18CA0714 (Feb. 14, 2019)(NSOP). The claimant petitioned for certiorari, and the Colorado Supreme Court denied his petition. *Webster v. Czarnowski Display Service, Inc*., 2019SC148 (April 22, 2019).

While the appeals were pending, the claimant filed another application for hearing endorsing compensability, medical benefits, authorized provider, PTD benefits, death benefits, disfigurement benefits, and penalties as issues to be heard. The respondents filed a summary judgment motion on all issues except PTD benefits. ALJ Felter granted the respondents' motion. The claimant appealed, and the Panel affirmed ALJ Felter's order. *Webster v. Czarnowski Display Service, Inc*., W.C. No. 5-009-761-003 (Feb. 4, 2019).

On January 23, 2019, and January 31, 2019, the claimant filed pleadings requesting a change of physician from his current authorized treating provider (ATP), Injury1 of Waco, Texas. The respondents objected to the claimant's requests. The respondents also filed a cross-motion for sanctions and attorney fees based on alleged violations of prehearing orders, and requested a prehearing conference with the Director.

The Director ultimately entered an order denying the claimant's requests for a change of physician. He reasoned that the claimant's complaints pertained to medical treatment prior to the date of MMI and from authorized providers who appear to no longer be involved in his case. The Director further held that since the claimant was seeking treatment for injuries and conditions other than the admitted lumbar spine condition, this also did not provide grounds for a change of physician. He further ruled that the respondents had indicated they had properly denied all requests for a change of physician under §8-43-404(5)(A)(VI), C.R.S. The Director stated that to the extent the claimant disputed this contention, this was a question of fact more properly heard by the Office of Administrative Courts. The Director also denied the respondents' motion for attorney fees and sanctions and their request for a prehearing conference. Last, the Director imposed additional case management procedures. However, the claimant has not raised any arguments on appeal regarding this part of the Director's order.

In his petition to review and brief in support, the claimant summarizes his medical records and various provisions of Colorado's Workers' Compensation Act (Act),

discusses the physicians who have treated him and the treatment he has received from them, and argues he is entitled to penalties under a number of statutes contained in the Act. He further argues that the Director erred in his review of the claimant's medical records. The claimant also argues he is entitled to a new physician because his current ATP is not providing treatment for his work injuries.[1] We perceive no error in the Director's order.

Sections 8-43-404(5)(a)(VI), and 8-43-207(1), C.R.S. afford an ALJ or the Director broad discretionary authority to grant a claimant's request for a change of physician. *See Vigil v. City Cab Co.*, W.C. No. 3-985-493 (May 23, 1995); *see also Carson v. Wal Mart*, W.C. No. 3-964-079 (April 12, 1993). However, neither the ALJ nor the Director is compelled to grant a change of physician based upon the claimant's personal dissatisfaction with a physician. *See Garcia v. Kings Table*, W.C. 4-110-844 (Sept. 17, 1992), *aff'd* Colo. App. No. 92CA1570 (May 27, 1993)(NSOP)(ALJ did not err in failing to grant change of provider based upon claimant's dislike of the attending physician). Because of the discretionary nature of the issue, we may not interfere with the Director's order unless an abuse of discretion is shown. An abuse exists if the Director's order is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1995).

Further, a decision regarding a change in physician should consider the need to ensure the claimant is provided reasonable and necessary medical treatment as required by §8-42-101(1), C.R.S. while at the same time protecting the respondents' interests in being apprised of the course of treatment for which they may ultimately be held liable. *See Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

Here, the claimant's argument notwithstanding, we perceive no abuse of discretion in the Director's decision on the change of physician issue. As held by the Director, in his requests for a change of physician, the claimant argued that his current treating provider failed to provide treatment for injuries other than the admitted lumbar spine condition. Since the other body parts and conditions have not been adjudicated to be compensable, this does not provide a basis for a change of physician under §8-43-404(5)(a)(VI), C.R.S. Similarly, the claimant's requests for a change of physician involved complaints pertaining to medical treatment prior to the date of MMI and from

[1] The respondents have filed a brief in opposition to the claimant's appeal. While page 3 is missing from the respondents' brief in opposition, we nevertheless are able to resolve the issues raised on appeal by the claimant irrespective of the missing page.

authorized providers who are no longer involved in his case. Again, such complaints do not provide a basis for a change of physician under §8-43-404(5)(a)(VI), C.R.S. Further, in his requests for a change of physician and in his argument on appeal, the claimant essentially states his personal dissatisfaction with his ATP. However, as detailed above, a claimant's personal dissatisfaction with a treating provider does not compel the Director to grant the request for a change of physician. *See Garcia v. Kings Table, supra*. We therefore have no basis to disturb the Director's order in this regard. Section 8-43-301(8), C.R.S.

To the extent the claimant argues that the Director erred in not penalizing the respondents under a number of provisions of the Act, this was not an issue raised by the claimant before the Director. Consequently, the issue may not be considered on appeal. *Kuziel v. Pet Fair, Inc*., 948 P.2d 13 (Colo. App. 1997). The claimant's remaining arguments on appeal involve inapplicable provisions of the Act, and proceedings not pertinent to his request for a change of physician. As a result, we will not address these arguments.

IT IS THEREFORE ORDERED that the Director's order dated February 25, 2019, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

7/16/19 by TT .

LARRY E WEBSTER, 437 N 60TH, WACO, TX, 76710 (Claimant)
RITSEMA & LYON PC, Attn: PAUL D FIELD ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)
DIVISION OF WORKERS COMPENSATION, 633 17TH STREET SUITE 400, DENVER, CO, 80202 (Other Party)

NOTE: For clarification, the following entities have not been served with this Order. However, if you appeal a Final Order, you **MUST** include a copy of your appeal to the parties at the addresses listed above **AND** to the following parties:

COLORADO COURT OF APPEALS
2 EAST 14TH AVENUE
DENVER, CO 80203

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY 6TH FLOOR
DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE
P.O. BOX 18291
DENVER, CO 80218-0291

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-065-967-001

IN THE MATTER OF THE CLAIM OF:

JOSEPH WANNER,

Claimant,

v.

FINAL ORDER

PATTERSON UTI DRILLING CO,

Employer,

and

LIBERTY MUTUAL,

Insurer,
Respondents.

The respondents and the claimant seek review of a corrected order of Administrative Law Judge Mottram (ALJ) dated February 25, 2019, that determined the claimant sustained a compensable injury on December 22, 2017, ordered the respondents to pay for medical treatment related to this injury, denied and dismissed the claim of injuries from the claimant's March 28, 2018, motor vehicle accident (MVA) and ordered the respondents to pay for temporary total disability benefits from December 27, 2017 through March 30, 2018, and from April 12, 2018, and continuing. We affirm the order.

This matter went to hearing on the issues of compensability, related medical treatment, whether the claimant proved that the injuries he sustained in a motor vehicle accident on March 28, 2018, occurred in the quasi-scope of employment or was an intervening event and the claimant's entitlement to temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for this employer as a derrick hand on a drilling operation in Wyoming. On December 22, 2017, the ALJ found that claimant was struck by a board with more weight on his left side. The claimant reported the accident to his supervisor but did not file a claim immediately. The claimant went to work the next day in pain and reported this to his supervisor. The employer modified the claimant's duties.

The claimant eventually reported the claim in Wyoming on December 26, 2017. The employer did not designate a physician for the claimant. The claimant returned to Colorado and sought treatment with St. Mary's Occupational Medicine on December 28, 2017. The claimant reported pain in the left side of his neck, left shoulder, left bicep and left tricep. Family Nurse Practitioner (FNP) Harkreader diagnosed a cervical strain and left distal bicep strain and imposed work restrictions that included no lifting over five pounds. The claimant returned to FNP Harkreader on January 9, 2018, and reported that he had not made any progress. FNP Harkreader noted the claimant's left shoulder pain, left elbow bicep strain, mild lateral epicondylitis, possible left cervical upper extremity, cervical radiculopathy and a hypoesthesia of the left heel. Radiographs were unremarkable and an MRI of the cervical spine was recommended.

The claimant was evaluated by Dr. Stagg on February 14, 2018. Dr. Stagg recommended that the claimant proceed with an MRI of the cervical and lumbar spine, noting that the claimant was complaining of back pain and numbness into his left heel area.

On March 28, 2018, the claimant attended an independent medical examination (IME) with Dr. Striplin at the respondents' request. In Dr. Striplin's opinion, the claimant did not have any objective pathology that was related to the work injury. Dr. Striplin stated that the claimant's mechanism of injury was consistent with a muscular strain of the left upper extremity and that the claimant reached MMI with no permanent impairment.

While driving from the IME to his home in Fruita, Colorado on March 28, 2018, the claimant was involved in a motor vehicle accident. The claimant testified that the truck in front of him stopped causing him to stop his vehicle and the car behind him rear-ended the claimant.

The claimant returned to Dr. Stagg on March 30, 2018. The claimant did not mention the MVA to Dr. Stagg at this appointment and Dr. Stagg noted that the claimant reported some improvement with his symptoms and released the claimant to return to full duty work. The claimant attempted to return to work but the employer did not return his calls.

The claimant returned to Dr. Stagg on April 12, 2018, before his scheduled appointment, and at this time reported that he had been involved in an MVA on March 28, 2018. Dr. Stagg noted that the claimant did not mention the MVA at the March 30, 2018, appointment because he was not hurting as bad and that he really needed and

wanted to go back to work. Dr. Stagg noted decreased range of motion in the claimant's cervical spine and tenderness to palpation over his paraspinal muscles. Dr. Stagg recommended x-rays of the cervical, thoracic and lumbar spine due to the claimant's complaints of increased pain in his entire back following the MVA**.**

The claimant returned to Dr. Stagg on May 3, 2018, and continued to complain of pain in his neck and low back with occasional numbness into his lower extremity. Dr. Stagg recommended a short course of physical therapy and provided the claimant with work restrictions that included no lifting over 40 pounds.

Dr. Stagg testified by deposition stating that the mechanism of the claimant's work injury was consistent with an injured rotator cuff. Dr. Stagg believed that the claimant's neck pain is related to his injury and that the back pain could also be related. Dr. Stagg was not clear as to what was causing the claimant's left heel numbness but felt that the MRI's he had requested would help determine what was causing the claimant's symptoms.

The claimant returned to Dr. Striplin for another IME on June 5, 2018. In Dr. Striplin's opinion the MVA on March 28, 2018, did not produce an objective injury. According to Dr. Striplin, the claimant does not need additional medical treatment.

The ALJ credited the claimant's testimony and the medical reports from FNP Harkreader and Dr. Stagg along with the testimony of Dr. Stagg to find that the claimant sustained a compensable injury arising out of and in the course of his employment on December 22, 2017. The ALJ further found that the claimant established the reasonableness and necessity of the medical treatment he received in the case and specifically found that the treatment for the heel injury, including the lumbar spine MRI, is related to the claimant's December 22, 2017 work injury.

The claimant argued at hearing that the injuries he sustained in the MVA on March 28, 2018, were compensable under the quasi-course of employment doctrine. The respondents conversely argued that the MVA was an intervening event that severed their liability for ongoing medical treatment. The ALJ found that the MVA did not result in any injury to the claimant and, therefore, is not compensable. The ALJ reasoned that although the claimant returned to Dr. Stagg on March 30, 2018, and did not mention the MVA, this was because the claimant needed and wanted to get back to work. Dr. Stagg released the claimant to return to work without restrictions on March 30, 2018. The claimant returned to Dr. Stagg on April 12, 2018 and reported the MVA complaining of low back and neck pain. The ALJ noted that the claimant did not complain of any

significant low back pain related to his December 2017 injury until after the March 28, 2018, MVA, but the ALJ further found that the claimant was complaining of left heel pain prior to the MVA which the ALJ found to be a compensable component of the December 22, 2017 work injury.

The ALJ concluded that the claimant's ongoing complaints of cervical spine, shoulder and left heel symptoms after the March 28, 2018 MVA are related to the December 22, 2017, work injury. The ALJ reasoned that the recommended medical treatment did not significantly change following the MVA, as a cervical and lumbar MRI was recommended in February of 2018 and after the MVA. The claimant wanted to return to work on March 30 and this did not necessarily represent his true ability to work.

The ALJ further found the work restrictions put into place by Dr. Stagg on April 12, 2018, were related to the December 22, 2017, work injury and not the MVA, crediting the opinion of Dr. Striplin who testified that the claimant did not sustain any injury in the MVA.

Thus, the ALJ concluded that the claimant sustained a compensable injury on December 22, 2017, and the respondents are liable for reasonable and necessary authorized medical treatment for this injury. The ALJ awarded the claimant temporary total disability based on the restrictions provided by Dr. Stagg, finding that these restrictions related to the December 22, 2017, work injury. The ALJ determined there was no injury as a result of the March 28, 2018, MVA and declined to address the parties arguments of whether injuries sustained in the MVA were compensable under the quasi-course and scope doctrine or whether the MVA was an intervening event.

I.

On appeal, the respondents contend that the March 28, 2018, MVA was an intervening event that severed the causal connection. We are not persuaded there is any error in the ALJ's order.

An insurer is liable for a claimant's disability which flows proximately and naturally from an industrial injury. *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). The insurer's liability may be severed if the evidence shows that the claimant's disability is attributable to an independent intervening injury or event. *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986). Because this issue is factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in

the record. §8-43-304(8), C.R.S.; *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Substantial evidence is probative evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. Thus, the scope of our review under the substantial evidence standard is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Where conflicting expert opinion is presented, it is solely for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Here, the ALJ determined that the claimant's injuries and disability were related to the December 22, 2017, work injury. This determination is supported by the evidence. Most notably the opinion of the respondents' own IME, Dr. Striplin, who determined that the MVA did not cause any injury to the claimant. The ALJ was free to credit those portions of the conflicting testimony and evidence that he found persuasive. *See Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968)(to the extent testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony). The existence of evidence recited by the respondents which, if credited, might permit a contrary result, affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

We also note that the respondents' intervening event argument is based on the mistaken premise that an injury during travel to an IME appointment is an intervening event. It is well established that a compensable injury is an injury which bears a causal connection to the employment. *Staff Administrators Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999). Under the "quasi-course of employment" doctrine, an injury occurring during travel to or from authorized medical treatment is compensable because the employer is required to provide medical treatment for the industrial injury and the claimant is required to submit to the treatment. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). Therefore, the treatment becomes an implied

part of the employment contract, and injuries sustained while attending the authorized medical treatment, are considered to be a consequence of the original industrial injury.

As support for their contention, the respondents cite to *Trover v. Coors Ceramics* W.C. No. 4-408-646 (October 8, 2004), in which the panel determined that the claimant's MVA while driving home from an IME appointment was not in the quasi course and scope of employment. As the claimant points out, however, this panel order was set aside by a panel of the court of appeals in *Allstate Insurance Company v. Industrial Claim Appeals Office*, Colo. App. No. 04CA220 August 11, 2005, *not selected for publication*. The court of appeals cited to *Turner v. Industrial Claim Appeals Office*, 111 P.3d 534 (Colo. App. 2004), which adopted the majority view that injuries involving an evaluation or examination at the employer's request are compensable, even though the claimant receives no therapeutic benefit. Moreover, in 2014, § 8-43-404(1)(b)(I) was amended to provide that the employer or insurer shall pay the claimant the expense involved in attending an examination by a physician requested by the employer. These expenses include mileage, food, hotels and lost wages. Unlike the treatment of the examination required in the DIME process, (*see Ince v. Southwest Memorial Hospital*, W.C. No. 4-535-488 (April 18, 2004)(injuries incurred in travel to a DIME not compensable)), the General Assembly has elected to make the attendance at a respondent's selected medical exam an implied part of the employment contract.

Here, the respondents do not dispute that the claimant was injured while driving home from an IME requested by the employer. Therefore, any injuries sustained by the claimant are covered by the quasi-course of employment doctrine. Consequently, the respondents arguments here that the ALJ's erred in determining the claimant's need for medical treatment and resulting disability were caused by the MVA are rendered moot because the respondents are liable in any event. *Rudnick v. Ferguson*, 179 P.3d 26 (Colo. App. 2007)(issue is moot when a judgment if rendered would have no practical legal effect upon an existing controversy).

II.

The claimant contends on appeal that the ALJ failed to determine whether the claimant sustained a compensable low back injury. We perceive no error.

The ALJ found that although the claimant did not complain of any significant low back pain related to his December 2017 injury until after the March 28, 2018, MVA, the claimant was complaining of left heel pain prior to the MVA which the ALJ found to be a compensable component of the December 22, 2017 work injury. Crediting Dr. Stagg's

testimony, the ALJ found that the treatment for the heel injury, *including the lumbar spine MRI,* is related, to the claimant's December 22, 2017 work injury. Dr. Stagg testified that the claimant's neck pain was related to the mechanism of injury described in the December 22, 2017, accident. Dr. Stagg Depo. at 40. Dr. Stagg went on to state that the low back could be related as well but that an MRI was needed to determine the extent of that and the claimant's heel numbness. Dr. Stagg Depo. at 40-41

Thus ALJ clearly stated that the MRI for the lumbar spine was related to the December 22, 2017, injury. ALJ order at 8, ¶36. Diagnostic procedures constitute a compensable medical benefit that must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to identify a possible compensable component of the injury so as to suggest a course of further treatment. Section 8-42-101(1)(a), C.R.S.; *See Merriman v. Industrial* Commission, 120 Colo. 400, 210 P.2d 448 (1949); *Jacobson v. American Industrial Service*, W.C. No. 4-487-349 (April 24, 2007); *Villela v. Excel Corp.*, W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Garland Co.*, W.C. No. 4-368-712 (August 11, 2000).

Thus, in our view, the ALJ plausibly concluded that the MRI for the lumbar spine recommended by Dr. Stagg is reasonable and necessary to diagnose or define the extent of the claimant's condition and determine the possible need for further treatment. Insofar as the claimant seeks additional medical benefits for the low back condition, those benefits were not at issue for hearing. Because the effect of the finding in future litigation is both hypothetical and speculative, we need not address the argument. There has been no award or denial of benefits in the hypothetical litigation, and any order which we might issue would be merely advisory. *See Board of Directors v. National Union Fire Insurance Company*, 105 P.3d 653 (Colo. 2005) (courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur).

IT IS THEREFORE ORDERED that the ALJ's order dated February 25, 2019, 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

7/17/19 by TT .

THE LAW FIRM OF JOANNA JENSEN PC, Attn: JOANNA C JENSEN ESQ, PO BOX 2297, GRAND JUNCTION, CO, 81502 (For Claimant)
LEE & BROWN LLC, Attn: JESSICA C MELSON ESQ, 3801 EAST FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

NOTE: For clarification, the following entities have not been served with this Order. However, if you appeal a Final Order, you **MUST** include a copy of your appeal to the parties at the addresses listed above **AND** to the following parties:

COLORADO COURT OF APPEALS
2 EAST 14TH AVENUE
DENVER, CO 80203

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY 6TH FLOOR
DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE
P.O. BOX 18291
DENVER, CO 80218-0291

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-058-572-01

IN THE MATTER OF THE CLAIM OF:

AMOS BURD,

Claimant,

v.

FINAL ORDER

BUILDER SERVICES GROUP INC
d/b/a MATO,

Employer,

and

ACE AMERICAN INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Nemecheck (ALJ) dated January 8, 2019, that denied a reduction in disability benefits due to a safety rule violation and that increased the admitted average weekly wage (AWW). We affirm the denial of the safety rule violation and modify the increase of the AWW, and, as modified, affirm the increase of the AWW.

The claimant began work for the employer as an installation professional on June 12, 2017. The claimant's job required him to work on the installation of fire stopping and insulation products. On September 22, 2017, the claimant was working on a building under construction near Ft. Lupton. He and another crew member were on the roof approximately 30 feet off the ground when the claimant fell off. The claimant suffered severe head injuries. He was still hospitalized at Craig Rehabilitation Hospital at the time of the May 21, 2018, hearing in the matter.

The respondents filed a General Admission of Liability on October 10, 2017. The AWW was calculated by the respondents to be $813.27. The respondents reduced the temporary benefits they admitted to pay by 50% due to the imposition of a safety rule penalty pursuant to § 8-42-112(1)(b).

The claimant challenged the application of the safety rule penalty. The claimant requested the AWW be increased to include the cost of continuing his group health

insurance and the cost of short term disability insurance. In addition, the claimant argued the AWW should be adjusted to indicate he did not work for the employer for a two week period while on vacation and that he was to be paid a $600 signing bonus when he started work for the employer in June, 2017.

In his January 8, 2019, order the ALJ ruled the respondents did not fulfill the burden of proof necessary to apply the safety rule penalty. The ALJ adjusted the AWW to eliminate two unpaid weeks from the claimant's period of employment. The ALJ found the claimant did not have health care benefits from the employer and declined to add the expense of short term disability insurance to the AWW. Finally, the ALJ ruled the claimant established he was to be paid a $600 signing bonus which was added to the total amount of wages paid the claimant to calculate the AWW. The AWW was determined to be $935.90 and the weekly temporary benefit rate $623.93.

The respondents appeal the ALJ's denial of the safety rule violation and his decision to add a signing bonus to the computation of the AWW.

I.

Section 8-42-112(1)(b), C.R.S, provides for a 50 percent reduction in compensation where the injury results from the claimant's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondents to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968); *see also Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra*; *Industrial Commission v. Golden Cycle* Corp., 126 Colo. 68, 246 P.2d 902 (1952).

Under § 8-42-112(1)(b), C.R.S., it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondents met their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *Id.*

Because the issue is factual in nature we must uphold the ALJ's determination if supported by substantial evidence in the record. § 8-43-301(8). *Heien v. DW Crossland LLC.*, W.C. No. 5-059-799-01 (November 29, 2018).

The ALJ found the employer had instituted a written Fall Protection Plan. This policy was implemented through rules communicated to its employees and training for its application. The claimant was injured when he fell 30 feet from a roof while not attached to a safety line as required. However, the ALJ noted the terms of the Fall Protection Plan were not consistently understood by the employer's management. Joshua Wolitzky, the employer's division manager, testified the employer's rule provides that any worker operating above six feet from the ground must be tied off to a safety line at all times, without exception. May 21, 2018, tr. at 113-14. The supervisor at the job site, Esteban Cabral, testified he believed workers need not be hooked up to safety cables when they were more than six feet from the edge of a roof. The ALJ determined the employer did not prove the claimant willfully violated the safety rule. The ALJ pointed to the testimony of Jesus Palacios, a co-worker with the claimant before the claimant fell, indicating Mr. Palacios had unhooked his safety harness to walk across the roof and the claimant was following him. The ALJ believed the claimant would have noted Mr. Palacio's act to detach his safety cable and would have felt there were circumstances under which he was not required to be tethered to a safety line.

Significantly, the ALJ concluded the employer did not enforce the safety rule. The ALJ referenced the testimony by Mr. Cabral. Mr. Cabral indicated he saw the claimant and the co-worker he was with, Mr. Palacios, walking along the roof with their safety harnesses unhooked from the fall restraint system. Mr. Cabral did not stop them and insist they reattach their harnesses. Mr. Palacios stated he had been observed by Mr. Cabral on several occasions working at heights without being clipped in to a safety cable and was not disciplined. May 21, tr. at 290-91. Mr. Wolitzky stated that the claimant's accidental fall was investigated but no reprimands of any kind were issued to any employees present. Tr. at 140. Relying on *Lori's Family Dining, Inc. v. Industrial Claim Appeals Panel*, 907 P.2d 715 (Colo. App. 1995), the ALJ concluded the absence of consistent enforcement of the purported safety rule and the acquiescence of the employer to violations of the policy, meant the employer did not actually have a safety rule with any force or effect. In *Lori's Family Dining*, *supra*, the claimant was injured in an episode of horseplay. The Court noted the employer's failure to enforce its asserted safety rule prohibiting that conduct rendered the rule unavailable as a basis to reduce compensation.

The most frequent ground for rejecting imposition of a

> penalty, whether it be for violation of a safety rule or willful misconduct, is the lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation. See *Pacific Employers Insurance Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943) (rule against jumping on moving vehicles that was not diligently enforced could not be invoked to reduce compensation); 1A A. Larson, Workmen's Compensation Law, § 33.30 at 6-66 (1995).
>
> Here, the ALJ found that employer was well aware of the employees' conduct in frequently engaging in horseplay and had established policies for dealing with such conduct, but it had never followed its own policies for disciplining employees for the prohibited conduct. The determination whether an employer has acknowledged and acquiesced in the employees' conduct or enforced its own rules is one of fact. … Accordingly, since the findings and evidence support the majority Panel's determination that employer condoned the horseplay by declining to impose sanctions in accord with its own policy regarding such conduct, that determination is binding on review. Therefore, full benefits were properly awarded. 907 P.2d at 719.

On appeal the employer argues that the ALJ abused his discretion when "the ALJ erroneously concluded that the Employer had not enforced the safety rules [and] it did not discipline employees, and acquiesced in the violations of the policy." The employer also argues that the record does not support the ALJ's findings that Mr. Cabral's understanding of the rule diverged in any significant degree from that of the written rule or that it was not shown the claimant willfully departed from the rule's requirements. We are not persuaded the ALJ committed reversible error.

The employer points to a section of testimony from Mr. Palacios where he states that on several occasions when he was unhooked from a safety cable his supervisor was unaware he had done so. This, it is argued, accounted for the absence of discipline. However, the ALJ's findings were supported by a subsequent portion of Mr. Palacios testimony wherein he explained that the site supervisor, Mr. Cabral, observed him work unclipped at heights and did not discipline him in any fashion. Tr. at 291. The employer suggests there may have been other subsidiary reasons the employer chose not to

discipline any of the workers due to the September 22 accident. However, no other reasons were reflected in the record. Finally, the employer's argument that maintaining attachment to a safety line was a procedure covered in safety meetings, did not necessarily require a finding that the claimant acted willfully when he failed to comply. The example provided by Mr. Palacios when he moved about the roof unhooked, and unchallenged for doing so, is a reasonable basis to allow the ALJ to conclude the claimant had not acted willfully when he proceeded in the same manner. Section 8-43-301(8), C.R.S.

Under these circumstances, we cannot say the ALJ erred as a matter of law in finding that the employer insufficiently enforced this safety rule and effectively acquiesced in employee noncompliance. Similarly, substantial evidence in the record supports the finding that requirements of the rule were given varying interpretations by supervisory staff. It was the presence of these circumstances that served as the basis for the ALJ's determination the respondents did not demonstrate the claimant acted willfully when he abridged the safety rule and fell on September 22. As was his sole prerogative, the ALJ, credited some witness testimony over that of others. *See Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Therefore, there is sufficient, albeit conflicting, evidence to support the ALJ's finding that the employer did not adequately maintain the safety rule. The mere existence of conflicting evidence affords no basis for relief on appeal. *May D&F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988). In this case substantial evidence supports the ALJ's finding the safety rule was not consistently applied and was not sufficiently enforced to allow the application of § 8-42-112(1)(b). We perceive no error in the ALJ's ruling.

II.

The employer asserts the ALJ was in error in finding the claimant was provided a $600 signing bonus when he accepted the respondents' offer of employment on June 12, 2017. The respondents contend the ALJ misinterpreted the testimony of Robert Garner, the production manager as support for this finding. It is also argued the ALJ's reliance on the testimony of the claimant's wife in this regard was misplaced. The claimant replies that the ALJ has discretion to adjust the AWW in order to arrive at a fair approximation of the wages and diminished earning capacity. The claimant points out the ALJ's discretion should be allowed unless it is beyond the bounds of reason, unsupported by the evidence or contrary to law.

The addition of a signing bonus to the AWW is contrary to law. Consequently, the order in this matter is modified, not because the ALJ abused his discretion, but

because the ALJ had no statutory authority to increase the AWW by adding the cost of fringe benefits. Section 8-40-201(19)(b) prohibits the inclusion in the calculation of wages "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)."

The ALJ ruled the claimant's AWW, based on the most representative period he worked for the employer, was $885.90. The ALJ calculated the signing bonus as adding $50 per week. Accordingly, the final determination of the AWW was $935.90

In *Meeker v. Provenant Health Partners,* 929 P.2d 26 (Colo. App. 1996), the Court reviewed the addition to the AWW of the claimant's accrual of paid time off. In *Meeker,* the employer credited the claimant with 9.5 hours of paid leave for each pay period. The claimant could use the credit thereafter by taking a period of paid leave from work. She could also bank the leave credit and receive pay for all her unused leave hours when she left employment. The decision applied the terms of § 8-40-201(19)(a) and (b). Section 8-40-201(19)(a) defined 'wages' "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subparagraph (b), however, limited the definition so as to not include "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." To determine if the claimant's accrued time off was indeed an included 'wage' and not an excluded 'fringe benefit', the decision applied criteria asking: "whether a reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Meeker v. Provenant Health Partners,* 929 P.2d at 28.

The *Meeker* court determined the claimant's accrued time off qualified as 'wages' to be included in the AWW. The hours credited to the claimant had an easily discernable immediate cash value derived by multiplying each hour accrued by the claimant's hourly rate of pay. In addition, once earned, the time off was never forfeited. The claimant therefore enjoyed reasonable access to the benefit. However, the value of the paid time off was not to be added as a lump sum of accrued wages payable at the point the claimant used them. Instead, the benefit was added to the claimant's wages at the rate they accrued. Therefore, the claimant's weekly wage rate was increased by the hourly value of the number of time-off hours earned each week. Conversely, in *City of Lamar v. Koehn,* 968 P.2d 164 (Colo. App. 1998), the Court determined vacation and sick pay subject to a maximum cap (over which accumulated hours were forfeited) could not be added to the calculation of 'wages' using the *Meeker* test. The court observed that

because "the value of claimant's leave time is dependent upon actual usage, and will decline if in fact it is not used, it cannot be considered a cash equivalent" such as was the case in *Meeker*. They were then, not added to the AWW.

In *Orrell v. Coors Porcelain*, W.C. No. 4-251-934 (May 22, 1997) and in *Yex v. ABC Supply Co*., W.C. No. 4-910-373-01 (May 16, 2014), the Panel considered the addition to a wages calculation of bonuses paid from employer profit sharing plans. In both cases the prior receipt of those bonuses were characterized as excluded fringe benefits rather than as wages. The profit sharing plans stated a bonus could be paid depending on the profits realized by the employer in the preceding year or calendar quarter. However, the claimant was required to be working for the employer on the date the pay out of the bonus was made. Applying the *Meeker* test, the bonus was found to be contingent and without a present day cash equivalent value. The size of the bonus could only be discerned at the conclusion of the year or quarter. It could only be paid out at that point and the claimant was unable to cash out any portion of the bonus until then, and only if still employed on the pay-out date. In addition to the absence of a present day cash equivalent value, the claimant had no access to the bonus on a day to day basis and had no immediate expectation of receiving the bonus.

The signing bonus in this matter suffers from features similar to the plans in *Orwell* and in *Yex*. The claimant would receive a signing bonus only once. Therefore, the longer the claimant remained employed with the employer, the lower the cash equivalent value of the bonus. Its relative value, in fact, cannot be determined until the claimant ceases employment. Because it has already been determined and paid, the claimant has no further access to the bonus and no expectation of earning any additional bonus. Accordingly, the claimant had no "reasonable access on a day-to-day basis, actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." The signing bonus then, is a fringe benefit not enumerated in § 8-40-201(19) and may not be added to the calculation of the AWW.

We therefore affirm the ALJ's increase in the AWW but modify that increase to reflect an AWW of $885.90.

IT IS THEREFORE ORDERED that the ALJ's order issued January 8, 2019, that denied the application of a safety rule violation penalty and an increase in the average weekly wage, as modified, to $885.90 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

7/9/19 by TT .

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HALL & EVANS LLC, Attn: DOUGLAS J KOTAREK ESQ, C/O: PAUL R POPVIC ESQ, 1001 SEVENTEENTH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

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COLORADO COURT OF APPEALS
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136

A LAWYER'S RESPONSE TO A CLIENT'S ONLINE PUBLIC COMMENTARY CONCERNING THE LAWYER

Adopted March 18, 2019

INTRODUCTION

This opinion considers the ethical considerations that apply when a lawyer responds online to negative online reviews posted by the lawyer's current, former, or prospective client. As used in this opinion, "client" includes only these categories of critics.

Online reviews of a lawyer's performance are increasingly common and often impact prospective clients' choice of counsel. When a lawyer receives a negative review, the lawyer might want to respond, including to clarify the underlying circumstances, correct inaccurate statements contained in the review, or otherwise defend the lawyer's work for the reviewing client. Nevertheless, the Colorado Rules of Professional Conduct (Colo. RPC or the Rules), relevant opinions from Colorado Supreme Court Office of the Presiding Disciplinary Judge (PDJ), and cases and ethics opinions in other jurisdictions indicate that a lawyer's ability to publicly respond to online criticism is limited.

The threshold question is whether a lawyer may *ever* respond to negative online reviews. The answer is "yes." No Colorado ethical rule specifically bars lawyers from responding to online reviews, but the duty of confidentiality contained in Colo. RPC 1.6 (applicable to current clients) and Colo. RPC 1.9(c) (applicable to former clients) prevents the lawyer from disclosing information related to the representation of a client, absent an exception to those Rules or the client's informed consent. Under the one potentially applicable exception to the general duty of non-disclosure, a lawyer may respond if the online criticism creates a "controversy" between the

lawyer and the client and the lawyer's response is limited to information reasonably necessary to establish a claim or defense on behalf of the lawyer in that controversy.

APPLICABLE COLO. RPC

Whether and, if yes, to what extent, a lawyer may respond to a client's negative online review implicates Rules 1.6 ("Confidentiality of Information"), 1.8(b)("Conflict of Interest; Current Clients; Specific Rules"), 1.9 ("Duties to Former Clients"), and 1.18 ("Duties to Prospective Client"). The pivotal rule is Colo. RPC 1.6(a), which provides in pertinent part: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."

Rule 1.6(b) sets forth exceptions to Rule 1.6(a). Applicable here is Colo. RPC 1.6(b)(6), sometimes referred to as the self-defense exception, which allows a lawyer to disclose information related to the representation

> to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Several comments to Colo. RPC 1.6 explain these concepts. Comment [3] contrasts the lawyer's ethical duty of confidentiality with the attorney-client privilege and the work-product doctrine: While the ethical duty of confidentiality applies to lawyers in all situations and covers a broad scope of information, the attorney-client privilege and the work product doctrine apply primarily in litigation and have a far narrower scope:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer

> confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Comment [10] elaborates on the self-defense exception stated in Colo. RPC 1.6(b)(6):

> Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

Other rules state the lawyer's duty of non-disclosure of client-related information in other contexts.

Colo. RPC 1.8(b) provides that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Colo. RPC 1.9(c) applies these concepts to former clients:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Colo. RPC 1.18(b), in turn, applies the strictures of Colo. RPC 1.9(c) to prospective clients: "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."

The Colorado Bar Association Ethics Committee (Committee) analyzes whether and how a lawyer may respond to online criticism within the framework of these rules.

ANALYSIS

Application of Colo. RPC 1.6(a) to a Lawyer's Online Responses to Client Reviews

No ethics rule or statute specifically precludes a lawyer from responding to online criticism. However, Colo. RPC 1.6 and 1.9 limit whether a lawyer may post and, if permissible, what a lawyer may disclose.

In the first instance, a lawyer's duty of confidentiality "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *People v. Albani*, 276 P.3d 64, 70 (Colo. O.P.D.J. 2011). Further, in *People v. Isaac*, Case No. 15PDJ099, 2016 WL 6124510, at n. 13 (Colo. O.P.D.J. Sept. 22, 2016), the PDJ noted that the duty of confidentiality included information relating to the client's identity and the nature of the lawyer's representation of the client, billing-related information, and information readily available from public sources. These cases offer valuable guidance, but they are not binding precedent. *In re Roose*, 69 P.3d 43, 47-48 (Colo. 2003).

Limitations on and Exceptions to Colo. RPC 1.6(a)

The duty of confidentiality imposed by Colo. RPC 1.6(a) is not absolute. The rule permits disclosure if (1) the client gives informed consent, (2) the disclosure is impliedly authorized in order to carry out the representation, or (3) the disclosure is authorized by an exception contained in subsection 1.6(b).

Express client consent is unlikely in the context of a lawyer's response to a negative online review. However, if the client provides the lawyer with express informed consent to publicly reveal information that the lawyer would otherwise be precluded from revealing under Colo. RPC 1.6(a), the lawyer may reveal such information, but only to the extent permitted by the client in his or her informed consent. Under the predecessor to Colo. RPC 1.6, DR 4-101(c)(1) of the Colorado Code of Professional Responsibility, the Colorado Supreme Court held that informed consent cannot be implied. *People v. Lopez*, 845 P.2d 1153 (Colo. 1993) ("DR 4-101(c)(1) does not encompass "implied consent", even if the facts warrant[] a finding that [the client] by his conduct impliedly consented to [disclosure]."). Thus, an argument by the lawyer that the client provided implied informed consent by posting the online criticism in the first place or revealing his or her confidential information in the online post is likely to be unavailing. Even if it did prevail, it would be difficult for the lawyer to know in advance whether the lawyer's rebuttal complied with the client's informed consent.

In the Committee's judgment, it is even less likely that a lawyer's online response to a client's negative review would be "impliedly authorized in order to carry out the representation." Colo. RPC 1.6(a). A lawyer who publicly responds to a client's negative comments is generally attempting to defend the lawyer's performance in the representation—not "carry[ing] out the representation." Such an online defense bears no similarity to the examples of impliedly authorized disclosures provided in Colo. RPC 1.6, *i.e.*, "to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter." *See* Colo. RPC 1.6, cmt. [5].

Colo. RPC 1.6(b) recognizes three circumstances in which the self-defense exception to the lawyer's general duty of non-disclosure may apply: (1) in a *controversy* between the lawyer

and client; (2) when a *criminal charge or civil claim* has been asserted against the lawyer based upon conduct in which the client was involved; or (3) in any *proceeding* concerning the lawyer's representation of the client. Because online criticism, standing alone, does not constitute a "criminal charge," "civil claim," or "proceeding," the remaining question is whether a negative online review creates a "controversy" between the lawyer and client as to which the lawyer may disclose otherwise protected client-related information in order "to establish a claim or defense."

Comment [10] to Colo. RPC 1.6(b)(6), quoted above, recognizes that a "controversy" that the lawyer is permitted to defend may exist before an "action" or "proceeding" has commenced. It does not address, however, whether online criticism creates such a controversy. The PDJ considered this issue in *People v. Isaac*, where the lawyer disclosed numerous confidential, detailed items of client information while responding to two online client criticisms. 2016 WL 6124510, at *1-5. Without discussion, the PDJ assumed the existence of a "controversy" within the meaning of Colo. RPC 1.6(b)(6), but this might have been because the client in *Isaac* had filed a disciplinary complaint against the lawyer in addition to posting online criticisms. *Id.* at *1. Ultimately, the PDJ concluded that, assuming the existence of a controversy, the lawyer's response was nevertheless inappropriate. The PDJ ruled that "[p]aragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to establish a defense." *Id.* at *3.[1] In its summary judgment order, the PDJ held:

> [T]he Court determines as a matter of law that Respondent could not have reasonably believed it necessary to disclose the full range of information he posted in his [online] responses.… In both instances, it appears that Respondent disclosed his clients' [confidential information] simply to embarrass and discredit the clients. The Court

[1] For this ruling, the PDJ cited Comment [14] to Rule 1.6. *Id.* Although that comment references Colo. RPC 1.6(b)(7), concerning disclosures to detect conflicts of interest, not Colo. RPC 1.6(b)(6), Rule 1.6(b) permits disclosures pursuant to *any* of its exceptions only "to the extent the lawyer reasonably believes necessary" to address the circumstances triggering the exception. Colo. RPC 1.6(b). *See also* Colo. RPC 1.6, cmt. [10] ("the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense").

> therefore concludes as a matter of law that Respondent violated *Colo. RPC 1.6(a)* by posting [the] responses and that no exception [] authorized his conduct.

Id. at *4 (italics in original).

A similar situation arose in *People v. Underhill*, 15PDJ040, 2015 WL 4944102, at * 1 (Colo. O.P.D.J. August 12, 2015) in which the PDJ approved a conditional admission of misconduct and suspended a lawyer who twice issued online rebuttals that, as in *Isaac*, "publicly shamed the [clients] by disclosing highly sensitive and confidential information gleaned from attorney-client discussions," and "publish[ed] an attorney-client communication and [made] uncomplimentary observations about and accusations against the [clients] based on confidential information related to the representation … in contravention of Colo. RPC 1.6(a) and Colo RPC 1.9(c)(2)." The conditional admission in *Underhill*, however, did not address the Colo. RPC 1.6(b)(6) self-defense exception.

Thus, a lawyer may not respond to negative online reviews by needlessly disclosing sensitive and embarrassing information about current or former clients, but certain undefined disclosures of confidential information may be appropriate under Colo. RPC 1.6(b)(6) if the client's online criticisms have created a controversy between the lawyer and the client and the lawyer's disclosures are necessary for the lawyer to assert a claim or mount a defense in that controversy. In other words, the extant Colorado authorities delineate how a lawyer may *not* respond, but they provide little guidance as to how a lawyer *may* respond, consistent with Colo. RPC 1.6(b)(6). And they do not clarify whether online criticism can result in a "controversy" such that Colo. RPC 1.6(b)(6) could apply at all.

Other jurisdictions, however, have issued opinions that provide additional guidance with respect to how the self-defense exception applies to a lawyer's online postings. For example, an Arizona ethics opinion addresses whether and to what extent a lawyer may disclose the substance

of the lawyer's discussions with a former client in order to refute the former client's public allegations against the lawyer. State Bar of Ariz., Ethics Op. 93-02 (1993). The opinion first noted the confidentiality provisions of Rule 1.6 and then turned to the three circumstances described in Arizona's self-defense exception, which is identical to Colo. RPC 1.6(b)(6). Focusing on whether allegations against the lawyer outside the context of a legal proceeding could constitute a "controversy" that permitted disclosure, the Arizona opinion states: "We believe that the assertions [of misconduct] made against the attorney by the former client … are sufficient to establish a 'controversy' between the attorney and his client." *Id.* The Arizona opinion notes that the other two circumstances included in the self-defense exception require the existence of an "action" or a "proceeding," and that interpreting a "controversy" to require a formal proceeding would render the controversy language "largely superfluous." *Id.* The Arizona opinion concludes:

> We do not believe that the right to disclose is limited to a pending or imminent legal proceeding. Instead, an attorney may disclose confidential information pursuant to [Rule 1.6] when the client's allegations against him or her are of such a nature that they constitute a genuine controversy between the attorney and the client which could reasonably be expected to give rise to legal or disciplinary proceedings.

Finally, like the Colorado PDJ in the *Isaac* case, the Arizona opinion "emphasize[s] that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegation. [Disclosure] is permitted only to the extent the lawyer reasonably believes necessary to establish a claim or defense." *Id.*

The Supreme Court of Wisconsin also has addressed the necessity of a "proceeding" when evaluating the "controversy" prong of the self-defense exception to Rule 1.6. In *In re Thompson*, 847 N.W.2d 793 (2014), the Court reviewed an ethics referee's conclusion that the Wisconsin self-defense exception did not apply in the absence of "court-supervised proceedings." *Id.* at 800. The Court noted that Wisconsin's confidentiality rule (like Colorado's), does not limit permitted

disclosures to a "court-supervised" setting. Consequently, the Court declined to impose that restriction on the term "controversy" as used in the Wisconsin version of Colo. RPC 1.6(b)(6). *Id.* at 802-03.

The Arizona and Wisconsin opinions appear to harmonize with the Colorado PDJ's opinion in *Isaac*. All three authorities either assume or recognize the potential viability of the self-defense argument even absent a formal proceeding. This is tempered, however, by the caveat that "disclosure [is permitted] only to the extent the lawyer reasonably believes the disclosure is necessary [to defend the lawyer]." *Isaac*, 2016 WL 6124510, *3.

The Restatement (Third) of the Law Governing Lawyers also speaks to the self-defense exception to Rule 1.6 confidentiality: "Charges against lawyers will often involve circumstances of client-lawyer relationships that can be proved only by using confidential information. Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group." *Id.*, § 64, cmt. [b]. A formal charge or proceeding in not necessary before the self-defense exception can be invoked; a disgruntled client's manifestation of an intent to bring such a charge is sufficient. *Id.*, cmt. [c]. Finally, and significantly, Section 64 notes that "[t]here is little authority in point" relative to the types of charges falling within the self-defense exception.

CONCLUSION

Although *Isaac* and the other authorities cited above can provide guidance, given the absence of binding authority, a Colorado lawyer must be cautious when deciding whether and in what fashion to respond to online criticism. For the lawyer wanting to err on the side of caution, the Pennsylvania Bar Association suggests the following language as a potential response:

> A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this

> forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

Pa. Bar Ass'n Formal Op. 2014-200, "Lawyer's Response to Client's Negative Online Review" (2014). The Committee believes that this language would comport with Colo. RPC 1.6(b)(6).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 487 **June 18, 2019**

Fee Division with Client's Prior Counsel

In a contingent fee matter, when a counsel (successor counsel) from one firm replaces a counsel (predecessor counsel) from another firm as counsel for the client, Rules 1.5(b) and (c) require that the successor counsel notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor counsel. The successor counsel may not be able to state at the beginning of the representation the specific amount or percentage of a recovery, if any, that may be owed to the predecessor counsel unless the amount or percentage has been agreed by the client and both predecessor and successor counsels. The successor counsel is not bound by the requirements of Rule 1.5(e), either at the time of engagement or upon a recovery, because Rule 1.5(e) addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another. Upon a monetary recovery, the successor counsel may only disburse a portion of the overall attorney's fee to the predecessor counsel with client consent or pursuant to an order of a tribunal of competent jurisdiction. If there is a dispute as to the amount due to the predecessor counsel under Rule 1.15(e) the disputed amount may have to remain in a client trust account until the matter is resolved. If successor counsel negotiates with predecessor counsel on the client's behalf, successor counsel must explain to the client the potential conflict of interest in the dual roles pursuant to Rule 1.7, where successor counsel has a personal interest in the amount predecessor counsel may receive or in the timing of the release of funds held pursuant to Rule 1.15(e).[1]

I. Introduction

A client has the right to terminate a lawyer's services at any time[2] but when the client terminates the services of a contingent fee counsel, without cause, prior to the occurrence of the contingency on which the parties' agreement is based, the counsel may be entitled to a fee for services performed before discharge under *quantum meruit* or, in some jurisdictions, pursuant to a so-called "conversion clause" or "termination clause" in the contingent fee agreement. This opinion addresses the successor counsel's obligations under the Model Rules of Professional Conduct after taking over the case when there is a monetary recovery. A counsel who subsequently takes over the case (the successor counsel) must advise the client, in writing, of the predecessor counsel's potential claim on a recovery.[3]

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2018) [hereinafter MODEL RULES]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(1) (2000) [hereinafter RESTATEMENT].

[3] This opinion applies where the client terminates a lawyer without cause and hires a new lawyer to replace that lawyer to handle a contingent fee matter. The opinion does not apply when a client terminates a lawyer with cause, or the lawyer withdraws without cause. In such situations, a lawyer may forfeit some or all of her fee.

II. Analysis

A. The Successor Counsel's Obligation to Advise the Client that the Predecessor Counsel May Make a Claim Against Any Recovery

Just as in any contingent fee matter, the successor counsel must comply with both Model Rule 1.5(b) in describing the rate or basis of the fee and with Model Rule 1.5(c)'s requirement that the written fee agreement include the method of determining the fee. Paragraphs (b) and (c) of Rule 1.5 provide:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom. "[A]n understanding as to fees . . . must be promptly established."[4] A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c).[5] To avoid client confusion,

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RESTATEMENT § 37 (2000); David Hricik, *Dear Lawyer: If you decide it's not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee*, 64 MERCER L. REV. 363 (2012-2013).

[4] MODEL RULES R. 1.5 cmt. 2.

[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389, at 4 (1994) (explaining that "the nature (and details) of the compensation arrangement should be fully discussed by the lawyer and client before any final agreement is reached."); Joyce v. Elliott, 857 P.2d 549, 552 (Colo. App. 1993) (stating that "one of the principal purposes of the rules respecting contingency fee agreements is to assure that a client is fully advised at the time such agreement is executed of all of the financial obligations that such client is assuming by the establishment of the attorney-client relationship."); Shaw v. Manufacturers Hanover Trust Co., 499 N.E.2d 864, 866 (N.Y. 1986) ("The importance of an attorney's clear agreement with a client as to the essential terms of representation cannot be overstated. The client should be fully informed of all of the relevant facts and the basis of the fee charges, especially in contingent fee arrangements[.]"); *In re* Davenport, 522 S.W.3d 452, 458 (Tex. 2017) ("The goal of an attorney-client fee agreement is to ensure that the client is informed of its terms. . . . whether the lawyer was reasonably clear is determined from the client's perspective.") (footnotes omitted).

making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee agreement and provided to the client at the same time.

Assume, for example, that a client retains a lawyer in a matter and enters into a written fee agreement in which the lawyer is entitled to one-third of any recovery. The client then decides to terminate the lawyer, without cause, and hires new counsel. The successor counsel takes the matter on the same terms as the predecessor counsel (one-third of any recovery) but the successor counsel's written fee agreement is silent on whether that one-third is in addition to or in lieu of the one-third specified in the predecessor counsel's fee agreement, and no such disclosure is made in a separate document provided to the client. In these circumstances, the client may not know whether the client must pay one or both lawyers or the amount of the fees owed. The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the *quantum meruit* claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated.[6] Under those circumstances, "a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney." [7]

Where a client hires successor counsel to handle an existing contingency fee matter, it does not pose an unreasonable burden on the successor counsel to advise the client that the predecessor counsel may have a claim to a portion of the legal fee if there is a recovery. In many instances, precision on this issue may be difficult as successor counsel may need to review the predecessor counsel's fee agreement and assess its enforceability. Similarly, successor counsel may not be fully familiar with the nature and extent of the prior lawyer's work on the matter. Successor counsel also will not know the amount of the recovery, if any, at the beginning of the representation. Nevertheless, Rules 1.5(b) and (c) mandate that successor counsel provide written notice that a portion of the fee may be claimed by the predecessor counsel.

Successor counsel must address with the client whether the client risks paying twice: one contingent fee to the predecessor counsel and another to the successor counsel. A client cannot be exposed to more than one contingent fee when switching attorneys, given that under the Rule 1.5(a) factors, each counsel did not perform all of the services required to achieve the result. Thus, neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee.

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[6] *See generally* RESTATEMENT § 40 cmts. b & c (2000) (On discharge, a lawyer may be entitled to the fair value of the lawyer's services. Determination of fair value takes into account the proportion of work performed by the discharged lawyer, and the value of work contributed. The determination also may consider a contract amount prorated for work actually performed.).

[7] San Francisco Bar Ass'n, Ethics Comm., Advisory Op. 1989-1 (1989).

B. Rule 1.5(e) Fee Division Provisions Do Not Apply

There is some authority concluding that successor counsel replacing a client's prior counsel must comply with Rule 1.5(e);[8] however, this Rule is designed to regulate fee-sharing between lawyers in different firms who handle a case simultaneously. Comment 7 to Rule 1.5 underscores this reading. It states:

> A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. *A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well*, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. (Emphasis added.)

Comment 7 thus clarifies that Rule 1.5(e) is limited to situations where two or more lawyers are working on a case simultaneously – not sequentially. Accordingly, Rule 1.5(e) was not meant to apply to the situation where one lawyer's services are terminated and the client retains a second lawyer to complete the matter.

Under Rule 1.5(e), fees must either be divided in proportion to the work performed or in some other specified division where both lawyers assume "joint responsibility" for the matter. Fee-sharing in proportion to the work performed by lawyers concurrently representing a client is similar to the *quantum meruit* analysis that is frequently used post-hoc to divide contingent fees between successive law firms. What differs where predecessor and successor counsel are involved in such fee issues before a recovery has been obtained is that the underlying case and the client's rights to discharge her lawyer may be adversely affected if the client is required to enter into a fee-sharing agreement under Rule 1.5(e). Requiring the predecessor and successor counsel and the client to agree on a proportional fee division may hinder the client's right to terminate a counsel by making the process of finding a replacement more difficult and protracted. A simple fee negotiation between the client and successor counsel would turn into a three-way debate.

The other approach under Rule 1.5(e) to divide a fee among lawyers concurrently representing a client requires that all counsel assume "joint responsibility" for the related matter. Such

[8] These authorities focus on client consent to a fee division. *See, e.g.*, Statewide Grievance Comm. v. Dixon, 772 A.2d 160, 164-65 (Conn. App. Ct. 2001) (concluding that the lawyer violated Rule 1.5(e) by failing to inform the client of payment made from recovery to prior lawyer in a different firm); Conn. Bar Ass'n, Comm. on Prof'l Ethics Op. 01-10, 2001 WL 34004971, at *1 (2001) (involving a new lawyer replacing the original lawyer because of conflict). None discuss other provisions of the rule, for example, how "joint responsibility" works. As discussed above, we agree that client consent to a payment by the successor lawyer to the predecessor lawyer is necessary, but reach that conclusion without reliance on Rule 1.5(e).

responsibility entails financial and ethical responsibility for the representation as if the counsel were associated in a partnership.[9] A referring counsel is allowed to receive a greater portion of the fee than the counsel's own efforts would otherwise merit through the acceptance of joint responsibility.[10] When a client discharges a lawyer and hires a new one, there is no "referring counsel" and there is no simultaneous representation of the client. Joint responsibility in practice does not exist because predecessor counsel has been replaced. To require "joint responsibility" under Rule 1.5(e) in these situations as a pre-condition of paying the predecessor counsel's fee claim is not realistic and ultimately burdens the client's ability to discharge the first lawyer and find replacement counsel. If the successor counsel would be responsible for the errors or omissions of a discharged predecessor, he or she would at best be reluctant to accept the engagement.

C. Client Agreement on the Eventual Fee Allocation Between the Discharged Counsel and the Current Counsel and Conflict of Interest Waiver

Because the client approval requirement is explicit in Rule 1.5(e), some authorities have used it as the vehicle to mandate client consent to fee divisions in consecutive representations even though Rule 1.5(e) is limited to joint representations. Rule 1.5(a), however, alone supports the conclusion that client consent is required to divide the fee at the end of the case.

Rule 1.5(a) requires that any fee be reasonable, including the total fees of predecessor and successor counsel, and client consent is required for all disbursements, including all fees payable to predecessor and successor counsel.

A client always has the right to challenge the total fee charged or the separate fee claimed by the predecessor counsel. The successor counsel may not disburse fees claimed by that counsel absent the client's consent. Otherwise, the client's right to challenge the fee as unreasonable would be impaired, if not extinguished. Of course, there may be circumstances where client consent may be inferred. For example, consent may be inferred where successor counsel has repeatedly provided notice of a proposed payment to predecessor counsel and the client has not responded.[11]

D. Role of Successor Counsel with Respect to Predecessor Counsel's Claim for a Share of the Fee

The role of the successor counsel in the process of addressing the predecessor counsel's claim for a share of the fee may vary. The successor counsel's work may include an assessment of the legitimacy of the predecessor counsel's fee claim to properly advise the client on the client's share of any recovery and the amount of funds, if any, that successor counsel must hold in trust under Rule 1.15. If the initial scope of successor counsel's representation of the client simply leaves the matter to be decided by the predecessor counsel and the client, the successor counsel should so indicate in the engagement agreement. But if the successor counsel offers to represent the client

[9] MODEL RULES R. 1.5 cmt. 7; N.Y. Cnty. Lawyers' Ass'n, Comm. on Prof'l Ethics Op. 715, 1996 WL 592658, at *4 & n.2 (1996).
[10] MODEL RULES R. 1.5(e)(1).
[11] The fee must, of course, be within the total fee as authorized by the client in the successor lawyer's fee agreement. The successor lawyer must also have a reasonable basis to conclude that the client has received the communications and is not suffering from any mental or physical disorder that prevents the client from considering the successor lawyer's communications.

in the *client's* dispute (as opposed to the successor counsel's dispute) with the predecessor counsel, such scope of representation should be reflected either in the initial fee agreement or in a new or revised fee agreement. Typically, where successor counsel is negotiating on behalf of a client with predecessor counsel, successor counsel should review with the client the nature and extent of the predecessor counsel's entitlement to a fee, including whether the predecessor counsel has forfeited the right to a fee, in whole or in part.

Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel cannot charge the client for work that only increases the successor counsel's share of the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

In many situations, the fees paid to predecessor and successor counsel may not affect the client's recovery. In these instances, successor counsel may obtain the client's consent to any fee split that does not alter the client's recovery. The client can, after consultation and adequate disclosure, decide that the matter should be worked out between counsel without further need for consent or consultation with the client. The client's consent should be informed and successor counsel may need to raise the possibility of protracted proceedings that could burden a client who may have nothing to gain and may be indifferent about the outcome.[12] Where the client is indifferent as to the fee allocation between the two counsel, both counsel must, in adjudicating their own dispute over their respective shares of the contingent fee, take adequate steps to protect client confidentiality under Rule 1.6, as well as any confidentiality provisions in any underlying settlement agreement.

The predecessor counsel may also seek client consent to a share of the fee. If the successor counsel represents the client in the fee dispute, then the predecessor counsel may not communicate about the fee directly with the former client without successor counsel's consent under Rule 4.2.

E. The Successor Counsel's Obligations with Respect to the Funds

Where a disagreement persists between the predecessor counsel and the client, or predecessor counsel and successor counsel, about the amount of the predecessor counsel's fees from the proceeds obtained by the successor counsel, the successor counsel must comply with Rule 1.15 and substantive law in notifying predecessor counsel of the receipt of the funds and in deciding how to handle the funds. In many jurisdictions, a counsel terminated without cause has the right to payment based on *quantum meruit*. If the client asserts that client terminated the predecessor counsel for cause, that counsel may not have any right to proceeds from the recovery.[13] If there is

[12] Most disputes between lawyers about a fee will likely involve the client as a witness. The disputes may also involve disclosure of the client's confidential information under Rule 1.6. In many such circumstances, the client may wish simply to move on and not be involved in any dispute between her lawyers. In addition, where recoveries are obtained through settlement, many settlement agreements impose confidentiality obligations on the client as to the settlement terms. In adjudicating a fee dispute with predecessor counsel, the successor lawyer must take steps to ensure that any confidentiality term of a settlement is respected.

[13] Determination of what constitutes terminating a lawyer's services "for cause" or a lawyer withdrawing from a representation *without* "just cause" vary by state, but some examples of situations where a lawyer had justifiable

a dispute as to whether some or all of those funds should be paid to the predecessor counsel by the client but there is a claim to the proceeds by that counsel, the successor counsel must hold the disputed portion of the funds in a client trust account pursuant to Rule 1.15(e).[14]

III. Conclusion

Where a client has engaged successor counsel in a contingent fee matter to replace predecessor counsel, successor counsel must inform the client in writing that predecessor counsel may have a claim against the contingent fee. Successor counsel is not, however, bound by the fee-division procedures set forth in Model Rule 1.5(e) because such procedures are designed to address situations where two lawyers from different firms handle a case concurrently. Upon a recovery, successor counsel must obtain the client's agreement before dividing any fee with predecessor counsel. In resolving any dispute, particularly a dispute solely between counsel, both successor and predecessor counsel remain bound by their confidentiality obligations to the client and any further confidentiality obligations undertaken by the client in a settlement of the underlying matter. In handling funds that are in dispute, the successor lawyer must follow the requirements of Model Rule 1.15.

cause to withdraw and may be entitled to a *quantum meruit* fee are: obligation to withdraw due to unforeseen conflict of interest (Smith & Burnetti, P.A. v. Faulk, 677 So. 2d 404 (Fla. Dist. Ct. App. 1996)); unanticipated costs and expenses of litigation (Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820 (N.J. Super. Ct. App. Div. 1993)); client refused to comply with discovery obligations (Ashford v. Interstate Trucking Corp. of America, Inc., 524 N.W.2d 500 (Minn. Ct. App. 1994)).

[14] The statements in this section are general in nature and do not address substantive law issues that may vary from state to state regarding charging or retaining liens. The rights and claims of the predecessor lawyer may depend on whether the client terminated the lawyer for cause or without cause, whether the lawyer withdrew with or without cause, or whether the lawyer has an effective lien. These substantive law issues are not addressed in this Opinion.