COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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January Case Law Update

Presented by Judge John Sandberg and Judge Michelle Sisk

This update covers COA and ICAO decisions issued from
November 21, 2019 to January 2, 2020

Court of Appeals

Industrial Claim Appeals Office

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COLORADO COURT OF APPEALS

DATE FILED: December 12, 2019
CASE NUMBER: 2018CA2398

Court of Appeals No. 18CA2398
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-059-799

Benjamin Heien,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; DW Crossland LLC; and Liberty Mutual Insurance,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE WEBB
Dunn and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 12, 2019

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

No Appearance for Respondent Industrial Claim Appeals Office

Lee and Brown, LLC, Joseph W. Gren, Emily M. Miller, Denver, Colorado, for Respondents DW Crossland LLC and Liberty Mutual Insurance

¶ 1 In this workers' compensation action, claimant, Benjamin Heien, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) which reduced claimant's non-medical benefits by fifty percent for a safety violation. We find no abuse of discretion in the ALJ's decision, and therefore affirm.

I. Background

¶ 2 Claimant worked as a maintenance and night laundry worker at Crossland Economy Studios, operated by employer, DW Crossland, LLC. In the early morning hours of October 14, 2017, claimant was working the night laundry shift, folding towels at a table. He testified that he "heard an unusual noise come from the washer" and "believed [he] saw a soda bottle with some soda in it, bouncing around in [the washing machine while] the machine was on the spin cycle." Because he did not want the bottle "to break open and have to completely rewash" the load of sheets, he opened the washer while the spin cycle was running, and "reached in to try to grab the pop bottle."

¶ 3 Employer's washer is "a Unima[c] Industrial style washer," that rotates at "about 550 rpm's" in the spin cycle. Claimant

testified that he neither hit the washer's stop button nor flipped the emergency electrical switch before reaching into the washer; rather, he followed his usual practice of opening the washer door mid-cycle. Claimant testified that the stop button "just never worked," and that, although cutting the power to the machine by flipping the emergency switch would have "cut[] the power to the machine," the machine would have continued spinning because the switch "wouldn't have applied the brakes." Consequently, the washer was still spinning at a high rate of speed when claimant stuck his arm in to retrieve the soda bottle he thought he saw.

¶ 4 Claimant admitted that posted on the washer was the following in all capital letters:

WARNING

MACHINE MAY BE HOT AND CAUSE BURNS

ATTEMPT NO ENTRY UNTIL BASKET HAS STOPPED

SERIOUS INJURY MAY RESULT

He conceded under oath that this warning constituted a safety rule which he "intentionally disregarded."

¶ 5 As claimant reached into the spinning washer, a "piece of sheet must have . . . wrapped around [his] wrist." The wrapped

sheet "flipped [him] up like a cartwheel," he landed with his "back towards the washing machine," and realized that his arm had been severed at the elbow.

¶ 6 Claimant called 911 himself. Police responded within one to two minutes and emergency medical technicians with the fire department arrived shortly thereafter. The first responding officer applied a Combat Application Tourniquet and was able to stop the bleeding quickly. Claimant was then transported by ambulance to the hospital for treatment.

¶ 7 Claimant admitted to the responding officers and under oath that just a few hours prior to sustaining his traumatic amputation injury, he smoked black tar heroin in employer's bathroom. The foil claimant used to smoke the heroin — still bearing the spiral residue track of the heated heroin and the remaining unheated chunk of the drug — was discovered in the bathroom by the responding police and fire personnel. Claimant testified that he used heroin daily and had used it on employer's premises every time he worked the night laundry shift. A toxicologist testified that the amount of heroin claimant smoked was sufficient to have put him in a "position where [he] would be impaired," "absolutely not normal,"

and "adversely affected by the use of heroin." She further testified that the accident's occurrence after claimant's use of heroin demonstrated a classic effect of heroin use — impulsivity and "a disregard for their own safety."

¶ 8 Employer admitted claimant's injury was work-related, but reduced claimant's non-medical disability benefits by fifty percent for claimant's violation of a safety rule as well as for his narcotic intoxication. Claimant applied for a hearing to challenge the reduction in his benefits. The ALJ rejected claimant's contentions, instead agreeing with employer that claimant willfully violated a safety rule. The ALJ expressly found that claimant

> acknowledged that placing his arm into the spinning basket of a washing machine constituted a dangerous situation. He agreed that the warning sign constituted a safety rule and by placing his arm into the machine he intentionally violated a safety rule. Claimant summarized that he "went against the posted safety code" by inserting his arm into the washing machine while it was on spin cycle. . . . His conduct lacked a plausible purpose because his action in ostensibly removing a Coca-Cola bottle from the washing machine while the basket was spinning was an attempt to speed the completion of his job duties. . . . His actions demonstrate that he deliberately violated [e]mployer's safety rule regarding operation of the washing machine.

> Accordingly, [c]laimant's actions constituted a willful failure to obey a reasonable safety rule adopted by [e]mployer in violation of [section] 8-42-112(1)(b), C.R.S. [2019,] and warranted the reduction of his non-medical benefits by fifty percent.

¶ 9 The Panel affirmed on review, holding that substantial evidence supported the ALJ's conclusion that claimant willfully violated a safety rule. The Panel also rejected claimant's contention that the ALJ abused his discretion by limiting claimant's testimony concerning the washing machine's operation and working condition.

¶ 10 Claimant now appeals. He contends that the ALJ improperly limited his testimony about the washer's working condition and that his testimony would have demonstrated a plausible purpose for violating employer's safety rule. Claimant argues that because he "was not permitted to testify that the stop and unlock buttons did not work, he was unable to [adequately] explain how his actions were the result of trying to do his job — in removing the item before it damaged the sheets — while simultaneously dealing with [e]mployer's faulty equipment." We are not persuaded that the ALJ abused his discretion or committed any error.

II. Analysis

¶ 11 A claimant's compensation "shall be reduced by fifty percent . . . [w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." § 8-42-112(1)(b). The term "willful" as used in the statute means "with deliberate intent." *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990) (quoting *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 144, 437 P.2d 548, 552 (1968)).

¶ 12 The employer bears the burden of proof of demonstrating a claimant's willful violation of a safety rule. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995). An employer meets its burden if it demonstrates that the employee knew of the rule "and yet intentionally does the forbidden thing . . . . It is not necessary for the employer to show that the employee, having the rule in mind, determined to break it; it is enough to show that, knowing the rule, he intentionally performed the forbidden act." *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 495, 232 P. 669, 670 (1925).

¶ 13 However, a safety rule will not be considered violated if the claimant offers a plausible purpose for the conduct. *City of Los Animas*, 804 P.2d at 286. More particularly, "willfulness is not established if an employee violates a safety rule in order to facilitate the accomplishment of a task." *Id.*

¶ 14 A finding that a claimant willfully violated a safety rule is a factual determination to be made by the ALJ and must be affirmed if supported by substantial evidence. § 8-43-308, C.R.S. 2019; *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 72, 246 P.2d 902, 905 (1952). We must also defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the record. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

¶ 15 Claimant concedes that he willfully violated a safety rule. He contends on appeal, as he did before the ALJ and the Panel, that he had a plausible purpose for doing so. Because the stop button did not work on the washer, he reasons he had no choice but to open the washer door while it was rapidly rotating on the spin cycle and retrieve the soda bottle he believed was inside. He argues that the ALJ stymied his ability to fully explain and develop his legal theory

by limiting his testimony regarding the functionality of the washing machine. He explicitly asserts that he was "disallowed . . . the opportunity to tell his side of the story" and barred from testifying "that the stop and unlock buttons did not work."

¶ 16 But, having reviewed the pertinent portion of the transcript, we conclude that claimant is overstating the ALJ's ruling. To summarize the exchange:

- Employer's counsel objected when claimant's counsel asked him if there were "any issues . . . with the washer, regarding its functionality."
- Employer's counsel argued that claimant was not qualified to testify about any mechanical problems the washer may have had.
- Claimant's counsel responded that claimant was "not going to testify to the mechanical" but that claimant "does have personal knowledge based off using the washer and I request that that information be admitted."
- The ALJ sustained employer's objection, admonishing the parties that they may "not go into sort of the mechanical

workings of the machine," a limitation to which claimant's counsel agreed, saying, "No, not at all, no."

- The ALJ continued, though, that "certainly, the claimant can testify about his experience with the machine."
- Claimant then proceeded to explain:

> In my experience, there was supposed to be a button that would stop the load from spinning, before you opened it. And you shouldn't – the purpose of the button was to stop the load from spinning, and then to unlock the latch. So that button had just never worked. And we never used it. And we would always just open the door. I would always just open the door.

Thus, as we read the transcript of the hearing, claimant was *not* prohibited from testifying "about how the stop and unlock buttons did not work," nor was he "disallowed . . . the opportunity to tell his side of the story." In our view, claimant has misconstrued the ALJ's ruling and overstated the detriment it caused him. Contrary to claimant's assertion, he stated on the record, and the ALJ heard, that the stop button did not work.

¶ 17 Moreover, even if the ALJ's decision to limit claimant's testimony about the mechanical workings of the washing machine negatively impacted claimant's presentation of his case, we note

that an ALJ has broad discretion to make evidentiary rulings. Section 8-43-207(1)(c), C.R.S. 2019, empowers an ALJ to "make evidentiary rulings." This statute vests in the ALJ "wide discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009). An ALJ's evidentiary ruling will therefore only be set aside if it is shown that the ALJ abused his discretion. *See Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 47 (refusing to set aside ALJ's ruling that documents were inadmissible where no abuse of discretion was shown). An ALJ abuses his discretion only if the evidentiary ruling "exceeds the bounds of reason." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993) (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985)).

¶ 18 Here, we cannot say that the ALJ abused his discretion by limiting claimant's testimony to his personal knowledge of the washer's operation and prohibiting him from testifying about the washer's mechanical operations. We note that claimant laid no foundation establishing he had any knowledge whatsoever of the washer's mechanical functioning. And, "whether a witness is qualified to testify as an expert witness is committed to the

discretion of the trial court and will not be disturbed absent a showing of a clear abuse of that discretion." *Schuessler v. Wolter*, 2012 COA 86, ¶ 70. Because claimant made no showing that he was knowledgeable about the washing machine's mechanical workings, we cannot say that the ALJ abused his discretion by limiting claimant's testimony to his personal knowledge of the machine's operation.

¶ 19 Claimant also contends that a question the ALJ asked during the hearing demonstrates that the ALJ did not understand the nature of the issues before him. The ALJ inquired:

> THE COURT: Okay, just for my clarification . . . so is it a safety rule violation, or is it the –
>
> MR. GREN (employer's counsel): Both.
>
> THE COURT: Okay, it's both.
>
> MR. GREN: Correct.
>
> THE COURT: Okay. That wasn't clear to me actually from the outset.

Although the statement is incomplete, it appears the ALJ was asking whether employer was pursuing a safety rule violation defense or an intoxication defense. Claimant implies that the ALJ therefore could not have properly weighed the objection to his

plausible purpose explanation of the washer's workings because the ALJ "was not aware that a safety rule violation was at issue." But here, too, claimant is reading too much into the ALJ's statement. The ALJ did *not* state that he was unaware that a safety rule violation was at issue at all; rather, he indicated that he was uncertain whether employer was pursuing both defenses. Nothing in the exchange suggests that the ALJ had made evidentiary rulings based on false assumptions. Absent such a showing, we cannot say that the ALJ's actions constituted an abuse of discretion. *See Coates, Reid & Waldron*, 856 P.2d at 856.

¶ 20 Moreover, as employer points out, in responding to employer's objection to claimant testifying about the washer's mechanical operation, claimant's counsel did not explain to the ALJ that he wanted to offer the testimony to support his plausible purpose contention. His only response to the objection was that claimant's testimony would be limited to claimant's "personal knowledge" of the washer. Because claimant did not provide an offer of proof about his testimony's purpose, he cannot now complain that the ALJ may not have understood the relevance of the washer's operation to his plausible purpose contention. *See Youngs v. Indus.*

Claim Appeals Office, 2013 COA 54, ¶ 42 (rejecting contention that the ALJ improperly limited testimony because no offer of proof was made).

¶ 21 Finally, claimant's admission that the warning label on the washer cautioning against making any "entry until basket has stopped" constituted a safety rule, and his concession that he "intentionally disregarded the safety rule," amply supports the ALJ's finding that claimant willfully violated a safety rule. Where, as here, substantial evidence supports the ALJ's factual finding, we may not set the finding aside. *See Golden Cycle Corp.*, 126 Colo. at 72, 246 P.2d at 905.

¶ 22 Accordingly, we find no error in the Panel's affirmation of the ALJ's order reducing claimant's non-medical disability benefits by fifty percent, pursuant to section 8-42-112(1)(b).

III. Conclusion

¶ 23 The order is affirmed.

JUDGE DUNN and JUDGE LIPINSKY concur.

COLORADO COURT OF APPEALS

DATE FILED: January 2, 2020
CASE NUMBER: 2019CA477

Court of Appeals No. 19CA0477
Industrial Claim Appeals Office of the State of Colorado
FEIN No. 45-2219514

Da Vinci Construction, LLC,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Director of the Colorado Division of Workers Compensation,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Freyre and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 2, 2020

Law Office of Steven J. Picardi, P.C., Steven J. Picardi, Parker, Colorado, for Petitioner

No Appearance for Respondents Industrial Claim Appeals Office and Director of the Colorado Division of Workers Compensation

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 This case involves the imposition of a fine against an employer for failing to carry the requisite workers' compensation insurance as mandated by section 8-43-409, C.R.S. 2019. We affirm the Panel's conclusion that a fine was appropriate in this case. However, because neither the Director of the Division of Workers' Compensation (Director) nor the Industrial Claim Appeals Office (Panel) had the benefit of considering this matter under the standard adopted by the Colorado Supreme Court in *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*, 2019 CO 47M, 442 P.3d 94, we set aside the portion of the Panel's order analyzing the alleged excessiveness of the fine and remand this case to consider whether the fine imposed is "grossly disproportional" under the *Dami Hospitality* standard.

I. Background

¶ 2 On August 16, 2018, the Director issued specific findings of fact, conclusions of law, and order to pay fine to employer, DaVinci Construction, LLC. The Director found that employer failed to comply with the statutory mandate set out in section 8-43-409 to carry a policy of workers' compensation insurance. He therefore ordered employer to pay a fine totaling $23,425.

¶ 3 Employer petitioned for review of the order and submitted new evidence for the Director's review. In response, the Director issued a supplemental order on November 20, 2018. Although he considered the new evidence employer offered, the Director again found that employer failed to comply with the statutory mandate to maintain workers' compensation insurance. He ordered employer to pay a fine of $47,425. In determining the appropriate fine, the Director paraphrased the test and cited to the following case law:

> *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), outlines a three factor test to be considered when determining an administrative fine: 1.) the degree of reprehensibility of the defendant's misconduct; 2.) the disparity between the harm or potential harm suffered and the fine to be assessed; and 3.) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. Further, *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 2017 COA 21, [*rev'd Dami Hosp.*, 2019 CO 47M] . . . requires the Director to make findings regarding Respondent's ability to pay.

¶ 4 On review, the Panel held that because "members of a limited liability company are considered employees," employer was statutorily obligated "to secure workers' compensation insurance" under sections 8-44-101 C.R.S. 2019 and 8-47-111, C.R.S. 2019.

The panel then determined that because substantial evidence supported the Director's finding that employer did not have in place a policy of workers' compensation insurance for a period of at least three years, the Director was authorized and permitted to impose a fine against employer. Relying upon the same case law the Director cited, the Panel affirmed the Director's supplemental order, concluding it had no basis for disturbing the fine, which fell within the statutory guidelines and complied with the test articulated in *Associated Business Products*. Employer now appeals.

II. Analysis

¶ 5 Since the Director and the Panel issued their respective orders in this case, the Colorado Supreme Court issued its decision in *Dami Hospitality* reversing and remanding the decision of a division of this court in *Dami Hospitality*, 2017 COA 21, ___ P.3d ___. Citing *United States v. Bajakajian*, 524 U.S. 321 (1998), our supreme court held that "the proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly disproportional to the gravity of the underlying offense." *Dami Hosp.*, 2019 CO 47M, ¶ 29, 442 P.3d at 101. The court explained that, when analyzing

whether an imposed fine is excessive and meets the proportionality test, reviewing courts must assess

> whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

Dami Hosp., 2019 CO 47M, ¶ 38, 442 P.3d at 103. As employer points out, the "grossly disproportional" test now applies to all analyses of asserted excessive fines in the workers' compensation context.

¶ 6 Employer does not contest that substantial evidence supports the Director's determination that it did not have the requisite workers' compensation insurance. Nor does employer appear to contest that the Director had the statutory authority and factual support to impose a fine against it. We have reviewed the record and agree with the Panel that substantial evidence supports the Director's factual determinations and his authority to impose a fine

in this case. These portions of the Panel's order are therefore affirmed.

¶ 7 However, employer contends that the case must be remanded to consider the fine under the "grossly disproportional" test adopted in *Dami Hospitality*. Because this test had not yet been adopted by the supreme court when the Panel issued its ruling, we agree with employer that remand is proper to consider whether the fine imposed was "grossly disproportional to the gravity of the underlying offense." *Dami Hosp.*, 2019 CO 47M, ¶ 29, 442 P.3d at 101.

III. Conclusion

¶ 8 The Panel's order is affirmed in part, set aside in part, and the case is remanded to the Panel to consider whether the fine imposed is "grossly disproportional to the gravity of the underlying offense." *Id.* at ¶ 29.

JUDGE FREYRE and JUDGE MÁRQUEZ concur.

COLORADO COURT OF APPEALS

DATE FILED: November 21, 2019
CASE NUMBER: 2019CA652

Court of Appeals No. 19CA0652
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-078-332

Rose Waldman,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and State of Colorado Department of Transportation,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE TOW
J. Jones and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 21, 2019

Rose Waldman, Pro Se

No Appearance for Respondent Industrial Claim Appeals Office

Philip J. Weiser, Attorney General, Tina R. Oestreich, Assistant Attorney General, Denver, Colorado, for Respondent State of Colorado Department of Transportation

¶ 1 In this workers' compensation action, claimant, Rose Waldman, appearing pro se, seeks review of a final order of the Industrial Claim Appeals Office (Panel) upholding the denial and dismissal of her claim for benefits. We affirm.

I. Background

¶ 2 Claimant works for employer, Colorado Department of Transportation (CDOT), in what she characterizes as a "desk job." On May 29, 2018, claimant was moving offices and reported feeling her back "wrench" after lifting a box out of her car. She testified that the box weighed less than four pounds. Midtown Occupational Health Services treated claimant's pain and diagnosed her with "lumbar strain."

¶ 3 Claimant had suffered back pain before this incident. The record reveals that in 2015, claimant sought massage therapy for "extreme pain in her low back" after hiking. At the time, she described her pain level as seven out of ten. After four sixty-minute therapeutic massage sessions within two weeks, claimant reported improvement in her back pain but still felt "slight tightness in her low back, primarily when she is sitting at her desk all day." She described similar progress with residual tightness in her back two

weeks later. After two more months of treatment, rather than improving, claimant reported that her back pain was "worse" and "that her low back has been aching constantly."

¶ 4 In 2015, claimant was involved in two motor vehicle accidents. She told her chiropractor that she had "symptoms of 'whiplash.'" In January 2016, the chiropractor diagnosed her with "moderate cervical joint dysfunction," "moderate thoracic joint dysfunction," "mild lumbar joint dysfunction," and "mild sacroiliac joint dysfunction." She continued treating with the chiropractor through at least August 2018. Although she improved under the chiropractor's care, she regularly reported a stiff and achy low back (June 2017), "mid back and upper back achy tightness" (July 2017), tightness in her lower back (September 2017), and a "tight" left low back (May 16, 2018).

¶ 5 Given her history of back treatment, CDOT contested her claim for benefits arising out of the May 29, 2018, box-lifting incident. CDOT retained a physician specializing in physical medicine and rehabilitation, Dr. Lawrence Lesnak, to independently examine claimant. Dr. Lesnak examined claimant, reviewed her prior medical records, and took her personal history. He noted that

claimant had a "completely 'normal' examination." He reported that he was unable to reproduce any symptoms "with any type of provocative maneuvers." And he noted that by claimant's own report, the box she lifted weighed "approximately four pounds" and that she had undergone treatment just before the work incident for "increased symptoms" in her back. Based on claimant's prior history and his exam, Dr. Lesnak concluded that

> although there may have been some type of incident that occurred on 05/29/18, there is absolutely no evidence that the patient had any type of injury. Unfortunately, she has had chronic diffuse spine soreness, stiffness, and achiness, and it has been well documented that she has had ongoing "tightness" throughout her low back for at least several years *prior* to the incident that reportedly occurred on 05/29/18. Therefore . . . there is absolutely no medical evidence to suggest that the patient sustained any type of "injury" during any potential incident that occurred during work hours on 05/29/18.

¶ 6 Claimant applied for an expedited hearing on the issues of compensability and medical benefits. After a hearing — the transcript of which is not part of the record before us — the administrative law judge (ALJ) hearing the case denied and dismissed claimant's claim for benefits. The ALJ found Dr.

Lesnak's opinions more credible and persuasive than medical opinions to the contrary or claimant's lay testimony. The ALJ noted that claimant had a "lengthy history of low back problems [and that her] . . . diagnosed lumbar strain is attributable to the natural progression of her long-standing back problems; and it did *not* amount to an acceleration or aggravation of her underlying back issues." Therefore, the ALJ concluded, claimant had failed to establish by a preponderance of the evidence that she sustained a compensable work injury on May 29, 2018.

¶ 7 On review, the Panel affirmed, noting that credibility determinations are within the ALJ's sound discretion, and that where, as here, substantial evidence supports the ALJ's factual findings, it cannot set them aside.

II. Analysis

¶ 8 Claimant contends that the ALJ abused his discretion in finding her back condition non-compensable, and that the Panel erred in affirming the ALJ's decision. She asks this court to review the evidence presented and set aside the Panel's order. She argues that the ALJ misapplied the law in finding that her back condition was the natural progression of her prior back condition because the

"theory of natural progression is not stated in the Workers' Compensation law." She argues, too, that Dr. Lesnak was not credible, "fabricated" portions of his report, and that the ALJ abused his discretion by relying on Dr. Lesnak's opinions. None of these arguments merits setting aside the Panel's order.

A. Governing Law and Standard of Review

¶ 9 "Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded." *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The issue of causation "is generally one of fact for determination by the ALJ." *Id.*; *see also H&H Warehouse v. Vicory*, 805 P.2d 1167, 1170 (Colo. App. 1990) ("The ALJ has great discretion in determining the facts and deciding ultimate medical issues.").

¶ 10 We must uphold the factual determinations of the ALJ if the decision is supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2019; *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007) ("We are bound by the factual determinations of the ALJ, if they are supported by substantial evidence in the record."); *Wal-Mart Stores, Inc. v. Indus. Claims*

Office, 989 P.2d 251, 252 (Colo. App. 1999) ("If substantial evidence supports the ALJ's conclusion that a claimant's condition is work-related, that determination may not be disturbed on review."). The reviewing court is bound by the ALJ's factual determinations even if the evidence was conflicting and could have supported a contrary result. It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ).

B. Natural Progression of Back Condition

¶ 11 Although claimant asserts that the ALJ misapplied the law in ruling that her back symptoms are the "natural progression" of her documented pre-incident back condition, her contention does not provide a basis for setting aside the ALJ's decision or the Panel's order affirming it. First, we note, contrary to claimant's assertion, the concept of "natural progression" of a pre-existing condition is not foreign to workers' compensation law. *See Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004) (worsened

condition due to the natural progression of earlier injury); *Loofbourrow v. Indus. Claims Appeals Office*, 321 P.3d 548, 552 (Colo. App. 2011) ("[T]he ALJ determined that claimant had proved she sustained a compensable injury to her lower back and that she suffered a subsequent worsening of that condition as a result of the natural progression of the initial work injury."), *aff'd sub nom. Harman-Bergstedt, Inc. v. Loofbourrow*, 2014 CO 5; *Roberts v. Indus. Comm'n*, 509 P.2d 1285, 1286 (Colo. App. 1973) (not published pursuant to C.A.R. 35(f)) (upholding ALJ's finding that claimant's presumed heart attack "was not causally related to his work but was caused by the natural progression of his pre-existing heart condition").

¶ 12 Second, while it is true that an aggravation of a pre-existing condition may be compensable, our analysis, like that of the ALJ's, cannot end there. *See H & H Warehouse*, 805 P.2d at 1169 ("The existing disease of an employee does not disqualify a claim if the employment aggravates, accelerates, or combines with the disease or infirmity to produce the disability for which workers' compensation is sought."). The mere occurrence of an incident at work does not necessarily render an injury compensable. *See F.R.*

Orr Constr. v. Rinta, 717 P.2d 965, 967 (Colo. App. 1985) (affirming finding that incident had not caused any compensable injury). Thus, the ALJ necessarily and correctly continued his analysis to ascertain whether claimant suffered a compensable injury at work. That determination is firmly within the ALJ's discretion because "whether a claimant has suffered a physical injury or has aggravated a pre-existing condition is a question of evidentiary fact." *Id.*

¶ 13 Here, the ALJ found, with record support, that claimant's condition was the natural progression of her ongoing back issues. Because record evidence supports this finding, we cannot disturb it. *See id.*

C. Substantial Evidence Supports the ALJ's Findings

¶ 14 Claimant's remaining contentions essentially ask us to reweigh the evidence to reach a finding contrary to the ALJ's conclusion, arguing that the evidence is not susceptible of the ALJ's interpretation. She challenges the accuracy of the medical evidence and questions the reliability of the medical findings.

¶ 15 However, we may not reweigh the evidence. *See Metro Moving & Storage*, 914 P.2d at 415. Assessing the reliability of the evidence

and testimony fall squarely within the ALJ's decision-making arena. "[W]e may not interfere with the ALJ's credibility determinations" unless the evidence is "overwhelmingly rebutted by hard, certain evidence" to the contrary. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *see also Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 46 ("Nor may we set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence."). The weight to be given expert medical testimony is within the ALJ's sound discretion. *See Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

¶ 16 Here, we cannot review the entire record before the ALJ, because the transcript of the hearing is not part of the record before us. Where a transcript is not included in the record, we must presume that the ALJ's resolution of the issue is supported by the evidence. *Nova v. Indus. Claim Appeals Office*, 754 P.2d 800, 801 (Colo. App. 1988).

¶ 17 Nevertheless, even if we exclude hearing testimony from our analysis, medical reports and written opinions contained in the record amply support the ALJ's decision. As described above, Dr. Lesnak found no causal relationship between the claimed work

injury and claimant's complaints of back pain. Dr. Lesnak opined that claimant's back pain was more likely attributable to her long-standing back condition. His opinion is corroborated by evidence in the record establishing that claimant had been treated for back problems since at least 2016.

¶ 18 Although claimant suggests that Dr. Lesnak's opinions are untrustworthy and "fabricated," such credibility determinations are soundly within the ALJ's discretion and claimant has offered no basis to challenge the ALJ's finding that Dr. Lesnak's opinions were credible and persuasive. *See Youngs*, ¶ 46; *Arenas*, 8 P.3d at 561; *Rockwell Int'l*, 802 P.2d at 1183. Given that Dr. Lesnak's opinions are corroborated by other evidence in the record, we find nothing in the record overwhelmingly rebutting Dr. Lesnak's testimony and opinions. *See Youngs*, ¶ 46; *Arenas*, 8 P.3d at 561. Absent such a showing, we are not at liberty to set aside the ALJ's finding that Dr. Lesnak's opinions were credible and persuasive. *See Youngs*, ¶ 46; *Arenas*, 8 P.3d at 561.

¶ 19 Accordingly, we conclude that the evidence amply supports the ALJ's factual findings and legal conclusions. We therefore perceive no basis for setting aside the Panel's or the ALJ's orders.

See § 8-43-308; *Wal-Mart Stores*, 989 P.2d at 252; *Metro Moving & Storage*, 914 P.2d at 415.

III. Conclusion

¶ 20 The order is affirmed.

JUDGE J. JONES and JUDGE FOX concur.

COLORADO COURT OF APPEALS

DATE FILED: December 19, 2019
CASE NUMBER: 2019CA544

Court of Appeals No. 19CA0544
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-012-221

JBS Holdings and Zurich American Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Antonio Meza-Guzman,

Respondents.

ORDER AFFIRMED

Division I
Opinion by JUDGE FREYRE
Taubman and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 19, 2019

Pollart Miller LLC, Brad J. Miller, Greenwood Village, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Kaplan Morrell, Britton Morrell, Greeley, Colorado, for Respondent Antonio Meza-Guzman

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 In this workers' compensation action, employer, JBS Holdings (JBS USA, LLC), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which upheld the decision of an administrative law judge (ALJ) finding claimant, Antonio Meza-Guzman, permanently and totally disabled. Because substantial evidence supports the ALJ's findings, we affirm the Panel's order.

I. Background

¶ 2 The record contains substantial evidence of the following. Mr. Meza-Guzman worked in the meat-packing industry for nearly thirty years, his last six years for employer. He was born in Mexico in 1953 where he attended, but did not complete, elementary school. He speaks Spanish and relied on an interpreter at the hearing in this matter. He reads some Spanish but is unable to read or write English.

¶ 3 In September 2015, while cleaning his knives at work, Mr. Meza-Guzman slipped on water and fell backwards, hitting his right hip and leg. The fall caused him back pain. He was diagnosed with thoracic spine sprain, lumbosacral sprain, and a back contusion and was placed on restricted duty as follows:

> Bending may not be performed. Carrying should be limited to 10 pounds or less. Climbing may not be performed. Lifting should be limited to 10 pounds or less. Lifting repetitively should be limited to 10 pounds or less. Pushing and pulling should not be performed. Stooping may not be performed.

Employer assigned Mr. Meza-Guzman to light duty, cleaning the locker room and cafeteria, to accommodate these restrictions. He continued working for employer until April 2016 when he exceeded employer's six-month maximum for temporary "restricted duty jobs," and employer terminated his employment. He has not worked since then.

¶ 4 In June 2016, Dr. Cathy Smith, placed him at maximum medical improvement (MMI). Another treating physician to whom Dr. Smith referred Mr. Meza-Guzman, Dr. Gregory Reichhardt, calculated Mr. Meza-Guzman's impairment as 17% of the whole person after combining his impairment ratings for his range of motion limitations and spine injuries. Dr. Reichhardt stated that he and Mr. Meza-Guzman "agreed on the following restrictions: Limit lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. No lifting while bending or

twisting at the waist. Limit bending and twisting at the waist to a rare basis, four times per hour, while not lifting."

¶ 5 Dr. Smith adopted Dr. Reichhardt's impairment recommendations but imposed her own permanent restrictions:

> All work in close to body from knee to chest level to avoid bending, twisting, stooping and reaching away from the body or above chest level. No walking or standing more than 60 minutes without sitting for 45 minutes. . . . Lifting should be limited to 15 pounds or less. Carrying should be limited to 15 pounds or less. Pushing and pulling should be limited to 15 pounds or less. Bending may not be performed. Reaching may not be performed. Stooping may not be performed. Twisting may not be performed.

¶ 6 After reaching MMI, Mr. Meza-Guzman underwent a division-sponsored independent medical examination conducted by Dr. Alicia Feldman. Dr. Feldman agreed Mr. Meza-Guzman had reached MMI in June 2016. She calculated his impairment rating at 18% of the whole person, which employer accepted in its final admission of liability.

¶ 7 However, employer questioned the extent of Mr. Meza-Guzman's injuries because he had numerous pre-existing medical conditions and prior accidents. He admitted that he

- was involved in a motor vehicle accident in November 1997;
- had sustained an injury to his right elbow at a beef packing plant in October 2001;
- had fallen on his back in November 2001;
- had fallen in his bathtub in February 2015;
- had fallen off a platform in August 2015;
- had fallen on ice sometime in 2016 or 2017; and,
- suffers from diabetes.

Medical records also suggested that Mr. Meza-Guzman suffers from alcoholism.

¶ 8 Aware of this background, employer retained Dr. Kathleen D'Angelo to examine Mr. Meza-Guzman and opine on the work-relatedness of his injuries. After examining him and reviewing his medical records, Dr. D'Angelo identified numerous unrelated medical conditions, including diabetes, diabetic neuropathy, chronic alcoholism, hypertension, gastritis, osteoarthritis, degenerative spine disease, and diffuse idiopathic skeletal hypertosis (DISH) from which Mr. Meza-Guzman suffered.

¶ 9 She further concluded his claim-related diagnoses were limited to lumbosacral and thoracic contusions, both of which had reached MMI and had been resolved. She opined that his pain complaints were disproportionate to the mechanism of his injury and lamented that she was "at a loss from a physiological standpoint to explain [his] continued complaints of pain in view of his benign lumbar spine examinations." To bolster her conclusion, she observed that when Mr. Meza-Guzman came to her office for his exam, she was

> struck by the – his ability to move and the fluidity of his motion. He was able to sit comfortably, he was able to transfer from sitting to standing, standing to supine, back again. He carried his cane, but he didn't walk with a limp, and most of the times . . . he didn't even touch the cane down to the floor.

¶ 10 Dr. D'Angelo ultimately opined that Mr. Meza-Guzman's "current complaints are not causally related to his September 2015 work injury due to cumulative injury, acute injury or aggravation of an underlying injury. It is further my medical opinion that [Mr. Meza-Guzman's] complaints are due to Degenerative Spine Disease and his underlying DISH."

¶ 11 Mr. Meza-Guzman remained unemployed, though, and, in May 2017, filed an application for hearing seeking permanent total

disability (PTD) benefits. Each party retained a vocational rehabilitation specialist to assess claimant's employability. Mr. Meza-Guzman's expert, Katie Montoya, concluded that his education level, illiteracy, age, transferable work skills, inability to speak English, and medical restrictions imposed by both Drs. Reichhardt and Smith rendered him unable "to return to" his prior area of employment and "unemployable."

¶ 12 In contrast, employer's vocational rehabilitation expert, Gail Pickett, opined that there were several jobs in the light duty category that Mr. Meza-Guzman could perform, including light production work in a manufacturing facility, light janitorial work, laundry attendant, fast food worker, food delivery driver, or porter for a car dealership. However, Ms. Pickett conceded that her analysis relied upon Dr. Reichhardt's less limiting work restrictions, but that if Dr. Smith's more restrictive work limitations were adopted — i.e., limiting Mr. Meza-Guzman to lifting not more than fifteen pounds rather than twenty pounds, and requiring him to keep his arms close to his body — he "would be unemployable."

¶ 13 The ALJ found the opinions of Drs. Smith, Reichhardt, and Feldman more persuasive and credible than those of Dr. D'Angelo.

He therefore adopted the work restrictions imposed by Drs. Smith and Reichhardt. Likewise, the ALJ credited Ms. Montoya's vocational opinions over those of Ms. Pickett. Finally, the ALJ found Mr. Meza-Guzman "to be a credible witness." Based on these findings, the ALJ concluded that the injuries he sustained at work in September 2015 rendered him unemployable and awarded him PTD benefits. The Panel upheld the ALJ's findings and conclusions because substantial evidence supported them.

II. Analysis

¶ 14 Employer contends that the ALJ erred in finding Mr. Meza-Guzman permanently and totally disabled. It argues that the ALJ "committed reversible error" by disregarding "compelling" medical evidence and lay testimony which established that claimant is capable of working. It contends that the ALJ was wrongly persuaded by his exaggeration of his symptoms and the extent of his disability. Essentially, employer asks us to reweigh the evidence to reach a different outcome than the ALJ reached. For the reasons discussed below, we decline to do so.

A. Law Governing Permanent Total Disability

¶ 15 A claimant is permanently and totally disabled, and therefore entitled to disability compensation, if he or she "is unable to earn any wages in the same or other employment." § 8-40-201(16.5), C.R.S. 2019. In determining whether a claimant is permanently and totally disabled, the ALJ may consider "human factors." *See Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). "Human factors" include such elements as the claimant's "education, ability, and former employment," *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 703 (Colo. App. 1999), "the claimant's age, work history, general physical condition, and prior training and experience," *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001), and "the community where [the] claimant resides." *Brush Greenhouse Partners v. Godinez*, 942 P.2d 1278, 1279 (Colo. App. 1996), *aff'd sub nom. Bymer*, 955 P.2d 550.

¶ 16 Whether a claimant is permanently and totally disabled — i.e., whether the claimant "is able to earn wages in the same or other employment" — is a question of fact for determination by the ALJ. *See Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194, 1197 (Colo. App. 1995). Consequently, an ALJ's determination

concerning a PTD award "may be set aside only if the factual findings in each case are unsupported by substantial evidence." *Bymer*, 955 P.2d at 558.

¶ 17 "Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). In reviewing an ALJ's decision, like the Panel, we must also defer to the ALJ's credibility determinations and "view the evidence as a whole and in the light most favorable to the prevailing party." *Id.* "If two equally plausible inferences may be drawn from the evidence, we may not substitute our judgment for that of the ALJ." *Id.* at 415. Consequently, the scope of our review "is exceedingly narrow." *Id.*

B. Substantial Evidence Supports the ALJ's PTD Determination

¶ 18 Here, the ALJ determined, with record support, that Mr. Meza-Guzman is permanently and totally disabled. The ALJ relied upon the reports and opinions of Drs. Smith, Reichhardt, and Feldman, who all opined that he sustained permanent impairment as a result

of his September 2015 work-related fall. Although some differences exist in the extent of restrictions each imposed, all three physicians agreed Mr. Meza-Guzman could not perform his usual work duties and required limitations on his daily activities.

¶ 19 As employer points out, Dr. D'Angelo reached a different conclusion, opining that Mr. Meza-Guzman's work-related injuries should have been resolved and attributing any ongoing complaints to his pre-existing, non-work-related conditions. Employer vigorously argues that Dr. D'Angelo's opinions were more persuasive than those of the other physicians and should have prevailed. However, the credibility of experts' testimony and opinions falls squarely within the ALJ's discretion. *See Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). And here, the ALJ found Dr. D'Angelo's opinions and testimony less credible and persuasive than those of Drs. Smith, Reichhardt, and Feldman. Indeed, the ALJ adopted Dr. Smith's recommended restrictions for Mr. Meza-Guzman. Absent a showing that the ALJ's credibility determination is "overwhelmingly rebutted by hard, certain evidence" to the contrary, we may not disturb it. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *see also*

Youngs v. Indus. Claim Appeals Office, 2012 COA 85M, ¶ 46 ("Nor may we set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence.").

¶ 20 Mr. Meza-Guzman's vocational rehabilitation specialist, Ms. Montoya, further buttressed the ALJ's findings. Relying on Dr. Smith's restrictions, Ms. Montoya testified that his physical and medical restrictions precluded him from entering the labor market in any capacity. Importantly, Ms. Pickett partially agreed. Even though her written report diverged from Ms. Montoya's conclusions, Ms. Pickett conceded at the ALJ hearing that she based her opinions on Dr. Reichhardt's restrictions rather than Dr. Smith's, and that if the latter's restrictions were adopted by the ALJ, Mr. Meza-Guzman would be deemed unemployable.

¶ 21 Mr. Meza-Guzman's testimony also corroborated Ms. Montoya's conclusions. He testified that he limits activities that cause him pain. Specifically, he stated that he walks no more than ten to fifteen minutes at a time, lifts only partially full gallons of milk "when it's a little empty," and drives no more than thirty to sixty minutes at a time. The ALJ credited this testimony; employer has offered no evidence overwhelmingly rebutting it; and we

therefore, cannot set aside this credibility determination. *See Arenas*, 8 P.3d at 561.

¶ 22 Finally, despite employer's contention that it is "unrefuted that the compensable work injury was limited to a back strain, which [was] resolved," employer does not dispute that Mr. Meza-Guzman has not returned to work in any capacity since his fall at work. Mr. Meza-Guzman testified that although he has applied for jobs, he has been unable to secure any employment. This undisputed fact also supports the ALJ's conclusion that the injury rendered claimant permanently and totally disabled and unemployable. *See Bymer*, 955 P.2d at 558.

¶ 23 Thus, even though employer presented evidence from which one could conclude that Mr. Meza-Guzman is employable, such evidence is insufficient to overcome our standard of review.

> [T]he mere fact that contrary evidence exists that could support the opposite result is insufficient to justify setting aside an ALJ's order or the Panel's decision affirming it. And, we may not reweigh the evidence to reach a result contrary to the ALJ's factual findings if those findings are supported by evidence in the record.

Sanchez v. Indus. Claim Appeals Office, 2017 COA 71, ¶ 57.

¶ 24 Accordingly, we find no basis to set aside the Panel's decision affirming the ALJ's award of PTD benefits to Mr. Meza-Guzman. *See Bymer*, 955 P.2d at 558.

III. Conclusion

¶ 25 The order is affirmed.

JUDGE TAUBMAN and JUDGE MÁRQUEZ concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-070-200-002

IN THE MATTER OF THE CLAIM OF:

SAMMIE LAWRENCE, IV,

Claimant,

v.

FINAL ORDER

HARVEST HAPPENS LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Margot W. Jones (ALJ) dated June 13, 2019, that denied and dismissed the claim. We affirm.

The ALJ conducted the evidentiary hearing on March 26, 2019. The record also includes an evidentiary deposition dated April 19, 2019.

The issue for determination was whether the claimant sustained a compensable injury arising out of and in the course of employment; and if so, whether the claimant is entitled to the concomitant medical and indemnity benefits.[1] In her order, the ALJ established findings of fact which are summarized below.

The employer is a supplemental staffing agency for licensed marijuana facilities in Colorado. The claimant worked as a marijuana harvester and trimmer. Claimant alleges that he sustained a head injury in the course and scope of his employment on February 19, 2018. On the morning of February 19, 2018, the claimant had an incident with a "bo staff"[2] that he was using for non-employment reasons. He showed up early to show two other individuals his techniques with respect to the spinning of the staff. He struck

[1] A secondary issue of responsibility for the termination of employment was heard but not decided because the ALJ determined that the claim was not compensable.

[2] A "bo staff" is a wooden or metal rod used as a weapon in certain martial arts. It can also be used for personal entertainment.

himself in the head with the staff. Claimant testified that the incident with the staff occurred approximately four hours prior to the alleged work injury.

In her findings of fact, the ALJ does not provide or describe the alleged mechanism of injury which purportedly occurred on February 19, 2018. (We reviewed the hearing transcript and necessarily summarize the alleged mechanism of injury as testified to by the claimant.) The claimant testified that he was in the drying room. As he walked in the door, a metal beam jarred from behind the door, and it fell. He went over to try and move the metal piece, and as he knelt down he "missed," and a wooden beam came from behind him and struck him in the left side of his head. Tr. at 18-19. The claimant knew immediately that he had been injured. Tr. at 20. The claimant worked the rest of his shift on February 19 and his next scheduled shift on February 20.

The incident in question was captured on video by a security camera. Resp. Ex. P. The ALJ found that the video does not corroborate claimant's claim of a work injury. Specifically, the ALJ found that the metal pole fell down to the ground. A wooden pole also fell but was caught by the claimant with his left hand. It did not appear that the wooden pole was diverted or altered by any object, including any part of the claimant's body. The video does not show the claimant flinch or engage in any other movement that would be consistent with a traumatic event. In addition, the ALJ found that the claimant's testimony concerning where he was struck was inconsistent.

The ALJ credited two coworkers that were nearby and arrived at the scene immediately after the incident. The coworkers testified credibly that the claimant denied being struck in the head, and that he did not exhibit behavior consistent with being struck in the head or suffering any injury.

The ALJ makes extensive findings in regard to the claimant's pre and post-injury health issues. However, we need not address these health issues because the ALJ effectively determined that the claimant sustained no injury of any kind during the incident. The ALJ gives no indication that the claim was denied on any other basis such as being due to a preexisting condition. Accordingly, the claimant's pre and post-injury health issues are not dispositive to our review.

Based on the findings of fact, the ALJ concluded that the claimant failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment. The ALJ determined that the video of the incident does not support any physical injury. The ALJ essentially discredits the claimant's testimony

regarding the incident, but specifically finds the testimony of the employer's witnesses to be credible. Consequently, the ALJ denied and dismissed the claim for compensation.

Through counsel, claimant filed a Petition to Review the ALJ's order on June 13, 2019. Thereafter, counsel for the claimant was granted leave to withdraw his representation by order of ALJ Goldman on July 17, 2019.

The grounds for appeal stated in the Petition for Review are:

> ALJ Jones' determination regarding compensability is based on obstructed video surveillance and the testimony of witnesses lacking credibility, thus ALJ Jones' determination regarding compensability is not supported by the weight of the evidence.

The claimant has not filed a brief in support of his petition to review and, therefore, the effectiveness of our review is limited. *Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986). The lack of a brief in support of the appeal does not bar the panel from ruling on a timely petition to review. *Jiminez v. Industrial Claim Appeals Office*, 107 P. 965, 967 (Colo. App. 2003). However, the claimant's contentions are not further developed on appeal, never articulating precisely what facts are being challenged or how the decision is contrary to the applicable law.

Because claimant has failed to develop any argument, we confine ourselves to our applicable statutory standard of review. Thus, we may only correct, set aside, or remand an order if the findings of fact are not sufficient to permit appellate review, if conflicts in the evidence are not resolved, if the findings of fact are not supported by the evidence, if the findings of fact do not support the order, or if the award or denial of benefits is not supported by the applicable law. §8-43-301(8), C.R.S. We perceive no basis to disturb the ALJ's order in this case.

Claimant argues that the view in the video of the incident was obstructed. In the video, the claimant's head is hidden behind other objects for a split second. It cannot be definitively determined whether the falling wood struck the claimant or not. Likewise, nothing shown in the video corroborates the claimant's claim of a work related injury. However, the video supports the ALJ's determination that the claimant was not credible in that it clearly belies the claimant's testimony that he was kneeling in an attempt to remove the metal bar when he was purportedly struck. In addition, substantial evidence exists in the record that upholds the ALJ's determination that the claimant's testimony was inconsistent. The claimant initially testified that the wood piece struck him on the left side of his head. Tr. at 18-19. After being shown the video during the hearing, the

claimant testified that the wood struck him on "the top of the head." Tr. at 65-66. The record also reflects testimony from two coworkers, who testified, that immediately after the incident, the claimant said, "That board almost hit me. Good thing it didn't though ...." Tr. at 111. And, "Oh man, I almost - - I would have gotten knocked out by this board, but I think it would have been okay because I have so much hair. And the noise was the board sliding down the wall." Tr. at 118-119.

In order to prove a compensable injury, the claimant bears the burden to establish that the injury arose out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). "The term 'arising out of' refers to the origin or cause of an employee's injury." *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014); *see also Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Id.*

The ALJ is charged with making pertinent factual determinations, including those concerning liability for benefits, under a preponderance of the evidence standard. Section 8-43-201, C.R.S. Proof by a preponderance of the evidence requires the proponent to establish that the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Id.*

Because the question of whether the claimant met his burden to prove compensability 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. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in the light most favorable to the prevailing party and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

We conclude that the findings of fact are sufficient to permit our review; any conflicts in the evidence were resolved in the ALJ's order; the findings of fact are

supported by the evidence; the findings of fact support the order and are otherwise supported by applicable law. To the extent that the ALJ's order required findings of fact, all such findings are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Accordingly, we find no basis on which to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order issued June 13, 2019, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

12/5/19 by KG .

SAMMIE LAWRENCE IV, 1926 CANYON BLVD APT 10, BOULDER, CO, 80302 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS & STERN LLC, Attn: KEVIN CARLOCK ESQ, 1700 LINCOLN STREET SUITE 4500, DENVER, CO, 80203 (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. 5-076-840-002

IN THE MATTER OF THE CLAIM OF:

AARON LORENZ,

Claimant,

v.

STATE OF COLORADO
DEPARTMENT OF CORRECTIONS,

Self-Insured Employer,
Respondent.

FINAL ORDER

The respondent seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated June 11, 2019, to the extent it determined certain medical treatments, "if prescribed", are reasonable and necessary. We correct this finding pursuant to § 8-43-301(8) C.R.S.

The claimant worked as a sergeant at the Denver women's correctional facility. He was assigned to manage the kitchen and the inmates working there. On August 6, 2017, the claimant injured his knee while working in the kitchen. He reported the injury to his supervisor but was not provided a list of physicians from which to treat. The claimant saw a doctor at the Family Medicine Clinic the next day. An MRI was recommended and was obtained on August 27. The MRI study revealed a "displaced bucket handle tear medial meniscus." The claimant was referred to Dr. Reister, an orthopedic surgeon. Dr. Reister recommended a surgical repair of the medical meniscus.

The respondent denied the compensability of the knee injury asserting that while the claimant described his injury as occurring in the employer's kitchen, the claimant had also initially reported his condition as a recurring injury. The claimant denied any prior knee injury or reporting he had ever experienced previous knee symptoms.

The claimant continued to work in order to accumulate enough paid sick days to allow him to miss several weeks of work following his pending knee surgery. Dr. Reister performed the surgical meniscectomy repair on May 29, 2018. The claimant was able to return to full duty work on July 8, 2018.

Following a hearing on April 9, 2019, the ALJ issued an order finding the claimant established a compensable injury to his right knee on August 6, 2017, in the course and scope of his employment. The ALJ concluded the claimant had not suffered any previous injury to the knee. The claimant was awarded temporary total disability benefits from May 29 through July 8, 2018.

Under the heading "ORDER", the ALJ also set forth "Claimant is entitled to a general award of medical benefits and specifically the surgery on his right knee performed on May 29, 2018."

In the Conclusions of Law, the ALJ resolved:

> Respondent filed an incident report but failed to send claimant to a physician or provide claimant a provider list. Claimant has established that all treatment to date, including the surgery recommended and performed by Dr. Reister is both reasonable and necessary to cure and relieve the effects of his injury. Any aftercare, if prescribed by Dr. Reister, including physical therapy or rehabilitation from this injury is also reasonable and necessary.

On appeal, the respondent seeks a corrected order removing the last sentence from this paragraph dealing with aftercare, physical therapy and rehabilitation. Citing to *Torres v. City and County of Denver*, W.C. No. 4-937-329 (May 15, 2018), and to *Potter v. Grounds Service Co.*, W.C. No. 4-935-523 (August 15, 2018), the respondent contends the sentence exceeds the authority of the ALJ because it has the effect of ordering specific medical treatment that has not been recommended by an authorized treating physician. The respondent also argues the issue of these specific medical procedures was not endorsed for decision by the ALJ either through prior notice or because no physician had ever recommended them. Finally, the respondent asserts it has a right to dispute a claimant's continuing medical care on the basis of reasonableness or its relation to the work injury. By prospectively authorizing specific treatment the respondent maintains the ALJ has prevented it from exercising this ability to challenge the requested therapies.

Section 8-43-301(2), C.R.S., provides that a party may petition to review any order which "requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty." However, orders which do not award or deny benefits or penalties are interlocutory and not subject to immediate review. *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). A finding that the respondent may be liable for an inchoate right to a medical procedure in the event it is recommended in the future, and

is not included in the section of an ALJ's decision designated as an 'Order', may cause the finding to escape review as an award of medical benefits as a final, appealable order because it seemingly does not require the respondent to pay a medical benefit. *See Harley v. Life Care Centers*, W.C. No. 4-810-998 (May 20, 2011); *Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996).

However, an interlocutory issue may become reviewable when it is associated with an ALJ's decision that does order or deny a benefit such that the order may be characterized as final. "Where an order neither awards nor denies benefits, it is merely interlocutory and is 'not ripe for appellate review.' … However, 'an interlocutory order becomes reviewable when appealed incident to or in conjunction with an otherwise final order.'" *BCW Enters., Ltd. v. Indus. Claim Appeals Office*, 964 P.2d 533, 537 (Colo. App. 1997)." *Youngs v. Industrial Claim Appeals Office*, 316 P.3d 50, 55 (Colo. App. 2013). Here, the ALJ directed the payment of both temporary disability benefits and the medical expenses for a May 29, 2018, surgery. Accordingly, the possibility that the ALJ's finding related to physical therapy, aftercare and rehabilitation is interlocutory does not preclude its review as it is appealed in conjunction with an otherwise final order.

The respondent's reliance on *Torres* and *Potter* is misplaced in this matter. Those decisions pointed out that an ALJ may not authorize a medical treatment not recommended by an authorized physician. This was because to do so the ALJ was necessarily requiring an authorized medical treater to perform a procedure the treater did not professionally agree to or approve.. In the alternative, the ALJ would be authorizing a treatment the claimant could never actually receive due to the unwillingness of an authorized treater to perform the task. However, in this case the ALJ specified the physical therapy, aftercare and rehabilitation first had to be "prescribed by Dr. Reister." It is a fair inference from the ALJ's holdings that Dr. Reister is an authorized medical provider pursuant to § 8-43-404(5)(a)(1)(A) C.R.S. Accordingly, the ALJ has directed that the treatment, if prescribed, would indeed be provided by an authorized physician.

The balance of the respondent's arguments largely features identical concepts. The statute, § 8-42-101(1)(a), requires that any medical benefits be demonstrated as "reasonably be needed" to treat "the effects of the injury". The claimant then must establish a causal link between the medical therapy and the work injury and a prospect that the therapy will render the effects of the injury to be cured or relieved. The respondent has a right to rebut these contentions and they must be provided prior notice of the issue in order to present their case. However, the respondent points out that at the outset of the hearing it specifically inquired as to the medical issues the claimant sought to present. Counsel for the claimant replied: "… he has a meniscus repair done on May

[2]9, 2018. … There's not any additional care that's being recommended." Tr. at 9-10. Both parties also submitted the final two treatment reports from Dr. Reister's office post-surgery. On June 12, 2018, the report noted: "He is not interested in any physical therapy for the knee. … follow up in 4-6 weeks." Exhibit 10. The final report dated July 10, 2018, states only: "Follow up 6 weeks, prn". Exhibit 11. The respondent relies on *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995), to indicate that a medical benefit not raised as an issue at hearing may not be addressed by the ALJ in the resulting order.

We agree with the respondent's position. We construe the statement of claimant's counsel as a judicial admission that there was no dispute over any pending medical recommendations. A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute. *Wang v. August Moon Asian Grill*, W.C. No. 4-885-554-07 (January 17, 2017); *Kempter v. Hurd*, 713 P. 2d 1274 (Colo. 1986), We have held that the post hearing advisement by a parties' attorney that "the claimant was not challenging the treating physician's determination of MMI … amounted to a judicial admission that the claimant was not seeking additional treatment to improve her condition...." *Dimitt v. Prime Cut Meat Market*, W.C. No. 4-426-344 (January 18, 2002). We have noted that parties may not advocate one position before the ALJ and assert a new position on appeal. *Kresl v. Poudre Valley Healthcare*, W.C. No. 4-359-681 (April 4, 2000)(relying on S*chlage Lock v. Lohr*, 870 P.2d 615 (Colo. App. 1993)).

As a consequence, the issue of physical therapy, aftercare and rehabilitation following the May 29 surgery was not an issue presented to the ALJ for resolution. We therefore correct the conclusions of law appearing on page 7 of the ALJ's order to strike the finding that "Any aftercare, if prescribed by Dr. Reister, including physical therapy or rehabilitation from this injury is also reasonable and necessary". Otherwise, we leave the ALJ's order undisturbed.

IT IS THEREFORE ORDERED that the ALJ's order issued June 11, 2019, is corrected as described above.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

John A. Steninger

CERTIFICATE OF MAILING

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

12/5/19 by KG .

FRICKEY LAW FIRM, Attn: ADAM MCCLURE ESQ, 940 WADSWORTH BLVD 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)
OFFICE OF THE ATTORNEY GENERAL, Attn: CLAY THORNTON ESQ, 1300 BROADWAY 10TH FLOOR, DENVER, CO, 80203 (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
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DENVER, CO 80203

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

INDUSTRIAL CLAIM APPEALS OFFICE

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

IN THE MATTER OF THE CLAIM OF:

LAURA DAVOLI,

Claimant,

v.

REMAND ORDER

UNIVERSITY OF COLORADO,

Employer,

and

UNIVERSITY RISK MANAGEMENT,

Insurer,
Respondents.

The claimant seeks review of an order on remand of Administrative Law Judge Turnbow (ALJ) dated July 17, 2019, that determined the claimant sustained a compensable injury on November 9, 2016, and concluded that the claimant received all reasonable and necessary medical treatment and appropriate disability and impairment benefits as part of a prior claim. We reverse the ALJ's order and remand the matter for determination of medical benefits.

This matter was previously before us. A hearing was held on the issues of compensability, reasonable, necessary and authorized medical providers, and the respondents' contention that the "accident or injury claimed was fully compensated in W.C. No. 5-009-471." The ALJ found that the claimant sustained an admitted work-related injury on March 3, 2016, when she struck her head on a counter. The respondent admitted liability in W.C. No. 5-009-471. The claimant was treated by Dr. McIntyre.

On November 9, 2016, the claimant struck the left side of her head and neck on an x-ray machine while at work. The claimant experienced an increase in symptoms because of the November 9, 2016, event. The claimant reported the November 9, 2016 event and her increased symptoms to Dr. McIntyre. Dr. McIntyre characterized the event as a "re-injury" and an "injury" that caused some regression and worsening in her symptomology.

On November 21, 2016, the claims representative documented a conversation with the claimant discussing the November 9th event and whether the respondent would open a new claim or cover the claimant under the prior March 2016 claim. The ALJ found that the claims representative advised the claimant that because the November 9, 2016, incident involved the same body part and Dr. McIntyre stated that it was an aggravation, the November 9, 2016, incident would continue to be handled under the current claim. The ALJ further found that the claim representative was under the impression that the claimant understood this to be the case.

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

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

On January 19, 2018, the claimant filed a new workers' claim for compensation for the November 9, 2016, event. The respondents filed a notice of contest taking the position that the November 9, 2016, event was "subsumed within W.C. No. 5-009-471 and that the case was closed." The claimant continued to treat with her private physician at Kaiser Permanente, continuing to complain of neck pain and headaches in those records.

In an order dated August 8, 2018, the ALJ found that the claimant did not lose any time from work or experience a permanent medical impairment that was not addressed in the final admission for March 3, 2016, injury. The ALJ further found that the respondents administrated the November 9, 2016, event as a component of the March 3, 2016, and denied the claim for compensability in W.C. No. 5-068-419.

The claimant appealed contending that the ALJ erred as a matter of law in finding that the respondents did not have to file a new claim when the claimant suffered a new injury resulting in additional medical treatment and physical restrictions. We determined that the ALJ misapplied the law and the findings of fact were conflicting and insufficient to permit appellate review because we could not determine from the face of the order whether the ALJ found that the claimant sustained a new injury or that her need for treatment was the result of the prior workers' compensation injury. We, therefore, remanded the matter for further findings and a new order.

On remand the ALJ determined that the claimant sustained a compensable injury on November 9, 2016. ALJ Order at 3 ¶19. The ALJ further found that the respondents provided the claimant all reasonable and necessary medical care for her November 9, 2016, injury as part of her March 3, 2016, claim handled as W.C. No. 5-009-471 and the claimant is not entitled to any additional benefits with respect to her November 9, 2016, injury. The ALJ noted that she reasonably inferred "from the context that the FAL encompassed Claimant's November 9, 2016, injury for which she had received treatment and been placed at MMI." The ALJ concluded that "[a]lthough the respondents should have opened a new claim for the November 9, 2016, injury, the insurer provided all reasonable and necessary medical care for that injury under the previously established claim." ALJ Order at 6.

On appeal, the claimant contends the ALJ erred as matter of law in her determination that the claimant's November 9, 2016, injury could be administratively subsumed into a prior claim. We agree the ALJ erred. Pursuant to § 8-43-301(8), C.R.S., the panel may set aside an ALJ's order where the findings are insufficient to permit appellate review, conflicts in the evidence are not resolved, the findings are not supported by the record, the findings do not support the order, or the order is not supported by applicable law. Here, the ALJ's findings do not support the order nor is the order supported by the law. We therefore reverse the ALJ's order and remand the matter to determine the claimant's entitlement to medical benefits.

A claim for a new injury cannot be "administratively subsumed into a prior claim." The claimant has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Here, the ALJ found that the claimant sustained a separate and distinct injury while at work on November 9, 2016. There is no causal connection between the November 9, 2016, injury and the prior March 3, 2016, injury. Therefore, the determination of the claimant's entitlement to benefits must also be separate and distinct in relation to those injuries. *Contra* ***Price Mine*** *Service, Inc., v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003)(quasi course and scope treated as single injury). We know of no basis in case law or statute to treat multiple compensable accidents as one injury for purposes of awarding benefits. *See City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967) (no benefits flow to the victim of an industrial accident unless the accident results in a compensable injury).

The claims representative testified that she advised the claimant that she would handle the November 9, 2016, event under the same claim as the March 3, 2016, claim. This was based on the claim representative's mistaken assumption that there was no new injury. Tr. at 29-30. However, as Dr. McIntyre later testified and the ALJ concluded, the November 9, 2016, incident was a new injury. Consequently, the November 9, 2016, injury must be treated as a separate and distinct injury.

In the brief in opposition to petition to review, the respondents state that they are not required to file an admission on this claim pursuant to §8-43-203, C.R.S, because the November 9, 2016, event did not cause lost time. This, however, is contrary to the ALJ's findings and the evidence. The ALJ determined that the respondents should have filed a claim. ALJ Order at 6. The ALJ also recognized that the claimant received "appropriate disability" for the November 9, 2016 injury, albeit paid out in the March 3, 2016, claim.

The evidence is also undisputed that on November 15, 2016, Dr. McIntyre adjusted the claimant's work restrictions after being informed of the claimant's November 9, 2016 injury. The claimant remained on modified until December 2, 2016. Respondents' Exhibit A. Although the claimant was being paid temporary partial disability benefits during this time under the prior claim, the claimant's work restrictions were changed after the November 9, 2016 injury resulting in at least some portion of lost time due to the November 9 2016 injury and, as found by the ALJ, requiring medical treatment. Respondents Exhibit L.

Nor are we persuaded by the respondents' contention that the claimant is not entitled to additional benefits because of the ALJ's finding that the claimant received all reasonable and necessary medical treatment and compensation as part of the March 3, 2016, claim and that the claimant's failure to object to the April 4, 2017, final admission of liability in that case closed the claim for the November 9, 2016, injury.

The final admission filed for March 3, 2016, injury cannot operate to close the claim for benefits for the November 9, 2016 injury. Although the ALJ states that she reasonably inferred that the April 4, 2017 final admission of liability included the November 9, 2016, injury, this was not a reasonable inference in view of the facts of the case**.** Neither the April 4, 2017, final admission nor Dr. McIntyre's medical report attached to the final admission make any reference to the November 9, 2016, date of injury. Dr. McIntyre's report states that the date of injury for the claim is March 4, 2016[1]. Respondents' Exhibits E and L. The only mention of the November 9, 2016 injury is a reference in the diagnosis section of the report which states that "striking against other stationary object, subsequent encounter." Respondents' Exhibits E and L. There is no reference to the actual date of injury or to the claim for the November 9, 2016 injury.

In our view the respondents' final admission of liability does not comply with § 8-43-203(2)(b)(II), C.R.S. for purposes of closing the November 2016 claim because the claimant could not tell from the final admission of liability or the attached medical reports that November 2016 claim was at issue. *See Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010)(statute requires medical reports to be filed in order to put the claimant on notice of the exact basis of the admitted or denied liability so that the claimant can make an informed decision whether to accept or contest the final admission).

Moreover, because there was no general admission filed in the November 2016 claim, even if Dr. McIntyre's April 4, 2017, MMI report could be construed as determining MMI for the November 9, 2016 injury, this MMI determination has no legal effect on a new injury that has recently been deemed to be compensable. *See Harman-Bergstedt, Inc. v. Loofbourrow*, 2014 Colo. LEXIS 80 ("'Maximum medical improvement,' as a statutory term of art, therefore has no applicability or significance for injuries… *(3) as in this case*, filing a new claim for an injury that has become compensable for the first time").

As found by the ALJ, the claimant sustained a compensable injury on November 9, 2016. Consequently the claim must be treated as a separate compensable claim to determine the claimant's entitlement to benefits. The respondents therefore must file an admission pursuant to Workers' Compensation Rule of Procedure 5-5 (C)(1), C.R.S. and the matter must be remanded for determination of the claimant's entitlement to benefits.

[1] We assume this is a typographical error from Dr. McIntyre as the date of injury is March 3, 2016.

IT IS THEREFORE ORDERED that the ALJ's order dated July 17, 2019, is reversed and the matter is remanded for determination of the claimant's entitlement to benefits.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

John A. Steninger

CERTIFICATE OF MAILING

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

12/10/19 by TT .

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NATHAN DUMM & MAYER PC, Attn: BERNARD WOESSNER ESQ, 7900 EAST UNION AVENUE SUITE 600, DENVER, CO, 80237 (For Respondents)

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