COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
633 17th Street, Suite 400
Denver, CO 80202-3660
303-318-8700

July Case Law Update

Presented by Judge Craig Eley and Judge Michelle Sisk
Ethics Presentation by Judge Tom DeMarino

This update covers ICAO and COA decisions issued between June 2, 2018 to July 13, 2018

Want to receive notifications about future Case Law Updates? Click Here!

The Case Law Update is offered as an educational and informational program. The discussions and commentary should not considered a policy statement by the Division of Workers' Compensation or an indication of how the presenters would rule on any future pending cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 17-cv-00052-LTB-KMT

EARLENE F. CORBISHLEY,

Plaintiff,

v.

PEP BOYS - MANNY, MOE & JACK OF DELAWARE, INC.,

Defendant.

ORDER

This case is before me on Walmart Stores, Incorporated's ("Walmart") Motion to Intervene [Doc # 40]. Walmart's motion in unopposed by Plaintiff Earlene F. Corbishley but opposed by Defendant Pep Boys - Manny, Moe & Jack of Delaware, Inc. ("Pep Boys"). After consideration of the motion, all related pleadings, and the case file, I deny Walmart's motion for the reasons set forth below.

I. Background

This case arises out of a July 27, 2014 fall by Ms. Corbishley in the parking lot of a Pep Boys retail store after she allegedly slipped on a large oil and grease spot. Ms. Corbishley has asserted a single claim for relief against Pep Boys under Colorado's premises liability statute, C.R.S. § 13-21-115. Ms. Corbishley's claim

against Pep Boys was first filed in state court on April 18, 2016 and removed to this court on January 6, 2017. *See* Doc # 1. Discovery was completed in this case in December of 2017, and a 5-day jury trial is scheduled to commence on June 25, 2018. Pep Boys has a pending motion for summary judgment that has been fully briefed by the current parties to the case.

Ms. Corbishley, an employee of Walmart acting within the course and scope of her employment at the time of her fall, submitted a claim for workers' compensation benefits related to this indcident. In March of 2016, Ms. Corbishley's counsel provided notice of her third-party claim against Pep Boys to Walmart's workers' compensation administrator. *See* Doc # 49, Exs. C & D. Walmart's current counsel filed an entry of appearance in Ms. Corbishley's workers' compensation case in October of 2016. *See* Doc # 49, Ex. D. On October 26, 2016, Walmart notified Plaintiff's counsel of its ongoing lien for workers' compensation benefits of approximately $150,000 paid to Ms. Corbishley and requested notice prior to any settlement of Ms. Corbishley's claim against Pep Boys. *Id.*, Ex. H.

On December 16, 2016, Ms. Corbishley's treating physician opined that she reached maximum medical improvement on October 26, 2016. *Id.*, Ex. F. Ms. Corbishley appealed this finding and underwent an independent medical examination with Dr. James Regan, who concluded that Ms. Corbishley was not at maximum medical improvement as of June 20, 2017. Doc #40, p.2. Walmart is currently challenging Dr. Regan's conclusion. *Id.* Based on the current posture of the case then, there is a possibility that Ms. Corbishley may recover additional

workers' compensation benefits.

Walmart filed its motion to intervene pursuant to Fed. R. Civ. P. 24(a) & (b) on January 19, 2018. Walmart's proposed complaint in intervention adds an additional claim for negligence against Pep Boys.

II. Standard of Review

Fed. R. Civ. P. 24(a) provides that, on timely motion, the court must permit a party to intervene if that party either is given an unconditional right to intervene by a federal statute or claims an interest relating to the subject of the action "and is so situated that disposing of the action may as a practical matter impair or impede the [party's] ability to protect its interest, unless existing parties adequately protect that interest."

Fed. R. Civ. P. 24(b) provides that, on timely motion, a court may permit a party to intervene if that party is either given a conditional right to intervene by a federal statute or has a claim or defense that shares a common question of fact or law with the main action. In exercising its discretion under Rule 24(b), the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

III. Analysis

Walmart argues that it satisfies the standard for both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b) because of its interest in recovering workers' compensation benefits paid to Ms. Corbishley. Pep Boys doesn't dispute that Walmart has an interest in recovering these amounts but

argues that Walmart's motion is untimely and therefore properly denied under Rule 24(a) & (b). I agree.

"The timeliness of a motion to intervene is assessed in light of all of the circumstances, including the length of time since the applicant knew of its interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.,* 407 F.3d 1091, 1103 (10th Cir. 2005) (*quoting Utah Ass'n of Counties v. Clinton,* 255 F.3d 1246, 1250 (10th Cir. 2001)).

It is clear from the background set forth above that Walmart has known of its interest in this case for well over a year prior to filing its motion to intervene. Although Walmart emphasizes the current posture of Ms. Corbishley's workers' compensation claim, the fact remains that it has known that it had an interest in collecting significant benefits paid or to be paid to Ms. Corbishley for an inordinate amount of time prior to the filing of its motion to intervene.

Moreover, if Walmart is permitted to intervene in this case at this late stage, Pep Boys will undoubtedly be prejudiced. Walmart argues that because it only intends to call one additional witness at trial, any additional discovery necessitated by its entry into the case would be minimal. It is entirely possible, however, that Pep Boys will need to conduct significant additional discovery based both on the testimony that this new witness plans to offer at trial and the fact that all discovery has been conducted to date based on the current posture of the case. In addition, Walmart seeks to add a common law negligence claim which Pep Boys will have to

address though this claim appears to be futile. *See Vigil v. Franklin,* 103 P.3d 322, 328 (Colo. 2004) ("...plain language [of premises liability statute] preempts prior common law theories of liability, and establishes the statute as the sole codification of landowner duties in tort.").

Conversely, I am not convinced that there will be any prejudice to Walmart if it is not permitted to intervene in this case. Under Colorado's Workers' Compensation Act, Walmart's subrogation rights extend to all economic and physical impairment damages that Ms. Corbishley recovers from Pep Boys but not to Ms. Corbishley's limited right to recover noneconomic damages such as pain and suffering. C.R.S. § 8-41-203(1)(b)(c) & (d)(I)(A)(B) & (C). *See also* C.R.S. § 13-21-102.5(1)(d)(I)(a) (capping the recovery of noneconomic damages). Based on past disclosures in this case, the bulk of the damages Ms. Corbishley seeks to recover in this case are subject to Walmart's subrogation rights. Furthermore, because of the uncertainty currently surrounding her workers' compensation claim, Ms. Corbishley has every incentive to maximize the total amount of any damages that are awarded against Pep Boys. In the event that Ms. Corbishley seeks to circumvent Walmart's subrogation rights by characterizing any settlement proceeds she received from Pep Boys as noneconomic damages, Walmart would have recourse whether it is a party to this case or not. *See Chavez v. Kelley Trucking, Inc.,* 275 P.3d 7373, 740 (Colo. App. 2011) ("... an employee may not defeat [an employer's] subrogation rights by settling causes of action and agreeing with the defendant to characterize the proceeds as noneconomic damages.").

Under the circumstances of this case then, I conclude that Walmart's motion to intervene is untimely, and IT IS THEREFORE ORDERED that Walmart's Motion to Intervene [Doc # 40] is DENIED.

Dated: March 13, 2018 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-047-389-01

IN THE MATTER OF THE CLAIM OF:

KIM ELORRIAGA,

Claimant,

v.

FINAL ORDER

ADP TOTAL SOURCE/THK ASSOCIATES INC,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY c/o HMS,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated December 6, 2017, that awarded benefits after determining that the claimant was in the course and scope of her employment when she was injured in a motor vehicle accident while driving home from a business meeting. We affirm the ALJ's order.

This matter went to hearing on the issues of compensability, medical and temporary disability benefits. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for the employer as a Landscape Architectural Project Manager. The claimant's job duties included consulting with entities such as the City of Loveland on large scale infrastructure developments. The claimant traveled two to three times per week for the employer, using her own personal vehicle, for which she was reimbursed mileage and tolls.

On May 16, 2017, the claimant drove to Firestone, Colorado to attend a business meeting. She then drove to the City of Loveland Public Works to attend a planning meeting which was in the course and scope of her employment. The meeting ended at 3:50 pm at which time the claimant began driving to her home in Broomfield instead of the employer's premises in Aurora. The claimant was involved in an auto accident in Loveland when she was broadsided by another vehicle. The accident report noted that

the claimant failed to stop/yield right of way at a stop sign. The claimant sustained serious concussive and vision injuries.

Citing to the factors in *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1991), the ALJ found that the claimant was within the course and scope of her employment. The ALJ went on to find that even if the going and coming rule were to apply in this case, the claimant stepped back into the course and scope of her employment when she placed a work-related call while driving. The ALJ found that at the time of the collision, the claimant had placed a work-related call on her cell phone to a technical specialist with the Loveland Department of Public Works. The claimant used a hand-free ear plug for her cell phone at the time of the accident and this was not noted to be a factor in the accident report. The ALJ rejected the employer's argument that by making the phone call in violation of the employer's handbook policy, the claimant deviated from the sphere of employment, making her injuries non-compensable.

Based on these findings, the ALJ determined that the claimant sustained a compensable injury and ordered the respondents to pay for medical and temporary disability benefits.

On appeal the respondents assert that the ALJ erred in rejecting their argument that the claimant's violation of the employer handbook policy concerning making phones calls while driving, removed the claimant from the sphere of employment. We are not persuaded the ALJ committed reversible error and affirm the order.

An injury "arises out of and in the course of" employment, and is therefore compensable under the Workers' Compensation Act, when it occurs during an activity which is sufficiently connected to the conditions and circumstances under which the employee usually performs his or her job functions. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). The "arising out of" requirement is met when the origins of the injury are work-related, and the injury is sufficiently related to the work to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

Generally, injuries sustained by an employee going to and from work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 212 (Colo. 1967). However, there is an exception where "special circumstances" exist to establish a causal connection between the travel and employment beyond the claimant's mere arrival at work. The essence of this exception is that when the employer requires the employee to travel beyond a fixed location established for the performance of the job duties, the

risks of such travel become risks of the employment. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. App. 1989); *Whale Communications v. Osborn*, 759 P.2d 848 (Colo. App. 1988)(claimant's death compensable while driving home in her personal automobile).

In *Madden v. Mountain West Fabricators, supra*, the Court listed four factors which are relevant in determining whether "special circumstances" have been established to create an exception to the "going to and coming from" rule. These factors are: 1) whether the travel occurred during work hours; 2) whether the travel occurred on or off the employer's premises; 3) whether the travel was contemplated by the employment contract; and 4) whether the obligations or conditions of employment created a "zone of special danger." *Id.* at 864. It is not necessary that all four factors exist to support a finding of "special circumstances." In fact, the existence of one variable is sufficient to create special circumstances if the evidence supporting that variable demonstrates a causal connection between the employment and the injury. *Id*. at 865.

The question of whether the claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Madden v. Mountain West Fabricators, supra*. Therefore, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8); *Eisnach v. Industrial Commission*, 633 P.2d. 502 (Colo. App. 1981). Under the substantial evidence standard, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and plausible inferences which he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d. 411 (Colo. App. 1995). Moreover, where, as here, a party fails to procure a transcript, we must presume the ALJ's findings are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). ALJ Order Striking Request for Transcript, March 1, 2018.

The respondents' arguments notwithstanding, there is substantial evidence to support the ALJ's finding that the claimant sustained her burden to prove her injury compensable. The respondents do not dispute the ALJ's finding that the travel was contemplated by the claimant's employment contract and at the direction of the employer. Although there was conflicting evidence about the claimant's reimbursement from travel, the ALJ found that the claimant received mileage and toll reimbursement from the job site to her home. In the absence of a transcript, these findings are presumed to be supported. *Nova v. Industrial Claim Appeals Office, supra.* Although the ALJ made the alternative finding that the claimant's business phone call brought her into the

course and scope of employment, we need not address this alternative finding of compensability, because the claimant's travel was clearly contemplated by the employment contract. *George v. Industrial Commission*, 720 P.2d 624 (Colo. App. 1986) (ALJ not held to a crystalline standard).

Nor are we persuaded that the ALJ erred in rejecting the respondents' contention that the claimant's phone call, allegedly in violation of the employer's handbook policy, removed the claimant from the sphere of employment.

As a general rule, an employer has the right to issue directives concerning what an employee may do, and when she may do it. Directives of this type regulate the "sphere" of employment, and if an employee sustains an injury while violating such a directive the injury is not compensable. Conversely, violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Industrial Commission v. Funk*, 68 Colo. 467, 191 P. 125 (1920); *Bill Lawley Ford v. Miller*, 672 P.2d 1031 (Colo. App. 1983).

The respondents cite to *Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (July 13. 2007), in support of their argument. This case, however, is distinguishable from the facts of the present case. In *Escobedo* the ALJ found that the sphere of employment was limited by the employer's direction to either go home or sit and wait for a scaffolding to be repaired. The claimant in *Escobedo* was told not to carry out his employment duties. Here, in contrast, it is undisputed that the claimant was required to drive as part of her employment to attend work related meetings at different locations. The record supports that driving to and from these meetings was an inherent part of the claimant's duties. In these circumstances, the employer's attempt to regulate the claimant's driving by prohibiting phone calls while driving constitutes an effort to control the claimant's methods of carrying out her duties and not a regulation concerning the sphere of employment**.** We, therefore, agree with ALJ that the claimant did not depart from the sphere of her employment when making a business call while driving home from a meeting. *See Industrial Commission v. Funk, supra; Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

IT IS THEREFORE ORDERED that the ALJ's order dated December 6, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

6/19/18 by TT .

KAPLAN & MORRELL LLC, Attn: RONDA K CORDOVA ESQ, 6801 W 20TH ST SUITE 201, GREELEY, CO, 80634 (For Claimant)
HALL & EVANS LLC, Attn: ERICA A JACOBSON ESQ, C/O: DOUGLAS J KOTAREK ESQ, 1001 SEVENTEENTH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-933-851-01

IN THE MATTER OF THE CLAIM OF:

KRISTINE AMES,

Claimant,

v.

FINAL ORDER

ADAMS 12 FIVE STAR SCHOOLS,

Employer,

and

ADAMS COUNTY BOCES,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Cayce (ALJ) dated November 3, 2017, that awarded the claimant permanent total disability (PTD) benefits and disfigurement benefits. We affirm.

The ALJ found that at the time of hearing the claimant was 44 years old. The claimant graduated from high school in 1991, and attended two or three semesters at Arapahoe Community College but did not obtain a degree or pursue any other academic training. Prior to her employment with the respondent employer, the claimant worked in various capacities performing retail and clerical duties and she also worked as a mailroom clerk.

The claimant has a prior history of pulmonary emboli and complaints of shortness of breath, chronic fatigue, and anxiety.

The claimant worked for the respondent employer as a senior cook/cashier. On October 24, 2013, the claimant suffered an admitted industrial injury to her right leg when she slipped and fell on a wet floor. The claimant's initial treating provider, Dr. Zuehlsdorff, diagnosed an anterior lateral subluxation dislocation of the proximal tibia-fibula joint and a contusion along the medial plateau.

The claimant ultimately transferred care to Dr. Hawke on October 30, 2013, and shortly thereafter began seeing Dr. Anderson-Oeser in consultation with Dr. Hawke.

On November 8, 2013, the claimant was evaluated at St. Anthony North Hospital with complaints of right leg swelling, chest tightness, and shortness of breath. The claimant was diagnosed with deep venous thrombosis (DVT) and pulmonary embolism related to the industrial injury.

The claimant underwent an EMG/nerve conduction study of her right lower extremity. Dr. Anderson-Oeser subsequently diagnosed the claimant with right peroneal neuropathy of the fibular head.

Dr. LaPrade performed a vena cavogram and thereafter placed a filter in the intrarenal inferior vena cava, which was removed on March 5, 2014. Dr. LaPrade subsequently opined the claimant had full range of motion in her right knee, the proximal tibia-fibular joint was stable, and the subluxation scar was completely healed.

On April 30, 2014, Dr. Schakaraschwili performed an autonomic testing battery, including QSART, to test the claimant for possible complex regional pain syndrome (CRPS). Dr. Schakaraschwili stated that the claimant's right lower extremity had a reddish discoloration with some shininess to the skin and dysesthesias to touch. He further stated that the claimant's right foot was cold and clammy. Dr. Schakaraschwili assessed pain and temperature abnormalities in the right lower extremity and stated that the testing battery showed a high probability for CRPS. Dr. Schakaraschwili also stated that the claimant had a positive response to a lumbar sympathetic block and opined she met the Colorado Division of Workers' Compensation Diagnostic Criteria for CRPS since she had two positive diagnostic tests.

Dr. Anderson-Oeser subsequently diagnosed the claimant with probable right lower extremity regional CRPS and referred the claimant for a lumbar sympathetic block with Dr. Ring. The claimant underwent 16 lumbar sympathetic blocks with Dr. Ring between 2014 and 2017. Dr. Anderson-Oeser noted the claimant had a positive response to the lumbar sympathetic blocks and recommended she continue receiving them.

Dr. Hawke released the claimant to light-duty work as of May 12, 2014. He restricted the claimant to performing seated tasks in her own footwear with no lifting or carrying over five pounds, and no working on slippery or cluttered surfaces. Dr. Hawke diagnosed the claimant with CRPS type 1 of the lower extremity.

The claimant subsequently reported to Dr. Hawke that it was difficult to sit for four hours at work and she was experiencing a burning pain in her leg. Dr. Hawke modified her work restrictions to working three hours a day with accommodations for the claimant to attend appointments and therapies.

The claimant returned to work on August 20, 2014, after being off for summer break. She reported an increase in pain upon returning to work. Her work restrictions at this time included no lifting/carrying over 10 pounds, no kneeling or squatting, to sit/stand/walk as needed, no walking on slippery or cluttered surfaces, using her own footwear, and being excused from work for all appointments and therapies.

On October 7, 2014, Dr. Hawke removed the claimant from work for five days due to increased pain and difficulty concentrating. Dr. Anderson-Oeser also saw the claimant and noted she was having increased anxiety and possibly depression related to return to work issues and chronic pain. Dr. Anderson-Oeser recommended the claimant undergo a psychological evaluation with Dr. Boyd.

The claimant underwent a pain psychological evaluation with Dr. Boyd. Dr. Boyd gave the following impression: somatic symptom disorder, adjustment disorder with mixed anxiety and depressed mood, and psychological or personality factors affecting medical condition. Dr. Boyd opined the claimant's physical symptoms may be multiple and magnified.

The claimant underwent an independent medical examination (IME) with Dr. Orent. Dr. Orent diagnosed the claimant with CRPS, worsening pulmonary hypertension, and depression and anxiety related to the work injury. Dr. Orent strongly believed the claimant had CRPS, and opined the data and her response to the diagnostic injection were quite clear. He further stated that the claimant has had a series of lumbar sympathetic blocks which relieved the claimant's pain but only for relatively short periods of time. Dr. Orent opined the claimant was not at MMI and placed her in a sedentary work capacity.

On April 12, 2016, Dr. Anderson-Oeser placed the claimant at maximum medical improvement (MMI). She noted that the claimant continued to be symptomatic but was hopeful she would remain stable with maintenance treatment and home exercise. Dr. Anderson-Oeser assigned a 44% whole person impairment rating, which consisted of 20% whole person impairment of the respiratory system calculated by Dr. Mayer, and 30% impairment for CRPS of the right lower extremity. Regarding permanent restrictions, Dr. Anderson-Oeser stated the claimant is to perform sedentary work only,

and to avoid crawling, kneeling, or squatting, to alternate sitting with standing and walking as needed for comfort, to elevate her right leg when sitting and wear her own footwear, and to avoid walking on slippery or cluttered surfaces.[1]

In September 2016, Dr. Anderson-Oeser subsequently restricted the claimant from working due to increased symptoms resulting from ongoing high levels of stress and anxiety at work.

On December 23, 2016, the claimant underwent a psychological assessment by Dr. Cotgageorge. Dr. Cotgageorge opined that psychological factors contributed to the claimant's pain perception.

Dr. Lesnak subsequently performed an IME at the request of the respondents. Dr. Lesnak noted no evidence of muscle atrophy, abnormal skin color, skin temperature, or skin integrity in the claimant's right lower extremity. Dr. Lesnak further noted full seated range of motion in the knee and ankle and some hypersensitivity to light touch over the right foot. Dr. Lesnak concluded that the claimant sustained a right proximal fibular head subluxation, a right peroneal nerve stretch injury, and most likely an acute right leg DVT. He questioned if the claimant sustained any pulmonary emboli. Dr. Lesnak opined the claimant did not have CRPS as there were no clinical physical findings supporting a CRPS diagnosis, multiple inconsistencies in Dr. Schakaraschwili's report, no significant documented evidence of improvement, and no positive sweat test. He explained that a peroneal stretch injury better explained the claimant's symptoms than a CRPS type 2 diagnosis. He further explained that a finding the claimant did not have CRPS was consistent with the Medical Treatment Guidelines promulgated by the Division of Workers' Compensation (Guidelines). Dr. Lesnak also explained the claimant's

[1] On August 9, 2016, Dr. Scott performed a Division sponsored independent medical examination. He determined the claimant sustained a peripheral nerve injury and CRPS Type 2 as a result of the work injury. Dr. Scott assigned a total combined whole person impairment of 25% consisting of an 18% whole person respiratory impairment and 20% lower extremity impairment for the claimant's common peroneal nerve stretch injury, range of motion, and decreased sensation. Dr. Scott opined the claimant did not have any work-related psychological, hip, or lumbar spine impairments. He further opined there was insufficient information to identify or determine apportionment regarding the claimant's DVT and pulmonary emboli. *See Cole v. Dish Network*, W.C. No. 4-918-651-02 (Jan. 15, 2016)("no procedural reason that a hearing cannot feature simultaneous arguments over both the DIME physician's determinations of causation for an impairment rating and the eligibility for permanent total benefits while applying a clear and convincing evidentiary standard to the former and a preponderance of the evidence test to the latter"), *aff'd* 16CA0205 (Dec. 22, 2016).

subjective complaints were unreliable, and that her significant psychosocial issues played a significant role in her symptomatology, recovery, and perceived function. He opined the claimant had a somatoform disorder that manifested her complaints. He further disagreed with Dr. Anderson-Oeser's work restrictions, contending that there was no evidence the claimant could not work full-time or could only perform sedentary work. Dr. Lesnak assigned the following permanent restrictions: refrain from frequent or excessive kneeling or squatting and repetitive or continuous stair climbing activities.

Dr. Schwartz also performed an IME of the claimant at the request of the respondents. Dr. Schwartz opined that the claimant sustained a work-related pulmonary embolism that resolved without sequelae by December 16, 2013. He opined that the claimant did not have any ongoing work-related pulmonary diagnosis and no restrictions based on her pulmonary status.

Dr. Van Dorsten subsequently performed a Health and Behavior Assessment Evaluation of the claimant. He noted identification of a variety of significant mood, personality, and behavioral factors which were likely strong contributors to the claimant's clinical presentation and high levels of somatic complaints.

At the request of the respondents, Donna Ferris performed a vocational evaluation of the claimant. She determined there were full-time and part-time telephone customer services positions in a variety of industries within the claimant's functional abilities. Ms. Ferris also noted there were companies offering work from home options with schedule and work environment flexibility.

At the request of the claimant, Katie Montoya performed a vocational assessment. Ms. Montoya opined that the claimant had limited transferable skills and both physical and psychological issues. She considered Dr. Anderson-Oeser's permanent restrictions as well as the amount of anticipated absenteeism for medical treatment and flare-ups and determined the claimant would not be competitive in finding and maintaining employment, and there would not be an employer who would accommodate the claimant missing even two days of work per month. Ms. Montoya noted, however, that if she were only considering the opinions of Drs. Schwartz and Lesnak, then the claimant could return to work in a number of capacities.

On June 6, 2017, counsel for the claimant sent a letter to Dr. Anderson-Oeser clarifying the claimant's restrictions. In response, Dr. Anderson-Oeser stated that the claimant continued to have the same permanent restrictions she assigned on April 12, 2016. She noted that the claimant experiences frequent pain flare-ups and foresees the

claimant missing three days of work per month in the winter and one day per month in the summer, and needing to take unscheduled breaks during the work day. She further noted that the claimant's work-related CRPS symptoms are increased and/or aggravated in stressful work environments, and that the claimant should avoid working in stressful work environments. She noted that the claimant also needed to elevate her leg 12 inches while seated.

Crediting the opinions of Dr. Anderson-Oeser and Ms. Montoya over the conflicting opinions of Dr. Lesnak and Ms. Ferris, the ALJ ultimately determined the claimant is permanently and totally disabled. The ALJ found the claimant has been diagnosed with CRPS, depression, and anxiety resulting from the industrial accident. In particular, she credited Dr. Anderson-Oeser's opinion that the claimant meets the CRPS diagnosis criteria because two out of the four CRPS tests (QSART and sympathetic blocks) the claimant underwent were deemed positive. She found the claimant continues to experience various symptoms as a result of her work-related conditions, which have decreased her ability to function and work. The ALJ further found that both Ms. Montoya and Ms. Ferris agreed the claimant's expected absences would hinder her ability to maintain employment. Further, the ALJ found the claimant suffers from mental limitations regarding concentration, memory, focus, and comprehension as a result of her pain and medications. The ALJ therefore ordered the respondents liable for PTD benefits and she also awarded the claimant disfigurement benefits.

I.

The respondents have petitioned to review the ALJ's order awarding PTD benefits and have raised several arguments of error. However, we are not persuaded by the respondents' arguments.

Pursuant to §8-40-201(16.5)(a), C.R.S., a claimant is entitled to PTD benefits if she is "unable to earn wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. places the burden of proof on the claimant to establish by a preponderance of the evidence that she is permanently and totally disabled. *See Cole v. Dish Network, supra* (applying preponderance of evidence standard when determining whether claimant is entitled to PTD benefits regardless of DIME determination or absence of causal link). The overall objective is to determine whether employment is reasonably available to the claimant under her particular circumstances. In making this determination the ALJ may consider the effects of the industrial injury in light of the claimant's human factors. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors may include the claimant's physical condition, mental ability, age,

employment history, education and the availability of work the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

Ultimately, whether a claimant is permanently and totally disabled is an issue of fact for resolution by the ALJ. *Weld County School District RE-12 v. Bymer, supra*; *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). Because the question of whether the claimant proved she is entitled to PTD benefits is factual in nature, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in a light most favorable to the prevailing party and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Thus, the scope of our review is exceedingly narrow. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). The fact that some evidence, if credited, might support a different result affords no basis for relief on appeal. *See Weld County School District Re-12 v. Bymer, supra*. In this regard, we note that the credibility of expert witnesses is a matter within the province of the ALJ as fact finder. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

A.

Initially, the respondents contend the ALJ erred in relying on Dr. Anderson-Oeser's alleged "incorrect interpretation" of the Guidelines when determining the claimant suffers from CRPS. They argue that Rule 17(G)(2)(a)-(e) of the Guidelines require all five components be satisfied when confirming a clinic diagnosis of CRPS, and Dr. Anderson-Oeser only confirmed one part of the five part test in the claimant's case. In further support of their argument, they reason that Dr. Lesnak found the claimant's peroneal stretch injury would better explain her symptoms rather than CRPS, and the claimant's extensive psychological treatment history suggests she would not satisfy the second of the five part test for a clinic diagnosis of CRPS.

The respondents also argue on appeal that the ALJ failed to adequately resolve conflicts in the evidence regarding the claimant's "well documented somatic disorder." They specifically contend the ALJ's finding that the claimant suffers from mental limitations fails to resolve the conflict with the opinions of Dr. Van Dorsten and Dr. Catageorge that the claimant has a somatoform disorder which causes her to magnify her symptoms. We perceive no error.

The Guidelines are contained in Rule of Procedure 17, 7 CCR 1101-3, and provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. *See* §8-42-101(3)(b), C.R.S. As pertinent here, Rule

17(G)(2)(a) through (e) address the diagnostic components of clinical CRPS and provides that all the criteria must be met. In addition, Rule 17(G)(2)(d) and (e) specifically state a claimant must meet the following criteria: "[n]o other diagnosis that better explains the signs and symptoms" and "[p]sychological evaluation should always be performed as this is necessary for all chronic pain conditions."

In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. Moreover, the Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). However, §8-43-201(3), C.R.S. specifically provides that ALJs are not required to utilize the Guidelines as the sole basis in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury.[2]

We have long held that an expert's compliance with the Guidelines does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given the ALJ to any particular medical opinion. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (Feb. 23, 2009); *see also Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009)(noting ALJ not required to award or deny medical benefits based on the Guidelines); *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008)(declining to require application of Guidelines for carpal tunnel syndrome in determining issue of PTD); *Siminoe v. Worldwide Flight Services, Inc.*, W.C. No. 4-535-290 (Nov. 21, 2006)(appropriate for ALJ to consider guidelines; however, deviation from medical treatment guidelines does not compel fact finder to disregard the opinion of that medical expert on issue of causal connection between work related injury and particular medical condition).

[2] The ALJ in this matter was not presented with an issue of medical treatment. The sole issue she resolved involved the claimant's ability to earn any wages. Accordingly, compliance with the Guidelines in this case is of tangential significance. Further, even in the case of evaluating medical treatment, §8-43-201(3), C.R.S. directs the ALJ only "to consider" the Guidelines. The section concludes by observing the ALJ "is not required to utilize the medical treatment guidelines as the sole basis for such determinations." Nevertheless, the ALJ here explicitly considered and made findings concerning the Guidelines. See Findings of Fact ¶¶ 41, 51.

Here, we are not persuaded by the respondents' argument that the ALJ erred in crediting Dr. Anderson-Oeser's opinions regarding CRPS on the basis that her opinions did not coincide with Rule 17(G)(2)(d) and (e) of the Guidelines. The respondents' argument notwithstanding, the ALJ was not persuaded by Dr. Lesnak's opinion that a peroneal stretch injury better explained the claimant's symptoms than a CRPS type 2 diagnosis. Further, the ALJ was not persuaded by Dr. Van Dorsten's or Dr. Catageorge's opinions that the claimant has a somatic pain disorder. The ALJ instead credited the conflicting testimony of the claimant and opinions of Dr. Anderson-Oeser, as was her prerogative. Order at 11-12 ¶¶66, 67, 70; Order at 13. *Rockwell International v. Turnbull, supra* (credibility of expert witnesses is a matter within the province of the ALJ as fact finder). Consequently, the ALJ implicitly determined that the claimant did, in fact, satisfy the requirements of Rule 17(G)(2)(d) and (e). Regardless, as stated above, Dr. Anderson-Oeser's deviation from the Guidelines did not compel the ALJ to disregard her opinion regarding CRPS. *Burchard v. Preferred Machining, supra; see also* §8-43-201(3), C.R.S. Thus, we are unable to say that the opinions of Dr. Anderson-Oeser regarding CRPS and the claimant's mental limitations are rebutted by such hard, certain evidence that it was error for the ALJ to credit it. *Halliburton Services v. Miller,* 720 P.2d 571 (Colo. 1986).

Similarly, we are not persuaded by the respondents' argument that the ALJ failed to adequately resolve conflicts in the evidence regarding the claimant's "well documented somatic disorder." The ALJ recognized the opinions of Dr. Van Dorsten and Dr. Catageorge that the claimant has a somatoform disorder which causes her to magnify her symptoms. The reports of both those physicians reveal the origin of the depression and somatoform condition were directly related to the complications the claimant encountered through her work injury. The characterization of a symptom as "somatoform" does not diminish its relevance to the effects of a work related disability. Additionally, the ALJ was not persuaded by the respondents' medical evidence in this regard. *See Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988)(ALJ not required to cite disputed evidence before rejecting it as unpersuasive). Instead, the ALJ credited the claimant's testimony and Dr. Anderson-Oeser's testimony that the claimant's pain and medications cause cognitive problems, fatigue and memory loss, and difficulties with concentration and comprehension. Tr. 6/26/17 at 34-35, 58-59, 90, 108. We further note that in her order, the ALJ expressly recognized that "[e]vidence and inferences contrary" to her findings were not credible or persuasive. Order at 12 ¶70. Consequently, not only did the ALJ resolve the conflict against the opinions of the respondents' medical experts regarding the somatoform disorder, but substantial evidence supports her contrary finding that the claimant suffers from mental limitations. Section 8-43-301(8), C.R.S.

To the extent the respondents argue the claimant failed to present expert witness testimony to refute the opinions of Dr. Van Dorsten and Dr. Catageorge regarding the somatoform disorder, this simply is not the law in Colorado. There is no requirement that a claimant present medical evidence to prove the cause of an injury. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Similarly, the claimant is not required to prove the cause of her injuries by medical certainty. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). To the contrary, the claimant's testimony, if credited, as it was here, may be sufficient to establish the requisite nexus between an industrial injury and the disability for which benefits are sought. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). To the extent expert medical testimony is presented, as it was done here, it is the ALJ's sole prerogative to assess its weight and sufficiency. *Rockwell International v. Turnbull, supra*. As explained above, the ALJ here was not persuaded by the opinions of Dr. Van Dorsten and Dr. Catageorge, and we are unable to say that the contrary opinions of Dr. Anderson-Oeser are rebutted by such hard, certain evidence that it was error as a matter of law for the ALJ to credit it. *Halliburton Services v. Miller*, *supra.* Additionally, to the extent the respondents properly raised below and now argue that Dr. Anderson-Oeser was not qualified to properly diagnose the claimant's psychological conditions, this merely goes to the probative weight of her opinions. *Rockwell International v. Turnbull, supra.* Consequently, we have no basis to disturb the ALJ's order on any of the foregoing grounds. Section 8-43-301(8), C.R.S.

B.

Last, the respondents argue the ALJ erred in finding Dr. Anderson-Oeser's opinions more credible than Dr. Lesnak's opinions regarding the claimant's physical limitations. They argue that it was only after the claimant had filed for PTD benefits that she started experiencing additional issues that resulted in modified permanent restrictions. They contend that Dr. Anderson-Oeser's permanent restrictions were not based on anything other than the demands of litigations. Thus, they argue it was reversible error for the ALJ to credit her opinions. We disagree.

As noted above, under the substantial evidence standard of review, it is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. *Rockwell International v. Turnbull, supra*. Further, as explained above, we may not substitute our judgment for that of the ALJ unless the testimony the ALJ found persuasive is rebutted by such hard, certain evidence that it would be error as a matter of law to credit the testimony. *Halliburton Services v. Miller, supra*. Testimony which is merely biased, inconsistent, or conflicting is not necessarily incredible as a matter of law. *See People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Consequently, the ALJ's

credibility determinations are binding except in extreme circumstances. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000).

Here, the respondents' complaints regarding the demands of litigation and Dr. Anderson-Oeser's resulting permanent restrictions simply go to the probative weight the ALJ chose to assign to the opinions. As noted above, the ALJ's credibility determination in favor of Dr. Anderson-Oeser is binding since we perceive no extreme circumstances demonstrating that it was error as a matter of law to credit her testimony or opinions. *Halliburton Services v. Miller, supra; Rockwell International v. Turnbull, supra* (ALJ, as fact-finder, is charged with resolving conflicts in expert testimony). Regardless, the medical records demonstrate that Dr. Anderson-Oeser or her medical staff saw the claimant on a monthly basis between the date of MMI and June of 2017. Her reports contain numerous references to complaints of worsening symptoms and struggles the claimant was experiencing as time progressed. Dr. Anderson-Oeser decided to take the claimant off work in September 2016. Further, the claimant was examined in the doctor's office as recently as May 15, 2017. The fact that the final set of limitations assigned the claimant were the result of a regular monitoring of the claimant is a circumstance the ALJ could reasonably rely upon to attribute weight to the doctor's opinion. Dr. Anderson-Oeser's list of restrictions therefore cannot be fairly characterized as assessed on a whim, as argued by the respondents. Moreover, the fact there was evidence, 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). Consequently, we have no basis to disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated November 3, 2017, 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

6/22/18 by TT .

KAPLAN MORRELL LLC, Attn: MICHAEL H KAPLAN ESQ, 6801 W 20TH ST SUITE 201, GREELEY, CO, 80634 (For Claimant)
RITSEMA & LYON PC, Attn: ROBERT V WREN ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

DATE FILED: June 28, 2018
CASE NUMBER: 2017CA1936

SUMMARY
June 28, 2018

2018COA93

No. 17CA1936, *City of Boulder v. ICAO* — Labor and Industry — Workers' Compensation — Coverage for Occupational Diseases Contracted by Firefighters

A division of the court of appeals considers whether a firefighter's cancer risks must be ranked in a workers' compensation case, and if so, whether the highest risk must be considered the cause of a firefighter's cancer, to the exclusion of all other causes. The division concludes that a trio of Colorado Supreme Court cases — *City of Littleton v. Industrial Claim Appeals Office*, 2016 CO 25; *Industrial Claim Appeals Office v. Town of Castle Rock*, 2016 CO 26; and *City of Englewood v. Harrell*, 2016 CO 27 — do not require administrative law judges to rank risk factors in the course of determining whether employers have

rebutted the statutory presumption found in section 8-41-209, C.R.S. 2017.

The division also concludes that there was substantial evidence to support the judge's factual findings that the employer had not overcome the presumption of compensability.

COLORADO COURT OF APPEALS **2018COA93**

Court of Appeals No. 17CA1936
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-990-597

City of Boulder Fire Department and CCMSI,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Dean Pacello,

Respondents.

ORDER AFFIRMED

Division I
Opinion by JUDGE BERNARD
Taubman and Welling, JJ., concur

Announced June 28, 2018

Dworkin, Chambers, Williams, York, Benson, & Evans, P.C., David J. Dworkin, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Law Office of O'Toole and Sbarbaro, P.C., Neil D. O'Toole, Denver, Colorado, for Respondent Dean Pacello

¶ 1 Must a firefighter's cancer risks be ranked in a workers' compensation case, and, if so, must the highest risk be considered the cause of the firefighter's cancer, to the exclusion of other causes? We answer these questions in the context of a challenge to the final order of a panel of the Industrial Claim Appeals Office of Colorado that affirmed the decision of an administrative law judge. The challengers are an employer, the City of Boulder Fire Department, and its insurer, Cannon Cochran Management Service, Inc., or CCMSI, which we shall refer to both as "the City." The judge found that the City had not overcome the statutory presumption that the squamous cell carcinoma in firefighter Dean Pacello's tongue was compensable.

¶ 2 The City contends that the judge should have ranked the possible causes of the firefighter's cancer to identify the highest risk factor. When the judge did not do so, the City continues, he did not follow a trio of Colorado Supreme Court opinions that had interpreted section 8-41-209, C.R.S. 2017, which we will shorten to "section 209," and its statutory presumption. We disagree because we conclude that (1) the trio of cases does not require the judge to rank the causes of the firefighter's cancer; (2) the sufficiency of the

evidence that the City needed to overcome section 209's presumption of compensability was a question for the judge to decide; and (3) substantial evidence supported the judge's factual findings. We therefore affirm the panel's decision.

I. Background and Procedural History

¶ 3 The firefighter worked for the City's fire department for thirty-five years. He retired in 2013. In July 2015, a doctor discovered that the firefighter had squamous cell carcinoma in his tongue. He filed a claim for workers' compensation benefits under section 209.

¶ 4 The legislature enacted section 209 in 2007. Ch. 245, sec. 1, § 8-41-209, 2007 Colo. Sess. Laws 962-63. Subsections (1) and (2)(a) of section 209 create a presumption that brain, skin, digestive, hematological, or genitourinary cancers are compensable if stricken firefighters meet certain criteria. But the legislature did not impose strict liability for these cancers on fire departments or cities. Instead, under section 209(2)(b), an employer, such as the City, may overcome the presumption by showing that a firefighter's cancer "did not occur on the job."

¶ 5 The City challenged the firefighter's workers' compensation claim. It maintained that the human papillomavirus 16/18, which

is a sexually transmitted virus known to cause cancer of the tongue in some men, was the more likely cause of his cancer. (A biopsy determined that the mass at the base of the firefighter's tongue was positive for the virus.)

¶ 6 To overcome the statutory presumption of compensability, the City retained a medical expert, Dr. Richard Bell, who specialized in cancers of the head and neck. Dr. Bell testified that, because the firefighter's tumor tested positive for the virus, "and the association between [the virus] and [cancer caused by the virus] and cigarette smoking is . . . weak," the firefighter's tongue cancer "was not related to his occupation . . . ." Dr. Bell added that the "preponderance of the evidence would suggest that [the firefighter's cancer] [had been] caused by a virus that was sexually transmitted that was not related to occupational smoke exposure."

¶ 7 Dr. Alexander Jacobs, an internal medicine specialist, echoed Dr. Bell's opinion. Dr. Jacobs observed that

> [t]his is one of the few instances where we actually have a known etiologic factor that causes cancer. In women, this is in the form of cervical cancer and in both men and women in the form of oral/pharyngeal cancer.

> In conclusion, [the firefighter] does have metastatic squamous cell carcinoma of the tongue and oral pharynx. Surgical pathology was positive for [the virus]. In my opinion, tobacco usage and even alcohol usage may have added a predisposition to this condition. However, the cause is clearly the . . . virus.

¶ 8 In response, the firefighter offered testimony from Dr. Annyce Mayer, an occupational medicine expert, to refute the opinions of Drs. Bell and Jacobs. Dr. Mayer testified that, in her opinion, the firefighter's cancer was caused by a "combination of [the virus] and the carcinogens to which he was exposed . . . that significantly elevated his risk of developing the cancer." She added that "we do know that the risk is significantly increased with the combination of the two." She cited a 1998 study in support of her opinion. It found a "1.7-fold increased risk" of contracting cancer from the virus alone; a "3.2-fold increased risk" from smoking alone; but "a synergistically-increased risk of 8.5-fold in those with both [the virus] and smoking." She thought that, although the 1998 study examined cigarette smoking rather than exposure to smoke while fighting fires, it was nonetheless relevant because "cigarette smoking and carcinogen exposures in fire, soot, and smoke have some carcinogens in common."

¶ 9 The firefighter's treating doctor, Dr. Sander Orent, corroborated Dr. Mayer's opinions. He described the firefighter's cancer as a "multifactorial disease" that was

> a result of not just the exposure to carcinogens or the presence of [the virus]. It is a product of the fact that the necessary soil for cancer is the [virus] and the carcinogen. Something has to make the seed grow. The [virus] is sitting there doing nothing until the carcinogen comes along and suppresses the immune system to the point where the malignancy develops.
>
> We know that there are multiple causes of immunosuppression in firefighters.
>
> [The firefighter] has been exposed to uncounted amounts of toxins in the course and scope of his job. . . . [T]he preponderance of the evidence, in my view, is overwhelming that his exposures to carcinogens in the course and scope of his work are far more important than any other factor in activating that [virus] that was there.

He added that the firefighter had been "absolutely" exposed to the triggering carcinogens "on the job."

¶ 10 Dr. Bell, who the reader will recall was one of the City's experts, rejected Dr. Orent's assessment. Dr. Bell observed that "there's simply no data, whatsoever, specifically with regard to [the virus] and occupational smoke exposure." Because the majority of

virus-related cancers occur in nonsmokers, Dr. Bell disagreed that smoking is a necessary catalyst for the disease's development. He instead concluded that "[i]t's not necessary to have a significant smoking history to . . . develop [virus]-related head and neck cancer." He reiterated that, without the virus, the firefighter "would not have had this particular [virus]-related cancer." But he conceded that he could not dispute "the fact that smoking may or may not increase the risk of developing [the viral] infection and [virus]-related cancer." He did not know "anything about firefighting."

¶ 11 Based on this evidence, the judge decided that the firefighter's cancer was compensable and awarded him benefits. The judge thought that Dr. Mayer's testimony that it had been "the combination of [the virus] and [the firefighter's] exposure to known carcinogens that [had] cause[d him] to contract cancer" was more persuasive than the contrary testimony of Drs. Bell and Jacobs.

¶ 12 The judge agreed that the firefighter's cancer was "related to the . . . virus." But he observed that "what is less clear, is the relationship between [the firefighter's] exposure to carcinogens at work and the development of the cancer in question." Given this

uncertainty, the judge concluded that the City had failed to show "that it [was] more likely than not that [the firefighter's] employment did not cause [his] particular cancer."

¶ 13 The panel affirmed. It held that it would not substitute its judgment for the judge's. It also determined that it was bound by the judge's findings and conclusions because substantial evidence supported them.

¶ 14 The panel rejected the City's argument that, by adopting Dr. Mayer's and Dr. Orent's "multifactorial" or "combination" theory of risk factors causing cancer, the judge had misapprehended the trio of supreme court cases. (The panel noted that nothing in section 209 or in the trio of supreme court cases required an administrative law judge to reject a multifactorial cancer cause.) By doing so, the City continued, the judge had made it impossible for any employer to overcome the section 209 presumption because most cancers are not caused by a single carcinogen or exposure.

II. The City's Contentions

¶ 15 The City contends that it proved that it was more likely that the virus had caused the firefighter's cancer than other, more attenuated, risks. As a result, it carried its burden "by more than a

preponderance of the evidence." It submits that, by accepting the "multifactorial" or "combination" of causes advanced by Drs. Mayer and Orent, the judge misinterpreted the trio of supreme court cases that had analyzed section 209:

- *City of Littleton v. Industrial Claim Appeals Office*, 2016 CO 25;
- *Industrial Claim Appeals Office v. Town of Castle Rock*, 2016 CO 26; and
- *City of Englewood v. Harrell*, 2016 CO 27.

¶ 16 According to the City, the trio of cases "requires" administrative law judges to "weigh and rank the risk factors to determine whether the employer showed by a preponderance of the evidence that a nonoccupational risk factor was the greater or higher risk factor in the firefighter's cancer." The judge and the panel therefore committed reversible error, the City continues, when they rested their determination that the firefighter's cancer was compensable on a finding that the cause of the firefighter's cancer was "multifactorial." The City adds that, by crediting a multifactorial cause for cancer, the panel and the judge effectively rendered the section 209 presumption irrebuttable because most, if

not all, cancers have multiple causal risk factors. We disagree with all the City's contentions.

III. Section 209

¶ 17 Section 209 states:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and
>
> (b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

The City concedes that the firefighter's cancer was subject to the section 209 presumption.

IV. Governing Law

¶ 18 In 2016, the Colorado Supreme Court weighed in on the burden that section 209 places on employers to overcome the presumption.

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

City of Littleton, ¶ 49 (emphasis added).

¶ 19 In *Town of Castle Rock*, the supreme court further explained that an employer can meet its burden of overcoming the statutory presumption by introducing "risk factor" evidence showing that a firefighter's cancer more likely arose from a nonoccupational cause. The court added that

> an employer can seek to meet its burden under section [209] to show a firefighter's cancer "did

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

Town of Castle Rock, ¶ 17.

¶ 20 But such evidence is not dispositive. Whether an employer has met this burden remains a question of fact for an administrative law judge to decide. Because the judge is the "sole arbiter of conflicting medical evidence . . . [the judge's] . . . factual findings are binding on appeal if they are supported by substantial evidence or plausible inferences from the record." *City of Littleton*, ¶ 51.

¶ 21 *Harrell* returned a case to an administrative law judge "for reconsideration in light of . . . *City of Littleton* and *Town of Castle Rock*." *Harrell*, ¶ 4.

V. Ranking the Risk Factors

¶ 22 The City's contention rests on the premise that the virus was the primary cause of the firefighter's cancer and that any other causes or risk factors were remote in comparison. The City maintains that, if the judge had properly applied the standards set out in *City of Littleton* and *Town of Castle Rock*, he would have concluded that it had overcome the section 209 presumption because the virus's role in causing the firefighter's cancer outweighed any other risks. It urges us to eschew "multifactorial" risks or "combination" causes in favor of a declaration that administrative law judges must find the one cause or risk that outweighs all the others. But, because *City of Littleton* and *Town of Castle Rock* cede discretion to administrative law judges to weigh the potential causes and risks, we disagree that the section 209 presumption is automatically overcome simply by identifying a significant nonoccupational cancer cause.

A. The Judge Did Not Misapply the Law

¶ 23 Despite the City's insistence that the supreme court has mandated administrative law judges to rank firefighters' cancer risks, the trio of supreme court cases does not express such a

mandate. And the trio does not preclude consideration of multifactorial causes of cancer. The City has not pointed us to any language in *City of Littleton*, *Town of Castle Rock*, or *Harrell* that requires administrative law judges to rank risks or causes, and we have not found any in our reading of those cases.

¶ 24 Rather, each case emphasized that an employer "*can*" meet its burden of overcoming the presumption by establishing the prevalence of non-work-related risk factors. *See City of Littleton*, ¶ 49; *Town of Castle Rock*, ¶ 17; *Harrell*, ¶ 2. But the trio of cases does not say that an employer *will* meet its burden by establishing a nonoccupational risk; the trio does not assure employers that they will overcome the section 209 presumption by showing that nonoccupational risk factors played a prominent role in the cancer's development; and the trio does not state that, once employers introduce such evidence, they will automatically rebut the section 209 presumption as a matter of law. In other words, the supreme court opened an avenue for employers to follow, but the court did not guarantee them that the avenue would automatically take them to their desired destination of rebutting the section 209 presumption.

¶ 25 The City's advocacy for a requirement that administrative law judges rank risks or causes ignores a critical standard that the trio of cases announced: the determination of whether an employer has met its burden remains within the fact finder's discretion. Indeed, *City of Littleton* reversed a division of this court because the division "erroneously failed to defer to the [administrative law judge's] findings of fact, which are supported by substantial evidence in the record." *City of Littleton*, ¶ 64. *Town of Castle Rock* did not simply set aside an order that had not considered risk-based evidence, and it did not hold that the risk-based evidence that the employer had offered had overcome the presumption. Instead, the supreme court *remanded* the case so that the administrative law judge could give the evidence due consideration. *Town of Castle Rock*, ¶ 27.

¶ 26 To hold — as the City urges — that administrative law judges *must* rank a firefighter's various cancer risks would create the following rule: an employer overcomes the presumption whenever it presents evidence that *any* nonoccupational cause outweighs the cancer risks posed by firefighting. Such a rule would erect a nearly insurmountable barrier that a cancer-stricken firefighter could only vault by establishing that firefighting exposures outweighed all

other potential cancer risks. By doing so, the rule would undercut what the legislature wanted to do by creating the section 209 presumption in the first place. In other words, the City's interpretation would tip the scale too far in favor of employers.

¶ 27 Such a rule would also contravene the supreme court's mandate that we "defer to the [administrative law judge's] findings of fact" when those findings "are supported by substantial evidence in the record." *City of Littleton*, ¶ 64. Accepting the City's proposed rule would therefore deprive administrative law judges of the discretion that the supreme court has described, which allows them to consider and to weigh the evidence offered by both sides. Accordingly, we conclude that *City of Littleton*, *Town of Castle Rock*, and *Harrell* did not require the judge to rank the firefighter's various occupational and nonoccupational cancer risks.

B. Substantial Evidence Supported the Judge's Findings

¶ 28 To be sure, the judge could have weighed the evidence in the City's favor; but, contrary to the City's position, the evidence did not mandate an outcome in its favor. Drs. Mayer and Orent testified that the firefighter's cancer likely had "multifactorial" causes and a

combination of risk factors, amply supporting the judge's finding of compensability.

¶ 29 The supreme court gave the judge the authority to determine whether the City had overcome the section 209 presumption. *City of Littleton*, ¶ 51. We are therefore bound by the judge's factual findings if they are supported by substantial evidence in the record. *Id.* at ¶¶ 51-52. We conclude, for the following reasons, that they are.

¶ 30 To begin, once the judge admitted the doctors' testimony and the rest of the evidence, it was up to him to decide what weight to give all of the evidence. *Id.*

¶ 31 Dr. Orent discussed the role fighting fires likely played in "activating" the firefighter's cancer-causing virus. Dr. Orent described it as "the trigger that allowed" the virus to become cancerous. He emphasized that the firefighter's lack of other risk factors for tongue cancer — he was a nonsmoker; he had not abused marijuana or drugs; he had been monogamous — meant that the "preponderance of his exposure virtually had to be fire."

¶ 32 Dr. Mayer corroborated Dr. Orent's view when she testified "that it was the combination of [the virus] and the carcinogens . . .

that significantly elevated his risk of developing cancer." She backed up her opinion with a study that found "a synergistically-increased risk of 8.5-fold in those with both [the virus] and smoking."

¶ 33 Although the City's medical expert, Dr. Bell, thought that the virus, and not any carcinogens to which the firefighter had been exposed on the job, had caused his cancer, Dr. Bell did not entirely dispute Dr. Mayer's synergistic theory. Instead, he called it a "grayer area," and he noted that "older data" existed that suggested "there may be an association" between the virus and firefighting exposures.

¶ 34 This evidence sufficiently supports the judge's finding and conclusion that the City had failed to show that it was "more likely than not that [the firefighter's] employment [had] not cause[d] [his] particular cancer." We, like the panel, are therefore bound by the judge's decision. *City of Littleton*, ¶¶ 51-52.

¶ 35 In reaching his decision, the judge found that Dr. Mayer's opinions were more persuasive than those of the City's medical experts. "We must . . . defer to the [administrative law judge's] credibility determinations and resolution of conflicts in the

evidence, including the medical evidence." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006). As in all workers' compensation cases, the weight to be given the experts' testimony "is a matter exclusively within the discretion of the [administrative law judge] as fact-finder." *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). "Further, we may not interfere with the [administrative law judge's] credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the [administrative law judge] would err as a matter of law in crediting it." *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000).

¶ 36 We conclude that the judge acted well within his discretion by crediting Dr. Mayer's opinions over the contrary opinions of Drs. Bell and Jacobs. *Rockwell Int'l*, 802 P.2d at 1183. In the absence of overwhelming evidence rebutting Dr. Mayer's and Dr. Orent's opinions, we may not disturb the judge's determination that Drs. Mayer and Orent were more credible and more persuasive than Drs. Bell and Jacobs. *See Youngs v. Indus. Claim Appeals Office*, 2012

COA 85M, ¶ 46; *Arenas*, 8 P.3d at 561; *Rockwell Int'l*, 802 P.2d at 1183.

¶ 37 We last conclude that, because substantial evidence supported the judge's factual finding that fighting fires played a causal role in the firefighter's cancer, the panel did not err when it affirmed the judge's decision. *See City of Littleton*, ¶¶ 51-52.

¶ 38 The order is affirmed.

JUDGE TAUBMAN and JUDGE WELLING concur.

Court of Appeals

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

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

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

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

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-687

IN THE MATTER OF THE CLAIM OF:

JAVIER PENA ALVAREZ,

Claimant,

v.

FINAL ORDER

RIFLE TEQUILAS INC,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated November 3, 2017, that awarded the claimant temporary total disability (TTD) benefits beginning on July 26, 2017, and medical benefits for his neck and face work injuries. We affirm.

The ALJ found that the claimant worked for the respondent employer as a dishwasher. Jose Arellano worked for the respondent employer as a waiter. Pedro Gomez is the manager of the respondent employer's restaurant.

After closing the restaurant, Mr. Gomez would provide one beer to the employees. On April 29, 2017, after his shift had ended, Mr. Arellano placed his beer and dinner on a table. He then noticed a customer was leaving, so he walked the customer to the door. When he went back to his table, his beer was missing. Mr. Arellano confronted the claimant about his missing beer, but the claimant would not give his beer back to him. Mr. Arellano then assaulted the claimant.

The claimant explained that Mr. Arellano approached him from behind while he was facing the dishwasher, turned him around, and choked him for a couple of minutes before he threw him to the ground. Mr. Arellano then picked the claimant up and struck him on the left cheek. The claimant stated he lost consciousness, and when he regained consciousness, he went outside.

The claimant reported the assault to the police the next day. Mr. Arellano ultimately was charged with assault and battery, and he pled guilty to the charges prior to the workers' compensation hearing at issue here.

Prior to the assault, Mr. Gomez was aware of the conflict between the claimant and Mr. Arellano. He had told both of them to behave. However, Mr. Gomez had not taken any disciplinary action against either the claimant or Mr. Arellano previously, and Mr. Arellano did not face any disciplinary action from the employer after the assault.

After the assault, the claimant sought medical treatment and was seen by Dr. Coleman. The claimant reported that he had been punched in the face with a closed fist by another employee at work, and the other employee was drunk. Physical examination revealed multiple reports of pain on palpation and an abrasion to the left cheek with mild swelling. The claimant was diagnosed with facial trauma, provided with medications, and referred for a facial computerized tomography (CT) scan.

The claimant returned to Grand River Health on May 15, 2017. Dr. Coleman noted that the claimant was reporting pain when swallowing or eating in his neck where he was choked. The claimant also complained of lower back pain. Dr. Coleman diagnosed the claimant with facial trauma, lower back pain, and neck strain. He recommended over the counter medications and x-rays of the claimant's neck. Dr. Coleman again recommended the claimant undergo a facial CT scan. The claimant was released to return to work full duty as of this date.

The claimant continued to receive monthly treatment at Grand River Health, and on July 26, 2017, he was evaluated by Cynthia Bjerstedt, a physician's assistant. The claimant was diagnosed with a facial contusion, thoracolumbar contusion, and anxiety and depression secondary to assault. Ms. Bjerstedt provided the claimant with work restrictions of no lifting over 10 pounds. A CT scan was again ordered to rule out a facial fracture.

The claimant again was evaluated by Ms. Bjerstedt on October 12, 2017. The claimant complained of significant low back pain and some intermittent loss of vision which he stated had been present since the injury. Ms. Bjerstedt diagnosed the claimant with a strangulation injury with a contusion to the left side of the face, a lumbar strain, a cervical strain, and a new diagnosis of possible amaurosis fugax or temporary blindness. She kept the claimant off work.

The ALJ ultimately determined that the claimant's injury was compensable. He found that the claimant and Mr. Arellano "had a history of agitating one another." He found that their prior interactions of horseplay included the claimant striking Mr. Arellano in the groin area, and Mr. Arellano and the claimant bumping shoulders intentionally at work. While the ALJ further found such conduct was not condoned by the employer, and that Mr. Gomez had warned both the claimant and Mr. Arellano to behave, he nevertheless determined such conduct was not the subject of discipline for either. The ALJ applied the test set forth in *Lori's Family Dining v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995) for determining whether the claimant's act of horseplay constituted a deviation from employment and, therefore, precluded an award of compensation. The ALJ found the interactions between the claimant and Mr. Arellano amounted to horseplay and eventually progressed to a willful assault. He determined that while there were other incidents between the claimant and Mr. Arellano, including Mr. Arellano flicking a beer cap at the claimant, the final straw that led to the assault was the claimant's act of hiding Mr. Arellano's beer. While the ALJ determined the claimant's decision to hide Mr. Arellano's beer was not associated with any of the claimant's specific work duties, he nevertheless found the assault was not inherently private. He reasoned that the employer's policy of providing one beer to the employees after the restaurant closed was a perk and the conflict and assault arose out of a confrontation involving that perk. He also ruled that the workplace assault resulted in injuries to the claimant's face and neck but not to his back and vision since these conditions developed long after the assault. The ALJ ordered the respondents liable for medical benefits for the claimant's neck and face injuries and TTD benefits commencing on July 26, 2017, the first date the claimant was provided with work restrictions.

The respondents have petitioned to review the ALJ's order. The respondents argue the ALJ erred in his application of the horseplay doctrine when determining that the claimant's injuries were compensable. They claim the ALJ was required, but failed, to apply a deviation analysis after he ruled that the claimant's act of hiding the beer was not part of his job duties. They reason that the ALJ failed to consider the first two of the four factor test enunciated in *Lori's Family Dining* for determining whether an injury sustained during horseplay was compensable. They also argue that the ALJ failed to consider the fourth factor enunciated in *Lori's Family Dining.* The respondents therefore contend that the claimant failed to demonstrate his injury arose out of his employment. They instead argue that the assault which gave rise to the injuries resulted from activities that were for the sole benefit of the claimant. We reject the respondents' arguments.

To recover workers' compensation benefits, the claimant must prove he sustained an injury arising out of and in the course of his employment. Section 8-41-301(1)(b),

C.R.S. As pertinent here, the "arising out of" test is one of causation and requires that the injury have its origin in an employee's work-related functions and must occur while the claimant is performing service arising out of the employment. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" component is satisfied if the conduct originates in work-related duties or responsibilities so as to be considered part of the service to the employer in connection with the contract of employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). There is no requirement that the conditions of employment be the direct cause of the event that caused the injury. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). Instead, an activity that is sufficiently related to the circumstances under which the claimant normally performs his duties is reasonably characterized as an incident of employment or a condition of the workplace. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Additionally, the fact that a claimant is the initial aggressor in assaultive behavior does not, in itself, render an injury non-compensable. *See Triad Painting Co. v. Blair, supra.*

Moreover, injuries do not arise out of and in the course of employment if, at the time of the injury, the employee is engaged in a personal deviation for his sole benefit. *Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986). As detailed by the ALJ in his order, in *Lori's Family Dining*, the Colorado Court of Appeals established a four-part test to determine whether a claimant's participation in horseplay is so far removed from the duties and circumstances of employment that it does not arise out of the employment. The four criteria are as follows:

> (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 abandonment of duties;
> (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.

The question of whether horseplay is a deviation significant enough to remove the claimant from the course and scope of employment is one of fact for determination by the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*. Accordingly, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in a light most favorable to the prevailing party and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn

from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, to the extent the respondents argue the ALJ failed to address each factor of the four-part test enunciated in *Lori's Family Dining*, the Colorado Court of Appeals previously has rejected this argument. In *Panera Bread v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006), the Court specifically held that nothing in the *Lori's Family Dining* decision suggests 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. Regardless, the respondents' argument notwithstanding, the ALJ's order reflects his consideration of the appropriate factors established in *Lori's Family Dining*. While the ALJ did not expressly use the word "deviation" in his horseplay analysis regarding the claimant's claim, he nevertheless sufficiently addressed the extent and seriousness of the deviation and the completeness of the deviation as enunciated in factors one and two of *Lori's Family Dining*. That is, the ALJ compared the claimant's conduct here to the conduct of the claimant in *Lori's Family Dining*, essentially concluding that the claimant's deviation in this case was neither prolonged nor geographically distant from the place of employment. Rather, the ALJ held the deviation was commingled with the claimant's and Mr. Arellano's perk of employment. Order at 8-9 ¶¶10, 11. Thus, the ALJ essentially concluded the claimant's conduct did not constitute a deviation from employment sufficient to preclude an award of workers' compensation benefits.

We similarly reject the respondents' argument that the ALJ erred in failing to analyze factor four enumerated in *Lori's Family Dining*, which is the extent to which the nature of the employment may be expected to include some horseplay. The respondents further argue that the claimant did not present persuasive evidence in the form of examples of other incidents of horseplay in the work place. Again, the claimant is not required to prove the existence of every element of the four-part test enunciated in *Lori's Family Dining* to prove a compensable claim resulting from horseplay. *Panera Bread v. Industrial Claim Appeals Office, supra*. Nevertheless, not only did the ALJ implicitly rule that the claimant's employment may be expected to include some horseplay, but the claimant also introduced evidence from Mr. Gomez which essentially pertained to factor four. The ALJ credited Mr. Gomez's testimony that he was aware of the conflict between the claimant and Mr. Arellano prior to the assault in that they would bump into each other, and that he previously had warned both to behave. Order at 3-4 ¶11. During the hearing, the respondents called Mr. Arellano and Mr. Gomez to testify. Mr. Arellano testified that he would walk into the back to grab ice off the coolers and the claimant "would goof around with us." Mr. Arellano testified he asked the claimant to "stop

playing with me" and that Mr. Gomez had asked them "a couple of times to stop doing that. . ." but the claimant "just kept bugging [him]." Tr. at 59. Similarly, Mr. Gomez testified that prior to the industrial incident at issue, he told both the claimant and Mr. Arellano to behave. Tr. at 49-50. On cross-examination, Mr. Gomez then testified that because "things [had been] going on between them. . . like bumping into each other. . and that's why [he] knew something was going to happen." Tr. at 56.

We also reject the respondents' argument that in order to satisfy factor three of *Lori's Family Dining*, horseplay cannot just take place just between the claimant and Mr. Arellano, but it must also include other workers. However, nothing in *Lori's Family Dining* requires that for the claimant's injury here to be held compensable, other workers must also have engaged in the horseplay. Rather, it merely is a factor for an ALJ to consider when determining the extent to which the practice of horseplay had become an accepted part of the employment, and the extent to which the nature of the employment may be expected to include some horseplay. Further, the respondents' argument notwithstanding, the ALJ did not rely solely upon the events of the day in question when determining that the claimant's injuries arose out of acceptable horseplay. Rather, as explained above, the ALJ credited Mr. Gomez's testimony that he was aware of the conflict between the claimant and Mr. Arellano prior to the assault in that they would bump into each other, and he previously had warned both to behave. Order at 3-4 ¶11.

The respondents also argue the ALJ erred in finding that horseplay was acceptable in the workplace. However, we again perceive no error. Similar to the facts in *Lori's Family Dining*, the ALJ here found that the employer failed to enforce any disciplinary action for engaging in horseplay. That is, the ALJ found there was no credible evidence introduced demonstrating that the claimant and Mr. Arellano were disciplined for engaging in horseplay during their employment. Similar to *Lori's Family Dining*, the ALJ could reasonably infer from this evidence that such conduct was customary and countenanced and a regular part of the claimant's employment. Thus, similar to *Lori's Family Dining*, the ALJ reasonably concluded that horseplay had become a regular part of the claimant's employment and was sufficiently related to the circumstances under which he normally performed his duties as to be reasonably characterized as a normal condition of the workplace.

To the extent the respondents also argue that the claimant failed to prove his injury arose out of his employment, we are not persuaded. As explained above, it is well settled that it is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising

out of and in the course of employment. *City of Boulder v. Streeb, supra*. Regardless, we perceive no error in the ALJ's application of the four-part test enunciated in *Lori's Family Dining*, when determining that horseplay was a regular part of the claimant's employment and was sufficiently related to the circumstances under which he normally performed his duties as to be reasonably characterized as an incident of employment. Since the ALJ's findings and evidence support his conclusion that the claimant's injury is compensable as arising out of his employment, we may not disturb it. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated November 3, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

7/6/18 by TT .

KAUFMAN & KAUFMAN LLC, Attn: MATHEW F KAUFMAN ESQ, 401 23RD STREET SUITE 302, GLENWOOD SPRINGS, CO, 81601 (For Claimant)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, PO BOX 258829, OKLAHOMA CITY, OK, 73125-8829 (For Respondents)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, 1801 BROADWAY SUITE 1300, DENVER, CO, 80202-3878 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-980-171-02

IN THE MATTER OF THE CLAIM OF:

ZACHARY MORRIS,

Claimant,

v.

FINAL ORDER

OLSON HEATING & PLUMBING CO,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of a supplemental order of Administrative Law Judge Spencer (ALJ) dated March 22, 2018, that denied his request for an award of post maximum medical improvement (MMI) medical benefits. We affirm the decision of the ALJ.

The claimant injured his left leg on April 8, 2015, when he fell on a scaffold and twisted his leg and ankle. The ankle injury resolved expeditiously but pain in the claimant's calf persisted. An EMG test administered in July 2015 showed peroneal neuropathy at the left fibular head. The claimant was treated with various medications. In November 2015, the claimant began complaining of low back pain. The claimant's authorized treating physician (ATP), Dr. Hattem, ordered a subsequent EMG in January 2016. That EMG revealed symptoms "potentially consistent with a left L5 radiculopathy." When Dr. Hattem evaluated the claimant on March 24, 2016, he concluded the EMG demonstrated the peroneal neuropathy condition had resolved and the claimant was at MMI. The doctor considered the claimant's low back L5 radiculopathy condition to be unrelated to his April 2015, work injury due to the delay in the development of the low back symptoms. The claimant was determined to have no permanent impairment from the work accident and had no need for future maintenance medical treatment.

The claimant requested a review of Dr. Hattem's MMI and impairment conclusions by a Division sponsored Independent Medical Examination (DIME). Dr. Gray conducted the DIME exam. The DIME report was equivocal about the contribution of the work accident to the claimant's low back radiculopathy. The doctor could not state the connection was probable, only possible. Consequently, Dr. Gray provided a lower extremity permanent impairment rating of 14% due to the injury to the peroneal nerve. He noted this rating accounted for both peroneal nerve changes and L5 radiculopathy. He agreed with Dr. Hattem that the claimant had achieved MMI on March 24, 2016. However, Dr. Gray recommended that the claimant be allowed post-MMI medical care in the form of 2-4 visits for physical therapy in the event of flare-ups in symptoms, up to three steroid injections and a trial of epidural steroid injections.

The respondents then filed a revised Final Admission of Liability (FAL) on May 17, 2017, in accordance with the DIME report. The FAL admitted for permanent disability benefits of 14% extremity rating as provided by Dr. Gray. Nonetheless, the FAL continued to deny liability for post-MMI *Grover* medical benefits. The claimant filed an application for a hearing concerning continuing medical benefits and conversion of the scheduled impairment rating to a whole person category. A hearing was conducted on November 21, 2017, in regard to post-MMI medical benefits.

Following the hearing, the ALJ denied the claimant's medical benefits request. The ALJ rejected the claimant's assertion that a DIME physician's recommendations regarding post MMI medical treatment are "findings or determinations" of the DIME which, pursuant to § 8-42-107.5(4)(c), must be either admitted by the respondents or otherwise made the subject of a request for a hearing initiated within 20 days of the DIME report. The claimant asserted the failure of the respondents to do either, made the recommendation for post MMI medical treatment a binding liability of the respondents. The ALJ reasoned the statutory reference to 'findings or determinations' of the DIME are limited to determinations of either permanent impairment or of MMI. Therefore, the issue of post-MMI medical benefits is not automatically binding simply through its inclusion in the DIME report. The ALJ ruled the claimant must request those benefits if not admitted and must carry the burden of proof by a preponderance of the evidence. The claimant did not testify at the hearing and did not submit evidence concerning medical benefits beyond that in the DIME report. The respondents presented the deposition testimony of Dr. Hattem and the testimony of Dr. Paz. The ALJ found their contentions that the peroneal nerve injury required no further treatment to be persuasive. Both doctors attributed the claimant's continued pain complaints to his low back condition, which was not work related. The ALJ adopted this explanation and ruled the need for further medical treatment was not justified by the claimant's work injury to his left leg.

The ALJ issued his supplemental order on March 22, 2018. Although the claimant filed a timely petition to review the ALJ's supplemental order on March 23, 2018, the petition to review was not accompanied by a brief in support as contemplated by § 8-43-301(6), C.R.S. The failure to file a brief in support does not deprive us of jurisdiction, however, and we have reviewed the appeal based on the record before us. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986)(failure to file a brief not jurisdictional).

On appeal, the claimant reiterates his contention that the failure of the respondents to either admit for post-MMI medical benefits or to request a hearing to challenge the DIME report's recommendations in that regard makes those recommendations conclusive. The Court of Appeals in *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-90 (Colo. App. 2002) and in *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482-83 (Colo. App. 2005), ruled the failure by the respondents to timely admit or contest the findings of the DIME physician renders those findings as binding on the parties. However, we agree with the ALJ that the terms 'the IME's findings or determinations contained in such report' as used in § 8-42-107.2(c), are defined in §§ 8-42-107(8)(b)(II) and 8-42-107(8)(c). Section 8-42-107(8)(b)(II) states that in the case of a dispute of the ATP's determination "on the question of whether the injured worker has or has not reached MMI, an independent medical examiner may be selected in accordance with section 8-42-107.2". Similarly, § 8-42-107(8)(c) specifies that if a party "disputes the ATP's finding of medical impairment, … the parties may select an IME in accordance with section 8-42-107.2". These are the only circumstances in which a DIME procedure may be initiated. Accordingly, the reference in § 8-42-107.5(4)(c) to 'findings or determinations' of the DIME report are necessarily limited to findings or determinations of MMI or permanent impairment. The Court of Appeals noted in *Cordova* the determination of the DIME physician may consist of sub-parts. "Because these issues inherently require a determination regarding the cause of a claimant's condition, a DIME physician's opinion that a causal relationship exists between the condition and an industrial injury must be overcome by clear and convincing evidence." *Id*. at 190.

In this matter, the claimant's injuries are all represented by conditions on the schedule of impairments included in § 8-42-107(2). Permanent impairment for those injuries is not subject to review and determinations by a DIME procedure, §§ 8-42-107(7)(b) and 8-42-107(8)(a). Accordingly, the determination of the impairment rating by the DIME physician in this case is not entitled to presumptive effect, including any prerequisite findings of relatedness. *Maestas v. American Furniture Warehouse*, W.C.

No. 4-662-369 (June 5, 2007); *Burciaga v. AMB Janitorial Services*, W.C. No. 4-777-882 (November 5, 2010); *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010).

The claimant relies on the decision in *City Market v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). In *City Market*, the claimant sustained an injury limited to her left shoulder, an injury on the § 8-42-107(2) schedule of disabilities. The employer filed an admission for the ATP's impairment rating. The claimant obtained a DIME review and received a higher rating for her upper extremity. The employer noted that scheduled injuries were not controlled by a DIME review and failed either to file a corresponding FAL or to request a hearing. The claimant requested penalties be assessed because of this failure to abide by § 8-42-107.2(4)(c). The Court approved an award of penalties literally applying the direction in § 8-42-107.2(4)(c). The claimant here argues that because the respondents in *City Market* were deemed subject to the requirement of § 8-42-107.2(4)(c) to either file an admission for the DIME findings or to request a hearing within 20 days, the failure to do so indicates the DIME's recommendations for medical treatment also became binding.

The claimant misapplies the decision in *City Market*. There, the Court observed that an employer must request a hearing following a DIME report, even in the case of a scheduled injury, for the reason that an ALJ would then have an expeditious opportunity to rule on the issue of whether the injury actually is limited to the schedule of impairments. Instead, the ALJ may find the injury is not so confined and is appropriately represented by a whole person rating. *Id*. at 603. *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). In this matter, the respondents did file an amended admission. However, as discussed above, a recommendation for post MMI medical treatment is not a DIME determination referenced by § 8-42-107.2(4)(c). In addition, because a DIME impairment rating is not required by the statute when an injury is on the schedule of disabilities, that determination is not required to be overcome by clear and convincing evidence as it would if § 8-74-107(8) applied. *See* § 8-42-107(8)(b.5)(II). *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007).

Further, subsequent to the *City Market* decision, the legislature amended § 8-43-201(1) in 2009 to require that a party seeking to modify a general or a final admission of liability "shall bear the burden of proof for any such modification." We have held this section does not affect the requirement in § 8-42-107(8)(b)(III) or (b.5)(II) that a party disputing the findings of MMI or permanent impairment determined by a DIME physician pursuant to § 8-42-107(8)(a) concerning a non-scheduled injury, must overcome those findings by clear and convincing evidence. However, in the case of a

scheduled injury, as here, § 8-43-201(1) would require the claimant to assume the burden of proof to modify the challenged admission. *Gagon v. Westword Dough Operating Co*. W.C. No. 4-971-646-03 (February 6, 2018). Accordingly, while § 8-42-107.2(4)(c), pursuant to *City Market*, would require a respondent to either file a conforming admission or request a hearing within 20 days of a DIME report in regard to a scheduled injury, the claimant would bear the burden of proof at such a hearing by a preponderance of the evidence to demonstrate the DIME impairment rating should apply. This amendment indicates the General Assembly does not view the decision of a DIME concerning a scheduled injury to feature a presumption of application either about permanent impairment or about any other element of that impairment analysis. In this matter, that would include the DIME recommendations for post MMI medical treatment.

Finally, the General Assembly indicated in its 2011 amendments to § 8-42-107(8)(f), that a presumptive decision, in fact a mandatory decision, pertinent to post MMI medical benefits is to be that of the ATP, absent a contradictory medical opinion.

Accordingly, the decision in *City Market* cannot be seen as a holding that a DIME opinion on post MMI medical treatment is entitled to the same presumptive effect as that attached to DIME determinations of MMI or whole person impairment ratings, nor is it an indication of a legislative intent to do so.

We therefore conclude that the ALJ did not commit error as alleged by the claimant in denying the claimant's request for post-MMI medical benefits.

IT IS THEREFORE ORDERED that the ALJ's supplemental order issued March 22, 2018 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

7/6/18 by TT .

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
IRWIN CARMICKLE & FRALEY LLP, Attn: ROGER FRALEY JR ESQ, 6377 REVERE PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: JEFF STAUDENMAYER ESQ, 1700 LINCOLN STREET, SUITE 4500, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-053-962

IN THE MATTER OF THE CLAIM OF:

DOUGLAS TEW,

Claimant,

v.

FINAL ORDER

ZACHS TRANSMISSION & 4X4 LLC,

Employer,

and

MILBANK INSURANCE CO,

Insurer,
Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

Rule 5-14 states in pertinent part as follows:

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

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

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

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

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

CERTIFICATE OF MAILING

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

7/3/18 by TT .

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

108 INADVERTENT DISCLOSURE OF PRIVILEGED OR CONFIDENTIAL DOCUMENTS

Adopted May 20, 2000.

Introduction

This opinion addresses the ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed, whether in a civil, criminal, or administrative proceeding or in a context that does not involve litigation. This opinion does not purport to address all the situations in which a lawyer receives privileged or confidential documents belonging to a person other than his or her client.[1] For purposes of this opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a civil, criminal, or administrative action or proceeding, even if they are not "privileged" *per se*.[2]

Syllabus

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

A lawyer who receives documents from an adverse party or an adverse party's lawyer ("sending lawyer") that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the receiving lawyer's only ethical obligation in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.[3]

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, as a matter of ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

Opinion

Although the Colorado Rules of Professional Conduct do not expressly address these issues, the Committee concludes that Rule 8.4(d) requires a lawyer to respect the privileged and confidential status of documents belonging to non-clients in order to ensure the orderly administration of justice. Colo. RPC 8.4(d). *See* CBA Formal Ethics Ops. 86, 102; *see also State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal.Ct. App. 1994); Utah State Bar Ethics Op. 99-01 (1999). As the California Court of Appeals concluded:

> The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the

> retention of the privileged information by an adversary who might abuse and disseminate the information with impunity. In addition, it has long been recognized that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."

WPS, 82 Cal.Rptr.2d at 808 (citations omitted).

Typically, an inadvertent disclosure of privileged or confidential documents occurs in two situations. One situation is where a lawyer receives documents that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer. This may occur because the document is addressed to the sending lawyer's client, but it is inadvertently sent to the physical address, facsimile transmission number, or e-mail address of the receiving lawyer, his or her adversary. Another situation is where one party inadvertently produces documents that are privileged or confidential to the adverse party in a civil, criminal, or administrative proceeding or in a context that does not involve litigation, such as a business transaction.

The facts in these situations are critical and vary widely. Accordingly, the courts and bar associations that have addressed the ethical obligations applicable to these situations have taken slightly different approaches. Almost all require the receiving lawyer to notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed. *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D.Ohio 1996); *Resolution Trust Corp. v. First of Am. Bank*, 868 F.Supp. 217, 219-20 (W.D.Mich. 1994); *WPS*, 82 Cal.Rptr.2d at 807-08; ABA Formal Op. 92-368 (1992); Utah State Bar Op. 99-01; North Carolina Bar Ass'n, Proposed RPC 252 (1997); Maine Advisory Op. 146 (1994); Florida Bar Ass'n Op. 93-3 (1993); *but see In Re Meador*, 968 S.W. 2d 346, 352 (Tex. 1998) (*dictum*).

The authorities differ, however, as to the receiving lawyer's obligations beyond giving notice. In a seminal opinion, the Standing Committee on Ethics and Professional Responsibility of the ABA addressed the situation where a lawyer inadvertently sends a document that is privileged or confidential to his or her adversary instead of the intended recipient, such as by a misdirected fax. [ABA Formal Op. 92-368.] In this situation, the ABA Committee concluded that the receiving lawyer should not examine the documents once the inadvertence is discovered, should notify the sending lawyer of their receipt, and should abide by the sending lawyer's instructions as to their disposition. *Id*. Several courts have followed ABA Formal Opinion 92-368. *American Express*, 1996 WL 346388 at *2; *First of Am. Bank*, 868 F.Supp. at 219-20; *WPS*, 82 Cal.Rptr.2d 799 at 807-08.

However, ABA Formal Opinion 92-368 is not universally followed. *See*, *e.g.*, Ohio Bar Ass'n Op. 93-11 (1993); Philadelphia Bar Ass'n Op. 94-3 (1994); *see also* Florida Bar Ass'n Op. 93-3 (requires only notice, but does not cite or analyze ABA Formal Opinion 92-368); *cf.*, D.C. Bar Ass'n Op. 256 (1995) (following ABA Formal Opinion 92-368 in part; receiving lawyer's duties depend on whether he or she knows of the inadvertence of the disclosure before examining the documents). Indeed, the Ethics 2000 Commission of the ABA has recently proposed for comment a new Model Rule of Professional Conduct that would depart dramatically from the approach in ABA Formal Opinion 92-368. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft) (Nov. 15, 1999). As proposed by the Ethics 2000 Commission, the new rule would require the receiving lawyer only to notify the sending lawyer that the document was inadvertently disclosed and would not prohibit the receiving lawyer from reviewing the document or require the receiving lawyer to abide by the sending lawyer's instruction as to its disposition. *Id*.

Further, where one party inadvertently produces documents that are privileged or confidential to an adverse party in a civil, criminal, or administrative proceeding, courts that have considered the ethical issues, rather than simply the evidentiary issue of waiver of privilege or confidentiality, have required the receiving lawyer to either follow the instruction of the adverse party's lawyer with respect to the disposition of the documents or refrain from using them until a definitive resolution is obtained from a court regarding their proper disposition. *Transportation Equip. Sales*, 930 F.Supp. at 1187; *WPS*, 82 Cal.Rptr. 2d at 807-08; *cf*., *In re United Mine Workers of America Employee Benefit Plans Litigation*, 156 F.R.D. 507

(D.D.C. 1994) (motion to reconsider magistrate judge's order compelling production of documents, including privileged and confidential documents that were inadvertently released for inspection by adverse parties; district court acknowledged the ethical issue, noted ABA Formal Opinion 92-368, but decided the motion based solely on the evidentiary issue of waiver of privilege and confidentiality).

In contrast, bar association ethics opinions are less stringent in this situation. The Utah State Bar concluded that once notice of the disclosure has been given, the lawyers can assess whether a waiver has occurred; that in some instances the lawyers may be able to agree how to handle the disclosure; but that in other instances, "it may be necessary to seek judicial resolution of the legal issues." Utah State Bar Op. 99-01. Similarly, the Florida Bar Association concluded that after the receiving lawyer has notified the sending lawyer, "[i]t is then up to the sender to take any further action." Florida Bar Ass'n Op. 93-3; *accord* Maine Advisory Op. 146 (a lawyer who receives documents that are privileged or confidential from an adverse party as part of a production of documents in a litigation should notify the producing lawyer of the disclosure and provide a copy of the documents to the producing lawyer if requested, but the receiving lawyer may use the documents in any way allowed under the rules of procedure and evidence). In this situation, too, the new rule proposed by the ABA Ethics 2000 Commission would require only notification. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft).

It is the opinion of the Committee that a lawyer who receives documents from an adverse party or an adverse party's lawyer that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the attorneys may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure in an effort to support a determination of waiver or to embarrass the sending lawyer, for example, by filing the arguably privileged or confidential documents in the public court file as attachments to a pleading or paper, or by quoting the content of the documents in pleadings or papers filed in the public court file. Although not prohibited as a matter of legal ethics, the Committee does not condone such practices. In this situation, both parties can litigate the matter without publicly disclosing the documents or their contents, for example, by filing the documents under seal or submitting them for *in camera* review and by referring to the content of the documents generally.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. This includes the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, it is the opinion of the Committee that, as a matter of legal ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition. *E.g.*, *American Express*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); D.C. Bar Ass'n Op. 256; *see also* ABA Formal Op. 92-368.

The receiving lawyer who actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents has these additional duties for two reasons. First, in this situation, the receiving lawyer knows that the documents which were inadvertently sent are not his or her property; therefore, the receiving lawyer has a duty to safeguard the documents as property belonging to others under Rule 1.15(a), and to notify the sending lawyer and return the documents if requested under Rule 1.15(b). Second, the receiving lawyer is prohibited from acting dishonestly under Rule 8.4(c), and in this situation it would be dishonest for the receiving lawyer to examine the privileged or confidential docu-

ments knowing that the documents were sent inadvertently. As the District of Columbia Bar Association noted in this regard:

> Reading the materials under these circumstances should be treated as the equivalent of a lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. *See, e.g., Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994).

D.C. Bar Ass'n Op. 256 (footnote omitted).

Myriad situations will arise between these two extremes, where the receiving lawyer knows of the inadvertence of the disclosure before examining the documents and where the receiving lawyer does not know of the inadvertence before examining the documents. In these situations, there may be conflicting indications on the face of the document or in the overall context whether the disclosure was inadvertent or intentional. For instance, a letter meant for the sending lawyer's client might be put in an envelope addressed to the receiving lawyer or sent with a facsimile transmission sheet directed to the receiving lawyer, and the letter itself might be ambiguous whether it was meant for the receiving lawyer or the sending lawyer's client. *See, e.g.,* Philadelphia Bar Ass'n Op. 94-3. Whether the receiving lawyer "knows" of the inadvertence of the disclosure before examining the documents depends on the specific facts and circumstances in each case. D.C. Bar Ass'n Op. 256. For this purpose, knowledge "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Colo. RPC, Terminology.

By requiring the receiving lawyer at least to give notice to the sending lawyer, as a matter of legal ethics, the interests in privilege and confidentiality that are so essential to the administration of justice will be protected, because the sending lawyer will be able to take protective measures. Moreover, as the Utah State Bar concluded, this approach has the virtue of separating the legal merits regarding waiver from the ethical determination of what an attorney ought to do. Utah State Bar Op. 99-01.

In this regard, it should be noted that these issues of legal ethics are separate and distinct from the evidentiary issue of waiver of privilege or confidentiality. A substantial body of law exists in the field of evidence regarding the waiver of attorney-client privilege and work product protection by inadvertent production. *See*, *e.g.*, *Alldread v. City of Granada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D.Cal. 1985); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997). *See generally*, *e.g.*, Section of Litigation, American Bar Association, *The Attorney-Client Privilege and the Work Product Doctrine* at 193-96 (3d ed. 1997).

Conclusion

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depend on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

In the situation where a party or a sending lawyer inadvertently discloses to an adverse party or an adverse party's lawyer documents that on their face appear to be privileged or confidential, the Committee concludes that the receiving lawyer, upon recognizing their privileged or confidential nature, has an ethical duty to notify the sending lawyer that he or she has the documents. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. In this situation, as a

matter of legal ethics, the receiving lawyer also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

NOTES

1. For example, this opinion does not address the ethical obligations of a lawyer who receives documents that are privileged or confidential from a non-party witness pursuant to a subpoena *duces tecum* in a civil or criminal action or proceeding. Instead, these obligations are addressed in Revised Formal Opinion 86 and Formal Opinion 102 of the Ethics Committee of the Colorado Bar Association.

Similarly, this opinion does not address the ethical obligations of a lawyer who purposefully obtains such documents from an adverse party directly or through his or her agent, such as the practice referred to colloquially as "dumpster diving" — that is, rifling through the garbage of an adverse party or an adverse party's lawyer in an effort to find documents that might be helpful to the rifling party's case. *See*, *e.g.*, *McCafferty's, Inc. v. The Bank of Glen Burnie*, 179 F.R.D. 163 (D.Md. 1998); *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D.Ill. 1981). *See generally* Solovy & Byman, "Federal Practice/Discovery: Fighting Those Who Dive Into Hi-Tech 'Dumpsters,'" *The National Law Journal* (Dec. 21, 1998).

In addition, this opinion does not address the ethical obligations of a lawyer who obtains such documents from his or her client.

2. Examples of such confidential documents may include those subject to the work product doctrine, *e.g.*, Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way, Fed. R. Civ. P. 26(c)(1), (4), (7); C.R.C.P. 26(c)(1), (4), (7); records of services to the mentally ill, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; and reports of AIDS or HIV-related illness, § 25-4-1404(1), C.R.S. In contrast, for purposes of this opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a civil action or proceeding, such as research, development or commercial information and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination). *See* CBA Formal Ethics Ops. 86 (revised 1998), 102 (1998).

3. The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure, in an effort to support a determination of waiver or to embarrass the sending lawyer. Although such practices are not prohibited as a matter of legal ethics, the Committee does not condone them.