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Department of
Labor and Employment

Division of Workers' Compensation
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June Case Law Update

Presented by Judge Craig Eley and Judge Jeff Goldstein

This update covers ICAO decisions issued between May 6, 2017 to June 8, 2017

Industrial Claims Appeals Office Decisions

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ADVANCE SHEET HEADNOTE
May 30, 2017

2017 CO 55

No. 16SC444, England v. Amerigas Propane—Workers' Compensation—Mutual Mistake of Material Fact—Colorado Workers' Compensation Act.

In this case, the supreme court considers whether a provision of the mandatory form settlement document promulgated by the Director of the Division of Workers' Compensation waives an injured employee's statutory right under section 8-43-204(1), C.R.S. (2016), to reopen a settlement based on a mutual mistake of material fact. The supreme court concludes that it does not because provisions of the form document must yield to statutory rights. Accordingly, the supreme court reverses the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2017 CO 55

Supreme Court Case No. 16SC444
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1210

Petitioner:

Victor England,

v.

Respondents:

Amerigas Propane and Indemnity Insurance Company of North America.

Judgment Reversed
en banc
May 30, 2017

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CHIEF JUSTICE RICE delivered the Opinion of the Court.
JUSTICE HOOD and **JUSTICE GABRIEL** do not participate.

¶1 This case requires us to determine whether a provision of the mandatory form settlement document promulgated by the Director of the Division of Workers' Compensation ("Director") waives an injured employee's statutory right under section 8-43-204(1), C.R.S. (2016), to reopen a settlement based on a mutual mistake of material fact.[1] We hold that it does not because provisions of the form document must yield to statutory rights. Accordingly, we reverse the judgment of the court of appeals and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶2 Petitioner Victor England was a truck driver for Amerigas Propane ("Amerigas"). He filed a workers' compensation claim after sustaining a serious injury to his shoulder in December 2012 while making a delivery for Amerigas. England underwent two surgeries in the first half of 2013 to repair his shoulder.

¶3 In July 2013, Amerigas's physician reported that England should reach maximum medical improvement ("MMI") in two or three months. England was still in pain after the second surgery, but believing that the pain was part of the recovery process and would subside as he healed, he agreed in September 2013 to settle his workers' compensation claim for $35,000.

[1] Specifically, we granted certiorari to review the following issue:

> Whether the court of appeals erred as a matter of law in interpreting the mandatory form settlement documents promulgated by the Division of Workers' Compensation to waive an injured employee's statutorily protected right to reopen a settlement based on mutual mistake of material fact.

¶4 England's claim was governed by the Colorado Workers' Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S. (2016) ("Act"), which requires that settlements between employer and employee must be written, signed by both sides, and approved by the Director or an administrative law judge ("ALJ"). § 8-43-204(2)–(3). Pursuant to section 8-43-204, the Director has promulgated a form settlement agreement ("Form"), which the parties are required to use to settle all claims. 7 Code Colo. Reg. 1101-3:9 (2016). In the instant case, the parties' settlement agreement was consistent with the Form, including, as relevant here, paragraphs four and six. Paragraph four, which incorporated the mutual mistake of material fact doctrine from section 8-43-204(1), provided for the right to reopen the settlement based on a mutual mistake of material fact, and paragraph six waived England's right to compensation for any "unknown injuries." The Director approved the settlement as required by section 8-43-204(3).

¶5 England's pain continued after the settlement agreement was signed and approved. In October 2013, he sought further medical evaluation, which revealed a previously undiagnosed stress fracture in the scapula (shoulder blade) of England's injured shoulder. Up to this point, no one was aware that this fracture existed. England claims that if he had been aware of this fracture, he would not have settled his claim.

¶6 England filed a motion to reopen the settlement on the ground that the newly discovered scapular fracture was a mutual mistake of material fact that justified reopening his workers' compensation claim. Upon reviewing the motion, an ALJ found: (1) none of the parties could have known about the scapular fracture when the claim was settled, and the parties instead believed that England was merely

experiencing recovery pain on his way to MMI, when in actuality he had "an undisclosed and undiagnosed scapula[r] fracture"; (2) the scapular fracture was caused by a screw that was inserted into England's scapula during the second of his two pre-settlement shoulder surgeries; (3) the scapular fracture existed when the claim was settled; (4) the scapular fracture was material because it necessitated more surgeries, it still had not been resolved, and it prevented England from returning to work; and (5) if England had been aware of the fracture in his scapula, he would not have settled his workers' compensation case. Based on these findings, the ALJ concluded that the parties' ignorance as to the scapular fracture constituted a mutual mistake of material fact, granted England's motion to reopen, and awarded England temporary total disability benefits starting on the date of the settlement. A panel of the Industrial Claim Appeals Office ("ICAO") affirmed.

¶7 In a published, unanimous decision, a division of the court of appeals reversed. Amerigas Propane v. Indus. Claim Appeals Office, 2016 COA 65, ___ P.3d ___, reh'g denied (May 26, 2016). The division concluded that although paragraph four of the settlement agreement provided for the right to reopen a settlement based on a mutual mistake of material fact, "unknown injuries" as defined in paragraph six were carved out of the definition of mutual mistake of material fact. Id. at ¶ 33. The scapular fracture, according to the division, fell within the category of "unknown injuries" defined in paragraph six because it was caused by a surgery to address England's original injury. Id. at ¶ 35. Therefore, the division concluded, the scapular fracture could not serve as a basis for reopening the settlement. Id. We granted certiorari.

II. Standard of Review

¶8 Like other statutes, provisions in the Act are interpreted de novo. Williams v. Kunau, 147 P.3d 33, 36 (Colo. 2006). Additionally, interpretation of the language of a settlement agreement is a question of law which we also review de novo. See Ad Two, Inc. v. City & Cty. of Denver, 9 P.3d 373, 376 (Colo. 2000); Moland v. Indus. Claim Appeals Office, 111 P.3d 507, 510 (Colo. App. 2004).

III. Analysis

¶9 We begin by providing an overview of the relevant portions of both the Act and the Form. We then conclude that a provision in the Form cannot waive an injured employee's statutory right under section 8-43-204(1) of the Act to reopen a settlement based on a mutual mistake of material fact. Finally, we determine that a mutual mistake of material fact was established in this case, and consequently, England retains the right to reopen his claim.

A. The Workers' Compensation Act and the Director's Form

¶10 The Act governs employers' payments of compensatory benefits to employees who have suffered work-related injuries. Whiteside v. Smith, 67 P.3d 1240, 1245 (Colo. 2003). As discussed above, the Act allows an employer and employee to settle an employee's injury claim, but the settling parties must use the promulgated Form and cannot modify its language. 7 Code Colo. Reg. 1101-3:9 (2016). Instead, the parties may

only fill in their names, the date of injury, a description of the injury, and the amount of the settlement.[2] See Form WC104, Colo. Dep't of Labor & Emp't (June 2016).

¶11 Two paragraphs of the Form are relevant to our analysis today: paragraph four and paragraph six. Paragraph four, in relevant part, states: "The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact." Id. at ¶ 4. This paragraph incorporates the statutory right to reopen a workers' compensation claim as provided by section 8-43-204(1) of the Act. That statutory provision states that a settlement agreement may be reopened "on the ground of fraud or mutual mistake of material fact," even where the agreement otherwise provides that the claim "shall not be reopened." § 8-43-204(1).

¶12 Paragraph six of the Form, in turn, contains a release of claims for "unknown injuries." In full, this paragraph reads:

> [The injured employee] realizes that there may be unknown injuries, conditions, disease, or disabilities as a consequence of these alleged injuries or occupation diseases, including the possibility of a worsening of the conditions. In return for the money paid or other consideration provided in this settlement [the injured employee] rejects, waives and FOREVER gives up the right to make any kind of claim for workers' compensation benefits against [the employer and its insurer(s)] for any such unknown injuries, conditions, diseases, or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement.

Form WC104, ¶ 6. Neither section 8-43-204(1) nor any other provision in the Act mandates such a release.

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[2] The parties may insert additional terms in paragraph nine, but they cannot alter or delete the existing language in the other paragraphs.

¶13 The crux of this case is whether the language in paragraph six waives or limits an employee's statutory right under section 8-43-204(1) to reopen based on mutual mistake of material fact as provided in paragraph four. We now turn to this question.

B. The Section 8-43-204(1) Right to Reopen

¶14 As noted above, section 8-43-204(1) clearly provides that workers' compensation claim settlements can be reopened "on the ground of fraud or mutual mistake of material fact." However, the Form cannot waive statutory rights and must yield to the statute. See Monfort Transp. v. Indus. Claim Appeals Office, 942 P.2d 1358, 1360 (Colo. App. 1997) (holding that any agency rule which conflicts with a statute is void). Therefore, in order to remain a valid provision of the Form, paragraph six must be interpreted in such a way as to be consistent with the statute.

¶15 To reach this conclusion, we first consider our decision in Padilla v. Industrial Commission, 696 P.2d 273 (Colo. 1985). In that case, Padilla and his employer settled Padilla's work-related injury claim. Id. at 275. The settlement agreement broadly released "any and all claims . . . of any kind or nature whatsoever, known and unknown" relating to the work-related injury. Id. The agreement also stated that Padilla was "forever" precluded from bringing additional claims. Id. The Director approved the agreement. Id. One year later, under the then-existing version of the Act, Padilla moved to reopen his settled claim on the ground of mistake because his condition had worsened.[3] Id. The ALJ denied the motion to reopen, holding that the

[3] When Padilla executed the settlement, the version of section 8-43-204 in effect at that time was silent about whether claims resolved by settlement could be reopened.

settlement agreement had waived any right to reopen. Id. at 276. The ICAO and the court of appeals both affirmed the ALJ. Id.

¶16 We reversed the court of appeals' denial of Padilla's request to reopen, holding that: (1) although no section of the Act expressly provided for reopening a claim that had been settled, the Act's sections allowing formally adjudicated claims to be reopened should also apply to settled claims, id. at 276, 279–80; and (2) a settlement agreement could not waive the statutory right to reopen a claim, id. at 280–81. In support of the latter conclusion, we reasoned that the agreement's waiver provisions must yield to "the very purposes of the Act and the policy expressed by [the Act's] reopening provisions." Id. Specifically, we noted that the overall purpose of the Act is the "beneficent" purpose of compensating injured workers; consequently, the Act's "provisions are to be interpreted liberally in favor of the right of injured workers." Id. at 276–77. Additionally, the Act's sections allowing formally adjudicated claims to be reopened "indicate a strong legislative policy to the effect that in workers' compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute," id. at 278, and the same statutory sections "represent a strong public policy" to reopen closed claims, id. at 279, "regardless of the manner in which the case was resolved," id. at 280.

¶17 In response to Padilla, the General Assembly amended the Act to preclude reopening a settled claim if the settlement agreement had waived the right to reopen.

However, other sections of the Act provided that claims resolved by formal agency action could be reopened, for various reasons specified in those sections. See § 8-43-303, C.R.S. (2016).

See Ch. 77, sec. 2, § 8-53-105, 1985 Colo. Sess. Laws 355, 355. However, as amended and as relevant here, the Act in section 8-43-204(1) allowed full and final settlements to be reopened in cases involving either (1) fraud or (2) mutual mistake of material fact. Therefore, the effect of the amendment was to restrict Padilla's scope to these two grounds for reopening a settlement. As such, Padilla's reasoning still applies to these two grounds, which are rooted in the Act. Thus, Padilla's holding—that workers' compensation claims resolved by settlement agreement may be subsequently reopened even if the settlement agreement waived claims for unknown injuries—remains in force in cases of mutual mistake of material fact. Accordingly, we hold that paragraph six of the Form cannot waive or limit an employee's statutory right to reopen his claim, incorporated into paragraph four, on the ground of mutual mistake of material fact.

¶18 Instead, we conclude that paragraph six must be interpreted in such a way as to be consistent with the statute. To do so, we hold that paragraph six applies only to those "unknown injuries" that develop after a settlement agreement is signed and approved and paragraph four applies only to those injuries that constitute a "mutual mistake of material fact" and are unknown and existing before the settlement agreement is signed and approved. This interpretation gives full effect to each paragraph without generating any conflict between the paragraphs. It also is consistent with the principle discussed below that the doctrine of mutual mistake does not apply to a future fact.

C. Mutual Mistake of Material Fact in This Case

¶19 Here, there was a mutual mistake of material fact that provides England a right to reopen his claim under paragraph four. The doctrine of mutual mistake provides that "an agreement founded in a mutual mistake of facts that are the very basis of the contract will void the contract." Carpenter v. Hill, 283 P.2d 963, 965 (Colo. 1955). A mutual mistake voids the contract because the contracting parties' mutual mistake prevented the true meeting of the minds needed to form a contract. 17A Am. Jur. 2d Contracts § 201 (2016).

¶20 The doctrine of mutual mistake has three primary criteria. First, the mistake must be mutual, meaning "both parties must share the same [factual] misconception." Cary v. Chevron, 867 P.2d 117, 118 (Colo. App. 1993). Second, the mistaken fact must be material, meaning that it is a fact which goes to "the very basis of the contract." Carpenter, 283 P.2d at 965. In other words, the mistake of fact must relate to a material aspect of the contract such that, but for the mistake, the party seeking rescission would not have entered the contract. See Reliance Fin. Corp. v. Miller, 557 F.2d 674, 679 (9th Cir. 1977) ("The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." (quoting Roller v. Cal. Pac. Title Ins. Co., 206 P.2d 694, 699 (Cal. App. 1949))). Third, the mistaken fact must be a past or present existing one, as opposed to "a fact to come into being in the future." Hailpern v. Dryden, 389 P.2d 590, 593 (Colo. 1964).

¶21 In the instant case, the parties were mutually mistaken about a material fact at the time they signed the settlement agreement, namely England's unknown but existing

scapular fracture. As the ALJ found, the mistake was mutual because both parties were unaware of the scapular fracture and instead believed that England was only experiencing recovery pain. The mistaken fact was material because England would not have settled if he had known of the scapular fracture. And it was a present existing fact because the scapular fracture existed at the time the settlement agreement was signed. Thus, England retains the right to reopen his claim based on mutual mistake of material fact.

IV. Conclusion

¶22 We hold that paragraph six of the Form cannot waive or limit an employee's statutory right to reopen a claim, incorporated into paragraph four, on the ground of mutual mistake of material fact. Thus, we interpret paragraph six to be consistent with section 8-43-204(1) and conclude paragraph six applies only to those "unknown injuries" which develop after a settlement agreement is signed and approved. We also conclude that a mutual mistake of material fact was established in this case and therefore under paragraph four England has the right to reopen his claim on this basis. We therefore reverse the judgment of the court of appeals and remand for further proceedings consistent with this opinion.

DATE FILED: May 18, 2017
CASE NUMBER: 2016CA1085

Court of Appeals No. 16CA1085
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-978-703-01

Michael Sanchez,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Denver Water, and Travelers Indemnity Company,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE ASHBY
Hawthorne and Nieto*, JJ., concur

Announced May 18, 2017

Law Office of Chris Forsyth, LLC, Chris Forsyth, Denver, Colorado, for Petitioner

Cynthia H. Coffman, Attorney General, Emmy A. Langley, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Ray Lego & Associates, Jonathan S. Robbins, Gregory W. Plank, Greenwood Village, Colorado, for Respondent Denver Water

No Appearance for Respondent Travelers Indemnity Company

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 The claimant in this case challenges the constitutionality of portions of the Workers' Compensation Act of Colorado, sections 8-40-101 to -55-105, C.R.S. 2016 (Act). Claimant, Michael Sanchez, contends that using administrative law judges (ALJs) and the Industrial Claim Appeals Office (Panel), from the state's executive branch, violates equal protection and the separation of powers. He also challenges the constitutionality of section 8-43-404(5)(a)(II)(A), C.R.S. 2016, which exempts governmental entities from providing an injured worker with a list of four physicians from whom the worker may seek medical care for his or her injury. Because we reject these constitutional arguments, and are not persuaded by claimant's remaining contentions, we affirm the Panel's decision denying and dismissing claimant's request for temporary disability benefits.

I. Background

¶ 2 Claimant works for Denver Water in the leak detection department. On March 25, 2015, he sustained a back injury lifting a hydraulic unit from his truck. He felt immediate back pain, reported his injury, and was sent to an in-house clinic for treatment and evaluation. Claimant described his injury as "pain to right low

back," but a pain diagram he completed that day illustrated aching and stabbing pain mid-way between his armpit and hip. Dr. Hugh Macaulay, the part-time physician at the clinic, diagnosed claimant with an injury to the "upper back (thoracic area) on the right side of the body."

¶ 3 A week later, Dr. Macaulay reported that claimant was "doing markedly better than on his last visit." Two and half weeks later, claimant reported that his "pain is much less" and rated it "as 1-1.5/10." By May 13, 2015, claimant had been released to full duty with no restrictions. Dr. Macaulay placed claimant at maximum medical improvement (MMI) for his mid-back injury on June 3, 2015.

¶ 4 However, after he was placed at MMI, claimant complained of "significantly more discomfort in his mid-back area." An MRI of the thoracic spine was "benign." He also told his physical therapist a day earlier that he had "excruciating" lower back pain.

¶ 5 Claimant returned for a follow-up visit with Dr. Macaulay in July 2015 complaining of low back pain. He told Dr. Macaulay that another physician had diagnosed "lumbar strain, thoracic strain and depression." But both Dr. Macaulay and a specialist concluded

that claimant's lumbar strain was not work-related. Based on an MRI study of claimant's low back, Dr. Macaulay opined that claimant's low back pain was associated with "normal age-related" degenerative changes.

¶ 6 Claimant sought temporary partial disability (TPD) benefits from the date of his injury and temporary total disability (TTD) benefits from June 2015 when his low back pain flared. But an ALJ rejected claimant's request for benefits, finding that his low back pain was unrelated to his work injury. The ALJ also found that because claimant had continued working, he had not suffered a wage loss and therefore was not entitled to either TPD or TTD benefits. On that basis, the ALJ denied and dismissed claimant's request for both TTD and TPD benefits. The Panel affirmed the ALJ's rulings, but it remanded the case to the ALJ to address whether claimant was entitled to a change in his physician. Claimant now appeals.

II. Issues Raised are Final for Purposes of This Appeal

¶ 7 We begin by addressing Denver Water's assertion that claimant's appeal should be dismissed for lack of finality. Denver Water argues that because the Panel remanded part of the ALJ's

order for further consideration, the order was not final for appeal and the appeal should be dismissed. We disagree.

¶ 8 Section 8-43-301(2), C.R.S. 2016, permits "[a]ny party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty [to] file a petition to review with the division." Thus, to be final and appealable, an ALJ's order "must grant or deny benefits or penalties." *Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d 448, 449-50 (Colo. App. 2008); *accord Ortiz v. Indus. Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003).

¶ 9 Because the Panel affirmed the ALJ's decision denying claimant's request for TPD and TTD benefits, that portion of the ALJ's order is final and appealable. We therefore turn to the merits of claimant's appeal. We first address claimant's various constitutional arguments, and then we consider his other claims for relief.

III. Constitutional Challenges

A. Separation of Powers

¶ 10 Claimant argues that the separation of powers doctrine is violated "by having workers' compensation cases heard in the

executive branch." He contends that "workers' compensation cases involve private rights that are properly heard by judicial branch judges." We are not persuaded.

¶ 11 "Article III of the Colorado Constitution prohibits one branch of government from exercising powers that the constitution vests in another branch." *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430, 433 (Colo. App. 2003). The "separation of powers doctrine does not require a complete division of authority among the three branches, however, and the powers exercised by different branches of government necessarily overlap." *Id.* *Dee Enterprises* held that the statutory scheme for deciding workers' compensation cases does not violate the separation of powers doctrine and that "review by this court of the Panel's final orders for errors of law and abuse of discretion is sufficient to protect the proper exercise of judicial function." *Id.* at 437.

¶ 12 Claimant nevertheless argues that the United States Supreme Court cases on which *Dee Enterprises* relied, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), and *Crowell v. Benson*, 285 U.S. 22 (1932), directly contradict the principles espoused in *Dee Enterprises*. But we conclude that *Dee Enterprises*

thoroughly and properly analyzed this issue and faithfully followed the precedent of *Thomas* and *Crowell*.

B. Equal Protection

¶ 13 The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although the Colorado Constitution does not contain an identical provision, "it is well-established that a like guarantee exists within the constitution's due process clause, Colo. Const. art. II, sec. 25, and that its substantive application is the same insofar as equal protection analysis is concerned." *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 2013 CO 39, ¶ 22 (quoting *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1014 (Colo. 1982)), *abrogated on other grounds by Warne v. Hall*, 2016 CO 50.

¶ 14 We address, and reject, each of claimant's equal protection challenges in turn.

1. Standard of Review

¶ 15 Claimant first asserts that his equal protection challenges should be analyzed under a strict scrutiny standard, rather than under a rational basis review.

> Under equal protection law, judicial scrutiny of a statute varies according to the type of classification involved and the nature of the right affected. The rational basis standard of review applies when a legislative classification does not involve a suspect class or abridgement of a fundamental right triggering strict scrutiny and also when the classification does not trigger an intermediate standard of review.

Culver v. Ace Elec., 971 P.2d 641, 645-46 (Colo. 1999) (citations omitted). "A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is '*necessary* to promote a *compelling* state interest,' and does so in the least restrictive manner possible." *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)), *aff'd*, 517 U.S. 620 (1996). In contrast, "[u]nder the rational basis standard of review, a statutory classification will stand if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious." *HealthONE v. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002). Claimant asserts that because his fundamental right to a fair hearing is threatened by using non-judicially selected and retained ALJs and Panel

members, his claim should be analyzed under the strict scrutiny standard.

¶ 16 But, "[n]ot all restrictions on fundamental rights are analyzed under a strict scrutiny standard of review," *Rocky Mountain Gun Owners v. Hickenlooper*, 2016 COA 45M, ¶ 19, and, as *Culver* held, "[r]eceipt of workers' compensation benefits is not a fundamental right." *Culver*, 971 P.2d at 646. Indeed, we have found no case, and claimant has not cited any to us, that analyzes workers' compensation hearings under a strict scrutiny standard.

¶ 17 Cases cited by claimant do not persuade us that strict scrutiny must be applied here. At least two of the cases do not address the fundamental right to a fair hearing and therefore are inapposite. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (state could not terminate mother's fundamental right to parent without a hearing on grounds that mother could not afford court costs); *Evans*, 882 P.2d at 1343-44 (Amendment 2 was too broad and "not narrowly tailored" to constitutionally accomplish its stated goals of protecting the rights to freely practice religion, "personal privacy," and "familial privacy").

¶ 18 A third case expressly holds that a pre-termination evidentiary hearing is *not* required — and thus no fundamental right to a hearing is violated — by the government using administrative procedures to determine continued social security benefits. *See Mathews v. Eldridge*, 424 U.S. 319, 340-42 (1976) (a claimant seeking continued social security disability benefits is not entitled to a pre-termination evidentiary hearing because social security disability benefits are "not based upon financial need" and "other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level").

¶ 19 Accepting claimant's argument that strict scrutiny analysis applies could also lead to the absurd result that the standard would apply whenever a litigant is dealt an unfavorable decision and then asserts the hearing was unfair because it was conducted by an allegedly unqualified or inadequately vetted judge.

¶ 20 Colorado courts have repeatedly held that workers' compensation claimants are not a suspect class and that workers' compensation benefits are not a fundamental right. *See Dillard v. Indus. Claim Appeals Office*, 134 P.3d 407, 413 (Colo. 2006);

Simpson v. Indus. Claim Appeals Office, 219 P.3d 354, 364 (Colo. App. 2009), *rev'd in part and vacated in part on other grounds sub nom. Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 778 (Colo. 2010); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002) ("[R]eceiving workers' compensation benefits is not a fundamental right."). The rational basis test therefore applies to equal protection challenges in the workers' compensation context, and claimant's constitutional challenge should be assessed under that standard. *See Mathews*, 424 U.S. at 349; *Dillard*, 134 P.3d at 413; *Kroupa*, 53 P.3d at 1197.

¶ 21 Under the rational basis test, "a statutory classification is presumed constitutional and does not violate equal protection unless it is proven beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose." *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997). "[T]he burden is on claimant, as the challenging party, to prove the statute is unconstitutional beyond a reasonable doubt." *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

¶ 22 In applying rational basis review, "we do not decide whether the legislature has chosen the best route to accomplish its objectives." *Dean v. People*, 2016 CO 14, ¶ 13. Instead, "[o]ur inquiry is limited to whether the scheme as constituted furthers a legitimate state purpose in a rational manner." *Id.*

2. Use of ALJs and Panel Members Who are Not Subject to Selection by the Governor or Retention by the Voters Does Not Violate Equal Protection

¶ 23 Claimant contends that the structure of the Division of Workers' Compensation — particularly its use of ALJs and the Panel to resolve disputes — violates his and other workers' compensation litigants' rights to equal protection. Claimant challenges the constitutionality of the selection process for Panel members and the use of ALJs by asserting identical arguments. Because these arguments overlap, we address them together.

¶ 24 Claimant contends that the state's process for choosing and retaining judicial officers is "carefully crafted to obtain fair and impartial judges." He suggests that he and other workers' compensation litigants are forced to have their claims heard by a potentially partial ALJ or tribunal, because ALJs and Panel members are "appointed by the executive director of the department

of labor and employment[,] can serve forever," and have not undergone the careful vetting of judges appointed under article VI.[1] This dichotomy between litigating civil suits and workers' compensation claims, he argues, violates his and other workers' compensation litigants' right to equal protection. We disagree.

¶ 25 Claimant bears the burden of showing "that the classification lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated." *Dillard*, 134 P.3d at 413. He identifies the class as all civil litigants. But, as several divisions of this court have noted, workers' compensation litigants should not be lumped together with civil litigants generally because

> workers' compensation cases are not ordinary civil disputes between "private parties litigating private rights" that must be resolved in the courts. Rather, the parties in workers' compensation proceedings have expressly surrendered common law rights, remedies, and proceedings in exchange for the benefits of the Act — namely, compensation to the employee for job-related injuries and immunity for the employer from common law claims.

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[1] Judicial power in the State of Colorado is vested in the judicial branch by article VI of the Colorado Constitution.

MGM Supply Co. v. Indus. Claim Appeals Office, 62 P.3d 1001, 1004 (Colo. App. 2002); *see also Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177, 180-81 (Colo. App. 2009) ("[T]he General Assembly essentially has determined that workers' compensation cases are not civil cases that must be heard in a judicial court."). We therefore conclude that the class should be defined more narrowly as comprising all workers' compensation litigants, because parties to workers' compensation actions are subject to different rules and a different statutory scheme than other litigants. *See MGM Supply*, 62 P.3d at 1004 (observing differences between litigants in "ordinary civil disputes" and litigants in workers' compensation proceedings). Classified in this manner, it is clear that all workers' compensation litigants, including claimant, are treated equally. Also, using ALJs and the Panel — both of whom fall under Colorado's executive branch — to hear workers' compensation claims advances the Act's goals of quickly and efficiently resolving claims. § 8-40-102(1), C.R.S. 2016; *see Simpson*, 219 P.3d at 363; *MGM Supply*, 62 P.3d at 1004. We conclude that advancing these legitimate governmental goals is a sufficient rational basis for

employing executive branch ALJs and the Panel to decide workers' compensation cases.

¶ 26 Claimant's arguments here mirror those addressed and rejected by other divisions of this court in two prior decisions: (1) *Youngs v. Industrial Claim Appeals Office*, (Colo. App. No. 08CA2209, Nov. 19, 2009) (not published pursuant to C.A.R. 35(f)) (*Youngs I*);[2] and (2) *Youngs v. Industrial Claim Appeals Office*, 2012 COA 85M (Colo. App. 2012) (*Youngs II*). In *Youngs I*, a claimant argued that his fundamental right to a fair hearing was jeopardized by the Division of Workers' Compensation's use of executive-appointed ALJs rather than judicial branch officers. In *Youngs II*, the same claimant argued that his rights to equal protection were violated because ALJs and Panel members were "not appointed by the Governor of Colorado for a term of years . . . and . . . not subject to impeachment." *Youngs II*, ¶ 48. The division in *Youngs II* relied on the prior division's decision as to the equal protection challenge on the basis of the doctrines of law of the case and issue preclusion. Further, relying on prior decisions of this court, *Youngs I* and *II* held

[2] Although the policy of this court forbids citation by parties to unpublished opinions, we cite to *Youngs I* to explain the procedural history and to place the decision in *Youngs II* in context.

that the claimant's constitutional rights were not violated. *Youngs II*, ¶ 61. *Youngs I* and *II* show that, contrary to claimant's conclusory assertion, the arguments he raises here are not "separate and distinct from arguments raised in prior cases."

¶ 27 The prior decisions on which *Youngs I* and *II* relied apply equally here. And, they provide precedential grounds for rejecting the argument claimant now makes. *See Aviado*, 228 P.3d at 180-81 (because there is no fundamental right to recover damages in district court, workers' compensation claimants are not deprived of a "fundamental constitutional right to a hearing in district court"); *Dee Enters.*, 89 P.3d at 434 (use of executive branch ALJs and the Panel does not prevent "the judicial branch of government from exercising power that is essential to its proper functioning"); *MGM Supply*, 62 P.3d at 1004.

¶ 28 Claimant denounces these prior opinions as "wrongly decided" and demands that they "be overturned." Yet, he fails to articulate any sound legal bases for doing so. We conclude that *Aviado*, *Dee Enterprises*, and *MGM Supply* are well reasoned, and we find no basis to disagree with their holdings. The same basic complaint asserted in those three cases is argued here — that depriving

workers' compensation claimants and respondents of access to judicial branch hearings violates their constitutional rights. No case cited by claimant, or any we have found, has held that administrative hearings deprive workers' compensation litigants of a right to a fair hearing. To the contrary, the workers' compensation scheme of dispute resolution has been universally upheld.

¶ 29 Moreover, workers' compensation litigants have access to judicial review. Like the appellants in *Aviado*, *Dee Enterprises*, *MGM Supply*, and *Youngs I* and *II*, claimant had a right — which he exercised — to have his claim heard by a judicial branch appellate court. "The General Assembly has explicitly made the exercise of the powers conferred upon ALJs and the Panel subordinate to the judiciary by providing for a review as of right by this court for errors of law and findings of fact that are unsupported by the evidence." *Dee Enters.*, 89 P.3d at 434. Thus, "[a]ny right [claimant] may have to have [his] disputes considered by judges subject to popular vote is protected by the provisions of the Act authorizing judicial review by direct appeal to this court." *MGM Supply*, 62 P.3d at 1004.

¶ 30 Accordingly, we reject claimant's contention that his right to equal protection was violated because his claim was heard by an executive branch ALJ and the Panel.

3. The Industrial Claim Appeals Office's Presence as a Party and Representation by the Attorney General's Office Do Not Violate Equal Protection

¶ 31 Claimant next challenges the Panel's dual roles as a decision-maker and as a named litigant if a case is subsequently appealed to this court. He contends that the Panel's fluid roles can improperly lead it to "magically transform back into an appellate tribunal," a "scenario [that] reeks of impropriety." He claims further that workers' compensation claimants are the only litigants subjected to this dichotomy, which wrongfully deprives him and other workers' compensation litigants of equal protection. Again, we are not persuaded.

¶ 32 The Act permits "[a]ny person in interest, including Pinnacol Assurance, being dissatisfied with any final order of the division, [to] commence an action in the court of appeals *against the industrial claim appeals office as defendant* to modify or vacate any such order on the grounds set forth in section 8-43-308." § 8-43-307(1), C.R.S. 2016 (emphasis added). Thus, claimant was

following the legislature's mandate to name the Panel as a defendant when he appealed to this court.

¶ 33 First, workers' compensation claimants are not the only litigants who encounter the Panel as both decision-maker and defendant. The Panel also appears as a defendant in unemployment cases brought before this court. *See* § 8-74-107, C.R.S. 2016.

> The threshold question in an equal protection challenge is whether the legislation results in dissimilar treatment of similarly situated individuals. To violate equal protection provisions, the classification must arbitrarily single out a group of persons for disparate treatment from that of other persons who are similarly situated.

Pepper, 131 P.3d at 1140.

¶ 34 Claimant asserts that workers' compensation litigants are treated unlike any other litigant and attempts to distinguish workers' compensation litigants from unemployment litigants. But we perceive no fundamental distinction between these groups for equal protection purposes.

¶ 35 And, contrary to claimant's underlying assumption, this exact dichotomy exists in the judicial branch, as well. Parties appearing

before article VI courts who are dissatisfied with an order may seek immediate relief from the order in the supreme court under C.A.R. 21, and may name the lower court or judge as a party. *See Colo. State Bd. of Med. Exam'rs v. Colo. Court of Appeals*, 920 P.2d 807, 814 (Colo. 1996) (holding under C.A.R. 21 that the court of appeals exceeded its jurisdiction in issuing stay). In such actions, the district court is generally represented by the Attorney General's Office. *See, e.g.*, *Pearson v. Dist. Court*, 924 P.2d 512, 517 (Colo. 1996) (ordering trial court to vacate its orders for mediation); *People v. Dist. Court*, 894 P.2d 739, 746 (Colo. 1995) (finding respondent court erred by suppressing evidence obtained through discovery in the prior civil proceeding). In fact, if a court or judge is named in a C.A.R. 21 petition, the implication for conflicts could be more serious than the types of conflicts claimant fears; unlike workers' compensation or unemployment cases that name the Panel generally, a C.A.R. 21 petition that names an individual judge is likely to be returned to that same judge to preside over subsequent proceedings. *See Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902, 908 (Colo. 1992) (holding that judge exceeded his jurisdiction

when he imposed sanctions against party and prohibited enforcement of the sanction).

¶ 36 Still, even assuming there is disparate treatment of workers' compensation litigants in requiring them to name the Panel as a defendant in an appeal, we conclude such a requirement does not violate equal protection. Requiring the Panel to be added as a party, and permitting the Attorney General's Office to represent the Panel on appeal, is not arbitrary. The entire Act is designed to "provide for the quick and efficient delivery of benefits to injured claimants at a reasonable cost to employers." *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053, 1057 (Colo. 2003). The requirement that the Panel be named as a party to any appeal serves the Act's legitimate and stated purpose of ensuring the thorough and expeditious review and, as necessary, enforcement of ALJ and Panel orders under the Act. Nevertheless, claimant insists that workers' compensation litigants are denied their right to a fair hearing because they must appear before Panel members who are biased because of their dual status as arbiters of claims and also as parties in any appeal of those claims. He correctly asserts that the Code of Judicial Conduct requires a judge to disqualify himself or

herself if he or she becomes a party to the proceeding, and that another division of this court has held that the Code applies to ALJs and Panel members. *See* C.J.C. 2.11; *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 29 ("The C.J.C. thus unambiguously and expressly applies to PALJs, ALJs, and Panel members, contrary to claimant's assertion."). The Panel, however, is not in the same position as those individual judges in the cases on which claimant relies. The Panel is named as a collective body and its members never appear in an individual capacity. We detect neither actual partiality nor the appearance of partiality in this arrangement.

¶ 37 A review of the cases cited by claimant illustrates this distinction. Claimant cites to *Venard v. Department of Corrections*, 72 P.3d 446 (Colo. App. 2003), for the proposition that judges may not become "advocates in a matter where they serve as judges." In *Venard*, however, unlike this case, the same individual served on a decision-making board hearing a case brought by a plaintiff's counsel and then also represented the state against the same plaintiff's counsel in an unrelated matter. A division of this court disqualified the board member from deciding cases involving the

plaintiff's attorney because of the undeniable appearance of impropriety. *Id.* at 450.

¶ 38 In contrast, Panel members who ruled on claimant's case do *not* appear as individual defendants and the Panel is represented on appeal by counsel from the Attorney General's Office. So, individual Panel members are not in the same adversarial posture as the board member described in *Venard*.

¶ 39 Claimant also relies on *People v. Martinez*, 185 Colo. 187, 523 P.2d 120 (1974). In that case the court found that, after the prosecutor failed to appear for a hearing, the trial judge

> assumed the role of the district attorney. The court not only moved sua sponte for the admission of the transcript of the preliminary hearing into evidence, but called witnesses for the People, examined them and cross-examined defense witnesses. He made sua sponte objections to defense counsel's questions and ruled on objections made to his own questions — many leading ones.

Id. at 188-89, 523 P.2d at 120-21. These actions, the supreme court determined, demonstrated that the trial judge was not impartial but instead acted as "an advocate and not a judge." *Id.* at 189, 523 P.2d at 121. The Panel in this case did not take any similar actions; claimant named the Panel as a defendant as

required by section 8-43-307, and the Attorney General's Office filed a brief on the Panel's behalf as anticipated by that statute. Claimant cannot establish that the individual Panel members have provided evidence or testimony in his case, or have personally advocated the Panel's position against his interests. The only individuals who have presented the Panel's position are members of the Attorney General's Office who have no role whatsoever in the Panel's decision-making functions.

¶ 40 There simply has not been a showing, as there was in *Martinez* and *Venard*, that an individual Panel member has acted with any partiality or appearance of impropriety. For these reasons, we conclude that claimant has not established an equal protection violation due to the Act's requirement that the Panel be named as a party. *Pepper*, 131 P.3d at 1140.

¶ 41 To the extent claimant asserts any impropriety or equal protection violation from the Attorney General's Office representing the Panel, the argument is undeveloped. We therefore decline to address it. *See Meza v. Indus. Claim Appeals Office*, 2013 COA 71, ¶ 38; *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007) (declining to address "underdeveloped arguments").

4. Section 8-43-404(5)(a)(II)(A) Does Not Improperly Single Out Governmental Workers and Therefore Does Not Violate Equal Protection

¶ 42 Claimant next challenges on equal protection grounds the statute that obligates an employer to furnish an injured worker with options for medical care. Section 8-43-404(5)(a)(I)(A) requires an employer to "provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, from which list an injured employee may select the physician who attends the injured employee." A later subsection of the statute carves out an exception for governmental entities and health care providers. It provides as follows:

> If the employer is a health care provider or a governmental entity that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternative physician or corporate medical provider from outside its own system.

§ 8-43-404(5)(a)(II)(A). Claimant asserts that this exemption deprives governmental workers of the right to select a physician in violation of equal protection. We disagree.

¶ 43 "To successfully challenge a statute on equal protection grounds, 'the party asserting the statute's unconstitutionality must show that the classification lacks a legitimate governmental purpose and, without a rational basis, *arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated.*'" *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 11 (emphasis added) (quoting *Dillard*, 134 P.3d at 413). By the plain terms of the statute, governmental workers are not the only group denied a list of four physicians. And if we determine that a rational basis exists for excluding employees of governmental entities and health care providers that have their own occupational health care provider system from the four-physician requirement, these groups are necessarily not "*arbitrarily* single[d] out . . . for disparate treatment" from other injured workers. *Zerba*, ¶ 11 (emphasis added) (quoting *Dillard*, 134 P.3d at 413).

¶ 44 We conclude that a rational basis does exist for excluding employees of governmental entities and health care providers from

the four-physician referral requirement. Both health care providers and governmental entities are more likely to have the expertise and means to establish their own provider systems than other employers. The legislature having determined that only these two types of entities qualify for the exclusion is therefore not arbitrary or irrational. And requiring employees of these entities to use providers within those systems is consistent with the Act's goals to minimize costs while efficiently providing care and compensation to injured workers. The fact that the statutory classification may impact only employees of these two types of entities does not render the classification unconstitutional. *See Dillard*, 134 P.3d at 414. Claimant therefore cannot establish an equal protection violation due to the physician referral exclusion.

IV. Non-Constitutional Challenges to Panel's Order

¶ 45 Claimant asserts three non-constitutional arguments: (1) the exemption from providing a list of four possible physicians did not apply because Denver Water did not meet the requirements of section 8-43-404(5)(a)(II)(A); (2) substantial evidence does not support the ALJ's factual findings; and (3) the ALJ made numerous

evidentiary errors. We are not persuaded to set aside the Panel's order by any of these arguments.

A. Denver Water Complies with Statutory and Regulatory Requirements for Having Its Own Occupational Health Care Provider

¶ 46 Claimant argues that Denver Water's clinic does not meet section 8-43-404(5)(a)(II)(A)'s criteria for an "occupational health care provider system" because it does not have a full-time physician at the clinic. Specifically, claimant contends that because Dr. Macaulay is only present at the clinic two days per week and does not supervise the clinic's operations, Denver Water's clinic does not comply with the statutory and regulatory requirements for an on-site health care facility. So, he maintains, Denver Water was not statutorily exempt; should have provided him with a list of four potential physicians; and, when it failed to do so, violated section 8-43-404(5)(a)(I)(A). We are not persuaded.

¶ 47 Section 8-43-404(5)(a)(II)(B) specifically states that in order for a governmental entity or health care provider to be exempt under the Act from listing four physicians, the on-site health care facility must meet "all applicable state requirements to provide health care services on the employer's premises." *Id.* The regulation governing

this provision requires "the on-site facility [to] be under the supervision and control of a physician, and a physician must be on the premises *or reasonably available*." Dep't of Labor & Emp't Rule 8-1(C)(1), 7 Code Colo. Regs. 1101-3 (emphasis added). We conclude that Denver Water's clinic adequately complies with these requirements.

¶ 48 The regulation does not require that a physician be on the premises at all times. Rather, so long as a physician is "reasonably available" the statutory mandate is met. Dr. Macaulay works at the clinic twice per week and can be reached at other times, as needed. This meets the statutory requirements.

¶ 49 Dr. Macaulay does not have administrative authority over the clinic's nursing staff or other personnel. But, Dr. Macaulay emphasized that he demands medical independence and is available to the clinic nurses to answer their medical questions. In other words, Dr. Macaulay exercises independent medical judgment and provides medical supervision at the clinic even though he does not provide any administrative supervision over the nursing staff such as approving vacation time, hiring staff, or making other personnel decisions.

¶ 50 Claimant asserts that this is fatal to Denver Water's clinic qualifying as an on-site health care facility. But the Panel interpreted Rule 8-1 as mandating that a physician be "responsible for making the necessary medical determinations and does not refer to the administrative supervision of employees such as scheduling time off and personnel matters." While we are not bound by the Panel's interpretation of the statute, and our review is de novo, we give "considerable weight" to the Panel's interpretation, *Zerba*, ¶ 35, and do not set it aside "unless plainly erroneous or inconsistent with such regulations." *Id.* at ¶ 37 (quoting *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002)); *see also Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). The Panel's interpretation will therefore be set aside only "if it is inconsistent with the clear language of the statute or with the legislative intent." *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998). We conclude that the Panel's interpretation is reasonable and consistent with the legislative intent. We therefore adopt it and apply it.

¶ 51 Nor are we persuaded by claimant's argument that the clinic does not comply with the statute because only one physician at a

time is staffing it. Focusing on the statute's use of the plural — "the employer may designate health care *providers*" — claimant reasons that section 8-43-404(5)(a)(II)(A) requires every clinic to have more than one physician on-hand and available at any given time. (Emphasis added.) We disagree.

¶ 52 Nothing in the statute suggests that multiple physicians must be present at a clinic. Claimant cites to no authority for his proposed interpretation and we have found none. The statute's plain language addresses an employer that "has its own occupational health care provider system" — singular — and the reference to designating "health care providers" within its own system simply allows an exempted employer the flexibility to employ or contract with one or more physicians. *See* § 8-43-404(5)(a)(II)(A).

¶ 53 Last, claimant argues that Denver Water effectively conceded that Dr. Macaulay is not part of its occupational health care provider system and waived its right to argue it had its own occupation health care provider system. He claims this is so because Denver Water objected when claimant's counsel questioned claimant about his conversations with Dr. Macaulay concerning claimant's impairment rating. As we understand claimant's

reasoning, he contends that if Denver Water considered Dr. Macaulay an employee, it could not object to his statements on hearsay grounds because the testimony would be an admission by a party opponent and therefore fall within an exception to the hearsay rule. But Denver Water's counsel objected to the questions about claimant's conversation with Dr. Macaulay because the statements were not made for purposes of a medical diagnosis. And, claimant's counsel argued only that the doctor's statements were admissible as prior inconsistent statements. Neither party laid the foundation for or characterized the statements as an admission nor argued that the court should admit them as such. So we find no basis to conclude that Denver Water made any concession or waived its right to argue that its clinic qualified as an on-site health care facility. For these reasons, we conclude that Denver Water's clinic complied with the requirements of section 8-43-404(5)(a)(II)(B) and Rule 8-1(C)(1).

B. Substantial Evidence Supports the ALJ's Conclusion that Claimant's Low Back Injury was Not Work-Related

¶ 54 Claimant next contends that the ALJ disregarded critical evidence when he determined that claimant's low back pain was unrelated to his work injury. We disagree.

1. Governing Law and Standard of Review

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

¶ 56 We must uphold the ALJ's factual determinations if the decision is supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2016; *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007) ("We are bound by the factual determinations of the ALJ, if they are supported by substantial evidence in the record."); *Wal-Mart Stores, Inc. v. Indus.*

Claims Office, 989 P.2d 251, 252 (Colo. App. 1999) ("If substantial evidence supports the ALJ's conclusion that a claimant's condition is work-related, that determination may not be disturbed on review."). The reviewing court is bound by the ALJ's factual determinations even if the evidence was conflicting and could have supported a contrary result. It is the fact finder's sole province to weigh the evidence and resolve any contradictions. *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ).

2. Substantial Evidence Supports the ALJ's Decision

¶ 57 Dr. Macaulay repeatedly testified that, in his opinion, claimant's low back pain was not related to his work injury. Even though he acknowledged that other doctors had differing opinions, Dr. Macaulay also expressed this opinion in a written report and when questioned by Denver Water's counsel. The ALJ could have reached a different conclusion based on other available evidence. But the mere fact that contrary evidence exists that could support

the opposite result is insufficient to justify setting aside an ALJ's order or the Panel's decision affirming it. And, we may not reweigh the evidence to reach a result contrary to the ALJ's factual findings if those findings are supported by evidence in the record. *See Pacesetter Corp.*, 33 P.3d at 1234; *Metro Moving & Storage Co.*, 914 P.2d at 415.

¶ 58 The ALJ credited Dr. Macaulay's testimony over other witnesses' testimony. And because Dr. Macaulay's opinions substantially support the ALJ's factual finding that claimant's low back pain is not related to his work injury, we must uphold this finding. *See* § 8-43-308; *Leewaye*, 178 P.3d at 1256; *Wal-Mart Stores, Inc.*, 989 P.2d at 252.

C. Other Alleged Evidentiary Errors Provide No Basis for Setting Aside the Panel's Decision

¶ 59 Last, claimant lumps together a number of "other issues," including "multiple evidentiary issues," that he asserts "constitute reversible error." He implies that the Panel wrongly relied on mootness to dispose of issues; argues that the "case should be remanded for a determination regarding waiver"; asserts that the final admission should be stricken because it "does not have an

impairment rating attached"; and claims that "multiple evidentiary issues were raised." None of these contentions provide a basis for setting aside the Panel's order.

¶ 60 Claimant suggests the ALJ committed an evidentiary error that prevented him from impeaching Dr. Macaulay. As we understand his argument, claimant sought to discredit Dr. Macaulay with a contract purporting to show that Denver Water only renewed Dr. Macaulay's contract because he had reduced its workers' compensation costs. He contends that the ALJ "refused to consider such evidence and ruled the information was irrelevant."

¶ 61 The record reveals, however, that the contract in question *was* admitted into evidence in its entirety. The ALJ was not required to explicitly reference this contract to demonstrate that he had considered it. An "ALJ operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive." *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000). Moreover, an ALJ "is not held to a crystalline standard in articulating his findings of fact"; findings are sufficient if "we are able to discern from the order the reasoning which underlies" it. *Id.* at 388.

¶ 62 Claimant offers nothing more than one or two conclusory sentences, with no citations to legal authority, addressing his remaining allegations of waiver, striking the final admission, and "multiple" other evidentiary issues.

> Our Court will not search through briefs to discover what errors are relied on, and then search through the record for supporting evidence. It is the task of counsel to inform us, as required by our rules, both as to the specific errors relied on and the grounds and supporting facts and authorities therefor.

Mauldin v. Lowery, 127 Colo. 234, 236, 255 P.2d 976, 977 (1953). "Given the dearth of legal grounds offered," we decline to address claimant's remaining arguments. *Meza*, ¶ 38; *see also Antolovich*, 183 P.3d at 604; *Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006) (a party who does not refer to evidence or authority in support of an argument does not present a cogent argument for review).

V. Conclusion

¶ 63 The Panel's order is affirmed.

JUDGE HAWTHORNE and JUDGE NIETO concur.

Court of Appeals

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

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

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: September 22, 2016

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

COLORADO COURT OF APPEALS **2017COA74**

DATE FILED: May 18, 2017
CASE NUMBER: 2016CA1388

Court of Appeals No. 16CA1388
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-911-673

Pueblo County, Colorado; and County Technical Services, Inc.,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado; and Mary Rodriguez,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE ROMÁN
Booras and Fox, JJ., concur

Announced May 18, 2017

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., Mary B. Pucelik, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Michael W. Seckar, P.C., Lawrence D. Saunders, Pueblo, Colorado, for Respondent Mary Rodriguez

¶ 1 This appeal presents a workers' compensation question of first impression in Colorado. Is an injury sustained by a union officer during attendance at a union meeting to review an employer's proposal for a new collective bargaining agreement compensable under the Workers' Compensation Act of Colorado (Act), sections 8-40-101 to 8-47-209, C.R.S. 2016? Applying the mutual benefit doctrine, we conclude, in the context of this case, that the answer is yes.

I. Background

¶ 2 Claimant, Mary Rodriguez, was the president of the local union. She worked for Pueblo County (employer) in the Housing and Human Services Department. Membership is required for workers in a "bargaining unit" and union dues are deducted from workers' paychecks, but participation in meetings is voluntary.

¶ 3 On December 11, 2012, claimant stayed after work for a union meeting. The meeting was held immediately after claimant clocked out for the day and took place in a conference room in the building in which she worked. Employer does not pay workers for the time spent in union activities, but it makes conference rooms in county buildings available for union meetings.

¶ 4 The purpose of the meeting was to review and make any necessary changes to the new collective bargaining agreement that was being negotiated. No one in management attended the meeting.

¶ 5 After the meeting ended, claimant walked to the adjacent parking lot where she normally parked at work. Claimant opened her car door, reached in to place a few items on the seat, turned around to get into the car, and slipped on ice. She fell, hitting the frame of the car door and injuring her shoulder, wrist, elbow, and shin.

¶ 6 Claimant filed a workers' compensation claim for her medical expenses. An Administrative Law Judge (ALJ) denied and dismissed the claim, concluding that claimant "was not in the course and scope of her employment at the time of her injury." In doing so, the ALJ pointed out that "as a general rule, union activities are personal and, therefore, if a worker is injured while participating in a union meeting, the claim is not compensable."

¶ 7 The Industrial Claim Appeals Office Panel (Panel) disagreed with the ALJ, concluding that claimant's union activities were "sufficiently incidental" to her work "as to be properly considered as

arising out of and in the course of employment." The Panel also stated that, "assuming arguendo, that the claimant was required to prove a benefit to the employer . . . the claimant met that burden here."

¶ 8 Accordingly, the Panel determined that claimant's injury occurred in the course and scope of her employment and arose out of her employment. It thus remanded the case to the ALJ to determine claimant's benefits.

¶ 9 On remand, the ALJ ordered employer to pay all of claimant's reasonable, necessary, and related medical treatment. The Panel affirmed this order, reiterating its prior conclusions and analysis. Employer now appeals to this court.

II. Arising Out of and In the Course of Employment

¶ 10 Employer contends that the Panel erred in holding that the post-work injury sustained immediately following claimant's attendance at a union meeting arose out of and in the course of employment. Under the facts of this case, we disagree.

¶ 11 In order for claimant's injury to be compensable, it had to both arise out of and in the course of her employment. "The 'course of employment' requirement is satisfied when it is shown that the

injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions." *Wild W. Radio, Inc. v. Indus. Claim Appeals Office*, 905 P.2d 6, 8 (Colo. App. 1995). An injury arises out of employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions so as to be considered part of employment. It is not essential, however, that an employee be engaged in an obligatory job function. *City of Brighton v. Rodriguez*, 2014 CO 7, ¶ 17 (citation omitted).

III. Compensability of Injuries Occurring From Union Activities

¶ 12 Colorado's appellate courts have not addressed whether a post-work union meeting, in which an employee participated, arose out of and in the course of employment, making an injury compensable. A number of other states and authorities have, however, addressed the compensability of injuries occurring in this context.

¶ 13 As articulated by the principal treatise on workers' compensation, *Larson's Workers' Compensation Law*, the general rule provides that union activities are "exclusively for the personal benefit of the employee, and devoid of any mutual

employer-employee benefit that would bring it within the course of employment." 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 27.04[3][a] (2015); *see also Pac. Indem. Co. v. Indus. Accident Comm'n*, 81 P.2d 572, 575 (Cal. Dist. Ct. App. 1938) (finding no coverage for injury sustained by employee during union meeting held on employer's premises because meeting was not "for the benefit or in the furtherance of the employer's work"); *Spatafore v. Yale Univ.*, 684 A.2d 1155, 1162 (Conn. 1996) ("Traditionally, attendance at a union meeting was viewed as a benefit solely for the employee with no concomitant benefit to the employer and therefore did not fall within the course of employment."); *Tegels v. Kaiser-Frazer Corp.*, 44 N.W.2d 880, 884 (Mich. 1950) (noting that employee's participation in union meeting at plant to elect shop steward did not arise "out of and in the course of his employment").

¶ 14 Today, it is still usually the case that injuries sustained during "unilateral union activities conferring, if any, only a remote or indirect benefit upon the employing enterprise" are not covered. *Mikkelsen v. N. L. Indus.*, 370 A.2d 5, 8 (N.J. 1977). Workers therefore are unlikely to have coverage for injuries sustained while walking the picket line or participating in a strike. *See, e.g.*,

Fantasia v. Hess Oil & Chem. Corp., 265 A.2d 565, 567 (N.J. Super. Ct. Law Div. 1970), *aff'd*, 273 A.2d 402 (N.J. Super. Ct. App. Div. 1971); *Koger v. Greyhound Lines, Inc.*, 629 N.E.2d 492, 495 (Ohio Ct. App. 1993); *Universal Cyclops Steel Corp. v. Workmen's Comp. Appeal Bd.*, 305 A.2d 757, 764 (Pa. Commw. Ct. 1973).

¶ 15 The leading treatise, however, recognizes a trend toward finding a mutual employer-employee benefit in the actions of union officers: "It is being increasingly held . . . that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interest of the employer [and the employee]." Larson & Larson at § 27.03[3][c].

¶ 16 Under the mutual benefit doctrine, the court must examine the circumstances of each case in determining whether a union activity is of mutual benefit to the employer and employee.[1] *New Eng. Tel. Co. v. Ames*, 474 A.2d 571, 574 (N.H. 1984) (holding that injury sustained when claimant hit knee on table during union

[1] Claimant also asks us to assess these cases based on whether the activities were "incidental to the employment." We decline to do so, because we agree with the New Hampshire Supreme Court that the better analysis is to consider whether the union activity was of mutual benefit to the employer and employee. *New England Tel. Co. v. Ames*, 474 A.2d 571, 574 (N.H. 1984).

negotiating session with employer compensable because "the activity . . . was of mutual benefit to [the claimant and the employer], and thus arose in the course of employment"); *Salierno v. Micro Stamping Co.*, 345 A.2d 342, 343, 345 (N.J. Super. Ct. App. Div. 1975) (finding that heart attack which occurred "[s]hortly after" employee participated in union negotiations compensable), *aff'd*, 370 A.2d 3 (N.J. 1977).

¶ 17 The facts of *D'Alessio v. State*, 509 A.2d 986 (R.I. 1986), are even more analogous. There, the claimant, a union officer, attended a union meeting in a conference room that the employer supplied "specifically for the purpose of conducting these meetings." *Id.* The meeting was held three hours after the claimant had clocked out — suggesting she was not paid for her time — and was called "to discuss grievances to be submitted to their employer." *Id.* Because the meeting "served to facilitate ongoing negotiations with the employer management by separating out gripes from legitimate grievances," the union meeting "was of mutual benefit to both the

employer and the employee" and the injuries claimant sustained during the meeting were compensable. *Id.* at 988.[2]

IV. Mutual Benefit Doctrine

¶ 18 Colorado too has applied the mutual benefit doctrine, albeit in different contexts.[3] *See Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 375, 423 P.2d 2, 5 (1967) ("An injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment." (quoting 99 C.J.S., *Workmen's Compensation*

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[2] We disagree with employer's assertion that there "is no precedent for holding as the ICAO did that negotiations can take place at a union meeting from which employer representatives are excluded." *See, e.g.*, *Mikkelson v. N.L. Indus.*, 370 A.2d 5, 9 (N.J. 1977); *D'Alessio v. State*, 509 A.2d 986 (R.I. 1986); *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 940 P.2d 685, 690 (Wash. Ct. App. 1997).

[3] The doctrine was originally labeled the dual purpose doctrine. *See Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 375, 423 P.2d 2, 5 (1967). But it is now referred to as the mutual benefit doctrine. *See Dunavin v. Monarch Recreation Corp.*, 812 P.2d 719, 720 (Colo. App. 1991) (affirming denial of workers' compensation benefits because claimant's "personal skiing activity" was not "an act for the mutual benefit of him and his employer (within the 'dual purpose' doctrine)").

§ 221 (1958))); *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 52, 552 P.2d 1033, 1036 (1976) (same).

V. Application

¶ 19 We conclude that union activity cases in Colorado should be analyzed under the mutual benefit doctrine to determine compensability. In this case, the claimant, a union officer, participated in a union meeting that served to facilitate ongoing negotiations between the union and employer concerning a new collective bargaining agreement. This process contributed to employer's efficient operation. Thus, we hold that the union activity in this case was of mutual benefit to employer and employee.

¶ 20 Further, where it is determined that mutual benefit occurred, the location of the injury is not determinative. *Compare Ames*, 474 A.2d at 572, 574 (worker from New Hampshire injured at union negotiating session with employer held offsite in Boston), *with D'Alessio*, 509 A.2d at 987 (purpose of after-hours union meeting held on employer's premises without management participation was to assess grievances to "weed out" "mere gripes . . . from legitimate contractual grievances before negotiation with employer").

¶ 21 Because the ALJ's factual finding was premised on a misapplication of the law, the Panel was not bound by it. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 431 (Colo. App. 2010) ("When an ALJ's findings of fact are supported by substantial evidence, we are bound by them. However, an agency's decision that misconstrues or misapplies the law is not binding.") (citation omitted).

¶ 22 We conclude that, under these circumstances, claimant's union meeting was a mutual benefit to employer and employee. Therefore, the injuries she sustained in the parking lot after leaving the union meeting were compensable.

VI. Conclusion

¶ 23 The order is affirmed.

JUDGE BOORAS and JUDGE FOX concur.

Court of Appeals

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

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

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: September 22, 2016

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

COLORADO COURT OF APPEALS **2017COA79**

DATE FILED: June 1, 2017
CASE NUMBER: 2016CA1375

Court of Appeals No. 16CA1375
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-972-492

Richard Hutchison,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Pine Country, Inc., d/b/a Pine Country Truck & Auto; and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE DAILEY
Plank*, J., concurs
Berger, J., specially concurs

Announced June 1, 2017

Withers Seidman Rice & Mueller, P.C., David B. Mueller, Grand Junction, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey Flewelling, Grant Butterfield, Denver, Colorado, for Respondents Pine Country, Inc. and Pinnacol Assurance

William J. Macdonald, Aurora, Colorado, for Amicus Curiae Workers' Compensation Education Association

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 In this workers' compensation action, claimant, Richard Hutchison, challenges an order apportioning his benefits award. An administrative law judge (ALJ) determined that only one-third of claimant's injury was work-related. The Industrial Claim Appeals Office (Panel) affirmed the ALJ's decision. We conclude that claimant's benefits award was properly apportioned and therefore affirm the Panel's decision.

I. Background

¶ 2 Claimant works as a trailer mechanic for Pine Country, Inc. (employer). With the exception of a nine-month period in 1997, claimant has worked for employer since 1990. Claimant explained that his work required that "[y]ou get on your knees, pull the tires off or get on your knees to get underneath the trailer or crawl around on the trailer putting screws in the deck." He estimated that he spends "half the time" on his knees while at work.

¶ 3 In 2012, claimant began experiencing right knee pain. He sought treatment from his personal physician, who referred him to an orthopedic specialist, Dr. Mitch Copeland, for further evaluation. Dr. Copeland diagnosed claimant with moderate to severe osteoarthritis of the right knee.

¶ 4 In August 2012, claimant told Dr. Copeland that he also had pain in his left knee that was "intermittent and worsening" and occurred "without any known injury." Claimant reported that this knee pain "began years ago, [but] worse[ned] in last 2 weeks." Dr. Copeland diagnosed severe osteoarthritis in claimant's left knee, as well.

¶ 5 Dr. Copeland injected Synvisc in both of claimant's knees, but claimant did not experience much pain relief. Dr. Copeland also prescribed unloader braces for claimant's knees.

¶ 6 In October 2014, when his symptoms worsened, claimant reported his knee pain to employer as a work-related occupational disease. Employer contested the claim on relatedness grounds. It bolstered its position with an independent medical examination conducted by Dr. J. Tashof Bernton. Dr. Bernton observed that claimant had "fairly diffuse osteoarthritis in many parts of his body. He is also overweight. These are independent predictors of osteoarthritis in the knee." He opined that claimant's work likely aggravated claimant's arthritic knees, but suggested that claimant's employment was not the cause of his arthritis:

> While it is clearly evident to and beyond a reasonable degree of medical probability that, given his independent risk factors for knee osteoarthritis, the patient would have had osteoarthritis of the knees if he were not in his current job, the occupational history repeated lifting and squatting over years is sufficient to meet the standard in the Colorado Workers' Compensation Treatment Guidelines for aggravation of this condition on a work-related basis.

He clarified that "to and beyond a reasonable degree of medical probability, the patient would have osteoarthritis of the knees whether or not he had his current job duties, although . . . those job duties aggravated the osteoarthritis."

¶ 7 Claimant retained an independent physician to examine him. That doctor, Dr. John Hughes, recognized that claimant's "weight, family history and idiopathic knee osteoarthritis are certainly independent risk factors for development of end stage osteoarthritis of the knees in a 55-year-old male." He went on to note that "[a]s a result of this consideration, I cannot state within a reasonable degree of medical probability that knee pain is a direct and proximate result of work-related occupational stresses and strains due to [claimant's] work as a mechanic for approximately 25 years." Nevertheless, Dr. Hughes stated that he did "believe that work tasks

have substantially contributed to and worsened [claimant's] bilateral knee osteoarthritis and other conditions. I believe his work is the proximate cause for his need for total knee arthroplasty [replacement] at this point in time."

¶ 8 With conflicting reports, claimant applied for a hearing on the issue of compensability. At the hearing, Dr. Bernton reiterated his opinion that "beyond a reasonable degree of medical probability, the osteoarthritis would be there and the need for treatment with or without the occupational activity." He also testified that claimant's work "was not a necessary precondition" to his knee condition. As he did in his report, Dr. Bernton acknowledged that claimant's work likely aggravated his knee condition, and he apportioned "approximately one-third" of claimant's condition "to the occupational exacerbation."

¶ 9 The ALJ found Dr. Bernton's opinions credible and persuasive. The ALJ found that Dr. Bernton and Dr. Hughes "agree[d] that [c]laimant's bilateral knee pain was not directly and proximately caused by [c]laimant's work, but that the cause is multi-factorial in nature." The ALJ credited Dr. Hughes' and Dr. Bernton's opinions that "independent risk factors" contributed to claimant's knee

problems, specifically identifying claimant's "weight, family history and idiopathic knee osteoarthritis." The ALJ was also persuaded that claimant's osteoarthritis "would more likely than not, have developed . . . regardless of whether or not claimant had a job or any occupational exposure." The ALJ therefore adopted Dr. Bernton's apportionment recommendation, attributing one-third of the cause of claimant's bilateral knee osteoarthritis to work-related factors, and ordered employer to pay for "33.33 percent of all medical benefits and any compensation awarded in this claim as a result of [c]laimant's work activities."

¶ 10 On review, the Panel held that the ALJ had properly apportioned claimant's benefits, and that the decision apportioning the benefits was supported by substantial evidence in the record. Claimant now appeals.

II. Apportionment Under Section 8-42-104, C.R.S. 2016

¶ 11 Claimant contends that his knee condition arose from repetitive kneeling and crawling necessitated by his work as a trailer mechanic, rather than from a specific incident. He therefore sought coverage for an occupational disease, which is defined as:

> "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14), C.R.S. 2016. "An occupational disease is present if employment conditions act upon an employee's pre-existing weakness or hypersensitivity so as to produce a disabling condition which would not have existed absent the employment conditions." *Masdin v. Gardner-Denver-Cooper Indus., Inc.*, 689 P.2d 714, 717 (Colo. App. 1984). *Masdin* recognized that occupational diseases may have both work-related and non-work-related causes, and that an employer may therefore be liable for only a portion of a claimant's occupational disease. *Id.* *Masdin* apportionment was adopted by the supreme court in *Anderson v. Brinkhoff*, 859 P.2d 819, 825 (Colo. 1993) ("We agree with the court of appeals in *Masdin*[.]").[1]

[1] We note that the Workers' Compensation Education Association (WCEA) has submitted an amicus brief in this case primarily

¶ 12 After *Anderson*, the legislature amended the apportionment statute to prohibit apportionment in certain circumstances. The current version of the statute — which was in effect when claimant filed his claim for coverage of his knee condition — provides: "An employee's temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous injury." § 8-42-104(3).[2]

¶ 13 The question we must answer, then, is whether claimant suffered a "previous injury" as that term is used in subsection (3). If so, then the statute would prohibit a reduction or apportionment

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arguing that *Anderson* misinterpreted the definition of "occupational disease." However, because WCEA raises arguments that are not addressed by either party, we will not consider WCEA's contentions. *See Beaver Creek Prop. Owners Ass'n v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 585 (Colo. App. 2011) (refusing to consider argument raised by amicus curiae that was not asserted by parties); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1189 (Colo. App. 2011) (refusing to consider "extensive additional issues" raised by amicus curiae "because only the issues raised by the parties are properly before us").

[2] Section 8-42-104(4), C.R.S. 2016, expressly permits "reductions in recovery or apportionments allowed pursuant to the Colorado supreme court's decision in the case denominated *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993)." However, that subsection applies exclusively to claims for "permanent total disability." Because claimant was seeking medical benefits only, subsection (4) is not at issue here.

of his medical benefits award "based on a previous injury." The Panel concluded, however, that claimant had not suffered a previous injury and that section 8-42-104(3)'s prohibition therefore did not apply.

¶ 14 Claimant contends that the Panel erred in applying *Anderson* apportionment to his claim. He argues that the express terms of section 8-42-104(3) prohibit apportionment here. In addition, he challenges the ALJ's application of *Anderson* apportionment to his claim, arguing that *Anderson* is distinguishable and apportionment under it is consequently unavailable. Specifically, he notes that unlike the claimant in *Anderson*, his knee condition was not "independently disabling before the industrial aggravation." We conclude that apportionment was proper in this case.

A. The Statute Does Not Prohibit All Apportionment

¶ 15 Whether section 8-42-104(3) prohibits apportionment is a matter of statutory interpretation, which we review de novo. *See Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006).

¶ 16 Section 8-42-104 does not define "previous injury." The general definitions of the Workers' Compensation Act of Colorado

(Act) broadly define "injury" to "include[] disability or death resulting from accident or occupational disease." § 8-40-201(2). This definition has remained unchanged since the Act's reenactment in 1990. "Previous" is not defined in the Act, but its dictionary definition is "going before in time or order," "prior to, before," Webster's Ninth New Collegiate Dictionary 933 (1989), or "going or existing before in time," Webster's Third New International Dictionary 1798 (2002).

¶ 17 "When we interpret a provision of the . . . Act, we give it its 'plain and ordinary meaning' if its language is clear." *Keel v. Indus. Claim Appeals Office*, 2016 COA 8, ¶ 30 (quoting *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004)). Injury is defined by the Act and "previous" has one clear dictionary definition. The phrase "previous injury" is consequently unambiguous: it means an accident causing injury or an occupational disease that occurred earlier in time to the claimant's claim.

¶ 18 In reaching its decision, the Panel implicitly applied the plain, ordinary meaning of "previous injury." The Panel noted that the occupational disease at issue here was "characterized as the

aggravation of osteoarthritis." In other words, because the claimant's knee condition was one ongoing disease with many causes, both work- and non-work- related, there was no separate "previous injury" as anticipated by section 8-42-104(3); it was instead one "injury" with multiple causes and not a "previous injury" because there was no onset of the occupational disease that occurred "before in time." The Panel therefore concluded that section 8-42-104(3)'s prohibition against apportionment for a "previous injury" did not apply.

¶ 19 We discern no error in the Panel's application of the definition of "previous injury." *Cf. Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998) (The Panel's interpretation will be set aside only "if it is inconsistent with the clear language of the statute or with the legislative intent."). Accordingly, neither the ALJ nor the Panel erred by concluding that section 8-42-104(3) did not prohibit apportionment in this case.

B. ALJ and Panel Did Not Misapply Anderson

¶ 20 Claimant next contends that apportioning his injury was improper because his knee condition was not disabling until his work aggravated it. He argues that his situation is distinguishable

from *Anderson* because, in *Anderson*, the claimant's condition manifested itself before work aggravated it. Specifically, he argues that unlike the claimant in *Anderson*, his occupational disease "was never independently disabling absent the job stressors."

¶ 21 In *Anderson*, a carpenter who was exposed to sawdust on jobsites for approximately fifteen years sought workers' compensation coverage for his disabling emphysema alleging that the sawdust exposure caused his disease. Evidence showed, though, that the carpenter had "a hereditary condition which causes progressive emphysema and associated heart problems." *Anderson*, 859 P.2d at 820. The carpenter also smoked cigarettes, "which further contributed to the progression of his disease." *Id.* An ALJ concluded that the disabled carpenter's "smoking and occupational dust exposures were co-equal aggravating factors in the acceleration of [his] severe emphysema." *Id.* at 821 (alteration in original). The supreme court upheld the ALJ's apportionment. Citing to *Masdin*, it held that "where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an

occupational disease only to the extent that the occupational exposure contributed to the disability." *Anderson*, 859 P.2d at 825.

¶ 22 Contrary to claimant's underlying presumption, *Anderson* does not require prior symptomology or limit apportionment to those injuries or illnesses that manifest themselves before a work-related exposure. True, the claimant in *Anderson* appears to have experienced symptoms before he began working for the employer and therefore was not asymptomatic. *Id.* at 820. But, *Anderson*'s reliance on and adoption of the holding in *Masdin* confirms that the timing of a claimant's symptomology is not dispositive. Unlike the claimant in *Anderson*, the *Masdin* claimant "experienced a sudden episode of acute respiratory distress" while at work. *Masdin*, 689 P.2d at 716. Nothing in that opinion suggests that the worker in *Masdin* experienced any symptoms of his disease before the "sudden" onset at work. Thus, the factual distinction between *Anderson* and claimant that he identifies does not render *Anderson* inapposite. We therefore reject claimant's assertion that apportionment here was improper because his injury arose "in concert with and in tandem with other 'risk factors.'"

¶ 23 We also reject claimant's assertion that *Anderson* prohibits ALJs from assigning any value to "genetic predisposition." Claimant argues that *Anderson* attributed fifty percent of the carpenter's emphysema to non-work-related smoking and fifty percent to his work-related sawdust exposure, but it did not apportion any of the claimant's illness to his genetic predisposition. *Anderson*, 859 P.2d at 821. He points to this as effectively a prohibition against assigning any apportionment to a predisposition or latent genetic make-up, arguing that the ALJ's apportionment of one-third of the cause of his knee condition to work-related aggravation and two-thirds to independent risk factors, including claimant's "weight, family history and idiopathic knee osteoarthritis," was improper and violated *Anderson*.

¶ 24 Essentially, claimant is arguing that employer was required to "take him as it finds him." But, this is a tort concept that does not perfectly translate to workers' compensation. *See Schafer v. Hoffman*, 831 P.2d 897, 900 (Colo. 1992) ("The negligent defendant is liable for the resulting harm even though the harm is increased by the particular plaintiff's condition at the time of the negligent conduct." (citing *Prosser and Keaton on the Law of Torts* § 43, at

291 (5th ed. 1984))); *see also* Restatement (Second) of Torts § 461 cmt. a (Am. Law Inst. 1965) ("A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent."). Workers' compensation, however, does not incorporate the notion of fault or negligence. Employers are liable for work-related injuries to their employees regardless of fault. *See* § 8-41-301(1), C.R.S. 2016.

¶ 25 Certainly, the ALJ in *Anderson* did not apportion any of the claimant's emphysema to his hereditary condition — he only apportioned claimant's smoking and work conditions as causes — but *Anderson* does not expressly prohibit apportionment of a genetic condition. And, even though *Anderson* did not apportion any of the cause of claimant's emphysema to his hereditary condition, other cases *have* reduced the employer's liability for an injury based on a pre-existing condition. Most notably, in *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004), a division of this court rejected a claimant's contention that "apportionment of liability attributable to the natural aging process" was impermissible. *Id.* at 1001. The court instead held that "the fact that aging is a factor does not preclude apportionment." *Id.*

¶ 26 Claimant has cited to no authority that expressly precludes apportioning a claimant's pre-existing genetic condition or natural proclivities. And, as shown by *Duncan*, other divisions have in fact upheld the very type of apportionment claimant challenges. We therefore perceive no error in the ALJ's apportionment of two-thirds of claimant's condition to "independent factors," including his weight, family history, and pre-existing osteoarthritis.

III. Substantial Evidence Supports ALJ's Findings

¶ 27 Having concluded that neither the ALJ nor the Panel violated the Act or *Anderson* by apportioning claimant's condition, we turn to claimant's contention that substantial evidence does not support the ALJ's finding apportioning only one-third of the liability for his injury to employer. He argues that this apportionment was based on speculation and was "violative of the apportionment principles." We disagree.

¶ 28 In general, we will uphold an ALJ's apportionment decision if it is supported by substantial evidence in the record. In reviewing *Duncan* and *Anderson*, it rapidly becomes clear that common to both opinions is the upholding of the ALJ's apportionment decision because each decision was supported by substantial evidence in the

record. *Anderson*, 859 P.2d at 825 ("Because this percentage is supported by the evidence, Anderson is entitled to an award based upon it."); *Duncan*, 107 P.3d at 1002 (upholding ALJ's apportionment of seventy-five percent of claimant's knee condition to pre-existing degenerative joint disease even though claimant's knee had been asymptomatic before the work aggravation "[i]n light of the medical opinion that claimant would need a right knee replacement"); *see also Res. One, LLC v. Indus. Claim Appeals Office*, 148 P.3d 287, 287-88 (Colo. App. 2006) (upholding an ALJ's refusal to apportion the claimant's pre-existing spinal condition and rejecting the employer's assertion that it was entitled to apportionment as a matter of law).

¶ 29 "Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). "When an ALJ's findings of fact are supported by substantial evidence, we are bound by them." *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 431 (Colo. App. 2010); *see* § 8-43-308, C.R.S. 2016.

¶ 30 "We must also defer to the ALJ'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). The weight to be given to the experts' testimony in this case "is a matter exclusively within the discretion of the [ALJ] as fact-finder." *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). "Further, we may not interfere with the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it." *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000).

¶ 31 Here, Dr. Bernton testified and opined that "approximately one-third" of claimant's knee condition was caused by work-related factors. He also unequivocally stated that it was his opinion "beyond a reasonable degree of medical probability, [that] the osteoarthritis would be there and the need for treatment with or without the occupational activity." And Dr. Hughes, claimant's retained physician, corroborated Dr. Bernton's opinion that independent risk factors, including claimant's "weight, family

history and idiopathic knee osteoarthritis" contributed to his developing "end stage osteoarthritis of the knees." The ALJ found Dr. Bernton's opinion credible and persuasive and noted that Drs. Bernton's and Hughes' opinions overlapped with respect to the causes of claimant's disease. Because these credibility determinations are not "overwhelmingly rebutted by hard, certain evidence" to the contrary, we may not set them aside. *See id.*

¶ 32 Claimant nonetheless argues that the apportionment assigned by the ALJ was "speculative" and therefore "violative of the apportionment principles." As outlined above, however, Dr. Bernton unambiguously stated in both his report and his testimony that "approximately one-third of [claimant's] condition can be reasonably apportioned to the occupational exacerbation of his underlying condition and the other two-thirds of his condition can be apportioned to the other two risk factors which are present (osteoarthritis in multiple other sites and increased body mass index)." In our view, Dr. Bernton's statements were concrete, not speculative.

¶ 33 In contrast, in each of the cases claimant cites to support his assertion that "speculative" apportionment cannot be upheld, the

physicians admitted that their opinions were ambiguous, equivocal, assumptive, or based on mere guesswork. In the absence of concrete supporting statements, the physicians' opinions were deemed too speculative to support apportionment. *See Parrish v. Indus. Comm'n*, 151 Colo. 538, 541-42, 379 P.2d 384, 385-86 (1963) ("[I]t was not error for the commission to refuse to allocate any portion of claimant's 5% disability to any alleged prior back condition or injury" where there was "no evidence of what that percentage should be" and physician testified that "he was unable to tell how much of this injury was due to this accident and how much to any previous back injury or condition."); *Empire Oldsmobile, Inc. v. McLain*, 151 Colo. 510, 513, 516, 379 P.2d 402, 403, 405 (1963) (The physician's statement that an impairment rating was an "assumption" and that "[i]t would be very difficult . . . to give any accurate . . . rating" could not support the disability impairment rating where the rating was made "on an arbitrary basis of assumptions or guesses."); *Mathews v. Indus. Comm'n*, 144 Colo. 146, 149, 355 P.2d 300, 301 (1960) (physician's testimony that his apportionment recommendation was "somewhat arbitrary" showed his recommendation was "[m]ere conjecture" insufficient to support

apportionment). We therefore reject claimant's argument that Dr. Bernton's opinions were "too speculative" to support apportionment.

¶ 34 Rather, we conclude that substantial evidence supports the ALJ's apportionment findings and hold that the Panel did not err when it declined to set aside the ALJ's order on this basis. *See Anderson*, 859 P.2d at 825; *Paint Connection Plus*, 240 P.3d at 431; *Duncan*, 107 P.3d at 1002.

IV. Conclusion

¶ 35 The order is affirmed.

JUDGE PLANK concurs.

JUDGE BERGER specially concurs.

JUDGE BERGER, specially concurring.

¶ 36 I join the court's opinion. I write separately only to address my concerns regarding apportionment of liability attributable to a claimant's genetic predisposition to a disease when the genetic predisposition has not actually resulted in the disease.[1]

¶ 37 The majority correctly observes that apportionment is permissible under some circumstances. *See, e.g.*, § 8-42-104(3), C.R.S. 2016.[2] An employer is statutorily responsible only for injuries and disabilities caused by work injury or industrial exposure. *Anderson v. Brinkhoff*, 859 P.2d 819, 823 (Colo. 1993). In *Anderson*, the Colorado Supreme Court held that because occupational diseases may have both work-related and non-work-

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[1] According to the National Cancer Institute, a genetic predisposition is an "[i]ncreased likelihood or chance of developing a particular disease due to the presence of one or more gene mutations and/or a family history that indicates an increased risk of the disease." *NCI Dictionary of Genetics Terms*, Nat'l Cancer Inst., https://perma.cc/MH99-WYKX; *see also What Does it Mean to Have a Genetic Predisposition to a Disease?*, U.S. Nat'l Library of Med., https://perma.cc/73BH-2XYZ.

[2] Some states have rejected apportionment entirely in workers' compensation cases. *See Sullins v. United Parcel Serv., Inc.*, 108 A.3d 1110, 1122 (Conn. 2015); *Stephens v. Winn-Dixie Stores, Inc.*, 201 So. 2d 731, 736-37 (Fla. 1967); *Newberg v. Armour Food Co.*, 834 S.W.2d 172, 175 (Ky. 1992); *Bond v. Rose Ribbon & Carbon Mfg. Co.*, 200 A.2d 322, 323-24 (N.J. 1964).

related causes, an employer may be liable for only a portion of a claimant's occupational disease.

¶ 38 I agree that apportionment was permissible under Colorado law in this case. Not only did the evidence support the administrative law judge's findings that the claimant's osteoarthritis in his knees was caused in part by the non-work-related factors of his weight and family history, at least one doctor identified pre-existing osteoarthritis in other parts of the claimant's body.

¶ 39 But apportionment of liability attributable to a person's mere likelihood of developing a disease, without more, is impermissible. Genetic predispositions are measured by statistical probabilities; for example, a woman or man who carries abnormalities in the BRCA1 or BRCA2 genes has a much greater chance of developing breast and ovarian cancer than a woman or man who does not carry those abnormalities.[3] *BRCA1 and BRCA2: Cancer Risk and Genetic Testing*, Nat'l Cancer Inst., https://perma.cc/U3W6-DH49; *What*

[3] I am not speaking here of genetic disorders that invariably cause a disease or condition. I am speaking only of genetic predispositions, which, while they increase the statistical likelihood of disease, do not invariably lead to disease.

Does it Mean to Have a Genetic Predisposition to a Disease?, U.S. Nat'l Library of Med., https://perma.cc/73BH-2XYZ.

¶ 40 Genetic predispositions are not, however, certainties. If a person has a ninety percent statistical likelihood of developing a particular disease (an unusually high predisposition), that also means that any given person with that genetic makeup may be one of the lucky ten percent who never develops the disease. Without evidence that the person's predisposition to development of the disease has manifested itself in the disease, apportionment is inappropriate.

¶ 41 To permit apportionment under these circumstances would be fatally inconsistent with the workers' compensation principle that an employer takes the employee as it finds him or her. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *see* § 8-42-104(3) ("An employee's temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous injury."); *see also Stephens v. Winn-Dixie Stores, Inc.*, 201 So. 2d 731, 737 (Fla. 1967) ("[T]he theory of apportionment is diametrically opposite to the injunction that 'the employer takes the employee as he finds him.'"). Instead of taking the employee as the employer

finds her, it would do precisely the opposite by burdening an employee who may never develop the disease for which she has a predisposition and penalizing her for the existence of that family history or her genes.

¶ 42 The collateral ramifications of such apportionments are also troubling. If apportionments based solely on genetic predispositions were permissible, what would stop an employer from seeking and obtaining a blood draw from a claimant and having the blood tested for genetic disease markers? Most employees would find this degree of intrusion into their most personal affairs shocking. And, if the genetic test results are even remotely related to the claimed work-related injury or disease, the employer or its insurer almost certainly would seek apportionment.

¶ 43 Nothing in the Workers' Compensation Act of Colorado, nor any Colorado Supreme Court case, authorizes apportionment based on a genetic predisposition that has not resulted in the disease. In my view, nothing in the court's opinion should be read to authorize such an apportionment.

Court of Appeals

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

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

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: September 22, 2016

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. 5-002-879-01

IN THE MATTER OF THE CLAIM OF

WILSON DAVID WORK,

Claimant,

v.

FINAL ORDER

CBC COMPANIES, INC.,

Employer,

and

VIGILANT INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated November 1, 2016, that determined the claimant's cervical condition is causally related to the industrial incident and that they are liable for the costs of the recommended cervical spine surgery. We affirm.

This matter went to hearing on whether the claimant's cervical condition is causally related to the admitted injury that occurred on June 3, 2015, and whether the recommended anterior cervical fusion at C5-C7 is reasonably necessary to cure and relieve the effects of the industrial injury.

After the hearing, the ALJ found that on June 3, 2015, the claimant was working as an administrative assistant for the respondent employer when he tripped on a weather rug. The claimant fell forward landing hard on the left side of his body with his left arm outstretched bracing his fall. He landed on his hand and hit his left hip. The claimant experienced the immediate onset of pain in his left hip and wrist, and pain and numbness in his thumb. The claimant was diagnosed with a probable triquetral fracture of the left wrist. The respondents filed a General Admission of Liability admitting to medical benefits only.

On June 5, 2015, the claimant was evaluated by authorized treating physician, Dr. O'Connell, at Occupational Health Services. He assessed the claimant with a triquetral

fracture in his left wrist, a contusion of the greater trochanter in his left hip, and hypesthesia diffusely in the digits of his left hand. Dr. O'Connell referred the claimant to Dr. Durbin at the Orthopedic and Spine Center of the Rockies.

The claimant saw Dr. Durbin on August 19, 2015, and he reported complete numbness in his left thumb region. Dr. Durbin recommended an EMG of the claimant's left upper extremity to determine if there was a nerve injury since he found the claimant's left thumb had radial and ulnar digital nerve neuropraxia.

The claimant underwent the EMG on September 25, 2015, with Dr. van den Hoven. Dr. van den Hoven observed decreased reflexes in the claimant's left biceps and pronator teres, sensory changes in the C6 dermatome, and clear weakness of the biceps, pronator teres, and wrist dorsiflexion. Dr. van den Hoven could not confirm conclusive evidence of cervical radiculopathy.

At a follow-up appointment, Dr. O'Connell opined that when considering the work-relatedness of the left thumb pain and numbness and after reviewing previous tests and examinations, the impact resulting from the fall wrenched the claimant's left shoulder and neck which resulted in either traction or contusion, leading to the C6 nerve root impingement. He recommended that the claimant proceed with an MRI of the cervical spine.

The claimant's MRI revealed moderately advanced and diffuse cervical spondylosis with disc desiccation and annular bulging in several areas including the C5-C6 and C6-C7 vertebrae. Dr. O'Connell referred the claimant for a cervical epidural steroid injection at the C6-C7 level which he underwent on January 12, 2016. Following the injection, however, the claimant still had persistent numbness and increased intensity of left thumb paresthesias and increased discomfort on the left side of his neck with right lateral bending. Dr. O'Connell referred the claimant to neurosurgeon Dr. Coester. Dr. O'Connell believed that surgical decompression surgery should be considered since other more conservative measures had no significant results.

On April 16, 2016, the claimant was examined by Dr. Coester for a cervical surgical evaluation. Dr. Coester found decreased sensation in a C6-C7 nerve distribution on the left and diminished reflexes in the triceps. Dr. Coester opined that the claimant was having neck pain, arm pain, and weakness due to disc disease at C5-C6 and C6-C7, and he recommended a C5-C6 and C6-C7 anterior cervical discectomy and fusion. He opined that the claimant had exhausted more conservative options.

Dr. Cebrian performed an independent medical examination (IME) at the request of the respondents. Dr. Cebrian concluded that the claimant's fall on June 3, 2015, did not cause injury to the claimant's neck. Dr. Cebrian reasoned that he did not see evidence that the claimant struck his head and the cervical complaints were not noted immediately following the industrial incident. Dr. Cebrian opined that since the claimant's cervical condition was independent, incidental, and unrelated to the work accident, then the recommended surgery should be "denied."

At the request of the respondents, the claimant also underwent an IME with Dr. Reiss. Dr. Reiss opined that the claimant's cervical condition was not caused by the industrial incident on June 3, 2015. He explained that the claimant did not suffer a traction injury during the fall and there was no immediate neck pain. Dr. Reiss also opined that there was no evidence of neck symptoms until time had passed from the date of the accident until after the claimant had an EMG and was advised that he had a cervical problem. Dr. Reiss further characterized the medical opinions recommending the cervical surgery as "speculative" but he was unwilling to characterize the recommendations as "medical malpractice." Dr. Reiss also testified that the recommended cervical surgery was contrary to the Division of Workers' Compensation Medial Treatment Guidelines.

The claimant also underwent an IME with Dr. Wunder. Dr. Wunder opined that the claimant's continuing symptoms are the result of a cervical condition caused by his industrial fall on June 3, 2015. He further opined that while the claimant had degenerative changes in his neck prior to the injury, he never had any symptoms or findings suggestive of cervical radiculopathy prior to his fall. Dr. Wunder determined that the claimant's MRI showed multilevel cervical degenerative disc disease and foraminal stenosis, and that the claimant's fall caused traction on the nerves which most likely produced some nerve root irritation in multiple nerve roots producing a pattern of numbness, tingling, and sensory loss. He further opined that the EMG confirmed the C6 radiculopathy and was consistent with the claimant's physical presentation from his first evaluation with Dr. O'Connell to the present. Dr. Wunder explained that due to the claimant's lack of improvement with conservative care and the correlation of symptoms, the cervical fusion surgery is reasonably necessary to cure and alleviate the claimant's condition.

The ALJ ultimately determined that the claimant had proven a work-related cervical injury that was caused by his fall at work on June 3, 2015. The ALJ specifically determined that the claimant had proven an acceleration and aggravation of his underlying degenerative cervical condition. The ALJ credited the opinions of Dr.

Wunder over those of Dr. Reiss and Dr. Cebrian. As pertinent here, with regard to Dr. Cebrian's opinion that the claimant sustained no cervical injury, the ALJ found Dr. Cebrian's reasoning to be vague and general. Further, with regard to Dr. Cebrian's opinion that the claimant's surgery should be "denied," the ALJ found Dr. Cebrian's use of the word "denied" illustrated a partisanship against surgery. Additionally, with regard to Dr. Reiss's opinion that the recommended cervical spine surgery was contrary to the Division of Workers' Compensation Medical Treatment Guidelines, the ALJ found that Dr. Reiss did not adequately explain his underlying reasons for this generalized opinion. With regard to Dr. Reiss's opinion that recommending the cervical surgery was "speculative" but he could not characterize it as "medical malpractice," the ALJ found that the performance of speculative surgery may amount to malpractice. Thus, the ALJ concluded that Dr. Reiss's opinions in this regard lacked persuasiveness and credibility. Instead, the ALJ found that Dr. Wunder's opinions were corroborated by the other authorized treating physicians, including Dr. Coester, who diagnosed and treated the claimant for over a year. The ALJ therefore ordered the respondents liable for paying the costs of the recommended cervical spine surgery.

The respondents have petitioned to review the ALJ's order. The respondents contend the ALJ erred in failing to credit the opinions of their expert witnesses, Dr. Cebrian and Dr. Reiss. In particular, they argue the ALJ erred in discrediting Dr. Reiss's opinion on the basis that he was unwilling to characterize the recommendations for speculative surgery as constituting medical malpractice. The respondents argue that the ALJ's inquiry of Dr. Reiss during the hearing "to take a position on an irrelevant and inapplicable issue and then discrediting him for declining to do so is a clear abuse of discretion." Brief In Support at 10. They further contend that the ALJ erred in discrediting Dr. Cebrian's recommendation against surgery because he used the term "denied" in his report. They argue that the ALJ's decision in this regard is contrary to W.C.R.P. 16-11, which addresses the payer's right to contest a request for prior authorization and uses various forms of the word "deny." They also contend that when using this analysis, an ALJ should equally discredit the opinions of treaters or medical experts who "recommend" treatment. The respondents therefore contend the ALJ's credibility determinations in this regard exceed the bounds of reason. Brief In Support at 11.

The respondents further argue that the ALJ's credibility findings are not supported by the record. They reason that contrary to the ALJ's finding, Dr. Cebrian's opinion that the claimant sustained no cervical injury was not "general or vague." They contend that Dr. Cebrian explained the bases for his opinion with great detail. Similarly, the respondents argue that contrary to the ALJ's finding, Dr. Reiss's opinion that the cervical

fusion was contrary to the Guidelines was not a "generalized opinion." They explain that Dr. Reiss provided a detailed explanation of why the recommended surgery was not within the Guidelines. The respondents further argue that based on this analysis by the ALJ, the opinions of a specialist necessarily prevail over those of a generalist. Thus, using this analysis, the respondents argue that Dr. Reiss's opinion as a surgeon would necessarily prevail over Dr. Wunder's opinion as a physiatrist. We are not persuaded the ALJ committed reversible error.

The claimant bears the burden of proof to establish that a need for medical treatment was proximately caused by an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because the issue is factual, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In applying the substantial evidence test, we may not substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of the evidence. *See Rockwell Int'l. v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) (ALJ, as fact finder, is charged with resolving conflicts in expert testimony).

Additionally, it is for the ALJ to assess the weight and credibility of expert medical testimony pertaining to the issue of causation. *Id.* We are bound by the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that it would be error as a matter of law to believe such testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *see also Loofbourrow v. Industrial Claims Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *cf. Town of Castle Rock v. Industrial Claim Appeals Office*, 373 P.3d 609 (Colo. App. 2013)(ALJ's credibility determinations need not be given deference if ALJ misapplied relevant law), *aff'd on other grounds* 370 P.3d 151 (Colo. 2016). The respondents' arguments notwithstanding, we perceive no such extreme circumstances here.

Although the ALJ was not required to articulate the bases for his credibility determinations, *Wells v. Del Norte School District C-7*, 753 P.2d 770 (Colo. App. 1987), in this case he did so. It is true that the ALJ expressly discredited Dr. Reiss's opinions, in

part, on the basis that he was unwilling to declare speculative surgery as constituting medical malpractice. Further, as argued by the respondents, the ALJ discredited Dr. Cebrian's opinion, in part, because he used the word "denied" in his report. The ALJ also discredited Dr. Cebrian's opinion as being general and vague, and Dr. Reiss's opinion as being generalized. Despite the ALJ's superfluous reasons for rejecting the opinions of the respondents' experts, it is evident that the ALJ simply was not persuaded by their opinions and instead was persuaded by the opinions of Dr. Wunder, Dr. O'Connell, and the claimant's other treating physicians. While we are mindful of the respondents' complaints, we nevertheless are unable to conclude that the testimony the ALJ credited is rebutted by such hard and certain evidence to the contrary that it was error to believe such testimony. *Sequra v. N.B.Q. Construction, Inc.*, W. C. No. 4-209-474 (Sept. 12, 1995)(appellate review of ALJ's credibility determinations is based upon substantial evidence standard and not abuse of discretion standard). As found by the ALJ, while in his EMG report Dr. van den Hoven could not confirm conclusive evidence of cervical radiculopathy, he nonetheless stated that the claimant had left arm denervation in C6 myotome, reduced cervical range of motion in the left lateral rotation, decreased reflexes in the left biceps and pronator teres, sensory changes in the C6 dermatome, and clear weakness of biceps, pronator teres, and wrist dorsiflexion. Ex. 11 at 85-87. Moreover, the cervical spine MRI revealed moderately advanced and diffuse cervical spondylosis with disc desiccation and annular bulging in several areas including the C5-C6 and C6-C7 vertebrae. Ex. 12 at 90-91. In his reports dated November 12, 2015, and December 3, 2015, Dr. O'Connell states that the claimant's C6 nerve impingement is related to the claimant's fall. Exhibit 9 at 45. As noted above, Dr. O'Connell specifically opined that the impact from the fall "wrenched the [claimant's] left shoulder and neck, and this resulted in either traction or contusion in this injury, resulting in left C6 nerve root impingement." Ex. 9 at 48-49. Dr. Wunder also opined that the claimant sustained a work-related neck injury. He opined that the cervical surgery at C5-C6 was reasonable and necessary. Ex. 6 at 9-10.

Admittedly, the respondents presented some evidence which, if credited, might support a contrary conclusion. However, we cannot say that the evidence the respondents presented constitutes such hard, certain evidence that it necessarily refutes Dr. O'Connell's and Dr. Wunder's opinions that the claimant's C6 nerve impingement is related to the claimant's industrial fall and the cervical surgery is reasonably necessary to cure and alleviate the claimant's resulting condition. Since the ALJ's credibility determinations are supported by substantial evidence, we have no grounds to disturb them. Section 8-43-301(8), C.R.S.; *see Halliburton Services v. Miller, supra*; *see also Sequra v. N.B.Q. Construction, Inc., supra.*

To the extent the respondents argue that the ALJ's order must be reversed because he credited a "fictitious physician," we do not agree. It is true, as the respondents argue, that the ALJ mistakenly cited to the medical report of Dr. O'Toole, and he is not a treating physician or an IME physician in this action. The ALJ, however, is not held to a crystalline standard in articulating the basis for his order. To the contrary, the ALJ's order is sufficient if the basis for the order is apparent. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). The basis of the ALJ's order is clear here. As we read the ALJ's order, he instead was crediting the medical report of Dr. O'Connell, the claimant's authorized treating physician. Ex. 9 at 25. As explained by the claimant, the error originally was made in the claimant's position statement that was submitted to the ALJ after the hearing. As noted above, the ALJ relied on Dr. O'Connell's opinions to find that the claimant proved his need for surgery was caused by the industrial incident. Since the ALJ's error was inadvertent and we understand the basis of his order, we have no basis to disturb it. Section 8-43-301(8), C.R.S.

We further add that we may not reweigh the evidence on review, as the respondents seem to request that we do. *See General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994). The existence of conflicting testimony or evidence that would support a contrary result does not provide a basis for setting aside the order. *See Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Instead, based on the ALJ's order, it is clear that he weighed the evidence, resolved conflicts, and made credibility determinations. Since the ALJ's credibility determinations are not overwhelmingly rebutted by hard and certain evidence to the contrary, we have no grounds to disturb the ALJ's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated November 1, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

5/15/2017 by TT .

RING & ASSOCIATES, PC, Attn: BOB L. RING, ESQ, 2550 STOVER STREET BUILDING C, FORT COLLINS, CO, 80525 (For Claimant)
RITSEMA & LYON, P.C., Attn: KRISTIN A. CARUSO, ESQ, C/O: DAVID R. BENNET, ESQ, 999 18TH ST SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-899-523-06

IN THE MATTER OF THE CLAIM OF

GENTRY PENNY,

Claimant,

v.

FINAL ORDER

TRINITY PACKAGING,

Employer,

and

GALLAGHER BASSETT,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Edie (ALJ) dated December 12, 2016, that determined the claimant had overcome the opinion of the Division-sponsored independent medical examination (DIME) physician on maximum medical improvement (MMI), and ordered the respondents liable for temporary total disability (TTD) and medical benefits. We affirm.

The claimant sustained an industrial injury on September 25, 2012, while trying to push a cart weighing over one thousand pounds. The claimant immediately sought treatment at St. Mary Corwin Hospital for pain in his right shoulder and abdomen. The next day, the claimant complained of low back pain, and two days later complained of neck pain as well. He was diagnosed with cervical, thoracic, and lumbar strains. The claimant has had neck and low back complaints since this time.

A subsequent MRI was positive for a rotator cuff tear. The claimant underwent surgery for the rotator cuff tear but it failed to improve his right upper extremity symptoms. The claimant's treating physicians felt part of his arm symptoms might be coming from a problem with his neck, so he underwent a cervical spine MRI on January 16, 2013. The MRI was positive for C4-C5 and C5-C6 disc herniations with significant canal stenosis. A low back MRI also was done and was positive for a L5-S1 disc herniation. An EMG study on June 10, 2015, was positive for C6 radiculopathy on the left side.

The claimant underwent extensive non-surgical treatment with his authorized treating physician (ATP), Dr. Olson. The claimant also received treatment for his shoulder injury and hernia condition. These issues have resolved and the parties agree the claimant is at MMI for his shoulder and hernia.

The claimant underwent an independent medical examination with Dr. Watson on May 6, 2014, at the request of the respondents. Dr. Watson noted that the claimant had marked pain behavior throughout the examination, including diffuse tenderness and pain throughout the cervical spine. The Spurling's test revealed pain but no evidence of radicular symptoms. With regard to the lumbar spine, Dr. Watson noted that the claimant had intense pain on both light touch and deep palpation. Dr. Watson further noted that the claimant gave way on all muscle testing and that his symptoms seemed to change throughout the examination. After reviewing the imaging studies, Dr. Watson found no objective basis for the claimant's extreme pain complaints and subjectively reported symptoms. He felt all active care should be terminated and that no further surgical intervention was appropriate.

The respondents eventually requested a 24-month DIME, which subsequently was performed by Dr. Griffis. On their DIME application, the respondents requested that Dr. Griffis examine the claimant's right shoulder and hernia injuries, but did not mention the claimant's neck and low back injuries. Dr. Griffis contacted the Division about the failure to include the neck and low back conditions on the DIME application. He was told to just examine the conditions listed on the application.

Dr. Griffis issued his DIME report on February 24, 2015, opining that the claimant was at MMI for his right shoulder and abdominal injuries as of August 12, 2013. The respondents filed a Final Admission of Liability thereby terminating the claimant's TTD benefits. However, they continued to pay for the medical treatment for the claimant's neck and low back injuries. The claimant has undergone numerous non-surgical treatments for his neck injury, including an injection and physical therapy. A C3, C4, and C5 rhizotomy was performed on June 4, 2015. None of the treatment modalities, however, has led to sustained reduction of the claimant's severe neck pain and they have not relieved the numbness in his hands and arms.

The claimant subsequently was evaluated for neck surgery. While Dr. Watson, Dr. Griffis, and a spine surgeon, Dr. Sceats, questioned whether neck surgery would help, the claimant was sent to Dr. Bhatti, another surgeon, for a second opinion. Dr. Bhatti ordered further tests and after receiving the results, indicated that he felt cervical fusion surgery had a good chance of reducing the severe pain that the claimant currently suffers

in his neck. Dr. Bhatti opined that the most recent MRI of the claimant's neck demonstrated a herniated disc and a recent EMG was positive for cervical radiculopathy on the left.

The claimant applied for a hearing on whether he was at MMI, whether he was entitled to TTD benefits, and whether he was entitled to the recommended neck surgery. The case went to hearing before ALJ Walsh on December 3, 2015. ALJ Walsh ultimately determined that Dr. Griffis' DIME was not controlling since it did not involve all of the claimant's injuries. ALJ Walsh also determined that the claimant was not at MMI because no treating physician and the DIME physician had not placed the claimant at MMI at the time. He ordered the respondents liable to pay for the claimant's TTD benefits, and he also decided that neck surgery was not appropriate at that time. His denial of neck surgery appeared to be based largely on the fact that the claimant's EMG study was positive on the left, but the claimant's major complaints were on his right side. ALJ Walsh's order was not appealed.

Dr. Olson then referred the claimant to another surgeon, Dr. Wong, for another opinion. Dr. Wong ordered an updated EMG. The EMG was performed on March 24, 2016, and was positive for bilateral C6 radiculopathy. Dr. Wong therefore opined that Dr. Bhatti was correct that the claimant is an appropriate candidate for a cervical fusion surgery.

Dr. Griffis retired and since ALJ Walsh held that Dr. Griffis' DIME was not controlling because it did not cover all of the claimant's conditions, the respondents requested a new DIME. Dr. Aschberger performed the new DIME, and in his DIME report, Dr. Aschberger stated that the claimant was at MMI on February 24, 2015, when Dr. Griffis saw him. Dr. Aschberger also opined that the claimant's neck problem was not related to the industrial injury since the claimant did not report complaints of neck problems within a reasonable time after the injury. He also opined that the claimant is not an appropriate candidate for a cervical fusion surgery. He gave the claimant an impairment rating for the cervical rhizotomy, which had been performed in June 2015, but refused to give him a rating for loss of range of motion in his neck and back even though his measurements were repeated three times and appeared to meet validation criteria.

The DIME Unit eventually sent a letter to Dr. Aschberger stating that the rules required him to repeat the measurements. However, Dr. Aschberger declined to do so, saying he could rely on measurements previously done by Dr. Watson and Dr. Sparr.

After the hearing, ALJ Edie ultimately determined that the claimant had overcome Dr. Aschberger's determination of MMI by clear and convincing evidence. The ALJ found the medical opinions of Dr. Olson, Dr. Griffis, Dr. Bhatti, and Dr. Wong to be credible and persuasive. ALJ Edie also concluded that the methodology used and conclusions drawn by Dr. Aschberger as to causation, MMI, and impairment ratings were highly probably incorrect. Consequently, he determined that the cervical surgery proposed by Dr. Bhatti and Dr. Wong was reasonable, necessary, and causally related to the claimant's industrial injury. The ALJ further determined that the claimant's cervical condition had worsened since the prior hearing before ALJ Walsh. He found that the original EMG study was abnormal for cervical radiculopathy on the left, but that the most recent EMG study showed bilateral cervical radiculopathy, with the right sided changes being new. ALJ Edie therefore determined that the claimant was not at MMI. He ordered the respondents to reinstate the claimant's TTD benefits retroactive to February 25, 2015. ALJ Edie also ordered the respondents to pay for the claimant's cervical fusion surgery. Additionally, as pertinent here, since the issues he was deciding were not identical to the issues decided by ALJ Walsh, ALJ Edie concluded that the doctrine of collateral estoppel was inapplicable.[1]

I.

On appeal, the respondents contend that ALJ Edie erred in failing to hold that the collateral estoppel doctrine applied and precluded re-litigating the issue of the cervical fusion surgery. The respondents reason that the issues before both ALJ Walsh and ALJ Edie were identical. While the respondents concede that ALJ Walsh's final order can be "reopened" based on a factual finding that the claimant's cervical condition had worsened, they contend that substantial evidence does not support ALJ Edie's finding of such worsening. We disagree.

Under issue preclusion, often referred to as collateral estoppel, "once a court has decided an issue necessary to its judgment, the decision will preclude re-litigation of that issue in a later action involving a party to the first case." *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 974 (Colo. App. 2012)(quoting *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007)); *see also Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). Issue preclusion completely bars re-litigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue

[1] We also note that in support of his determinations, ALJ Edie cites to the deposition testimony of Dr. Bhatti. However, the record on appeal does not include the deposition of Dr. Bhatti. Regardless, we are able to resolve the issues presented on appeal based on the record presented before us.

actually determined in the prior proceeding; (2) the party against whom issue preclusion is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d at 47. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Here, the respondents' argument concerning application of the collateral estoppel doctrine necessarily fails. Whenever a party asserts that a claimant's condition has changed since the date of the last order, the issue is necessarily different from the issue previously determined. The issue decided by ALJ Walsh is not the same as that resolved by ALJ Edie. This is because the claimant's condition was shown to have changed during the interval between the December 2015 hearing before ALJ Walsh and the October 2016 hearing conducted by ALJ Edie. The issue before ALJ Walsh was whether the proposed cervical fusion surgery was reasonable and necessary whereas the issue before ALJ Edie was whether the fusion surgery was reasonable after the claimant's cervical condition had changed. As found by ALJ Edie, the medical records and testimony demonstrate that the claimant sustained a clear worsening of his cervical condition. The updated EMG study on March 24, 2016, showed a positive result for bilateral C6 radiculopathy. In his report dated May 12, 2016, Dr. Wong states that the claimant has bilateral C6 changes, and the right sided changes are new. Dr. Wong opined that the claimant is an appropriate candidate for cervical fusion surgery. Ex. 11 at 209-210. Similarly, Dr. Olson testified that the claimant's recent EMG study showed bilateral C6 radiculopathy. Dr. Olson explained that the claimant's cervical condition had changed since he previously had only left-sided radiculopathy and he now has bilateral radiculopathy. Depo. of Dr. Olson at 27-29, 42-43. Additionally, the claimant testified that since the last hearing before ALJ Walsh, he has had numbness in his arms, numbness in the back of his skull, numbness in his fingers, headaches, pain shooting through his neck, constant radiating pain, and he is unable to sleep at night. Tr. at 41-42. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Consequently, since substantial evidence supports ALJ Edie's determination that the claimant's cervical condition has worsened, we have no grounds to disturb his order in this regard. Section 8-43-301(8), C.R.S.; *see El Paso County Dep't of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993)(collateral estoppel doctrine useless when determining whether prior order constitutes "award" for purposes of reopening; whenever party asserts claimant's condition has changed since date of last order, the issue is necessarily different from the issue previously determined); *see also Holcombe v FedEx Corp*. W.C. No. 4-824-259-05 (March 24, 2017).

Moreover, in support of their argument that the claimant's cervical condition has not changed, the respondents cite to two MRIs that the claimant underwent in January 2013 and August 2015. According to the respondents, these MRI reports show no significant foraminal narrowing that would explain the claimant's radicular symptoms. However, we may not reweigh the evidence on review, as the respondents request us to do. *See General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994). The existence of conflicting testimony or evidence that would support a contrary result does not provide a basis for setting aside the order. *See Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Further, we also reject the respondents' argument that ALJ Edie erred in failing to adequately address certain physician's concerns regarding the claimant's presentation at medical appointments. It is well settled that an ALJ need not address every piece of evidence if the bases of the order are clear from the findings, as is the case here, and evidence not addressed was presumably rejected as not persuasive. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Thus, we have no grounds to disturb his order in this regard. Section 8-43-301(8), C.R.S.

II.

The respondents also argue that ALJ Edie's findings do not support a conclusion that Dr. Aschberger's DIME opinion was overcome by clear and convincing evidence. Again, we disagree.

If a DIME physician has rendered an opinion on MMI or medical impairment, those opinions must be overcome by clear and convincing evidence. Sections 8-42-107(8)(b)(III); 8-42-107(8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App.2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *see also Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005)(DIME physician's opinions regarding MMI and permanent medical impairment given presumptive effect and are binding unless overcome by clear and convincing evidence). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI findings or impairment rating are incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d at 592. Whether a party has met the burden of overcoming a DIME by clear and convincing evidence "is a question of fact for the ALJ's determination. *Metro*

Moving & Storage Co. v. Gussert, 914 P.2d at 414. We must uphold the factual determinations of the ALJ if the decision is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Here, the respondents' argument notwithstanding, ALJ Edie made extensive and detailed findings regarding the evidence he found persuasive and the numerous reasons why Dr. Aschberger's DIME opinion on MMI was incorrect. ALJ Edie reasoned, in part, as follows regarding how Dr. Aschberger's opinion was incorrect:

> 1. The claimant underwent significant medical treatment after February 24, 2015, including a cervical rhizotomy which was expected to improve his condition. ALJ Edie concluded that the substantial medical treatment the claimant received after February 24, 2015, aimed at improving his condition supports a finding the claimant was not at MMI on that date;
>
> 2. Dr. Aschberger gave the claimant an impairment rating for a cervical rhizotomy which was performed after February 24, 2015. ALJ Edie found that the claimant's undergoing a procedure in June 2015, which affected his degree of permanent impairment, supports a finding that he was not at MMI as of February 24, 2015;
>
> 3. Dr. Aschberger's opinion that the claimant's neck problem is not related to his work injury because he voiced no neck complaints within a short time after the injury is controverted by the medical records which show the claimant reported neck pain and was assessed a cervical strain within three days of the industrial injury. Order at 7-8 ¶G.

These findings made by ALJ Edie are reasonable inferences from the record and also are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Further, in their Brief in Support, the respondents point to one error in ALJ Edie's order wherein he found that Dr. Aschberger did not have the most recent EMG report dated March 24, 2016. Ex. A at 1, 7. While Dr. Aschberger did, in fact, reference this EMG report and state that the claimant and his wife provided the March 24, 2016, EMG report to him, we nevertheless conclude that ALJ Edie's error in this regard is harmless. As noted above, ALJ Edie provided other extensive and detailed findings regarding the reasons why Dr. Aschberger's DIME report on MMI is incorrect. Section 8-43-310, C.R.S. (harmless error to be disregarded). Consequently, we have no basis to disturb ALJ Edie's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated December 12, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

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Colorado Court of Appeals
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Denver, CO 80203

Industrial Claim Appeals Office
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Denver, CO 80202

Office of the Attorney General
State Services Section
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Denver, CO 80203

CERTIFICATE OF MAILING

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

5/22/2017 by TT .

DARRELL S. ELLIOTT, P.C., Attn: ROBERT F. JAMES, ESQ, 1600 PENNSYLVANIA STREET, DENVER, CO, 80203 (For Claimant)
WHITE & STEELE, P.C., Attn: KEITH D. ORGEL, ESQ, C/O: ROBERT H. COATE, ESQ, 600 SEVENTEENTH STREET SUITE 600N, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-877-153-02

IN THE MATTER OF THE CLAIM OF

KELLY BARTASHIUS,

Claimant,

v.

FINAL ORDER

VOYAGER HOSPICE CARE, INC.,

Employer,

and

LIBERTY MUTUAL,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram dated December 29, 2016, that granted the claimant's petition to reopen her claim and the request for a total shoulder replacement surgery. We affirm the ALJ's order.

This matter went to hearing on the issues of the claimant's petition to reopen based on a change of condition and whether the recommendation for a total shoulder replacement surgery was reasonable, necessary and related to the industrial injury. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to her shoulder on September 8, 2009, when she was lifting a deceased patient. The claimant received treatment which included surgery. The claimant continued to see her treating doctor, Dr. Bynum, after the surgery for periodic shoulder injections. On January 7, 2013, Dr. Bynum noted that the claimant had chronic left shoulder pain and arthritis in the left shoulder. Dr. Bynum also noted that the claimant may be a candidate for a total shoulder replacement surgery in the future.

The claimant was placed at maximum medical improvement (MMI) on July 24, 2013. A Division Independent Medical Examination (DIME) physician, Dr. Campbell, agreed with the date of MMI and gave the claimant a 20 percent extremity rating. The DIME physician also stated that if and when the claimant had a partial or total shoulder

arthroplasty, the procedure would not be related to the claimant's September 2009 work injury.

The claimant returned to Dr. Bynum on March 26, 2014, for a repeat shoulder injection. The claimant reported that she had three months of relief following the injection. Dr. Bynum continued to perform injections roughly every three to four months.

The claimant reported to Dr. Bynum on February 22, 2016, with continued complaints of shoulder pain. Dr. Bynum performed repeat x-rays which showed progression of the claimant's left shoulder arthritis with some inferior subluxation. The claimant and Dr. Bynum discussed further treatment plans and the claimant elected to proceed with surgery. A CT scan on March 31, 2016, demonstrated severe degenerative arthrosis of the glenohumeral joint.

Dr. Fall performed an independent medical examination at the respondents' request. According to Dr. Fall, the claimant's underlying degenerative condition involving her shoulder was not related to her work injury and the work injury did not cause or aggravate the claimant's pre-existing arthritis. Dr. Fall also testified that the claimant's current symptoms would not be relieved by the shoulder replacement surgery.

Dr. Bynum, in contrast stated that the claimant's left shoulder post-traumatic arthritis was related to the 2009 work injury and that the claimant's post trauma arthritis has been progressing and was not responsive to appropriate treatment, including injections, therapy and activity modification.

The ALJ credited the claimant's testimony and Dr. Bynum's opinion to conclude that the claimant's condition had changed and the petition to reopen should be granted. The ALJ also found that the request for surgery was reasonable, necessary and related. The ALJ specifically rejected the opinions of Dr. Fall and the DIME physician.

On appeal the respondents contend that the ALJ's determination to reopen the claim and the findings that the requested surgery was reasonable, necessary and related are not supported by substantial evidence. The respondents also contend that the ALJ failed to resolve the conflicts in the evidence. We are not persuaded the ALJ erred.

I.

Section 8-43-303, C.R.S., permits a claim to be reopened based upon "a change in condition." The power to reopen under the provisions of §8-43-303 is permissive and left to the sound discretion of the ALJ. Consequently, we may not interfere with the ALJ's decision unless the record reveals fraud or a clear abuse of discretion. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). An abuse of discretion is not shown unless the ALJ's order is beyond the bounds of reason, as where it is contrary to the law or not supported by the evidence. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1985).

The ALJ here found, with record support, that the claimant sustained a change in her condition and now required a total shoulder replacement surgery. The respondents contend that the ALJ's finding is not supported by the evidence because Dr. Bynum mentioned the possibility of the claimant needing the surgery back in 2013, prior to MMI, and therefore her condition did not change. We perceive no error in the ALJ's determination that there was a change of condition.

When considering the sufficiency of the evidence, we must uphold the ALJ's factual findings if supported by substantial evidence. Section 8-43-301(8), C.R.S. This standard of review requires us to 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). We specifically note that we may not interfere with the ALJ's decision to credit the testimony of a witness unless, in extreme circumstances, the testimony is overwhelmingly rebutted by such hard, certain evidence the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000).

The ALJ here credited the claimant's testimony that her condition worsened which included increased pain and inability to perform daily activities. Tr. at 15 -17. Although Dr. Bynum stated in 2013 that there was a possibility that the claimant would need a total shoulder replacement surgery, Dr. Bynum said that it was too early for the surgery and continued to treat her with other modes of treatment in an effort to alleviate her symptoms. Claimant's Exhibit 6 at 64. However as Dr. Bynum noted in September 2016, the claimant was now complaining of a deep pain in her shoulder, the other treatment methods had failed and surgery was now recommended and the claimant wished to proceed with the surgery. Claimant's Exhibit 7 at 102. The claimant's testimony and medical reports from Dr. Bynum provide substantial evidence and valid

support for the ALJ's determination that the claimant's condition had changed and the petition to reopen should be granted. We have no basis to disturb the ALJ's determination on review. §8-43-301(8), C.R.S.

II.

We are also not persuaded that the ALJ erred in granting the claimant's request for the total shoulder replacement surgery. The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office, supra*. Whether the claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Further, the respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office, supra*. Pain is a typical symptom from the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949).

The issue of whether medical treatment is necessitated by a compensable aggravation is also one of fact for resolution by the ALJ based upon the evidentiary record. *See University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.; Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The ALJ is not held to a crystalline standard in articulating his findings, and we may consider findings which are necessarily implied by the ALJ's order.

Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).

Here, the ALJ credited Dr. Bynum's opinion that the worsening of the claimant's post-traumatic arthritis, as a result of the claimant's 2009 work related injury, caused the need for the surgery. Dr. Bynum also stated that the surgery was necessary as other modes of treatment had failed. The ALJ relied on the opinions of Dr. Bynum and the claimant's testimony to reach this conclusion. In our view the evidence relied on by the ALJ fully supports such a determination and we perceive no error in the ALJ's order. Section 8-43-301(8), C.R.S.

Nor are we persuaded that the ALJ erred based on the respondents' contention that Dr. Bynum's recommendation for surgery did not meet the diagnostic criteria under the Medical Treatment Guidelines (Guidelines). The Guidelines contained in W.C. Rule of Procedure 17, 7 Code Colo. Reg. 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. See § 8-42-101(3.5)(a)(II), C.R.S. (Director shall promulgate rules establishing system for determination of medical treatment guidelines). In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid. See § 8-42-101(3)(b), C.R.S. (medical treatment guidelines shall be used by health care practitioners for compliance with section) and 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). While it is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition, (*see Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005)(medical treatment guidelines are a reasonable source for identifying the diagnostic criteria)), the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). The statute provides the ALJ need not rely on the Guidelines as the sole basis to determine the reasonableness of medical treatment. § 8-43-201 (3). *See*, *Cordova v. Walmart Stores*, W.C. No. 4-926-520-05 (March 14, 2017).

The parties in this case presented conflicting medical evidence on whether the recommended surgery was reasonable, necessary and related. Dr. Fall in her report of July 20, 2016, discussed the applicability of the Guidelines. The ALJ made several findings discussing the opinions of Dr. Fall and ultimately found them to be unpersuasive. The ALJ did take into consideration the provisions of the Guidelines but

found them inapplicable in this matter. Because the ALJ is not bound by the Guidelines, even assuming that the respondents' argument is correct on the alleged failures of Dr. Bynum's surgical recommendation under the Guidelines, it would be harmless error in view of the ample evidence in support of the ALJ's conclusion. § 8-43-310, C.R.S. (harmless error disregarded).

III.

The respondents contend the ALJ failed to resolve the conflicts in the evidence. We disagree. The ALJ specifically rejected the opinions of the respondents' expert, Dr. Fall and the DIME physician. Although an ALJ is not required to articulate the basis for his credibility determinations, the order here explained the basis for his determination and weighing of the probative value of the conflicting evidence. Similarly, the ALJ is under no obligation to make detailed findings concerning the basis of his decision to discredit the testimony of a witness. *See Wells v. Del Note School District C-7*, 753 P.2d 770 (Colo. App. 1987). Neither is the ALJ required to expressly discuss every piece of evidence before rejecting it as unpersuasive. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994). Rather, it is sufficient for the ALJ to enter findings concerning the evidence he considers dispositive of the issues, and evidence and inferences inconsistent with the order are presumed to have been rejected. *Magnetic Engineering Inc. v. Industrial Claim Appeals Office, supra.*

Because the ALJ's findings are supported by the evidence and those findings, in turn, support the ALJ's conclusions of law, we have no basis to disturb the order on review. §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated December 29, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

NOTICE

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Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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5/17/2017 by TT .

MINTZ LAW FIRM, LLC, Attn: HUNTER HOLLEY, ESQ, 605 PARFET ST STREET SUITE 102, LAKEWOOD, CO, 80215 (For Claimant)
LEE + KINDER, LLC, Attn: SHEILA TOBORG, ESQ, C/O: ANGELA LAVERY, ESQ, 3801 E FLORIDA AVENUE SUITE 210, DENVER, CO, 80210 (For Respondents)