COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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October Case Law Update

Presented by Judge Laura Broniak and Judge Michelle Sisk

This update covers ICAO and COA decisions issued from September 8, 2018 to October 12, 2018

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-849-166-06

IN THE MATTER OF THE CLAIM OF:

JAMES PRESCOTT,

Claimant,

v.

FINAL ORDER

SCHLUMBERGER TECHNOLOGY CORPORATION,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Sidanycz dated March 6, 2018, that found the injuries the claimant sustained in a motor vehicle accident are compensable under the quasi-course and scope doctrine and ordered the respondents to pay for medical treatment per stipulation. We affirm the ALJ's order.

This matter went to hearing on the issue of compensability under the quasi-course and scope of employment doctrine. The parties stipulated that if the claimant's August 23, 2017, injures were found compensable, the medical treatment the claimant received at Vail Valley Medical Center is reasonable, necessary and related to the claimant's work injury. The stipulation was approved by a Prehearing ALJ. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to his back on February 10, 2011. The injuries have required multiple surgeries. The claimant resides in Grand Junction, Colorado. During this claim the claimant has traveled to the Denver, Colorado area for medical treatment. These medical treatments and related travel were authorized and paid for by respondents.

The claimant was scheduled to undergo treatment at Craig Hospital, in Englewood, Colorado, on August 22, 2017. The treatment included an urodynamic study and an MRI of the claimant's brain. It was undisputed that the treatment was related to the claimant's work injury. Although the claimant was originally scheduled for two

nights of hotel accommodations for the August 22, 2017, related travel, after discussions with the claimant, the respondents only provided one night, August 21, 2017. The claimant was told that the treatment would be completed early enough on August 22, 2017, to allow the claimant time to travel home on that same date. The claimant testified that because of his work injury he no longer drives and, as a result, his spouse typically drives him to and from medical appointments. His spouse does not drive at night because of issues with her vision. When traveling, the claimant must stop periodically to stretch and walk to alleviate the pain he has in his back and legs. The claimant testified that on a typical trip from Grand Junction to Denver he will need to stop four to five times. The claimant planned to travel on I-70 for the trip.

Once the arrangements were made for the August 22, 2017, medical appointments, the claimant spoke with his daughter, who lives in Fort Collins, and agreed that when the claimant was coming to Denver for the medical appointment he would bring items of furniture to the daughter that he had been storing for her in Grand Junction. The claimant owns a Lincoln Navigator and a 16 foot long trailer. Prior to traveling in late August 2017, the trailer was attached to the Navigator for purposes of transporting the furniture items for the claimant's daughter. Due to the decision to deliver the furniture to their daughter in Fort Collins, the claimant and his spouse left "a day or two early," either August 19th or 20th. During that time, the claimant and his spouse stayed at their daughter's residence in Fort Collins and disconnected the trailer from the Navigator. On August 21, 2017, the claimant and his spouse traveled from Fort Collins to Craig Hospital in Englewood where overnight accommodations had been arranged. They did not tow the trailer at that time. The claimant underwent the scheduled medical treatment on August 22, 2017. At the conclusion of the treatment the claimant and his spouse drove from Englewood back to Fort Collins. The claimant testified that because the MRI was not completed until approximately 4:00 pm, they decided that they would not travel home on that date and stayed an additional night at their daughter's residence on August 22, 2017.

On the morning of August 23, 2017, the now empty trailer was re-attached to the Navigator. The claimant and his spouse left Fort Collins at approximately 9:30 am traveling down I-25 to I-76 and then to I-70. They stopped in Frisco/Dillon to allow the claimant a chance to walk and stretch and eat a meal. After the stop, they returned to westbound I-70 to travel home to Grand Junction and were involved in a motor vehicle accident. They were traveling on the west side of Vail Pass, which was under construction. As a result, there was an area where the two westbound lanes were reduced to one lane. Another driver made space to allow the claimant and his spouse to merge left into the single lane. Approximately two-three minutes after moving to the single lane

of traffic they were struck from behind by the same driver that had allowed them to merge. The claimant did not stop or slow down once they were in the single lane.

The claimant instantly felt pain in his back and he was transported to Vail Valley Medical Center by ambulance and was admitted to the hospital overnight.

The driver that struck the claimant's vehicle was Mr. Phillips. Mr. Phillips testified that he allowed the claimant to merge but that after merging into the single lane, the claimant's vehicle slowed abruptly and he tried to brake to avoid striking them. However, Mr. Phillip's vehicle made contact with the claimant's trailer and the trailer, in turn, struck the claimant's vehicle. According to the State Trooper who responded to the accident, the vehicles were moving at the time of impact and the claimant's trailer and vehicle sustained what was described as moderate damage.

The respondents argued at hearing that the claimant's travel to Fort Collins constituted a substantial deviation that severed the quasi-course and employment relationship. The ALJ rejected this argument and found that the primary purpose of the claimant's trip to Denver was for authorized medical treatment. The ALJ found that although the claimant engaged in two deviations while traveling to and from his medical appointment to Craig Hospital, the ALJ further concluded that in each instance the deviation ended prior to the August 23, 2017, motor vehicle accident. The first deviation occurred when the claimant left I-70 to travel north to Fort Collins rather than south to Englewood. The claimant engaged in a second deviation on August 22, 2017, when the claimant again went to the daughter's residence to stay an additional night and to retrieve the trailer. The ALJ, however, found that the deviation ended on August 23, 2017, once the claimant returned to I-70 because of the westbound travel home to Grand Junction. The accident occurred on Vail Pass, after the deviation had ended and, therefore, the ALJ concluded that the claimant was in the quasi-course and scope of employment when he was injured.

The ALJ was not persuaded by the respondents' assertion that the use of trailer itself created a substantial deviation that continued throughout the trip. The ALJ also concluded that the existence of an empty trailer did not cause the motor vehicle accident. The ALJ therefore held that the claim was compensable and ordered the respondents to pay medical benefits pursuant to the stipulation.

On appeal the respondents argue that the ALJ erred as a matter of law in finding that the claimant was in the quasi-course of employment when the accident occurred. The respondents contend that although the claimant was still geographically traveling

from the authorized visit to Craig Hospital back to his home in Grand Junction when the accident occurred, the fact that the claimant was towing a trailer made the overall nexus of this trip strictly personal. We are not persuaded the ALJ committed error.

Under the quasi-course of employment doctrine, an injury occurring during travel to or from authorized medical treatment for an industrial injury is compensable. The theoretical basis for the doctrine is that because the Act requires the employer to provide medical treatment and the claimant to submit to it, a "trip to the doctor's office becomes an implied part of the employment contract, " and such injuries during travel to authorized medical treatment are considered to be within the range of compensable consequences of the original industrial injury. *Price Mine Service v. Industrial Claim Appeals Office*, 64 P.3d 936, 938 (Colo. App. 2003); *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393, 1395 (Colo. App. 1993). *see Schrieber v. Brown and Root*, 888 P.2d 274 (Colo. App. 1993)("Liability is extended because these activities would not have been undertaken but for the compensable injury . . . ."). As the court of appeals noted in *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009), awarding compensation for a motor vehicle accident becomes more complicated when there is a deviation from the route of travel for medical treatment. Thus in *Kelly v. Industrial Claim Appeals Office*, the court applied the substantial personal deviation rule to travel for authorized medical appointments.

In these situations a traveling employee is held to be within the course of employment continuously during the trip, except when the employee makes a distinct departure on a personal errand and, is therefore, engaged in a substantial, personal deviation. *Employer's Liability Assurance Corp. v. Industrial Commission*, 147 Colo. 309, 363 P.2d 646 (1961); *Alexander Film Co. v. Industrial Commission*, 136 Colo. 486, 319 P.2d 1074 (1957); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). A personal deviation ends and the claimant returns to the scope of employment the "moment he commences his return to his home or to his lodging." *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970)(claimants' injuries were compensable because they were "proceeding toward their lodging quarters for the night" at the time of the injury); *see also, Mohawk Rubber Co. v. Cribbs*, 165 Colo. 526, 440 P.2d 785 (1968) (evidence supported inference that deviation had ended where decedent was killed in a car accident while driving ten blocks from his home and on his usual route home); *Continental Airlines v. Industrial Commission*, 709 P.2d 953 (Colo. App. 1985) (deviation for shopping trip had ended where claimant fell while leaving the store, but was on her way back to hotel); *Phillips Contracting, Inc. v. Hirst, supra.*,(deviation ended when claimant left a tavern in order to return to his temporary lodging).

Generally, the question of whether the claimant is a "traveling employee" is one of fact for resolution by the ALJ. *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978); *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995); *Triad Painting Co. v. Blair*, 812 P.2d. 638 (Colo. 1991). Similarly, the question of when a personal deviation has ended and the claimant has commenced the return to his home or lodging is generally one of fact for determination by the ALJ. Further, the claimant bears the burden of proof on this issue. *Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra*. Because the issue is factual, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 1998.

Because these questions are factual in nature, we are bound by the ALJ's determinations if they are supported by substantial evidence in the record. §8-43-301(8), C.R.S. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, there is no dispute that the claimant was traveling from his home to Englewood for authorized medical care. Moreover, we find no error in the ALJ's determination that although the claimant engaged in two personal deviations, the deviation ended when the claimant was on I-70 returning home to Grand Junction. The evidence supports the ALJ's findings that the claimant was on his way home on I-70 when the accident occurred and the personal deviation he engaged in by traveling to his daughter's home had ended. *See Phillips Contracting, Inc. v. Hirst, supra* (156-mile round-trip not automatically out of the course of employment). Although the evidence might have supported a contrary finding, the ALJ was not persuaded to draw such inferences. We may not substitute our judgment for that of the ALJ concerning the plausible inferences to be drawn from this record.

Nor are we persuaded by the respondents' argument that the ALJ failed to address the respondents' argument that the claimant was on a "continuous rolling deviation"

because he traveled with a trailer. The ALJ found that the primary purpose of the claimant's trip was not to bring the daughter's furniture. ALJ Order at 5, Finding of Fact No. 22. Therefore because there was some advantage to the employer resulting from the claimant's trip, it cannot be regarded as purely personal and wholly unrelated to employment. *See Deterts v. Times Pub*. Co. 38 Colo. App. 48, 552 P.2d 1033 (Colo. App. 1976)(Dual Purpose doctrine holds that an injury suffered by an employee while performing acts for the mutual benefit of the employer and employee is usually compensable).

We are also not persuaded by the respondents' contention that the claimant's motor vehicle accident became an unforeseeable consequence because of the trailer. The ALJ rejected Mr. Phillips' testimony if the trailer had not been there, he would have had time to stop with her finding that the existence of an empty trailer did not cause the motor vehicle accident. ALJ Order at 5, Findings of Fact No. 22. The claimant was injured when a following automobile did not keep a safe distance and did not stop in time to avoid hitting the claimant's trailer. Those conditions could have led to an accident even in the event the claimant did not have a trailer because the following driver would, instead, have run into the rear of the claimant's car. As a result, the presence of the trailer was not an intervening cause since it was not necessary that it combine or join with the claimant's highway travel to cause the injuries. This is the basis for the ALJ's conclusion "the existence of an empty trailer" did not cause the accident.

The ALJ made sufficient findings to provide the factual and legal basis for her conclusion. The ALJ properly considered the claimant's travel plans to conclude at the time of the accident the claimant had ended his deviation and was traveling home from an authorized medical appointment. The record fully supports the ALJ's conclusions. We have no basis to disturb the ALJ's order. §8-43-301(8), C.R.S. Accordingly, the parties are directed to abide by their prehearing stipulation requiring the respondents to pay the costs for the claimant's treatment at the Vail Valley Medical Center resulting from the injuries he incurred in the August 23, 2017, motor vehicle accident, and subject to the fee schedule under the Workers' Compensation Act of Colorado.

IT IS THEREFORE ORDERED that the ALJ's order dated March 6, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin
David G. Kroll

CERTIFICATE OF MAILING

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

9/19/18 by TT .

THE LAW FIRM OF JOANNA C JENSEN PC, Attn: JOANNA C JENSEN ESQ, PO BOX 2297, GRAND JUNCTION, CO, 81502 (For Claimant)
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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-033-012-02

IN THE MATTER OF THE CLAIM OF:

DONALD FRISCH,

Claimant,

v.

FINAL ORDER

BERWICK ELECTRIC COMPANY,

Employer,

and

TRAVELERS INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Edie (ALJ) dated May 15, 2018, which awarded temporary total disability (TTD) benefits from October 12, 2017. We affirm.

Procedural background

Prior to the issues presently before the panel (to be discussed below), the parties had a previous hearing before ALJ Lamphere on May 23, 2017. Judge Lamphere entered an order on June 27, 2017, which concluded that the claimant was responsible for the termination of his employment and was therefore barred from receipt of TTD benefits. Judge Lamphere relied on the following findings of fact in reaching his decision.

The claimant sustained an admitted injury on November 28, 2016, when he was exposed to 12,000 volts of electrical current while working on a high voltage switch. The electrical current entered his body through the head causing severe burns and injuries to his head, brain, shoulder, with an intracranial bleed and a subsequent Methicillin-resistant Staphylococcus aureus (MRSA) infection as a complication of the skin grafting performed to treat his burns.

The claimant was airlifted to the University of Colorado Health Center for emergent treatment. A drug screen was performed at that facility which revealed the presence of cannabinoids in the claimant's urine.

On and before the date of injury, the employer had a drug-free substance abuse policy. In said policy, the employer specifically prohibited marijuana use and expressly stated that it does not recognize Colorado's Amendment 64 with regards to marijuana use. Judge Lamphere found that the zero-tolerance policy was in effect 24-hours a day and applied as well to off-duty consumption of illegal substances. The policy was adopted because of the dangers associated with working with high voltage electricity. Based on the positive test for cannabinoids and the attendant violation of the drug-free policy, the employer terminated the claimant's employment on December 20, 2016.

The respondents filed a general admission of liability on December 20, 2016, taking a 50% reduction in TTD benefits for violation of safety policy. The claimant did not challenge the legal propriety of the safety rule violation before Judge Lamphere. On February 13, 2017, respondents filed a petition to modify, terminate, or suspend compensation requesting that claimant's ongoing TTD benefits be terminated in accordance with §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S.—the so-called "termination statutes"—and the matter was heard by Judge Lamphere as described above.

Judge Lamphere wrote, "Simply put, if a claimant is responsible for his termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.*, W.C. No. 4-465-839 (ICAO February 13, 2002)."[1]

Judge Lamphere concluded that the claimant volitionally chose to use marijuana in direct contravention of the employer's drug policy. The ALJ noted, "Because his termination was not compelled by the natural consequence of the work injury, claimant is 'responsible' for his job separation and his claim for TTD benefits is *permanently barred*." [Emphasis added.] The ALJ ordered that the claimant's claim for TTD benefits was "barred," "denied," and "dismissed." Lamphere order ¶ I.-Resp.'s exhibit A at 8.

The claimant did not appeal ALJ Lamphere's order and consequently it became final.

[1] It is uncertain why the ALJ cited to an ICAO opinion when this case ultimately was decided by the Colorado Supreme Court in Anderson v. Longmont Toyota, Inc., 102 P.3d 323 (Colo. 2004)

Judge Edie's order

A hearing was held before ALJ Edie on April 3, 2018. The issue posed by the ALJ was whether the claimant showed, by a preponderance of the evidence, that he is entitled to TTD benefits effective October 12, 2017 and ongoing, due to a worsening of his compensable condition. The ALJ concluded in the affirmative.

In conjunction with the facts contained in ALJ Lamphere's order, ALJ Edie established additional findings of fact, which are summarized below.

The claimant was discharged from the Burn Unit-ICU at the University of Colorado Hospital on December 14, 2016. At discharge, there were plans to readmit the claimant for additional surgical debridement, autografting, and possible [skin] flap placement. These medical procedures were performed on December 23, 2016 and January 7, 2017. In addition, the claimant required around-the-clock supervision, the majority of which was provided by his wife (who by happenstance is a nurse), but also by a home health nurse to assist in wound care and activities of daily living.

He was terminated from his employment, as referenced above, on December 20, 2016. At that time, the claimant required assistance to dress himself, to shower, and to prepare meals. He was unable to perform house chores, like laundry. He spent his entire day either on a couch or in bed. The claimant had difficulty walking, was a fall risk, could not drive, and was unable to leave home by himself. He only left his house to attend medical appointments. The claimant was essentially bedridden. The claimant was completely unable to work in any employment.

After the surgery of January 7, 2017, the claimant's condition slowly improved. On May 18, 2017, Dr. Lund reported that, "Patient needs temporary restrictions, patient can lift a maximum of 10 lbs., can repetitively lift 10 lbs., can carry a maximum of 10 lbs., may walk 2 hours per day, may stand 2 hours per day and may sit 4 hours per day, light duty, must work indoors, seated duty, part-time 4-6 hours/day." Dr. Lund added, "Patient is able to return to modified duty from 5-18-2017."

Dr. Rudderow assumed the ongoing care and treatment of the claimant. The respondents sent surveillance of the claimant to the doctor for review. By note of June 25, 2017, Dr. Rudderow indicated that the claimant could lift greater than 15 pounds, but should ease back into work due to issues with balance, memory and processing. She noted, "Thus, we will continue a stepwise approach to return to work. Please encourage your client to accommodate the restrictions." The ALJ found that neither Dr. Lund nor

Dr. Rudderow were apparently aware that the claimant's employment had already been terminated when they provided work restrictions.

By July 2017, the claimant could do some laundry and other house chores. He could drive. He was able to leave the house more freely and was able to attend family functions, such as his brother's wedding in New York, in addition to his medical appointments.

By the time of the appointment with Dr. Rudderow on August 15, 2017, the claimant's condition had started to worsen. The doctor noted that the claimant's condition as: "[in] PT has no balance, no strength or stamina, can't ride bike or do sit ups, can't walk fast, middle of shoulder blades has extreme pain with certain movements. Sees psychologist monthly, he is going to refer patient to shrink." The claimant's condition got progressively worse. The claimant had open sores which could not be explained. Dr. Rudderow requested a CT scan on September 26, 2017. The CT scan discovered staph aureus infection in the claimant's skull. Bone culture also found MRSA and P.Acnes infections. The claimant was admitted to the University of Colorado Hospital on October 12, 2017, with a diagnosis of osteomyelitis of the calvarium status post debridement and craniectomy. Following surgery, the claimant was discharged on a 6 week course of continuous vancomycin (through a PICC line) and a JP drain was placed in his skull. The treatment plan also included a future surgery to install a skull replacement plate to cover the claimant's brain. The claimant also developed mental issues with anxiety and dealing with his situation. He was referred for mental evaluation and treatment.

At hearing the respondents' argued that Judge Lamphere's prior order permanently barred the claimant from receiving TTD benefits because the claimant was responsible for the termination of his employment. In addition, they argued that the claimant was effectively totally disabled at the time his employment was terminated, was no more disabled after the October 2017 surgery, and thus failed to establish a worsening of condition. In other words, respondents argued that on December 20, 2016 (the date of termination of employment), the claimant was essentially bedridden, required 24/7 care, and had zero earning capacity. And at the time of the worsening of the physical condition, the claimant had zero earning capacity. Thus, the respondents argue that the claimant failed to establish that he sustained a worsening of condition in October 2017, and any wage loss was still attributable to the termination of employment rather than to his work injury.

ALJ Edie concluded that the claimant's condition had worsened after the date of Judge Lamphere's order, specifically by October 12, 2017. The ALJ also found that the claimant's earning capacity had improved after the date of the termination. The ALJ further concluded that after the claimant's physical condition worsened, the claimant was incapable of working in any capacity and thus suffered a wage loss attributable to his injuries. The ALJ cited § 8-42-105(4), C.R.S. and *Anderson v. Longmont Toyota* (hereinafter "Longmont Toyota"), 102 P.3d 323 (Colo. 2004) as authority for reinstating the claimant's TTD benefits. The ALJ awarded TTD benefits from October 12, 2017 and continuing.

On appeal to the panel, the respondents allege that the ALJ erred in misapplying the legal standard to determine whether the claimant's condition worsened. The respondents state that once the claimant was found responsible for his termination on December 20, 2016, the right to TTD post-termination may only be reestablished if the claimant shows a worsened condition which causes a subsequent wage loss. They too cite *Longmont Toyota, id.*, in support. Further, the respondents argue that under the ICAO decision in *Martinez v. Denver Health Medical Center*, W.C. No. 4-527-415, (August 8, 2005), it is the claimant's economic condition on the date of the termination that is relevant as to whether a claimant later experiences a worsening of economic condition under the *Longmont Toyota* analysis.

The respondents allege the ALJ erred in creating a legal fiction by finding that a worsening of condition can be found by comparing functional ability and restrictions on a date months after the termination for cause, with a subsequent worsening (which was really just a return to the termination baseline). The respondents further contend that the ALJ's order "is colored by his premise that somehow ALJ Lamphere's order was wrong ('if indeed § 8-42-105(4) even applies to pre-injury misconduct')." The respondents also submit that the ALJ erred in distinguishing the *Martinez* case from the facts in this claim. In summary, the respondents advance that ALJ Edie's conclusion that the claimant proved an entitlement to post-termination temporary indemnity is premised upon a misapplication of the law and should be overturned.

The specific facts in this claim make it a case of first impression. Under the termination statutes, §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S., a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition which reestablishes the causal connection between the injury and the wage loss. *See Longmont Toyota*, *supra; see also Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). The burden of proof to establish a subsequent worsening of condition and consequent

wage loss is on a claimant who has been found responsible for a termination. *Rutledge v. Academy School District 20*, W.C. No. 4-843-161 (May 14, 2012). *See also Green v. Job Site, Inc.*, W.C. No. 4-587-025 (July 19, 2005).

Generally, an injured worker's physical condition is at its nadir in the immediate aftermath of an injury, especially in catastrophic cases such as is present here. Recovery has just commenced; treatment for the acute injuries is ongoing but incomplete; maximum medical improvement (MMI) has not been reached, and the victim's earning capacity may be temporarily non-existent. To use the date of termination as the definitive date to which to compare the claimant's earning capacity forevermore, even before the healing effects of medical treatment have been even minimally appreciated, would artificially and permanently bind the claimant to an earning capacity below which—short of death—he can never sink.

We believe that this was never the intent of the General Assembly in enacting the termination statutes, of the Supreme Court in *Longmont Toyota,* or of the panel in *Martinez v. Denver Health Medical Center*. A review of the *Longmont Toyota* progeny does not change this evaluation.

The respondents argue that the earning capacity which existed on the date of termination is the cornerstone against which all future levels of earning capacity must be measured. The respondents cite the case of *Martinez v. Denver Health Medical Center*, W.C. No. 4-527-415, ICAO August 8, 2005 in support of their contention. The ALJ distinguished this case. We are not persuaded that the ALJ erred.

Martinez was decided in the immediate aftermath of the Supreme Court's decision in *Longmont Toyota*. In *Martinez,* the claimant injured her right shoulder on January 2, 2002. In April 2002, the authorized physician approved a modified duty job as a "sitter" in a hospital setting. The claimant returned to the modified job but later quit for personal reasons which the ALJ found were the claimant's fault. In June 2002, the claimant took another job in a patient care facility but quit that job in August 2002. The claimant's condition worsened and she underwent surgery to the shoulder in October 2002. The ATP restricted the claimant to "no use of the right arm." The surgeon also restricted the claimant "from any use of the right shoulder." The ALJ found that the claimant had proven a worsening of her condition and that the worsened condition caused the subsequent wage loss. The ALJ awarded TTD benefits. The employer appealed to the panel. Respondents' contention of error was that the ALJ failed to determine whether the wage loss resulted from the industrial injury or from the claimant's decision to terminate her employment. The panel affirmed the award of TTD benefits stating, "The ALJ

correctly stated that *Longmont Toyota* stands for the proposition that even if a claimant is 'responsible' for a termination from employment, the right to TTD may again be established if the claimant shows a worsened [physical condition] which causes a subsequent wage loss." *Martinez, supra at pg. 3*.

In the *Martinez* case, the panel extraneously and unnecessarily expanded the *Longmont Toyota* doctrine when it stated:

> The principle which *appears to guid*e each of these cases[2] is that a wage loss is 'caused by a worsened condition' if the worsening results in physical limitations or restriction which did not exist at the time of the termination, and these restrictions cause a limitation on the claimant's earning capacity which did not exist when the claimant caused the termination. (Emphasis added.) (Quotations in the original.)

We note that ALJ Lamphere made no findings as to the degree of disability sustained by the claimant as of the date temporary benefits were stopped, February 12, 2017. (The respondents in that hearing had not requested that benefits be ended as of the December 20, 2016, date of discharge.) The Panel has previously noted that when temporary benefits are terminated due to misfeasance occurring prior to the injury, they may not be stopped at a point the claimant is entirely disabled from all work.

> We have previously held that wage loss does not "result" from a termination if the injury has totally disabled the claimant such that he is not capable of performing any employment. In that situation, the wage loss stems entirely from the disability caused by the injury, not the claimant's conduct in causing the loss of prior employment. *Selvage v. Terrace Gardens*, W.C. No. 4-486-812 (September 23, 2002).

Similarly, in *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008), the claimant was discharged after his work injury because the post-injury blood tests revealed cannabis in his system. This constituted a violation of the employer's policy and the claimant was therefore terminated. The claimant was restricted from all work for the first month after his work injury. The employer declined to pay TTD benefits because the claimant had been terminated for cause pursuant to § 8-42-105(4). The ALJ only stopped the claimant

[2] Referring to *Longmont Toyota, supra; Krause v. Sorter Construction, 102 P.3d 323(companion case to Longmont Toyota);* and *Martinez, supra.*

from receiving TTD after he was provided some work restrictions. Prior to that point, when the claimant was completely taken off any type of work, but after the date he had been discharged, he was awarded TTD benefits. The claimant argued he first had to be offered a modified duty job from which he was fired. The Court indicated that was not necessary. The opinion stated:

> He was released to modified employment by his authorized treating physician approximately one month after his accident. However, claimant did not return to work for employer, because he had been terminated from his employment shortly after the accident for violating employer's drug policy.
>
> The ALJ awarded claimant TTD benefits for the period of time he was unable to work because of his injuries. Once claimant was released to modified work, the ALJ ordered that the disability benefits ceased. Had claimant not precipitated his termination by engaging in activities that violated employer's no-tolerance drug policy, he could have been offered modified work by employer. The fact that he was not offered modified employment because he had been terminated has no bearing on *the critical fact that he was physically able to work*. We therefore conclude that the ALJ properly applied the law when he discontinued claimant's TTD benefits. Id. at 1132. (Emphasis added).

In both *Selvage* and *Gilmore*, the total removal of the claimant from work indicates the claimant's wage loss is a result of the injury and not the discharge from employment. Until the claimant is able to work in some capacity, § 8-42-105(4) cannot be applied to preclude temporary benefits. ALJ Lamphere made no findings in this regard. It is therefore, not possible to use the claimant's condition on February 12, 2017, as a standard to determine there has been a worsening in October, 2017.

Respondents' citation of case law

The respondents list nine ICAO decisions that cite to the so-called "principle" set forth in the *Martinez* case, *supra*. However, none of the nine cases, or the *Martinez* case

itself, deal with the fact pattern herein. In the instant claim, the conduct which ultimately led to the termination of employment occurred when the claimant ingested cannabinoids prior to the date of the injury. The claimant did nothing on December 20, 2016 to cause his termination. It was simply the date of his termination. The drug screening sufficed to expose a reason to terminate the claimant's employment. The termination ended the claimant's employment; however, on and before the date of the termination the claimant's earning capacity was effectively nil as it had already been eliminated by the acute effects of his injury.

The nine ICAO decisions cited by the respondents are reviewed below. In *Evans v. JC Penny [sic] Co.*, W.C. No. 4-904-748-04 (September 19, 2016), the claimant was placed at MMI and thereafter stopped showing up for work and was terminated for job abandonment. The ALJ found a worsening of condition —*as compared to the date of MMI*—and new physical restrictions. The ALJ concluded that the claimant's wage loss was due to the worsening of the claimant's physical condition and awarded TTD benefits. The panel affirmed.

In *Ramos v. Hajoca Corp.,* W.C. No. 4-950-301-02 (May 17, 2016), the claimant had recovered from the effects of his work injury and was *performing his regular job* until terminated for failure to take anger management classes. The claimant suffered a worsening of condition and additional limitation in his ability to perform physical activities in the year prior to the date of the hearing and subsequent to his discharge from work. The ALJ awarded TTD benefits and the panel affirmed.

In *Vigil v. Apex Transportation*, W.C. No. 4-850-101 (April 30, 2012), the claimant was *released to work without restrictions* following an industrial injury. Thereafter, the claimant failed a drug test and was terminated from employment. Later, a doctor removed the claimant from work due to medical reasons. The ALJ found that the claimant failed to demonstrate a worsened condition and concluded that the termination, not a worsened condition, caused the wage loss. The ALJ denied TTD benefits. The panel reversed the ALJ, concluding that the claimant had established a worsening of condition, and that the worsening reestablished the causal connection between the injury and the wage loss.

In *Rutledge v. Academy School Dist. 20*, W.C. No. 4-843-161 (May 14, 2012), the claimant resigned her employment effective at the end of the school year. Prior to the end of the school year, the claimant sustained a work injury. Physical restrictions were imposed which the employer accommodated and the claimant continued to work full-time until her retirement at the end of the school year. Thereafter, the claimant

underwent spinal surgery and additional physical restrictions were assigned. The following school year, the claimant applied for renewed employment as a substitute teacher. The employer did not offer any employment. The ALJ found that the spinal surgery constituted a worsened condition and that the temporary wage loss was caused by the surgery rather than by the voluntary retirement. The ALJ also found that the restrictions prevented her from performing any job. The ALJ awarded TTD benefits. The respondents argued that the work restrictions imposed prior to the surgery essentially were the same work restrictions that were imposed after the claimant's surgery. Further, the respondents argued that the ALJ erred in awarding TTD benefits because the claimant did not establish that the worsening of condition caused a greater impact on her earning capacity. The panel affirmed the ALJ's award of benefits.

In *Noble v. Staples,* W.C. No. 4-842-470 (November 9, 2011), the claimant *returned to her job after the injury*. After failing a performance improvement plan, the claimant resigned her employment. The ALJ determined that the claimant was responsible for the termination and that the claimant failed to prove that she suffered a worsening of condition and increased disability after the termination, sufficient to reestablish TTD benefits. Absent a worsened physical condition, the ALJ denied TTD benefits and the panel affirmed.

In *Demaio v. Southeast Auto Detail,* W.C. No. 4-814-833 (September 27, 2010), the claimant suffered an injury in January 2009. In January 2010, the respondents admitted TTD benefits with a reduction of 50% for an intoxication penalty. The claimant was also terminated for violation of the employer's "no drug" policy. The ALJ found that the claimant's condition worsened as of March 2010 and also found that the respondents had failed to prove the statutory requirements for a 50% penalty. The ALJ awarded TTD benefits from March 2010, essentially finding that the worsened condition resulted in the wage loss as opposed to the termination for cause. On appeal, the respondents contended that the claimant was never taken off work after March 2010 by medically imposed restrictions and thus the ALJ was compelled to conclude that the claimant's condition had not worsened. The panel affirmed the ALJ's findings of a worsening of condition and award of TTD benefits as a result thereof because the order was supported by substantial evidence.

In *Fantin v. King Soopers,* W.C. No. 4-465-221 (February 15, 2007), the claimant sustained two industrial injuries with physical restrictions. The employer was able to accommodate the restrictions until the claimant was terminated for cause. The claimant was placed at MMI after the termination and three years later filed a petition to reopen the claim following a surgery related to the original injury. Respondents voluntarily

reopened the claim and admitted for TTD benefits. The *Longmont Toyota* case was issued by the Supreme Court in 2004, and the respondents thereafter sought to terminate the claimant's TTD benefits in accordance with the court's ruling. The respondents argued that the original basis for the termination of TTD benefits is revived after the claimant's physical restrictions return to what they were prior to the time the claimant was responsible for her termination from employment. The ALJ held that the intervening worsening of the claimant's condition provided the basis to reopen the award and also provided the claimant with additional TTD and medical benefits. The panel affirmed the award of benefits and found the respondents reliance on *Martinez* to be misplaced. The panel determined that the ongoing wage loss was no longer related to the termination from employment, but to the deterioration of her condition resulting in post-termination surgery.

In *Hammack v. Falcon School District 49,* W.C. No. 4-637-865 (October 23, 2006), the claimant *returned to work in a modified job* after a work injury. Months later the claimant resigned because she did not feel capable of meeting the goals of a work remediation plan. The ALJ concluded that the claimant was responsible for the termination from employment. The ALJ also concluded that the claimant *failed to prove that she suffered a worsened condition* following her termination, or that any such worsened condition, instead of her voluntary resignation, caused her wage loss. On appeal, the panel revisited the *Martinez* dicta (cited above) and stated, "…we did not mean to suggest in *Martinez* that such additional restrictions *compelled* an award of additional TTD. Rather, we also noted there that the principle guiding each of these cases is that a wage loss is 'caused by a worsened condition." (Emphasis in the original.) The panel went on to state, "The question of whether new restrictions resulting from a worsened condition have caused the claimant's wage loss following a termination from employment remains one of fact for determination by the ALJ." The ALJ's denial of TTD based upon a failure to prove a worsened condition was affirmed by the panel.

Lastly, the respondents cite *Davis v. Trans-Colorado Concrete,* W.C. Nos. 4-456-522, 4-592-957, 4-627-378, & 4-627-379 (January 4, 2006) in support of its position. In these claims the ALJ granted the claimant's petition to reopen based upon a worsening of physical condition attributable to the first of multiple back injuries. The ALJ found that the claimant was responsible for his wage loss since he resigned his employment and denied TTD benefits. On appeal, the panel set aside the denial of TTD benefits. The panel stated, "…it appears that the ALJ may have construed [the termination statute] as a permanent bar to all temporary disability benefits where the claimant is responsible for the loss of employment. In [*Longmont Toyota*], however, the supreme court held that [the statute] bars temporary disability wage loss claims when the voluntary or for-cause

termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss… Consequently, § 8-42-105(4) is not a permanent bar to temporary disability benefits when a claimant's condition worsens."

We cannot interfere with Judge Lamphere's order because it is final. However, we can review ALJ Edie's order regarding the claimant's entitlement for TTD based upon a worsening of physical condition. After lengthy treatment, the claimant's physical condition improved to a point where he arguably regained an earning capacity greater than zero. Claimant then had a worsening of physical condition which squelched any earning capacity which may have been regained. The ALJ found that it was the effects of the injury that caused the total wage loss, not claimant's termination from employment for cause. We agree.

The ALJ's determination that the claimant's medical improvement and the attendant regaining of an earning capacity should be interpreted as an intervening event severing the causal relationship between the termination and the wage loss resulting from the worsened condition is based on sound reasoning. *See El Paso County Dept. of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993). In *Donn* a temporarily partially disabled claimant voluntarily retired from her part-time employment, and the retirement was found to be an "intervening event" which severed the causal relationship between the industrial injury and the partial wage loss. However, when the claimant's condition subsequently worsened and she became disabled from *any* employment, the wage loss was caused by the injury because the claimant no longer had the choice to work part-time. *Id.* at 880.

A simple comparison between the earning capacity on the date of termination and the earning capacity on the date of a worsened condition ignores the human factors and the circumstances related to unpredictable medical recoveries. The questions that should be definitive and dispositive are: 1) whether the injury related condition worsened; and 2) whether the wage loss at the time of worsening was attributable to the worsening or to the termination for cause.

The question of whether restrictions resulting from a worsened condition have caused impairment of the claimant's earning capacity is one of fact for determination by the ALJ. Proof of such disability may be by lay or medical evidence. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Wujcik v. City of Colorado Springs*, W.C. No. 4-122-742 (August 28, 1998).

Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

ALJ Lamphere found that the wage loss at the date of termination resulted from the termination. However, Judge Lamphere's statement that this serves as a permanent bar to TTD does not comport with the *Longmont Toyota* precedent. We concur with ALJ Edie's characterization of this statement as dicta.

As stated above, the present factual scenario is unique and of first impression to the panel. The cases cited by the respondents are distinguishable and not dispositive in our view. We are not persuaded that the ALJ erred in his findings that the claimant proved a worsening of condition and that the worsening—and not the termination from employment—was the cause of the claimant's ongoing wage loss.

IT IS THEREFORE ORDERED that the ALJ's order issued May 15, 2018 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

David G. Kroll

CERTIFICATE OF MAILING

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

9/11/18 by TT .

TURNER ROEPKE & MUELLER LLC, Attn: ROBERT W TURNER ESQ, 1259 LAKE PLAZA DRIVE SUITE 260, COLORADO SPRINGS, CO, 80906 (For Claimant)
POLLART MILLER LLC, Attn: BRAD J POLLART ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-002-486-01

IN THE MATTER OF THE CLAIM OF:

SHANNON JARAMILLO,

Claimant,

v.

FINAL ORDER

INTEGRATED HEALTHCARE STAFFING LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated April 19, 2018, that ordered the claimant responsible to repay, in monthly installments of $500.00, a $42,183.89 overpayment of temporary total disability (TTD) benefits. We affirm.

This matter went to hearing on reopening or withdrawal of the respondents' general admission of liability (GAL) dated July 21, 2017, and any other GAL which admitted and paid TTD benefits from December 14, 2015, through June 11, 2017, whether the claimant was entitled to TTD from December 14, 2015, through June 11, 2017, calculation of temporary partial disability (TPD) benefits owed from December 14, 2015, through June 11, 2017, calculation of overpayment, a credit for an overpayment against permanent partial disability (PPD) benefits, overpayment reimbursement, and whether the claimant willfully made a false statement or representation material to obtaining benefits under §8-43-402, C.R.S.

After the hearing, the ALJ found that the claimant works as a licensed practical nurse. The claimant began working part time for the respondent employer in October 2015 approximately 8 hours per week. The claimant sustained an admitted injury on December 13, 2015, when she slipped and injured her left knee while working for the respondent employer. At the time of her industrial injury, the claimant's concurrent and full-time job was with the Children's Medical Center, P.C. (Children's).

The claims representative handling the claim for the respondent insurer is Ryan Saladin. In reliance upon the claimant's representation that she was not working either job, Mr. Saladin calculated the claimant's average weekly wage (AWW) based upon both employments. On January 6, 2016, Mr. Saladin asked the claimant to let him know when she returned to work to either employer to avoid an overpayment. Mr. Saladin then filed a GAL on January 7, 2016, which admitted for TTD benefits at a weekly rate of $771.07, which was based on an AWW of both employments of $1,156.60. Mr. Saladin proceeded to pay the claimant TTD benefits.

Thereafter, the AWW was revised based upon inquiry from the Division of Workers' Compensation, and a new GAL was filed on January 26, 2016. This new GAL admitted for a slightly higher AWW of $1,183.86. TTD benefits were paid out at a rate of $789.24 per week beginning December 14, 2015, until June 11, 2017.

The following timeline of events occurred following the respondents' filing of the January 26, 2016, GAL:

-On February 22, 2016, the claimant emailed Mr. Saladin asking for mileage reimbursement for January 2016. Mr. Saladin submitted mileage reimbursement for processing, and he asked the claimant whether she had returned to work for Children's. The claimant responded "No" to his return to work question;

-Pay records from Children's shows the claimant working full time and receiving regular and overtime hours from Children's beginning December 28, 2015, and until March 6, 2016;

-On March 1, 2016, Mr. Saladin received an email from the claimant requesting mileage reimbursement. The email made no mention of returning to work for Children's. However, wage and hour records show the claimant was working at Children's during this time;

-On March 10, 2016, the claimant emailed Ms. Saladin regarding medical treatment. That email made no mention of returning to work at Children's. However, wage and hour records show the claimant was working at Children's during this time;

-On September 2, 2016, Mr. Saladin sent the claimant a return to work questionnaire. This questionnaire included the following questions: "Have

you returned to work for any employer or earned any income at any time since your injury? Yes____ No____". The claimant responded "No." "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes____ No____" The claimant responded "No." She also wrote as follows in response to the question "If the answer is 'No' please give us your reason for not returning to work": "Unable to work due to not able to walk for any length of time." However, wage and hour records show the claimant was working at Children's steadily during this period;

-On October 13, 2016, Mr. Saladin sent the claimant a return to work questionnaire. She did not respond;

-On November 14, 2016, Mr. Saladin sent the claimant a return to work questionnaire. This questionnaire included the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes____ No____" The claimant responded "No." "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes____ No____" The claimant responded "No." She also wrote as follows in response to the question "If the answer is 'No' please give us your reason for not returning to work" as follows: "Unable to walk for any amount of time, to perform my job." However, wage and hour records show the claimant was working at Children's steadily during this period, but she continued to cash her TTD checks from the respondent insurer;

-On December 16, 2016 Mr. Saladin sent the claimant a return to work questionnaire but she did not respond;

-On January 25, 2017, the claimant emailed Mr. Saladin asking for mileage reimbursement. He informed her he would submit the request to the payment team and asked her whether she was still not working for the respondent employer or any other employer. The claimant did not respond to this question;

-On January 27, 2017, Mr. Saladin sent the claimant a return to work questionnaire, but she did not respond;

-On February 17, 2017, Mr. Saladin sent the claimant a return to work questionnaire. The claimant signed and returned this on February 27, 2017. This questionnaire included the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes____ No____" The claimant responded "No." "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes____ No____" The claimant responded "No." She also wrote, in response to the question "If the answer is 'No' please give us your reason for not returning to work" as follows: "Unable to stay on my feet/knee for long period of time." However, wage and hour records show the claimant was working at Children's and cashing her TTD checks from the respondent insurer;

-On March 8, 2017, Mr. Saladin called the claimant and left a message asking her to call him back to discuss the claim and her work status, but the claimant did not return his call;

-On March 10, 2017, Mr. Saladin sent a letter and surveillance video of the claimant to her authorized treating physician, asking several questions, including whether the claimant was working. The claimant was copied with this letter. The surveillance video showed the claimant going to Children's over a several day period early in the morning and then leaving in the evening. The claimant did not contact Mr. Saladin about this letter and his phone calls to her were left unanswered;

-On March 28, 2017, Mr. Saladin sent the claimant a return to work questionnaire, but she did not respond;

-On May 5, 2017, the claimant wrote an email to Mr. Saladin, attaching her mileage from January to April 2017, requesting reimbursement. Mr. Saladin replied he would submit the requests for processing. He also informed the claimant he needed to talk to her about ongoing lost wage benefits and her working. He explained it was very important and asked whether she had time that day to discuss this. Mr. Saladin also phoned the claimant and left a message asking her to call him back to discuss the claim and her work status, but the claimant did not call him back;

-On May 7, 2017, the claimant emailed Mr. Saladin back and informed him her dad had recently passed away and that she was in Kansas helping her

mom. The claimant made no comment in response to his questions about working. Mr. Saladin extended his condolences and asked that she call him back. Pay records from Children's for the period of April 3, 2017, through May 14, 2017, showed the claimant working her usual full-time hours, and she continued to cash her TTD check from the respondent insurer;

-On May 9, 2017, Mr. Saladin sent the claimant a return to work questionnaire. In his cover letter, Mr. Saladin explained that the respondent insurer had been paying lost wages for both the respondent employer and Children's since December 14, 2015. He explained it was very important that she send the questionnaire as soon as possible;

-On June 9, 2017, Mr. Saladin called the claimant and left a message asking for her to call back to discuss the claim and her work status. He sent another return to work questionnaire and included a cover letter again explaining that the respondent insurer had been paying lost wages for both her employers since December 14, 2015, and that it was very important she send back the questionnaire as soon as possible;

-On June 12, 2017, the claimant signed and returned the May 9, 2017, return to work questionnaire. This questionnaire included the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes____ No____". The claimant responded "Yes." "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes____ No____" The claimant responded "No." She filled in the blanks stating she had returned to work at full wages, in the amount of $554.05 per week for Children's. The form asked the date she had returned to work, but the claimant did not supply that information;

-On June 16, 2017, Mr. Saladin sent the claimant a return to work questionnaire. This questionnaire included the following questions: "Have you returned to work for any employer or earned any income at any time since your injury? Yes____ No____". The claimant responded "Yes." "Have you been self-employed or performed any activity for which you earned any income since your injury? Yes____ No____" The claimant responded "No." The form asked the date the claimant returned to work, and she again did not supply that information. She stated she had returned

to work at full wages in the amount of $554.05 per week for Children's. The questionnaire is signed July 1, 2017;

-On July 11, 2017, Mr. Saladin sent the claimant a return to work questionnaire. In his cover letter, Mr. Saladin asked the claimant to complete and sign the questionnaire and employment release. He asked her to include the date she returned to work and explained it was important to return it as soon as possible. Notice was provided to the claimant on July 15, 20, and 31 by certified mail. However, the certified mail was unclaimed and returned to the respondent insurer;

-On July 14, 2017, Mr. Saladin contacted Matt Heiderich in the investigation unit at the respondent insurer. He noted the claimant had not returned phone calls, and not responded to requests for information about the date of return to work;

-On July 26, 2017, the claimant emailed Mr. Saladin requesting mileage reimbursement for May, June, and July 2017. This was the claimant's first communication of Mr. Saladin since her May 7, 2017, email. She did not comment about her return to work and did not provide any of the information previously requested. Mr. Saladin wrote in response to the claimant with another return to work questionnaire and a request for a release for information from Children's;

-On August 10, 2017, Mr. Heiderich met the claimant at her medical appointment at Concentra. He took with him a copy of the return to work questionnaire and employment release for Children's. The claimant filled out the form stating she had returned to work with Children's at a wage of $26.52 per hour, 40 hours per week, on January 3, 2017, and then signed and dated the form. Mr. Heiderich asked the claimant directly if she had returned to work for Children's from December 13, 2015, to the date of January 3, 2017. The claimant told Mr. Heiderich that she had actually returned to work for Children's in May 2016. When he asked her more questions about the date of return, the claimant stated she did not recall the date in May 2016, but that she had returned part time. The claimant then provided Mr. Heiderich a release for records from Children's. When he obtained these records, he saw the claimant had returned to work prior to May 2016 and worked primarily on a full-time basis from the date of injury until the date of their discussion.

The ALJ subsequently issued his order, finding that for the period of December 14, 2015, through June 11, 2017, the respondents had paid the claimant a total of $61,560.72 in TTD benefits. He found that when cashing every TTD check, the claimant read, understood, and signed on a line directly above the following statement:

> Read before cashing this check. If you are currently earning wages and this check is payment for temporary or permanent total disability benefits, you may not be legally entitled to this benefit. If you cash this check and are ineligible for the benefit it represents, you may be required to repay Pinnacol Assurance for the amount received.

The ALJ ultimately concluded the claimant had obtained TTD benefits through fraud, since she made a false representation of a material existing fact, she repeatedly informed the respondents she had not returned to work at Children's when she actually was working and being paid by Children's, the respondents were ignorant of the fact the claimant was working while collecting TTD benefits, the claimant intended the respondent insurer to rely on her representations in order to continue paying her TTD benefits, and, the respondent insurer suffered damages by paying the claimant TTD benefits when such were not owed. The ALJ ordered the respondents' GALs dated January 7, 2016, January 26, 2016, and July 21, 2017, reopened based upon fraud and overpayment. He also ordered the GALs dated January 7, 2016, January 26, 2016, and July 21, 2017, withdrawn retroactively as to the admission for TTD benefits. The ALJ determined the claimant was not entitled to TTD for December 14, 2015, through June 11, 2017, but instead was owed TPD benefits from the period of December 14, 2015, through June 11, 2017. He determined the claimant was overpaid $44,570.98 in TTD benefits for the period of December 14, 2015, through June 11, 2017, that the respondents could take a credit against the overpayment for PPD benefits of $2,387.08, and that the remaining overpayment was $42,183.89. He ordered the claimant to pay $500 per month for 84 months commencing the month after his order became final, and a final payment of $183.89 in the 85th month.

The claimant has petitioned to review the ALJ's order. The claimant does not dispute the amount of the overpayment as she states she clearly was in the wrong and she is remorseful. However, the claimant requests that the $500 per month repayment amount be reduced to $250 per month given she is a single mother and she is trying to pay her other bills and take care of her child. We perceive no abuse of discretion.

Pursuant to §8-40-201(15.5), C.R.S., there are three categories of possible overpayment: when a claimant receives money "that exceeds the amount that should have been paid"; that a "claimant was not entitled to receive"; and money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354, 359 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *see also Moreno v. Sysco Corp*., W.C. No. 4-917-763 (June 24, 2016); *Josue v. Anheuser-Busch Inc.*, W.C. No. 4-954-271 (June 17, 2016), *aff'd*, 16CA1036 (March 2, 2017)(NSOP); *Grandestaff v. United Airlines*, W.C. No. 4-717-644 (Dec. 12, 2013).

Section 8-42-113.5(1)(c), C.R.S. provides that the insurer is authorized to seek an order for repayment of an overpayment and ALJs are expressly granted authority in §8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson*, the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ's schedule for recoupment of an overpayment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881 P.2d 456, 457 (Colo. App. 1994). An abuse of discretion is not shown unless the order is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

Additionally, the Panel and the Colorado Court of Appeals have held that respondents may retroactively recover an overpayment of benefits. *See Simpson v. Industrial Claim Appeals Office, supra*; *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *Heffner v. Wal-Mart Stores, Inc.*, W.C. No. 4-869-417-02 (April 26, 2016); *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (July 25, 2013); *Haney v. Shaw, Stone & Webster*, W.C. No. 4-796-763 (July 28, 2011).

Here, as detailed above, the ALJ had the discretion to fashion a remedy for repayment of the overpayment, and only when there is an abuse of such discretion may we interfere the remedy ordered. *Louisiana Pacific Corp. v. Smith, supra*. Our review of the record demonstrates that the ALJ here drew permissible inferences as to the claimant's ability to repay the overpayment. As such, we are unable to conclude that the ALJ abused his discretion. We therefore have no basis to disturb the order on appeal. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued April 19, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

10/1/18 by TT .

SHANNON JARAMILLO, 507 WEST 91ST DRIVE, THORNTON, CO, 80260 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS SMITH AND STERN, Attn: KATHERINE HR MACKEY ESQ, 1700 LINCOLN ST SUITE 4500, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-004-801-02

IN THE MATTER OF THE CLAIM OF:

LUZ MARIA KING,

Claimant,

v.

FINAL ORDER

THE CHILDREN'S HOSPITAL,

Employer,

and

SELF-INSURED,

Respondent.

The respondent seeks review of a corrected order of Administrative Law Judge Felter (ALJ) dated December 28, 2017, that determined the *pro se* claimant overcame the Division Independent Medical Examination (DIME) physician's permanent impairment rating and ordered the respondent to provide maintenance medical benefits. We affirm the ALJ's order.

This matter went to hearing on the issues of overcoming the DIME physician's findings on maximum medical improvement (MMI) and permanent impairment and the claimant's request for maintenance medical benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked as a certified Spanish health interpreter in June 2015. On June 10, 2015, the claimant sustained an admitted injury to her left knee and ankle when she tripped on a cable and fell. The claimant reported her injury and was referred to Concentra and later referred to Dr. Ocel at Cornerstone Orthopedics and Sports Medicine who diagnosed an injury to the peroneal tendon of the left foot.

Dr. Scott performed an independent medical examination (IME) at the respondent's request. Dr. Scott assessed the claimant with a left knee sprain or an aggravation of underlying and pre-existing chondromalacia patella and a left ankle abrasion and reported evidence of a peroneus brevis muscle tendon tear.

The claimant saw her private health care provider, Dr. Hopp, on March 31, 2017, who diagnosed the claimant with a tear of the medial meniscus of the left knee, chondromalacia and corroborates the ongoing pain and symptoms in the left lower extremity reported by the claimant.

Dr. Thurston referred the claimant to Dr. Aschberger for an impairment assessment on August 19, 2016. Dr. Aschberger concluded that the claimant had sustained a left knee strain with findings of chondromalacia patella on the MRI, and a longitudinal tear of the peroneal tendon and assessed a 22 percent impairment rating for the left lower extremity. Dr. Aschberger performed a follow-up evaluation by letter dated September 2, 2016, noting that he had watched a video provided to him by the respondents which showed the claimant doing Zumba steps for a short while; standing on her right leg and subsequently climbing the steps to the Mother Cabrini Shrine in Golden Colorado. After viewing the video Dr. Aschberger reduced his rating to 11 percent of the left lower extremity.

The claimant requested a DIME which was performed by Dr. Dillon on June 6, 2017. The DIME physician determined that the claimant had reached MMI on May 3, 2016, and opined that there was no ratable condition with respect to the chondromalacia or left knee or ankle strain. The DIME physician further stated that the claimant had regained functionality and that the claimant's symptoms are well out of proportion to the underlying pathology and that there is no chronic presentation of the strain itself.

The ALJ determined that the DIME physician's report reflected a bias that the claimant was either magnifying her symptoms or has a functional overlay which is inconsistent with the weight of the medical evidence and the claimant's presentation at hearing. The ALJ also found more persuasive Dr. Aschberger's 11 percent rating and, therefore, found that the DIME physician's impairment rating was overcome by clear and convincing evidence. The ALJ also listened to an audiotape that was placed in to evidence, over the respondent's objection, of the DIME examination that the claimant had surreptitiously recorded. The ALJ commented that the audiotape reveals from the beginning that the DIME physician was gravitating to an opinion of no permanent impairment. The ALJ, however, went on to find that the DIME physician's zero percent rating was not adequately explained or supported and contradicted by the weight of the evidence, lay and medical, and was clearly erroneous.

The ALJ also awarded maintenance medical benefits. The ALJ referenced the DIME physician's statement in her report that "[g]iven her level of function, the only ongoing future treatment I recommend is a self-directed exercise and stretching program

and NSAID medication for symptomatic control." The ALJ inferred from this statement that the claimant required maintenance medical care. The ALJ's order also states that he relied on the "aggregate credible medical evidence." Consequently, the ALJ awarded the claimant an 11 percent lower extremity rating and maintenance medical benefits.

On appeal the respondent contends that the ALJ's order is not supported by the evidence or applicable law and that the ALJ erred in allowing the surreptitiously recorded DIME into evidence. We are not persuaded the ALJ committed reversible error.

Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of medical impairment shall be overcome only by clear and convincing evidence. Further, the DIME physician's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). It follows, therefore, that the party disputing the DIME physician's opinions on the issues of impairment and causation bears the burden to overcome the DIME physician's opinions by clear and convincing evidence. "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Whether the DIME physician's impairment rating has been overcome by clear and convincing evidence is a question of fact for the ALJ. Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard requires that we defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. Accordingly, the scope of our review is exceedingly narrow. *Metro Moving & Storage Co. v. Gussert, supra*. We may not substitute our judgment by reweighing the evidence to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990)(reviewing court is bound by resolution of conflicting evidence, regardless of the existence of evidence which may have supported a contrary result); *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)(ALJ, as fact-finder, is charged with resolving conflicts in expert testimony). Moreover, the ALJ's order is sufficient for purposes of review if the legal and factual bases of the order are apparent from the findings of fact and conclusions of law. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ expressly weighed the conflicting medical evidence in the factual findings. After doing so, he was persuaded that Dr. Aschberger's opinion and the other medical evidence in the record were of sufficient probative value to overcome the DIME physician's opinion by clear and convincing evidence and rendered the DIME physician's opinions highly probably incorrect. The ALJ is not required to set forth the grounds for his credibility determinations, but in our opinion did so here. The ALJ took into account the other evidence in the record corroborating the claimant's complaints and Dr. Aschberger's opinion concerning a diagnosis and rating. The ALJ discounted the DIME physician's opinion specifically noting that her opinion that the claimant had regained functionality was "unsupported by the aggregate medical evidence." The ALJ also noted that the DIME physician gave no explanation for her statement that there were no "ratable" conditions. The ALJ concluded that the DIME physician's opinions lacked credibility. Finding more than a mere difference of opinion, the ALJ determined the claimant established that it was highly probably, unmistakable and free from serious and substantial doubt that the DIME physician's zero percent rating was in error. The ALJ's inferences were reasonable ones from the record and we have no basis to disturb his conclusion that the DIME physician's opinion was overcome by clear and convincing evidence.

We are not persuaded by the respondent's contention that the ALJ erred in admitting the claimant's recording of the DIME. As recognized by the respondent and the ALJ, Colorado is a one-party consent state regarding the audio recording of communications. *See* §18-9-303 (1), C.R.S. (a person commits unlawful wiretapping if the person knowingly records a telephone communication without consent of at least one party to the call). Therefore, the claimant's recording, done as a *pro se* claimant, was not inherently unlawful. The claimant's recording here, was done by her, as a *pro se* claimant.

The ALJ has broad discretion in the conduct of evidentiary proceedings. *IMPC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). We, therefore, review the ALJ's ruling in this instance under the abuse of discretion standard. *See Renaissance Salon v. Industrial Claim Appeals Office*, 994 P.2d 447 (Colo. App. 1999) (reviews of orders concerning the conduct of administrative hearings are subject to the abuse of discretion standard). An abuse of discretion does not occur unless the ALJ's order is beyond the bounds of reason, as where it is unsupported by the record or contrary to the law. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. App. 1993). No abuse of discretion occurred here.

The respondent initially made a hearsay objection to the admission of the recording. October 26, 2017, hearing, Tr. at 45. The ALJ agreed to continue the hearing in order to allow the DIME physician to be in the courtroom. December 15, 2017, hearing, Tr. at 4. Although the respondent now argues on appeal that the audio recording should have been barred as a matter of law, the respondent did not make this objection at hearing. A party may not predicate error on the admission of evidence unless the party registered a contemporaneous objection stating the specific ground for the objection. C.R.E. 103(a)(1); *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995); *Kuziel v. Pet Fair, Inc.*, 948 P.2d 103 (Colo. App. 1997)(party may not raise issues on appeal which were not raised before the ALJ). Moreover, although the ALJ admitted the recording into evidence, this was not the dispositive factor in the ALJ's determination. Rather, the ALJ specifically noted that "Dr. Dillon's rating of zero is not adequately explained or supported, it is contradicted by the weight of the evidence, lay and medical; and, it is clearly erroneous." Thus, any error in admitting the recording is harmless. *See* § 8-43-310, C.R.S. (harmless error to be disregarded).

The respondent also contends that the ALJ erred in awarding maintenance medical benefits because no authorized provider recommended maintenance treatment. We disagree. The claimant has the burden to show, by a preponderance of the evidence, that her request for maintenance medical benefits is reasonable, necessary and related to relieve the effects of the claimant's industrial injury or to prevent further deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether a need for treatment is causally connected to an industrial injury is a question of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Consequently, we must also uphold the ALJ's determination in this regard if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

It is well settled that a DIME physician's opinion has no presumptive weight on the issue of maintenance medical benefits. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Rather, the normal rules for establishing entitlement to maintenance medical benefits apply. *See Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The DIME physician's opinion, however, is evidence, from which the ALJ could determine that the claimant satisfied her burden to provide entitlement to maintenance medical benefits by a preponderance of the evidence. In addition to a self-directed exercise and stretching program, the DIME physician stated in her report that she recommended ongoing NSAID medication for symptomatic control for ongoing future treatment. Additionally, there are recommendations for physical therapy and prolotherapy from Dr. Ocel, Dr. Hopp and Dr.

Scott. The ALJ noted this in conjunction with the "aggregate, credible medical evidence" to award the claimant maintenance medical treatment as part of an effort to prevent further deterioration of the claimant's condition. *See Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992).

The ALJ's findings are supported by the evidence and those findings in turn support the ALJ's conclusions. The respondent's arguments do not persuade us that the ALJ erred by awarding permanent impairment or by awarding maintenance medical benefits. Consequently, we have no basis to disturb the ALJ's order. §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's corrected order dated December 28, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

9/11/18 by TT .

LUZ MARIA KING, 12724 BOWLES PLACE, LITTLETON, CO, 80127 (Claimant)
RITSEMA & LYON, Attn: KEITH D ORGEL ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-681-113-09

IN THE MATTER OF THE CLAIM OF:

JOE R. DICKENS,

Claimant,

v.

FINAL ORDER

WAGNER EQUIPMENT,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated March 5, 2018, that dismissed his request for benefits on the ground his claim was closed, and that denied his petition to reopen. We affirm.

This case has a protracted history. We recite those findings of facts that are necessary to understand the posture of the case and the issues on review.

The claimant sustained an industrial injury to his right knee on March 7, 2006. Authorized treating physician (ATP), Dr. Primack, treated the claimant's right knee injury. The claimant was temporarily totally disabled with right knee pain; he underwent numerous knee surgeries, and walked with an antalgic gait. Dr. Primack ultimately placed the claimant at maximum medical improvement (MMI) on September 23, 2010. The claimant has contended he has had back pain since his industrial accident in 2006.

The claimant underwent a Division sponsored independent medical examination (DIME) with Dr. Shea. After undergoing two additional knee surgeries, the claimant underwent a subsequent DIME with Dr. Shea. Dr. Shea agreed with Dr. Primack that the claimant reached MMI on September 23, 2010, with a 16% whole person impairment rating, and recommended periodic maintenance for medication re-evaluation. Dr. Shea did not assess any impairment related to low back pain.

The claimant underwent a psychological evaluation with Dr. Kenneally on April 5, 2011. The claimant reported severe "back pain." Dr. Kenneally opined that the claimant's pain report was exacerbated by both conscious and unconscious psychological factors. The claimant had marked elevation on the fake bad scale, indicating exaggerated symptom reporting.

The claimant underwent a lumbar MRI, which revealed degenerative changes at L4-L5 and L5-S1.

On October 14, 2011, the claimant was seen by Dr. Primack and complained of chronic back pain. Dr. Primack concluded the claimant's back problem was not work-related.

The claimant subsequently underwent a psychological evaluation with Dr. Carbaugh. Dr. Carbaugh noted "a summary of the claimant's treatment included physical therapy with no benefit, medications with some benefit, injections with no benefit, and at least five surgical procedures on his right knee with no benefit to a worsening of condition." Dr. Carbaugh also noted that the claimant complained of back pain and indicated he had been told by Dr. Loucks that he needed back surgery. Dr. Carbaugh opined the claimant "is an extremely poor candidate for surgery strictly from a psychological standpoint. His ongoing depression and personality characteristics make it very unlikely that he will respond positively to any invasive procedure."

The claimant's claim was voluntarily reopened due to a worsening condition. On December 13, 2012, the claimant underwent a revision right knee arthroplasty to remove the knee prosthesis which contained materials he was allergic to.

The claimant returned to his authorized knee surgeon, Dr. Hugate, on August 8, 2013. Dr. Hugate placed the claimant at MMI on this date, and because Dr. Hugate was not a Level II provider, he referred the claimant to Dr. Fall for an impairment rating. Dr. Fall reported the claimant had a 15% whole person impairment. Neither physician assessed or rated back pain.

On November 19, 2013, the respondents filed an amended final admission of liability (FAL), admitting for MMI on August 8, 2013, and 38% scheduled impairment. No permanent partial disability (PPD) benefits were paid under the amended FAL because the $75,000 cap on total temporary disability (TTD) benefits had been exceeded. The amended FAL denied future medical benefits and specifically listed disfigurement benefits and permanent total disability (PTD) benefits as "NONE."

After being placed at MMI, the claimant reported continued knee pain and low back pain, as well as pain throughout his entire body. The claimant underwent another MRI on September 17, 2014, which revealed some spondylosis at L4-L5 and L5-S1 with moderate bilateral foraminal stenosis. There was no evidence of neural element impingement. These findings were no different from the first MRI the claimant previously had undergone.

On July 30, 2015, Dr. Gesquire responded to a letter written by the claimant's counsel asking whether the claimant's back condition was caused or aggravated by his altered gait. Dr. Gesquire indicated that the claimant had a "chronic antalgic gait caused by his right knee injury" which caused his back pain to worsen.

The claimant subsequently underwent multiple bilateral L4-L5 and L5-S1 facet blocks, medial branch nerve blocks, bilateral L4-L5 transforaminal epidural steroid injections, and selective nerve blocks. The claimant reported that none of these procedures provided him any relief.

On April 26, 2016, the claimant underwent a L4-L5 fusion which was performed by Dr. McPherson. Dr. McPherson opined that the claimant had degenerative spondylolisthesis. His indication for surgery was based on the claimant's pain symptoms and lumbar x-ray. This procedure did not relieve the claimant's symptoms.

On September 26, 2016, the claimant underwent an independent medical examination with Dr. Ridings. The claimant reported his back pain began the date of his industrial injury. Dr. Ridings opined the claimant's increased pain symptoms and imaging did not warrant the lumbar fusion but rather could be due to the claimant's inflammatory arthritis or lack of opiates in his system. Dr. Ridings further reported that the claimant was not a surgical candidate given there were no surgical indications from the claimant's MRIs or x-rays because there was no instability documented anywhere. Dr. Ridings opined the claimant's low back pain was complicated by a degree of psychological overlay to the severity of his complaints. Dr. Ridings further opined the claimant did not require any treatment for his low back and he remained at MMI since he was placed there in 2010. He stated it was highly unlikely an antalgic gait would cause structural spinal damage but would more likely cause muscular pain or a lumbar strain.

ALJ Cannici's Order

On June 23, 2014, more than 30 days after the claimant's receipt of the amended FAL, the claimant filed an application for hearing on the sole issue of "[w]hether

Respondents' Final Admission of Liability was properly served, and if so, when, and based upon such, whether Claimant's Objection to Final Admission of Liability was timely." These issues were set to be heard at a hearing scheduled for October 16, 2014. However, on October 14, 2014, the claimant filed an unopposed motion to withdraw his application for hearing, preserving all ripe issues, claims, defenses, and time requirements. The claimant's motion was granted.

Then, on August 4, 2015, the claimant filed a petition to reopen, alleging a change in medical condition, error, or mistake.

The claimant filed another application for hearing on February 2, 2017, again endorsing the issue of "[w]hether Respondents' Final Admission of Liability was properly served, and if so, when, and based upon such, whether Claimant's Objection to Final Admission of Liability was timely" and petition to reopen.

Hearings were held before ALJ Cannici on May 16, 2017, and June 2, 2017. ALJ Cannici stated that the issues before him included whether the amended FAL was properly served, whether the claimant's objection to the amended FAL was timely, and the claimant's petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S.

On July 13, 2017, ALJ Cannici issued his order, finding that the amended FAL was not properly served, and that the claimant's objection to the FAL was timely. He determined that the claimant received the amended FAL on April 28, 2014, and therefore, the claimant's May 22, 2014, objection to the amended FAL was timely. Section 8-43-203(2)(b)(II)(A), C.R.S. ALJ Cannici concluded that the claimant's claim had not closed and remained viable and, therefore, it was unnecessary to address his petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. He reserved for future determination all issues not resolved.

ALJ Cannici did not address or resolve whether the claimant timely filed an application for hearing or a notice and proposal to select a DIME within 30 days from his receipt of the amended FAL. Section 8-43-203(2)(b)(II)(A), C.R.S.

ALJ Goldman's Order

On August 22, 2017, over three years after the respondents filed their amended FAL, the claimant filed an application for hearing on the issues of compensability, medical benefits, authorized provider, reasonably necessary, petition to reopen claim,

disfigurement, TTD benefits from August 7, 2013, to ongoing, PPD benefits, PTD benefits, and all issues ripe for determination arising from ALJ Cannici's July 13, 2017, order. In response, the respondents endorsed numerous issues, including the claimant's failure to timely endorse issues related to benefits, and §8-43-203(2)(b)(II), C.R.S. Further, at the hearing before ALJ Goldman held on January 17, 2018, the respondents moved to dismiss the issues of medical benefits, ATPs, reasonable and necessary treatment, disfigurement, TTD benefits, PPD benefits, and PTD benefits on the basis these issues were closed under§8-43-203(2)(b)(II), C.R.S.

On March 5, 2018, ALJ Goldman entered his order granting the respondents' motion to dismiss. Using ALJ Cannici's findings that the respondents filed their amended FAL on November 19, 2013, that the claimant did not receive the amended FAL until April 28, 2014, and that the claimant timely objected on May 22, 2014, ALJ Goldman ruled that the claimant did not file an application for hearing or notice and proposal to select a DIME within 30 days of receiving the amended FAL, as required under §8-43-203(2)(b)(II)(A), C.R.S. Rather, he found that the claimant merely filed an objection to the amended FAL on May 22, 2014. ALJ Goldman further determined that the claimant failed to establish his claim should be reopened under §8-43-303(1), C.R.S. Relying on the opinions of Drs. Kenneally, Carbaugh, and Ridings, ALJ Goldman determined that the claimant's altered gait did not cause or aggravate his underlying back condition, did not necessitate the need for medical treatment, and did not cause any additional disability. ALJ Goldman also found as unpersuasive the claimant's testimony regarding his low back pain complaints dating back to 2006. He specifically found that the claimant did not injure his back on March 7, 2006, when he fell at work, and that his altered gait did not cause or aggravate his back condition. Also, ALJ Goldman found the claimant failed to establish that his work related medical conditions had worsened since being placed at MMI.

I.

The claimant first argues that ALJ Goldman erred in granting the respondents' motion to dismiss. He contends that ALJ Goldman dismissed his claim based upon a statutory provision that does not exist in §8-43-203(2)(b)(II), C.R.S. Namely, he argues ALJ Goldman inserted the "non-existent word 'receipt'" in §8-43-202(2)(b)(II)(A), C.R.S. to hold that the claimant failed to apply for a hearing or request a DIME within 30 days of *receiving* the respondents' amended FAL on April 28, 2014. The claimant instead argues that since he filed his application for hearing on August 22, 2017, which was within 30 days after ALJ Cannici's July 13, 2017, order was final; his application for hearing therefore was timely. We perceive no error.

Section 8-43-203(2)(b)(II)(A), C.R.S., provides in pertinent part as follows:

> (II) (A) An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that *the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing*, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. (Emphasis added)

Thus, under §8-43-202(2)(b)(II)(A), C.R.S. an FAL will become final unless within "thirty days after the date of the final admission" the claimant contests the final admission in writing and requests a hearing on any disputed issues that are ripe for hearing. *See Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). Further, the claimant is entitled to actual notice of the FAL before the failure to object triggers a closure. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996).

It is true, as the claimant argues, that §8-43-203(2)(b)(II)(A), C.R.S. does not expressly use the word “receipt” when providing that the case will be automatically closed as to the issues admitted in the FAL if the claimant does not, within thirty days after the date of the FAL, contest the final admission and request a hearing on disputed issues ripe for hearing, including the selection of a DIME. However, the Panel previously has held that even if the FAL is mailed to an incorrect address, the claimant's receipt of actual notice was sufficient to trigger the obligation to object to the FAL and request a DIME. *Duran v. Russell Stover Candies*, W.C. No. 4-524-717 (April 13, 2004); *see also Davies v. Kindred Healthcare*, W.C. No. 4-727-298-03 (July 30, 2014). This is because an error in addressing the FAL does not necessarily vitiate its effectiveness if the claimant actually receives the FAL in sufficient time to file a timely objection. It is undisputed here that the claimant did not actually receive the amended FAL in sufficient time to file a timely objection after it was served. Nevertheless, the time period for the claimant to file an application for hearing on disputed issues ripe for hearing began to run when the claimant received actual notice of the amended FAL, which was on April 28, 2014. *See Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986)(time limitations did not commence to run until claimant's attorney first received notification, following

his request for a hearing in January 1984, that the admission of liability had been filed); *Meskimen v. FFE Transportation*, W.C. No. 3-966-629 (March 31, 2003).

In *Henriquez v. K.R. Swerdfeger Constuction*, W.C. No. 4-439-726 (May 5, 2003), the Panel held that receipt of an FAL by obtaining a copy of the Division's file 10 months subsequent to the filing of the FAL initiated the 30 day period to contest the FAL as of the date the file was received. We held that where a party receives actual notice of a proceeding and is afforded a reasonable opportunity to participate, non-jurisdictional errors in the statutory notice process do not nullify the administrative determination. *See Wunder v. Department of Revenue*, 867 P.2d 178 (Colo. App. 1993)(despite Department of Revenue's violation of statute requiring 10 days written notice of change in license revocation hearing site, no error occurred where claimant received oral notice of change on day of hearing and there was no evidence the change prejudiced his ability to participate in hearing); *Shumate v. Department of Revenue*, 781 P.2d 181 (Colo. App. 1989)(even if notice of license revocation not properly served, claimant's right to notice was not affected because he appeared at revocation hearing and participated). It necessarily follows, therefore, that ALJ Goldman correctly held that the claimant's "receipt" of the amended FAL on April 28, 2014, triggered the time frame under §8-43-203(2)(b)(II)(A), C.R.S. for him to apply for a hearing on disputed issues ripe for hearing. Thus, we necessarily reject the claimant's argument that his application for hearing which he filed on August 22, 2017, was timely since it was filed within 30 days after ALJ Cannici's order was final.

To the extent the claimant argues that the respondents were required to again serve the amended FAL with a new date which would "reinitiate the 30 day deadlines of §8-43-203(2)(b)(II)(A), C.R.S.," we disagree. The claimant previously conceded he actually received the amended FAL on April 28, 2014. Our courts have held that there can be no due process violation where a party fails to use an existing process to protect his rights. *See Cramer v. Industrial Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994). Additionally, §8-43-203(2)(b)(II)(A), C.R.S. is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). Applying time limits to a claimant's right to contest closure is rational and advances that purpose. *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2006). Thus, since the claimant had actual notice of the amended FAL on April 28, 2014, which afforded him with the opportunity to apply for a hearing on those disputed issues ripe for hearing, we necessarily reject his argument that the respondents were

required to refile their amended FAL to reinitiate the 30 day deadline under §8-43-203(2)(b)(II)(A), C.R.S.

Additionally, to the extent the claimant argues that the holding in *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005) dictates a different result, we disagree. In *Berg*, the Colorado Court of Appeals held that a DIME physician's uncontested finding of MMI could be reopened under §8-43-303(1), C.R.S. based on a mistake of fact. Although the claimant in that case did not file an application for hearing within 30 days of the employer's FAL, it was not until after his subsequent surgery that the true extent of the claimant's herniated disc became known and he petitioned to reopen his claim based on mistake of fact. Conversely, here, we are not concerned with reopening based on a mistake of fact. Rather, we are concerned with the claimant's failure to file an application for hearing on disputed issues ripe for hearing within 30 days after the date the claimant received actual notice of the FAL pursuant to §8-43-203(2)(b)(II)(A), C.R.S. Consequently, we will not disturb ALJ Goldman's order on this ground.

II.

Next, the claimant argues that ALJ Cannici conclusively determined his case was open and that the petition to reopen was thereby moot. The claimant reasons that ALJ Cannici's order was a final order and was not appealed and, therefore, it was not subject to re-litigation. Accordingly, the claimant contends that claim and issue preclusion prevented ALJ Goldman from holding to the contrary. We perceive no error.

Claim preclusion has been held to apply to administrative decisions including those involving workers' compensation. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001); *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006). Claim preclusion works to bar the re-litigation of matters that already have been decided as well as matters that could have been raised in a prior proceeding but were not. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604 (Colo. 2005). Claim preclusion protects "litigants from the burden of relitigating an identical issue with the same party or his privy and . . . promot[es] judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003)(quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552 (1979)). For a claim in a second proceeding to be precluded by a previous judgment, there must exist the following: (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity of or privity between parties to the actions. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999).

Additionally, under the issue preclusion doctrine, "once a court has decided an issue necessary to its judgment, the decision will preclude relitigation of that issue in a later action involving a party to the first case." *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007). Issue preclusion is less "flexible" than the law of the case doctrine, because it 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 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*.; *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 973-974 (Colo. App. 2012).

Initially, we agree with the respondents that the claimant failed to raise the claim preclusion or issue preclusion argument before ALJ Goldman and, therefore, it has not been preserved for our review. *Colorado Compensation Ins. Authority v. Industrial Claim Appeals Office*, 884 P.2d 1131 (Colo. App. 1994).

Regardless, even assuming the claimant's argument has been preserved, we nevertheless conclude that neither claim nor issue preclusion prevented ALJ Goldman from addressing whether §8-43-203(2)(b)(II)(A), C.R.S. barred the claimant's request for benefits. As noted above for claim preclusion to apply, the four factors enumerated above must be satisfied. *Holnam, Inc. v. Industrial Claim Appeals Office, supra*. While the fourth factor, or identity of or privity between parties to the actions, is satisfied here, the other three factors are not. The first factor, which is finality of the first judgment, is not existent. As detailed above, ALJ Cannici ruled that the respondents' amended FAL was not properly served, that the claimant's objection to the amended FAL was timely, and since his claim remained open, it was unnecessary to address his petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. ALJ Cannici reserved for future determination all issues not resolved. ALJ Cannici's order could not be appealed since it did not require any party to pay a penalty or benefits or deny a claimant any benefit or penalty and, therefore, it was not final. Section 8-43-301(8), C.R.S. Next, the second and third factors, or identity of subject matter and identity of claims for relief, do not exist here. The proceedings before ALJ Cannici and ALJ Goldman involved different matters. Again, ALJ Cannici addressed whether the respondents' amended FAL was properly served, whether the claimant's objection to the amended FAL was timely, and the claimant's petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. While ALJ Goldman similarly addressed the claimant's petition to reopen, he

also addressed the claimant's request for benefits and whether it was barred by his failure to request a DIME within 30 days from the date he received actual notice of the FAL, §8-43-203(2)(b)(II)(A), C.R.S.

Similarly, the doctrine of issue preclusion did not prevent ALJ Goldman from addressing whether §8-43-203(2)(b)(II)(A), C.R.S. barred the claimant's request for benefits. While the second factor, or the party against whom issue preclusion is asserted has been a party to or is in privity with a party to the prior proceeding, is existent here, the other three factors are not. The first factor, or the issue sought to be precluded is identical to an issue actually determined in the prior proceeding, is not existent here. Again, ALJ Cannici addressed whether the respondents' amended FAL was properly served, whether the claimant's objection to the amended FAL was timely, and the claimant's petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. While ALJ Goldman similarly addressed the claimant's petition to reopen, he also addressed the claimant's request for benefits and whether it was barred by his failure to request a DIME within 30 days from the date he received actual notice of the FAL, §8-43-203(2)(b)(II)(A), C.R.S. Next, the third factor, or whether there is a final judgment on the merits in the prior proceeding, is not existent here. As explained above, ALJ Cannici ruled that the respondents' amended FAL was not properly served, that the claimant's objection to the amended FAL was timely, and since his claim remained open, it was unnecessary to address his petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. ALJ Cannici reserved for future determination all issues not resolved. ALJ Cannici's order could not be appealed since it did not require any party to pay a penalty or benefits or deny a claimant any benefit or penalty and, therefore, was not a final order. Section 8-43-301(8), C.R.S. The fourth factor does not exist here, or whether the respondents had a full and fair opportunity to litigate the issue of whether §8-43-203(2)(b)(II)(A), C.R.S. barred the claimant's request for benefits. In the proceeding before ALJ Cannici, the claimant did not request any benefits. Rather, he merely sought a ruling on whether the respondents' amended FAL was properly served, whether the claimant's objection to the amended FAL was timely, and the claimant's petition to reopen based on a worsening of condition under §8-43-303(1), C.R.S. As such, the respondents did not have a full and fair opportunity to litigate before ALJ Cannici the issue of closure under 8-43-203(2)(b)(II)(A), C.R.S. Consequently, the doctrine of issue preclusion cannot be applied here.

Citing to *Todd v. Bear Valley Village Spts.*¸980 P.2d 973 (Colo. 1999), *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008), and *Catholic Health Initiatives v. Earl Swenssen Assocs., Inc.*, 2017 CO 94, the claimant argues that ALJ Goldman's dismissal of his claims "does not meet the scrutiny of a proper proportionality analysis." Essentially, the

claimant argues that ALJ Goldman's order is "harsh" and should not be based on an inflexible application of the Workers' Compensation Act.[1] We are not persuaded there is any error in ALJ Goldman's determination. The automatic closure of issues resulting from an uncontested FAL, as provided for in §8-43-203(2)(b)(II)(A), C.R.S., is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. Thus, once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *See Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Consequently, the statutory scheme prevents us from providing the requested equitable relief sought here.

III.

The claimant further argues that ALJ Goldman erred in denying his petition to reopen. The claimant reasons that after suffering from an antalgic gait for 11 years, this almost certainly will cause back problems. The claimant contends that ALJ Goldman's contrary determination in this regard is not supported by substantial evidence. We disagree.

Section 8-43-303(1), C.R.S., provides that an ALJ may reopen any award within six years on the grounds of error, mistake, or a change in condition. As pertinent here, a change in condition refers either "to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328, 1330 (Colo. App. 1985); *see also Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). The reopening authority under the provisions of § 8-43-303, C.R.S. is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). Absent fraud or a clear abuse of that discretion, we may not disturb the ALJ's order. *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986).

[1] The respondents argue that the claimant failed to raise the "proportionality analysis" argument before ALJ Goldman and, therefore, it has not been preserved for our review. However, the claimant did, in fact, raise this issue before ALJ Goldman in his proposed full findings of fact, conclusions of law, and order. Claimant's Proposed Order at 3, 7 ¶¶5, 21. Accordingly, we reject the respondents' argument in this regard.

The findings of fact upon which the ALJ bases his determination must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences that he drew from the evidence. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. 2003). To the extent medical evidence is presented, it is solely the ALJ's responsibility to assess the weight of that evidence and resolve any conflicts or inconsistencies. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Here, the record supports ALJ Goldman's denial of the claimant's petition to reopen. As explained above, ALJ Goldman credited the opinions of Drs. Kenneally, Carbaugh, and Ridings to hold that the claimant's altered gait did not cause or aggravate his underlying back condition, did not necessitate the need for medical treatment, and did not cause any additional disability. Dr. Ridings testified that based on his review of the medical records, the claimant did not sustain a separate medically documented injury to his low back when he fell on March 7, 2006. He also testified that the claimant's back complaints could not be related to his industrial injury. Dr. Ridings explained that while he would expect an antalgic gait over a prolonged period of time to cause muscular pain in the low back, he believed that the claimant's low back pain was merely muscular and that he did not incur any structural damage as a result. (Depo. of Dr. Ridings on 10/24/2016 at 5-6, 37, 47; Depo. of Dr. Ridings 12/4/2017 at 29, 60); Ex. D at 30; see also Ex. C at 19. Further, Dr. Kenneally opined that the claimant's pain disorder "is being sustained by both conscious and unconscious factors." Ex. B at 14.

In his brief, the claimant cites to evidence in the record to support his argument of a causal relationship between his antalgic gait and his back condition, including the opinions of Drs. McPherson, Gesquire, and Dr. Ridings. Essentially, the claimant requests that we reweigh the factual record and draw inferences of our own different from those of ALJ Goldman. While the claimant certainly presented evidence to support such a causal relationship, we nevertheless have no authority to substitute our judgment for that of ALJ Goldman concerning the sufficiency and probative weight of the evidence that was presented. As such, we decline the claimant's invitation to do so. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *Rockwell International v. Turnbull, supra*. We instead conclude the ALJ's findings are supported by the record and his conclusions are supported by the applicable law. Thus, we have no basis to disturb ALJ Goldman's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ Goldman's order March 5, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

CERTIFICATE OF MAILING

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

9/13/18 by TT .

CRISTIANO LAW LLC, Attn: FRANCIS V CRISTIANO ESQ, 50 SOUTH STEELE STREET SUITE 930, DENVER, CO, 80209 (For Claimant)
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COLORADO COURT OF APPEALS

DATE FILED: September 20, 2018
CASE NUMBER: 2017CA1619

Court of Appeals No. 17CA1619
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-889-298

Allen Villegas,

Petitioner,

v.

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

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE CARPARELLI*
Dunn and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 20, 2018

Chris Forsyth Law Office, 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

Hall & Evans, LLC, Douglas J. Kotarek, Evan M. Blonigen, and Matthew J. Hegarty, Denver, Colorado, for Respondents Denver Water and 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. 2018.

¶ 1 Claimant, Allen Villegas, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the denial of his claim for permanent total disability (PTD) benefits. Claimant challenges several of the administrative law judge's (ALJ) evidentiary rulings and questions the constitutionality of the decision. We affirm.

I. Procedural and Factual Background

¶ 2 Claimant laid and repaired water pipes for employer, Denver Water, for thirty-eight years. He became a supervisor in 1996.

¶ 3 In February 2012, he sustained an admitted back injury while fixing a valve leak in a confined space. He sought treatment from Dr. Hugh Macaulay in Denver Water's in-house clinic, but Dr. Macaulay concluded that claimant's back injury was not work-related and referred claimant to his personal physician, Dr. Christopher LaFontano, for follow-up care.

¶ 4 Claimant worked for a few weeks after sustaining his back injury but stopped working in April 2012. He later filed a claim for workers' compensation. Although Denver Water initially contested the claim, it eventually admitted liability.

¶ 5 In September 2015, claimant applied for a hearing to obtain PTD benefits. The two-day hearing took place on May 13, 2016, and July 25, 2016, after two postponements. The ALJ eventually denied the claim, holding that claimant had the "ability to earn wages and therefore is not permanently and totally disabled." Noting evidence that claimant drives, takes care of his six-year-old niece, and works out, the ALJ was not persuaded claimant was permanently and totally disabled. Further, the ALJ expressly found the vocational rehabilitation specialist claimant retained, Doris Shriver, "less persuasive" than the vocational rehabilitation expert endorsed by Denver Water, William Hartwick, in part because Ms. Shriver conceded that the database upon which she relied had not been updated in twenty-five years. The Panel affirmed, holding that substantial evidence supported the ALJ's finding.

II. The ALJ Retained Jurisdiction

¶ 6 Citing section 8-43-209, C.R.S. 2018, claimant contends that because the hearing did not occur within 180 days, the ALJ lost jurisdiction to decide the case. We disagree.

¶ 7 In accordance with section 8-43-209, "[h]earings must commence within one hundred and twenty days from the date of

the notice of setting by the director." One extension of time of not more than sixty days is permitted.

¶ 8 "[C]ourts will construe a statute to limit jurisdiction only when that limitation is explicit." *Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177, 183 (Colo. App. 2009); *see also Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996) (statute stating that ALJ "shall" enter written summary order denying or allowing a workers' compensation claim within fifteen days after conclusion of a hearing is directory, not mandatory).

¶ 9 There is no explicit jurisdictional limitation in section 8-43-209. Claimant has not cited and we have not found any case that holds that the failure to comply with section 8-43-209 divests an ALJ of jurisdiction to hear a case.

¶ 10 Accordingly, we conclude that the section 8-43-209 is procedural, not jurisdictional. *Accord Palacios-Ortiz v. Excel Corp.*, W.C. No. 4-527-581, 2004 WL 771682, at *1 (Colo. I.C.A.O. Apr. 2, 2004) ("The absence of express legislative direction concerning the effect of failure to conduct the hearing in a timely fashion indicates the provisions are directory rather than jurisdictional.").

¶ 11 Although claimant raised the timeliness of the hearing's commencement in his brief to the Panel, he did *not* raise it before the ALJ. The failure to raise an issue before the ALJ renders an issue unpreserved. *See City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997) ("Petitioners did not raise this specific argument before the ALJ and it was only raised before the Panel in petitioners' reply brief, which was stricken from the record by the ALJ." The argument therefore was not addressed on appeal.)

¶ 12 Because claimant did not raise the timeliness of the hearing with the ALJ, he did not preserve the issue for our review, and we decline to address it further. *Dunagan*, 939 P.2d at 500.

III. Definition of PTD is Not Unconstitutionally Vague

¶ 13 Claimant also contends that the statute governing PTD is unconstitutionally vague. The Act defines "permanent total disability" as the inability "to earn any wages in the same or other employment." § 8-40-201(16.5), C.R.S. 2018. Claimant argues that the phrase "fails to provide explicit standards for those who apply it." Because the phrase is broad, he reasons, ALJs have too much leeway to rely upon imprecise terms such as "light" and "sedentary" work when assessing whether a claimant is permanently and totally

disabled. And, claimant contends, that room for imprecision renders the statute unconstitutionally vague both "as written and as applied." We are not persuaded.

A. Standard of Review for Challenges to a Statute's Constitutionality

¶ 14 In determining whether section 8-40-201(16.5) is unconstitutionally vague, we begin with the presumption that it is valid. *See Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 305 (Colo. App. 2005), *aff'd*, 134 P.3d 407 (Colo. 2006).

> In addressing a challenge to a statute as unconstitutionally vague in violation of the due process clause of the Colorado Constitution, we must determine whether the statute "either forbids or requires the doing of an act in terms so vague that [persons] of ordinary intelligence must necessarily guess as to its meaning and differ as to its application."

People v. Gomez, 843 P.2d 1321, 1322 (Colo. 1993) (footnote omitted) (quoting *People ex rel. City of Arvada v. Nissen*, 650 P.2d 547, 550 (Colo. 1982)).

> No vagueness problem exists if a party strains to inject doubt as to the meaning of words where no doubt would be perceived by the normal reader.
>
> Statutory terms need not be defined with mathematical precision. Rather, the statutory language must be sufficiently specific to give

> fair warning of prohibited conduct, yet it must also be sufficiently general to permit application of the prescribed standards of conduct to varied circumstances and changing times.
>
> Further, words and phrases used in statutes are to be considered in their generally accepted meaning, and the court has a duty to construe the statute so that it is not void for vagueness when a reasonable and practical construction can be given to its language.

White v. Indus. Claim Appeals Office, 8 P.3d 621, 625 (Colo. App. 2000) (citations omitted). "Where fairness can be achieved by a commonsense reading of the statute, we will not adopt a hypertechnical construction to invalidate the provision." *People v. Garcia*, 197 Colo. 550, 554, 595 P.2d 228, 231 (1979). "Moreover, if a challenged statute is capable of several constructions, one of which is constitutional, the constitutional construction must be adopted." *People v. Schoondermark*, 699 P.2d 411, 415 (Colo. 1985).

¶ 15 "[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).

B. PTD Guidelines

¶ 16 When determining whether a claimant is permanently and totally disabled, the ALJ may consider "human factors." *See Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). "Human factors" include such elements as the claimant's "education, ability, and former employment," *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701, 703 (Colo. App. 1999), "the claimant's age, work history, general physical condition, and prior training and experience," *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001), and "the community where [the] claimant resides." *Brush Greenhouse Partners v. Godinez*, 942 P.2d 1278, 1279 (Colo. App. 1996), *aff'd sub nom. Bymer*, 955 P.2d 550. And, despite having the opportunity to do so, the legislature did not narrow the definition of PTD to exclude consideration of these factors, as it did to the statute governing permanent partial disability, section 8-42-107, C.R.S. 2018. *See Bymer*, 955 P.2d at 556 ("[U]nlike in the PPD

amendments, the legislature did not explicitly preclude consideration of these factors in a PTD determination.").

¶ 17 The list of factors to be considered, by its very nature and intention, is not exhaustive. The statute is designed to be flexible and bend as needed to accommodate each claimant's unique situation. "This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of the claimant." *Bymer*, 955 P.2d at 557. Thus, a claimant who may have been able to find employment in a different community was found to be permanently and totally disabled because positions he could hold were not within "a reasonable commutable distance from his home." *Brush Greenhouse Partners,* 942 P.2d at 1279.

C. Statute is Not Unconstitutional

¶ 18 We conclude that courts have construed the statute in a manner that is sufficiently specific to give claimants fair notice of what constitutes PTD and to ensure that it can be applied to varied circumstances. Claimant's argument that the statute is unconstitutionally broad and lacks specific criteria does not satisfy his burden to prove beyond a reasonable doubt that section

8-40-201(16.5) is "so vague that [persons] of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." *Gomez*, 843 P.2d at 1322; *see also Pepper*, 131 P.3d at 1139.

IV. Constitutional Challenges to Workers' Compensation System

¶ 19 Claimant also asserts constitutional challenges to the workers' compensation system. He alleges that

1) allowing ALJs and the Panel to rule on this case violates the separation of powers doctrine because they inhabit the executive branch, thus depriving workers' compensation litigants of a judicial branch hearing; and,

2) when the Panel appears as a litigant in the appellate courts it is represented by the attorney general's office, which is unfair to claimant and other workers' compensation litigants because parties who can have their claims heard in a district court "do not have to face a judge represented by the AG."

¶ 20 Divisions of this court have addressed and rejected these identical, or remarkably similar, issues in several previously published decisions. *See Sanchez v. Indus. Claim Appeals Office*,

2017 COA 71; *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30; *Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M; *Aviado*, 228 P.3d 177; *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003); *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

¶ 21 Claimant nevertheless challenges the reasoning of these previous cases, particularly *Sanchez* and *Dee Enterprises*. He argues, in addition to other grounds, that *Dee Enterprises* should not be given precedential weight because the opinion "was written by retired judges"; that "*Sanchez* is not a final opinion" because certiorari, which has since been denied, was still pending; that we are not bound by *Dee Enterprises* and its progeny; and, that *Sanchez* "blatantly refused to address arguments raised and broke the rules regarding appellate proceedings."

¶ 22 However, *Sanchez* addressed the same arguments raised here, and we perceive no reason to revisit it. The division in *Sanchez* rejected the separation of powers argument, holding 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.'" *Sanchez*, ¶ 11 (quoting *Dee Enters.*, 89 P.3d at 437). It further noted that "*Dee Enterprises* thoroughly and properly analyzed this issue and faithfully followed the precedent of *Thomas* [*v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985),] and *Crowell* [*v. Benson*, 285 U.S. 22 (1932)]." *Id.* at ¶ 12.

¶ 23 Similarly, the division in *Sanchez* rejected the argument that there is any impropriety or conflict in the Panel's roles because Panel members who decide cases do not also serve as advocates. *Id.* at ¶ 36. To the extent claimant asserts any impropriety in the attorney general's representation of the Panel, he does not explain why "it is not fair" for workers' compensation litigants "to face a judge represented by the AG." As in *Sanchez*, claimant has not provided sufficient reasoning to support this argument. *Id.* at ¶ 41. We therefore perceive no reason to revisit these issues.

¶ 24 Finally, to the extent claimant relies on *Stern v. Marshall*, 564 U.S. 462, 489 (2011), we note that *Stern* involved bankruptcy proceedings. The only mention of workers' compensation in the opinion is in Justice Breyer's dissent. Consequently, *Stern* does not call the holding in *Sanchez* into question.

V. Evidentiary Issues

¶ 25 Claimant presents five evidentiary and procedural challenges to the ALJ's ruling. He argues that

1) Dr. Macaulay should not have been allowed to testify because he was not designated as an expert witness until one week before the hearing;

2) Denver Water should have been sanctioned for its failure to timely designate Dr. Macaulay as an expert;

3) Dr. Macaulay should have been sequestered from the hearing;

4) Dr. Macaulay's testimony should have been excluded because it did not meet the reliability standards of *People v. Shreck*, 22 P.3d 68 (Colo. 2001); and,

5) Claimant's occupational therapist, Sherry Young, should have been allowed to testify as a rebuttal witness.

We perceive no errors.

A. Factual Background Related to Evidentiary Issues

¶ 26 At the beginning of the first hearing, claimant objected to Denver Water's intent to call Dr. Macaulay as an expert witness. Claimant argued that Denver Water blind-sided him by designating Dr. Macaulay as an expert one week before the hearing. He argued that the late notice of Dr. Macaulay's expert designation handicapped his hearing preparation and unfairly prejudiced his case.

¶ 27 The ALJ overruled the objection and permitted Dr. Macaulay to testify as an expert. The ALJ noted that claimant's application for hearing and answers to interrogatories identified Dr. Macaulay as a witness many weeks before the hearing, and the case information sheet (CIS), which was filed one week before the hearing listed Dr. Macaulay as an expert witness.

¶ 28 To address claimant's concern about Dr. Macaulay's expert testimony, the ALJ directed that claimant would be permitted to take Dr. Macaulay's discovery deposition before the second hearing. Claimant did not do so. However, he hired an occupational therapist, Sherry Young, to rebut Dr. Macaulay's testimony and opine on claimant's employability.

¶ 29 At the second hearing, claimant called Ms. Young as a rebuttal witness, and said she would address the psychological components of her work and the functional capacity evaluation (FCE) of claimant she had completed. Denver Water objected to Ms. Young's testimony, arguing that she had "not been identified as a witness anywhere"; claimant had misstated Dr. Macaulay's testimony; Denver Water's occupational therapist had not requested a new FCE; Ms. Young's testimony did not rebut anything Dr. Macaulay actually said; and, claimant was attempting to circumvent Dr. Macaulay's deposition. By way of an offer of proof, claimant explained that he was calling Ms. Young to testify

> regarding how these tests are done, how occupational therapists do these tests, how they do them to negate any secondary gain or mental aspects, how they clearly show what someone is physically capable of doing, as they did with [claimant], and to further alleviate and rebut respondents' contentions that the findings and adoption of Dr. LaFontano were unreasonable and invalid based on their surveillance video.

He indicated that he "had no reason to put together this information" earlier because he "didn't know Dr. Macaulay was

going to testify as an expert," and, that Ms. Young's testimony was necessitated by Dr. Macaulay's late expert designation.

¶ 30 The ALJ was not persuaded by claimant's contentions and excluded both Ms. Young's testimony and her FCE report. The ALJ listed the following reasons for his decision:

1) as the ALJ, he had the authority to control the "testimony and format of a hearing";
2) claimant did not identify Ms. Young on his CIS;
3) Ms. Young's testimony regarding psychological factors would likely be cumulative of Dr. Macaulay's, who also opined that claimant should undergo psychological testing;
4) her testimony would not "rebut[] anything that Dr. Macaulay [said]," but would instead "introduce even further evidence before the Court";
5) claimant had not demonstrated "good cause why this record should come in"; and
6) because there must be finality in litigation lest a hearing continue in perpetuity: "[o]nce a hearing is started, you can't keep adding medical records."

After considering the evidence, the ALJ issued his order concluding claimant was not permanently and totally disabled.

B. Standard of Review for Challenges to Evidentiary Rulings

¶ 31 "Evidentiary decisions are firmly within an ALJ's discretion, and will not be disturbed absent a showing of abuse of that discretion." *Youngs v. Indus. Claim Appeals Office*, 2013 COA 54, ¶ 40; *see also* § 8-43-207(1)(c), C.R.S. 2018 (ALJ is "empowered to . . . [m]ake evidentiary rulings"); *IPMC Transp. Co. v. Indus. Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (ALJ has wide discretion to control the course of a hearing and to make evidentiary rulings).

¶ 32 "An ALJ abuses his or her discretion only if the evidentiary ruling 'exceeds the bounds of reason.'" *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 18 (quoting *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993)); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). This, then, is the burden of proof borne by the party challenging an ALJ's evidentiary ruling. *See Coates, Reid & Waldron*, 856 P.2d at 856.

C. Disclosure of Dr. Macaulay as an Expert

¶ 33 Denver Water employs Dr. Macaulay as the physician at its on-site clinic. Claimant explains that although Dr. Macaulay was listed as a witness on Denver Water's response to claimant's application for hearing and in its answers to claimant's interrogatories, he was not identified in either pleading as an expert, even though the interrogatories specifically instructed Denver Water to identify "all experts you have retained." Claimant therefore claimed unfair surprise when Denver Water listed Dr. Macaulay as an expert on its CIS. Claimant now argues that Denver Water violated C.R.C.P. 26 by failing to disclose Dr. Macaulay as an expert or provide a report summarizing his opinions.

¶ 34 The Workers' Compensation Act (Act) and its governing rules contain witness and evidentiary disclosure requirements. Specifically, the Act requires that "[a]ll relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date." § 8-43-210, C.R.S. 2018. The rules governing

proceedings in the Office of Administrative Courts (OAC) specify that

> [o]nly endorsed witnesses may testify in a party's case-in-chief. Endorsed witnesses are witnesses listed on either the application or the response to the application, witnesses added by written notice before the hearing date is confirmed, witnesses added by written agreement of the parties, or witnesses added by order of a judge or designee clerk.

Dep't of Pers. and Admin. Rule 13, 1 Code Colo. Regs. 104-3. Finally, the Workers' Compensation Rules of Procedure require any party served with interrogatories to respond to the interrogatories "to all opposing parties within 20 days of mailing of the interrogatories and requests." Dep't of Labor & Emp't Rule 9-1(B), 7 Code Colo. Regs. 1101-3. Parties have "a continuing duty to timely supplement or amend responses to discovery up to the date of the hearing." Dep't of Labor & Emp't Rule 9-1(D), 7 Code Colo. Regs. 1101-3.

¶ 35 Denver Water complied with these applicable rules and statutes. It endorsed Dr. Macaulay months before the hearing, provided claimant with pertinent medical records generated by Dr. Macaulay or the Denver Water clinic, and responded to and

supplemented its answers to interrogatories identifying Dr. Macaulay as a witness. Claimant's objection, however, is that Denver Water did not adhere to expert disclosure mandates of the Colorado Rules of Civil Procedure: that Dr. Macaulay should have been identified as an expert sooner; and that Denver Water should have provided a report summarizing his opinions.

¶ 36 "The Colorado Rules of Civil Procedure do not apply in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute." *Nova v. Indus. Claim Appeals Office*, 754 P.2d 800, 802 (Colo. App. 1988). In this case, the Act and the applicable rules and regulations provide "the procedure and practice" for discovery in workers' compensation cases, including expert discovery. And, while there may not be a specific rule enumerating how, when, and what expert information must be disclosed, the existing workers' compensation rules, regulations, and statutes governing discovery apply equally to experts. Therefore, we do not agree that there are no rules governing expert disclosures in workers' compensation cases. Because there *are* applicable discovery rules, different rules that govern civil cases do not apply because they are "inconsistent

or in conflict with the procedure and practice provided by the applicable statute." *Id.*

¶ 37 Claimant accurately states that Denver Water did not identify Dr. Macaulay as a retained expert in its responses to his interrogatories. Denver Water counters that claimant's interrogatory asked it to list and name experts it had *retained* and there is no evidence that Denver Water retained Dr. Macaulay for this action. Instead, it retained Dr. Macaulay as a staff physician at its clinic under a general contract to provide regular medical services. There is no evidence that Dr. Macaulay received additional compensation to testify in this matter. And Denver Water disclosed Dr. Macaulay as a medical doctor and produced the medical records he had regarding the claimant's care. In these circumstances, we conclude that Denver Water did not improperly respond to the interrogatory. We conclude that claimant received sufficient notice that Dr. Macaulay would testify and that he would provide medical opinions.

¶ 38 To the extent that claimant contends that he was not given sufficient notice to enable him to prepare for Dr. Macaulay's testimony, the ALJ gave claimant an opportunity to depose Dr.

Macaulay before the doctor testified. Claimant did not do so. *See IPMC Transp. Co.*, 753 P.2d at 805 (no due process violation where petitioners failed to take pre-hearing depositions or call experts at first hearing as instructed). Claimant asserts that late notice of Dr. Macaulay's testimony adversely affected his ability to prepare his case-in-chief. Indeed, one purpose of proper disclosure is to inform the opposing party of potential evidence and issues so that party can prepare cross examination and other means to address them. However, claimant has not asserted how the late notice adversely affected his preparation or presentation or how it prejudiced him.

¶ 39 Considering these issues in the context in which they occurred, we conclude that the ALJ did not abuse his discretion when he permitted Dr. Macaulay to testify, and we perceive no basis for setting aside the ALJ's discretionary decision. *See Kilpatrick*, ¶ 18.

D. Sanctions for Not Disclosing Dr. Macaulay as an Expert

¶ 40 Claimant next contends that the "ALJ erred as a matter of law" when he did not sanction Denver Water for its failure to disclose Dr. Macaulay as an expert. Claimant argues that the ALJ should have imposed an automatic sanction of Denver Water under C.R.C.P.

37(c) for its alleged discovery failure. C.R.C.P. 37(c) mandates that a "party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial." We are not persuaded that any error occurred.

¶ 41 Because we have already determined that Denver Water committed no discovery violation, a sanction would not have been appropriate. In addition, given that sanctions are within an ALJ's discretion, we cannot say that the ALJ abused his discretion by declining to impose one where no violation had occurred. *See Shafer Commercial Seating, Inc. v. Indus. Claim Appeals Office*, 85 P.3d 619, 621 (Colo. App. 2003) ("Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion.").

¶ 42 But claimant is not alleging an abuse of discretion. Instead, he asserts that the ALJ erred in failing to impose a *mandated* sanction under C.R.C.P. 37(c). However, the mandatory sanction provision of C.R.C.P. 37(c) does not apply here because, as discussed above, the rules of civil procedure apply in workers' compensation actions only to the extent "they are inconsistent or in

conflict with the procedure and practice provided by the applicable statute." *Nova*, 754 P.2d at 802.

¶ 43 Here, both the Act and the regulatory scheme provide for discovery sanctions. The Act authorizes ALJs to impose sanctions on any party that violates an order or rule, including discovery rules, *see* § 8-43-304, C.R.S. 2018; *Pioneers Hosp. of Rio Blanco Cty. v. Indus. Claim Appeals Office*, 114 P.3d 97, 99 (Colo. App. 2005) (penalties appropriate where hospital failed to provide written notice or obtain an order from the ALJ before taking specialist's deposition), and permits ALJs to "rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery." § 8-43-207(1)(e), C.R.S. 2018; *see Shafer Commercial Seating*, 85 P.3d at 622 (ALJ did not abuse discretion by imposing sanctions for employer's discovery violations). In addition, the workers' compensation rules of procedure include a sanction provision: "If any party fails to comply with the provisions of this rule and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule. However, attorney fees may be imposed only for violation of a discovery

order." Dep't of Labor & Emp't Rule 9-1(F), 7 Code Colo. Regs. 1101-3.

¶ 44 Because the statutes and regulations provide discovery sanctions in workers' compensation proceedings, C.R.C.P. 37 sanctions do not also apply here. *See Nova*, 754 P.2d at 802.

¶ 45 Our conclusion is consistent with another division of this court which previously held that C.R.C.P. 37 did *not* apply to a workers' compensation action specifically because the Act already provides for sanctions. "In light of pertinent statutes, we conclude that C.R.C.P. 37 does not apply here. . . . Had sanctions been imposed here, they would properly have been imposed under the statutory authority granted the Panel and not C.R.C.P. 37." *Nova*, 754 P.2d at 802. Thus, because discovery sanctions are available under the statutes and rules governing workers' compensation actions, C.R.C.P. 37 does not apply.

E. Sequestration of Dr. Macaulay

¶ 46 Claimant next contends that the ALJ committed reversible error by permitting Dr. Macaulay to remain in the courtroom during the hearing. Claimant argues that Dr. Macaulay should have been subject to the ALJ's sequestration order and that the ALJ's failure

to enforce the order as it pertained to Dr. Macaulay caused him "great prejudice" and was "devastating to his claim." We disagree.

¶ 47 C.R.E. 615 states as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

The rule is intended "to prevent a witness from conforming his testimony to that of another and to discourage fabrication and collusion." *Martin v. Porak*, 638 P.2d 853, 854 (Colo. App. 1981). Failure to sequester a witness rises to the level of a reversible error only when the challenging party establishes that "the error constitutes sufficient prejudice to amount to an abuse of discretion." *Id.*

¶ 48 Dr. Macaulay testified after hearing claimant's witnesses. He opined that there "is a good chance that [claimant] will have significant medical improvement and can go back safely into the work place." He qualified his opinion, though, with the statement

that claimant's psychological and psychiatric conditions should first be fully evaluated and that claimant's return to the workforce was likely dependent on the extent to which psychological factors contributed to his pain condition. Dr. Macaulay, as well as other Denver Water witnesses testified that claimant "could work in the sedentary to light category."

¶ 49 Although sequestration would have averted this concern, we do not see any indications that the failure to do so affected the ALJ or prejudiced claimant with regard to the outcome. The ALJ's findings and conclusions of law referred to the testimony Mr. Hartwick, Denver Water's vocational rehabilitation expert, several times and relied on that testimony to significant extent. In contrast, the ALJ recounted Dr. Macaulay's past treatment of claimant from 1998 through April 2012 as well as Dr. Macaulay's medical evaluations of claimant's medical condition. Just one paragraph of the ALJ's findings of fact mentions an opinion Dr. Macaulay may have expressed about the causality of claimant's injury, his ability to work, or his need for work restrictions. The ALJ's legal conclusions do not refer to Dr. Macaulay's testimony at all.

¶ 50 Thus, to the extent that it would have been preferable for the ALJ to exclude Dr. Macaulay from the courtroom when claimant's witnesses testified, given the ALJ's extensive reliance on Mr. Hartwick's testimony, we conclude that Dr. Macaulay's testimony did not prejudice claimant with regard to the outcome of the case. As a division of this court noted, "'All effective evidence is prejudicial in the sense that it is damaging to the party against whom it is being offered.' . . . [But] such evidence is only excluded where it has 'some undue tendency to suggest a decision on an improper basis, commonly an emotional basis, such as bias, sympathy, hatred, contempt, retribution, or horror.'" *People v. Cardenas*, 2014 COA 35, ¶ 52 (quoting *People v. Fasy*, 813 P.2d 797, 800 (Colo. App. 1991), *rev'd on other grounds*, 829 P.2d 1314 (Colo. 1992)).

¶ 51 Given these facts and circumstances, we cannot say that Dr. Macaulay's presence in the courtroom caused claimant sufficient prejudice, if any, "to amount to an abuse of discretion." *Martin*, 638 P.2d at 854. Accordingly, claimant has not met his burden of establishing that the ALJ abused his discretion by permitting Dr. Macaulay to remain in the courtroom.

F. Reliability of Dr. Macaulay's Testimony under Shreck

¶ 52 Claimant contends that Dr. Macaulay did not meet *Shreck*'s criteria for reliability and therefore should have been barred from testifying. Specifically, he argues that "the *Shreck* standard for allowing expert testimony cannot be met when an expert has not provided an opinion prior to hearing." As we understand claimant's argument, because Denver Water did not provide a pre-hearing report outlining Dr. Macaulay's opinions, his testimony should have been excluded as non-compliant with *Shreck*. We disagree.

¶ 53 Under *Shreck*, scientific evidence must be "both reliable and relevant." *Shreck*, 22 P.3d at 77. "In determining whether the evidence is reliable, a trial court should consider (1) whether the scientific principles as to which the witness is testifying are reasonably reliable, and (2) whether the witness is qualified to opine on such matters." *Id.*

¶ 54 "Trial courts are vested with broad discretion to determine the admissibility of expert testimony under CRE 702, and the exercise of that discretion will not be overturned unless manifestly erroneous." *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002). Here, Dr. Macaulay treated claimant for prior injuries, saw claimant

at least once for the injury at issue here, and is, indisputably, a qualified medical doctor with knowledge of the kind of injury claimant sustained. We therefore find no "manifest error" in the ALJ's determination that Dr. Macaulay was qualified to testify and that his medical opinions were sufficiently reliable. *Id.*

¶ 55 Moreover, contrary to claimant's premise, *Shreck* does not expressly mandate that an expert's opinion be disclosed prior to hearing. And the majority opinion in *Venalonzo v. People*, 2017 CO 9, ¶ 50, upon which claimant relies for the proposition that *Shreck* "requires that evidence be available prior to hearing" does not cite to *Shreck*. Instead, the only citation to *Shreck* anywhere in *Venalonzo* is in the special concurrence, and then only for the general proposition that opinions should be based on "reliable science or expertise." *Venalonzo*, ¶ 68. Claimant consequently has not offered any direct support for his claim that *Shreck* mandates prior release of an expert's opinion, and we are unaware of any such rule.

¶ 56 Accordingly, the ALJ did not abuse his discretion when he allowed Dr. Macaulay to testify. *See Shreck*, 22 P.3d at 77.

G. Rebuttal Testimony of Sherry Young

¶ 57 Claimant next contends that the ALJ committed reversible error by barring the testimony of his rebuttal witness, Sherry Young. As set out above, though, the ALJ enumerated at least six reasons why he was barring Ms. Young's testimony, any one of which, standing alone, constitutes grounds for barring the testimony. Indeed, a review of Dr. Macaulay's opinions against claimant's offer of proof in support of Ms. Young's testimony reveals that her testimony would not directly rebut anything Dr. Macaulay said.

¶ 58 More importantly, though, "[t]he admission of rebuttal testimony is within the sound discretion of the ALJ and will not be disturbed absent an abuse of that discretion." *Rice v. Dep't of Corr.*, 950 P.2d 676, 681 (Colo. App. 1997); *see also Youngs*, ¶ 45 (ALJ has "discretionary authority to control the proceedings and to make evidentiary decisions"). Given the ALJ's thorough consideration of Ms. Young's proposed testimony and the many reasons he stated for barring her testimony, we simply cannot say that the ALJ abused his discretion by prohibiting Ms. Young from testifying. *Id.*

H. ALJ's Rulings Were Not Arbitrary and Capricious and Therefore Did Not Violate Due Process

¶ 59 Claimant also asserts that the ALJ's evidentiary rulings — specifically permitting Dr. Macaulay to testify — "amount[ed] to a constitutional violation of the due process clause which guarantees a fair and impartial tribunal." Essentially, claimant refers to his evidentiary grievances collectively and contends that they demonstrate the ALJ's bias against him in violation of the due process clause. We are not persuaded.

¶ 60 "The fundamental requisites of due process are notice and the opportunity to be heard by an impartial tribunal." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). "The essence of procedural due process is fundamental fairness." *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 150 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *see also Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009) (Due process "requires fundamental fairness in procedure.").

¶ 61 Contrary to claimant's assertion, we cannot say that the evidentiary rulings that constituted due process violations. The

hearing lasted two full days, during which claimant, his primary physician, and his retained vocational rehabilitation specialist all testified. Claimant also cross-examined Denver Water's witnesses and called Denver Water's manager of health care and benefits as a rebuttal witness. Most of claimant's exhibits, including pleadings, medical records, and reports, were admitted. And, the ALJ offered claimant the opportunity to depose Dr. Macaulay after the first hearing to alleviate any potential prejudice created by his testimony. Although some evidentiary rulings were not in claimant's favor, adverse rulings by themselves do not violate the due process clause's guarantee of impartiality. *See In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007) ("Adverse rulings, standing alone, do not constitute grounds for claiming bias or prejudice."); *Riva Ridge Apartments v. Robert G. Fisher Co.*, 745 P.2d 1034, 1037 (Colo. App. 1987) ("The rulings of a judge, even if erroneous, numerous, and continuous are not sufficient in themselves to show bias or prejudice.").

¶ 62 We therefore conclude that the ALJ did not violate claimant's right to due process.

I. Substantial Evidence Supports the ALJ's Findings

¶ 63 Underlying claimant's contentions is the assumption that excluding Dr. Macaulay's testimony and permitting Ms. Young to testify would have swung the pendulum in his favor, resulting in an award of PTD benefits. And, certainly, claimant's physician, Dr. LaFontano, and his vocational rehabilitation specialist, Ms. Shriver, testified unequivocally that claimant could not work in any capacity.

¶ 64 However, testimony and evidence other than Dr. Macaulay's opinions weighed heavily in Denver Water's favor. Notably, Denver Water's vocational rehabilitation specialist, Mr. Hartwick, contradicted Ms. Shriver's opinion and stated claimant could work in a light sedentary capacity. He also detailed inconsistencies and deficiencies he perceived in Ms. Shriver's opinion, including (1) the lack of any medical records corroborating her conclusion that claimant could not use his hands; (2) not having claimant wear his reading glasses while testing his near-vision; and, (3) reporting that claimant should not drive even though he frequently drives and is not medically restricted from driving.

¶ 65 The ALJ found Mr. Hartwick credible and persuasive and expressly credited his testimony over Ms. Shriver's. We may not set aside a ruling dependent on witness credibility unless the witness's testimony is "overwhelmingly rebutted by hard, certain evidence" to the contrary. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *see also 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). And, so, because substantial evidence supports the ALJ's factual findings and credibility determinations, we may not set them aside. *Id.* at 414.

VI. Conclusion

¶ 66 The Panel's order is affirmed.

JUDGE DUNN and JUDGE TOW concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-961-870-03

IN THE MATTER OF THE CLAIM OF:

JASON BAUM,

Claimant,

v.

FINAL ORDER

UNITED AIRLINES,

Employer,

and

SELF-INSURED,

Respondent.

The claimant appeals the Director's order dated August 16, 2017 and the Director's supplemental order dated October 20, 2017, granting United Airline's (United) motion for summary judgment concluding that the phrase "other similar benefits" in §8-42-124(2)(a), C.R.S., does not include Occupational Injury Leave (OIL) benefits described in the Collective Bargaining Agreement between United Airlines and the International Association of Machinists Union. The claimant also appeals the Director's May 11, 2018, final order based on the parties' stipulation. We affirm the Director's orders.

The following facts are not in dispute. United operates a wage continuation plan pursuant to §8-42-124 (2) (a), C.R.S. Under this statute, a self-insured employer is entitled to a credit against its liability for benefits because it continued to pay the claimant a sum in excess of the temporary total disability benefits prescribed by the Act, so long as the employer "has not charged the employee with any earned vacation leave, sick leave, or other similar benefits." *See Denver City and County of Denver v. Industrial Claim Appeals Office*, 107 P.3d 1019 (Colo. App. 2004)

United's plan is governed by a Collective Bargaining Agreement which provides for "Occupational Injury Leave" (OIL) to be accrued by employees at the rate of eight hours per month. The accrued leave defines the period for wage continuation. So long as

an employee has accrued OIL they continue to receive full wages. Once the OIL is exhausted, the employee begins to receive temporary disability benefits and participation in the wage continuation program is terminated.

In this case, the claimant sustained an admitted injury causing temporary total disability on September 8, 2014. United filed a General Admission of Liability admitting for temporary disability benefits, subject to United's wage continuation plan. The claimant has no discretion on accessing the OIL and may only do so when United has either admitted liability for the claim or the claim has been deemed compensable following litigation. The claimant received full pay under the OIL plan from September 8, 2014 to June 18, 2015. During this time United claimed credit for $33,949.49 in temporary disability benefits, (the amount the claimant would have been paid if not for OIL). During the time period between September 8, 2014 and June 18, 2015, the claimant's OIL was used up at 40 hours per week. The OIL was exhausted on June 18, 2015 and the claimant then began receiving temporary disability benefits. The claimant continued to receive $48,944.49 in temporary disability benefits until he was placed at maximum medical improvement on September 25, 2016.[1]

United filed a Final Admission of Liability on May 3, 2017, admitting for $82,895.50 in temporary disability benefits. United also admitted for a two percent whole person impairment rating pursuant to a stipulation of the parties. United asserted that the statutory cap on indemnity benefits in §8-42-107.5, C.R.S., applied and there was no payment of permanent partial disability benefits and United reserved the right to recoup the overpayment of temporary disability against future benefits owed.

The claimant timely objected and filed an application for hearing endorsing the issue of temporary disability benefits for September 8, 2014, through June 17, 2015, the period of time the claimant was paid OIL, and challenging the application of the statutory cap to the extent that this period of temporary disability was included in the calculations. The claimant contended that he is owed temporary total disability and OIL for the same period of time and that OIL benefits should not be applied to the statutory cap in §8-42-107.5., C.R.S.

[1] The Collective Bargaining Agreement provides that once the OIL is exhausted, accrued sick leave can be converted to OIL. The claimant disputed United's right to offset this amount against temporary disability benefits. *City and County of Denver v. Industrial Claim Appeals Office*, *supra.* The parties subsequently entered into a stipulation dated May 11, 2018, to resolve this issue. Under the stipulation United reinstated the claimant's sick leave and paid additional temporary disability benefits so that the final Admission of Liability now accurately reflects the correct amount of temporary disability. The parties agreed that the temporary disability paid is accurate in the General Admission.

United filed a motion for summary judgment contending that it has a valid wage continuation program, the claimant's earned benefits were not impaired under the wage continuation program and that the OIL benefits paid pursuant to the wage continuation plan count towards the statutory cap.

The claimant filed a response and a cross motion for summary judgment. The claimant disagreed that United had a valid wage continuation plan approved by the Director. The claimant asserted that, as a matter of law, the claimant's earned OIL is a similar benefit when compared to sick leave and vacation leave and, therefore, United cannot use the earned OIL in lieu of payment of temporary total disability and take credit against the statutory benefit cap.

The Director issued an order on August 16, 2017, granting United's motion for summary judgment and determining that OIL is not a "similar benefit" to sick and vacation leave. The Director was not persuaded to characterize OIL as a similar benefit simply because it is accrued at the same rate as sick leave. The Director instead found it significant that OIL can only be used after a legal determination is made and requires medical certification. The Director further found a valid wage continuation policy in place and determined that the respondents correctly took credit for the OIL against the statutory cap.

The claimant appealed the Director's Order again asserting that there was not a valid wage continuation plan in place and that United could not take credit for temporary total disability benefits against the cap while he was receiving OIL because OIL is a similar benefit to sick and vacation leave. The claimant also asserted his due process rights has been violated.

The Director issued a Supplemental Order on October 20, 2017. The Director determined that the phrase "similar benefit" in §8-42-124 (2)(a), C.R.S. is not ambiguous and these words should be given their plain and ordinary meaning. The Director reasoned that sick leave and vacation leave are accessible at the employee's discretion, are earned and redeemed for the employees benefit. While OIL is also earned, OIL is only available when there is a compensable workers' compensation claim and the employee has no discretion in using these benefits. The Director again rejected the claimant's assertion that the mere fact that types of leave are earned made them "similar benefits" for purposes of §8-42-124(2), C.R.S. The Director also further elaborated on his findings that United had a valid wage continuation plan in place and noted that he did not have jurisdiction to address the claimant's facial constitutional challenge.

The parties subsequently entered into a stipulation to resolve the issue of converted sick leave, penalties and interest and stipulated facts of issues on appeal. The stipulation was approved by the Director on May 11, 2018.

The only issue the claimant now appeals is that the Director erred in his determination that OIL is not "other similar benefits" under §8-42-124(2) and, therefore, he is entitled to is entitled to both OIL and temporary total disability benefits for the period of September 8, 2014, through June 17, 2015. The claimant further asserts that because the claimant did not receive temporary disability for this time period, the OIL benefits should not have been credited against the statutory benefit cap. We are not persuaded that the Director erred.

We note initially that the claimant has attached a document labeled as exhibit 5 to his Brief in Support of Petition to Review. This document was not presented below and consequently, we do not consider it now on review. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995) (appellate review limited to the record before the ALJ).

Summary Judgment is appropriate where there are no disputed issues of material fact. C.R.C.P 56; *Nova v. Industrial Claim Appeals Office,* 754 P.2d 800 (Colo. App. 1988)(Colorado Rules of Civil Procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. In the context of summary judgment, we review the Director's legal conclusions *de novo. See A.C. Excavating v. Yacht Club II Homeowners Association,* 114 P.3d 862 (Colo. 2005). Pursuant to § 8-43-301(8), C.R.S., we have authority to set aside the Director's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

Section 8-42-124(2)(a) provides as follows:

> Any employer who is subject to the provisions of articles 40 to 47 of this title and who, by separate agreement, working agreement, contract of hire, or any other procedure, continues to pay a sum in excess of the temporary

> total disability benefits prescribed by articles 40 to 47 of this title to any employee temporarily disabled as a result of any injury arising out of and in the course of such employee's employment and *has not charged the employee with any earned vacation leave, sick leave, or other similar benefits* shall be reimbursed if insured by an insurance carrier or shall take credit if self-insured to the extent of all moneys that such employee may be eligible to receive as compensation or benefits for temporary partial or temporary total disability under the provisions of said articles, subject to the approval of the director. (Emphasis added).

The principal rule of statutory construction is that statutes should be interpreted so as to effect the legislative intent for which they were enacted. Thus, words and phrases should be given their plain and ordinary meaning, and when no ambiguity is involved it is unnecessary to resort to rules of statutory construction. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993). The phrase at issue, "other similar benefit," is not ambiguous.

Giving the term "other similar benefits" its' plain and ordinary meaning, the Director made detailed findings concerning the commonalities and differences between sick leave, vacation leave and OIL. The Director rejected the claimant's assertion that the benefits were necessarily similar because they were all earned benefits. The Director examined these benefits further and found that while vacation leave and sick leave can be used at the employee's discretion, albeit with the possibility of some employer restrictions on sick leave, OIL, in contrast, is only available when a compensable workers' compensation claim has occurred. The employee has no discretion in accessing OIL leave. We see no error in the Director's conclusions.

This distinguishing factor was also addressed by Director Whiteside in a 2005 Memorandum Order of the Director. Respondent's Motion for Summary Judgment, Exhibit D. In the 2005 Order, Director Whiteside gave the term "similar" benefits its plain and ordinary meaning according to Webster's Dictionary which defined "similar" as implying the possibility of being mistaken for each other. The 2005 order concluded that there is no possibility that OIL could be mistaken for vacation leave or sick leave because of the requirement that there be a compensable work injury before OIL is used. Although all benefits are "earned" through years of service, unlike sick leave or vacation leave, OIL is conditioned upon absence resulting exclusively from work-related illness or injury.

The claimant relies on the case of *Public Service Company v. Johnson*, 789 P.2d 487 (Colo. App. 1990) as support for his argument that OIL is a "similar benefit" for purposes of §8-42-124(2), C.R.S., because like sick leave and vacation leave, all of these benefits are earned. We disagree that this case mandates a different result.

As stated in *Public Service Co. v. Johnson, supra*, §8-42-124, C.R.S. reflects "a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits." The use of OIL is not a sacrifice of an earned benefit. The creation of OIL was a program specifically designed to pay a claimant full wages in lieu of temporary disability paid at 2/3 of the claimant's average weekly wage. Even though OIL is earned through time-in-service, the access to OIL is not "impaired by a work injury" because OIL was expressly created to be paid in the event of a work injury. Moreover, unlike sick leave and vacation leave that are gone once they are used, when OIL is depleted, United must pay the claimant temporary disability benefits according to statute.

Additionally, the terms of the Fleet Service Employee Agreement (Respondent's Motion for Summary Judgment, Exhibit B) make it clear that OIL pay will be "reduced by the amount of workers' compensation pay the employee receives from the Company's insurance carrier or the state." Respondent's Motion for Summary Judgment, Exhibit B at 21 4. Thus, in our view, OIL was designed to be paid in lieu of workers' compensation benefits and was not designed to be paid simultaneously with temporary disability benefits.

We therefore agree with the Director's conclusion that OIL is not a "similar benefit" when compared to sick leave and vacation leave for purposes of §8-42-124, C.R.S. *See Travelers Indemnity Co. v. Barnes*, 190 Colo. 278, 552 P.2d 300 (1976); *Ettelman v. State Bd. of Accounting*, 849 P. 2d 795 (Colo. App. 1992) (deference musts be given to the interpretation of the statute by the administrative agency charged to enforce the statute). Consequently, we also reject the claimant's assertion that United was not entitled to take credit against the cap for the amount of OIL paid as temporary total disability benefits.

IT IS THEREFORE ORDERED The Director's Orders dated August 16, 2017, October 20, 2017 and May 11, 2018, are affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

10/1/18 by TT .

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