COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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October Case Law Update

Presented by Judge John Sandberg and Judge Laura Broniak

This update covers COA and ICAO decisions issued from
September 16, 2019 to October 7, 2019

Industrial Claim Appeals Office

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-079-980-001

IN THE MATTER OF THE CLAIM OF:

LUIS ORDONEZ-GAMEZ,

Decedent,

ALAYNA ORDONEZ (Surviving Spouse),
EVAN ORDONEZ (Minor Child),
ELIJA ORDONEZ (Minor Child),

Decedent Dependents,

v.

FINAL ORDER

SKYWEST AIRLINES INC,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated March 20, 2019, that denied and dismissed the decedent dependents' (dependents) claim for death benefits. We reverse.

The ALJ made the following pertinent factual findings. The decedent had been a pilot for the respondent employer since 2007. At the time of his death, the decedent had resided in the State of California. The decedent was married to Alayna Ordonez, and they had two minor children from the marriage.

In mid-January 2018, the decedent traveled to Denver, Colorado to participate in the respondent employer's flight training to become a captain flying the E175 aircraft. The flight training in Denver was expected to take one and one-half to two months to complete with the claimant staying in Denver for the duration. The flight training took

place at the Flight Safety Denver Learning Center located at 6755 Yampa Street in Denver, Colorado. The training center is located west of North Tower Road between East 68th Avenue and East 67th Avenue.

As pertinent here, during his flight training, the decedent stayed at the SpringHill Suites by Marriott Denver Airport (SpringHill Suites), located at 18350 East 68th Avenue in Denver, Colorado. This hotel is located on the west side of North Tower Road.

Baylee Ladner (Ladner) also is a pilot for the respondent employer. Ladner's flight training for the respondent employer overlapped, in part, with the decedent's flight training. Ladner and the decedent partnered during flight simulator training. As pertinent here, during his flight training, Ladner stayed at the Fairfield Inn & Suites by Marriott Denver Airport (Fairfield Inn) located at 6851 Tower Road in Denver, Colorado. Similar to the SpringHill Suites, this hotel also is located on the west side of North Tower Road.

On February 14, 2018, at 10:00 p.m., the decedent and Ladner had completed the Initial Maneuvers Validation (IMV) testing halfway through their flight training. Both the decedent and Lander passed the testing. The decedent and Ladner were scheduled off work on February 15, 2018, and were to return to their flight training on February 16, 2018.

On the evening of February 14, 2018, at approximately 10:27 p.m., the decedent and Ladner ate dinner and drank beer at Ruby Tuesday. They then left Ruby Tuesday and went downtown to one or more bars to continue celebrating having passed the IMV testing.

At approximately 2:00 a.m. on February 15, 2018, the decedent and Ladner finished drinking, were picked up by a ride-sharing service, and were returned directly to the Fairfield Inn where Ladner was staying. The night auditor for the Fairfield Inn, Melissa Arciniega, testified that at approximately 2:00 a.m. on February 15, 2018, the decedent came to the front desk asking to have a new room key made as his was not working. Arciniega noted that the logo on his room key was for SpringHill Suites, not Fairfield Inn. Arciniega explained to the decedent that he was at the wrong hotel. Ladner then convinced the decedent to go up to his room as he was staying at the Fairfield Inn. Arciniega then observed the decedent at 2:00 a.m. walking as if he was intoxicated. She testified that the decedent smelled of alcohol. As a night auditor, she had observed this type of activity before. Both Ladner and the decedent then "left to go upstairs."

Then, at approximately 5:30 a.m. on February 15, 2018, Arciniega interacted with the decedent when he again asked for a room key. Arciniega again informed the decedent that he was staying at the SpringHill Suites, not the Fairfield Inn. Arciniega's written statement provides that the decedent "was drunk and he spent about twenty minutes talking to [her] about how he couldn't put a lid on the coffee cup." Arciniega informed the decedent that the SpringHill Suites was approximately two buildings away and pointed in the direction of SpringHill Suites. She observed the decedent for approximately 10 minutes, and noticed he was struggling with his coffee and unable to put the lid on his cup. Arciniega testified that the decedent still appeared very intoxicated and she was worried he might burn himself on the hot coffee. She then became distracted helping other hotel guests. Arciniega testified that she was not sure whether the decedent was trying to get to his hotel.

Around 6:09 a.m. on February 15, 2018, the decedent was crossing Tower Road away from the flight training facility and away from SpringHill Suites when a car heading southbound on North Tower Road struck the decedent, just south of Tower Road and 69th Avenue. The collision occurred while it was still dark. Emergency services transported the decedent to the University of Colorado Hospital. During attempts to stabilize the decedent's condition, a critical care doctor initiated a massive transfusion protocol. The decedent received five units of blood at 7:39 a.m. and began receiving his sixth unit of blood at 7:40 a.m. A blood sample was taken from the decedent at the hospital at approximately 7:47 a.m. Hospital records show the decedent had a blood alcohol concentration of .209 g/100 ml. The decedent died from his injuries at approximately 9 a.m.

The ALJ ultimately denied and dismissed the dependents' claim. While the ALJ held that the decedent was in travel status while in Colorado, she nevertheless found that he had engaged in a personal deviation and had not returned to the course and scope of his employment at the time of the collision. The ALJ based her determination in this regard on two bases. First, the ALJ found that when the decedent left the Fairfield Inn, he travelled east and attempted to cross Tower Road, which was in the opposite direction of the training facility and his hotel. Comparing the decedent's circumstances to those in *Bunn v. Woody's Paint*, W.C. No. 4-370-167 (May 17, 1999), the ALJ held that while the decedent had returned to his co-worker's hotel, "he never returned to his own hotel" and, therefore, the decedent remained on a "continuous personal deviation and was not in the course and scope of his employment at the time of the accident." She specifically determined as follows:

> While *Pat's Power Tongs, Inc*. held that a worker's personal deviation ends the moment he begins to return to his lodging, the facts here do not support a finding that Decedent began to return to his lodging. Decedent was not heading toward the SpringHill Inn and Suites, but rather was heading in the opposite direction. Our facts are more similar to those in *Wild West Radio*[1] and *Bunn*. While Decedent did return to his co-worker's hotel, he never returned to his own hotel. When the motor vehicle struck him, [Decedent] undisputedly was heading not towards the SpringHill Inn and Suites or Employer's' training facility. Both are located on the west side of Tower Road and neither location would require Decedent to cross Tower Road. Even if the Judge were to infer that Decedent was trying to return to his hotel by asking for a replacement room key, the facts show he decided not to head in the direction of the SpringHill Inn and Suites. These facts are similar to *Dunn* (sic), where an intention eventually to return to a hotel room is not sufficient to end the deviation and specific travel away from the hotel continues the personal deviation. Order at 8.

Second, the ALJ found that the claimant was intoxicated when he sustained his injuries, and that he was in a personal deviation at the time of the accident due to "hours of consuming alcohol." The ALJ cited to *Pacesetter Corp. v. Collet*, 33 P.3d 1230, 1234 (Colo. App. 2001) for the proposition that "in some circumstances the act of consuming alcohol, by itself, can constitute a personal deviation sufficient to remove the Decedent from the scope of employment." The ALJ specifically ruled as follows:

> The Judge finds and concludes Decedent was in a personal deviation at the time of the accident, due to hours of consuming alcohol. The ongoing consumption and resulting intoxication amounted to a continuous deviation that began starting at Ruby Tuesday with the consumption of two beers and continued up until the time of the accident. The consumption of alcohol and high level of intoxication provides no benefit to Employer and is of such a personal nature that

[1] We view the ALJ's reference to *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995) here as an inadvertent mistake. In *Wild West Radio*, the Colorado Court of Appeals affirmed the Panel's decision upholding the award of workers' compensation benefits to the claimant. The Court held that the claimant's intoxication did not prevent her from being in the scope of her employment at the time of the accident when the collision occurred within the time and place limits of employment and arose from work-related functions.

> one cannot conclude it to be within the course and scope or arise from Decedent's position as a commercial airline pilot. Order at 8.

The ALJ further held that while the dependents had argued that the decedent was heading in the wrong direction because "he was confused," the ALJ ruled that she found "no persuasive evidence to support" that argument. Instead, she found that the persuasive evidence showed the decedent had been in the location of the hotels and accident since January 12 or 13, 2018, he had been staying at the SpringHill Suites through the date of his death, and hospital staff found numerous receipts of restaurants around the area. Based on the totality of the circumstances, the ALJ concluded that the dependents had not met their burden of proving that the decedent had returned to his employment at the time of the accident.

I.

On appeal, the dependents argue that the ALJ's order is erroneous based on an incorrect legal standard. They contend that any deviation ended, as a matter of law, the moment when the decedent and Ladner got into the Uber to go back to the Fairfield Inn. We conclude that the ALJ's factual findings support the conclusion that the decedent was on travel status by the time he was involved in the collision and, therefore, he was under workers' compensation coverage.

It is well settled that an employee who is away from home on business remains under continuous workers' compensation coverage from the time of the departure until the employee returns home. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973). Under this rule of law, which is commonly referred to as travel status, the risks associated with the necessities of eating, sleeping, and ministering to personal needs while away from home are considered incidental to, and within the scope of, the traveling employee's employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995).

However, the Colorado appellate courts have held that if the traveling employee makes a distinct departure on a personal errand, then the workers' compensation coverage will cease. *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970); *Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra*. Nevertheless, the Colorado Supreme Court has explained that when the traveling employee's personal errand is concluded, then the deviation ends, and the traveling employee is again covered for workers' compensation. *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. at 543-544, 474 P.2d at 615 (claimants were on a business trip, they concluded their personal activities, and at the time they sustained injuries they were proceeding toward their lodging quarters

for the night and, therefore, they were entitled workers' compensation benefits); *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d at 8 (merely because claimant was intoxicated at time of collision did not remove her from scope of her employment when collision occurred within time and place limits of employment and arose from work-related functions); *Continental Airlines v. Industrial Commission*, 709 P.2d 953, 955 (Colo. App. 1985)("even if a brief shopping trip could be construed to be distinct departure on a personal errand, the evidence established that the injury did not occur until after claimant had concluded her shopping and was leaving the store on her way back to the hotel. Because the injury occurred after [claimant] had finished shopping, it was compensable because any 'personal errand' had been completed.").

The burden is on the employer to show that the employee made a distinct departure from the scope of employment while on travel status. *Upchurch v. Industrial Commission*, 703 P.2d 628 (Colo. App. 1985). However, whether an employee has returned to the scope of employment after a personal excursion is an issue of fact, with the burden of proof placed on the claimant. *Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra*.

Here, there can be no dispute that when the decedent was away from his home in California to participate in the respondent employer's flight training in Denver, Colorado, he was on travel status from the time of his departure. *See Silver Engineering Works, Inc. v. Simmons, supra* (employee who is away from home on business remains under continuous workers' compensation coverage from the time of departure until the return home). Additionally, the ALJ found that the decedent had engaged in a "distinct departure on a personal errand." We do not disagree with the ALJ that based on her factual findings, the decedent had engaged in a personal deviation.[2] However, where we disagree with the ALJ, is her ruling that the decedent had engaged in "a continuous deviation" and that this "continuous deviation" extended until the time of the accident. As detailed above, the ALJ based her "continuous deviation" ruling, in part, on the fact that the decedent had not returned to his own hotel. However, the fact that the decedent had returned to Ladner's hotel rather than his own hotel is not dispositive under the travel status doctrine. The travel status doctrine does not depend on which particular hotel an injured employee seeks lodging. Instead, the pertinent consideration is whether the evidence demonstrates that the personal deviation had ended at the time of the employee's injury. Here, based on the ALJ's own factual findings, we conclude that the

[2] The ALJ found the decedent's personal deviation began at the time he consumed two beers at Ruby Tuesday. Order at 8. We do not address the ALJ's ruling in this regard since the pertinent issue here is not when the personal deviation began but instead is whether the deviation had ended by the time the decedent was involved in the collision.

decedent's personal deviation had ended and the decedent had returned to travel status by the time he was involved in the collision. *See Pat's Power Tongs, Inc. v. Miller, supra; see also Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra; see also Phillips Contracting, Inc. v. Hirst, supra* (ministering to personal needs while away from home are considered incidental to, and within the scope of, the traveling employee's employment). This is supported by the ALJ's findings regarding the decedent's return to the Fairfield Inn:

> After [the claimant and Ladner] finished drinking at approximately 2:00 a.m. on February 15, 2018, Decedent and Mr. Ladner returned to Mr. Ladner's hotel, which was two buildings from Decedent's hotel. The night auditor, Melissa Arciniega, testified that Decedent and Mr. Ladner stopped by the front desk. Decedent requested a new key as his did not work. Ms. Arciniega noticed that the Decedent's key card was for the SpringHill Suites and told him he was at the wrong hotel. Decedent and Mr. Ladner left to go upstairs…. Order at 6-7.

From these findings, it can only be inferred that the claimant thought he had returned to his hotel but was mistaken in his belief. As yet further support for the determination that the decedent's personal deviation had ended by the time he was involved in the collision, the following pertinent colloquy occurred during Ladner's testimony, which the ALJ found to be credible and persuasive:

> Q Okay. So at 2 a.m., did you take an Uber back to your hotel?
>
> A I'm not sure the exact time, but yes, it – at some point we did take an Uber back to my hotel.
>
> Q Okay. So when you – did – you know, did you call the Uber or did [the decedent]? How did you guys get the Uber?
>
> A I believe that I – I believe that I ordered it on my – on my phone.
>
> Q Okay. And at that time, you guys were done for the evening and wanted to go back to the hotel, correct?
>
> A Yes, that's why we got the Uber, to go back to the – to my hotel, yes.

> Q Okay. So when you got back to the hotel, it was at Fairfield Inn, where you were staying, correct?
>
> A Yes, it was at my hotel, yes.
>
> Q And when you went into Fairfield Inn, what happened?
>
> A To the best of my knowledge, we went to my hotel room and just – we were – just continued talking, you know, and talking about our – our—whatever we were talking about. I don't – I don't recall. But I know that we – we went to my hotel room. And then, the next thing that I remember is I – I—I woke up in the morning.
>
> Q Okay. And so when you were back in your hotel room, were – were you guys, you know, sitting on chairs or laying down?
>
> A From – from what I remember, I was sitting on – I was laying on my – my bed and he was on one of the chairs in the room, because there were two. He might—it's a desk chair, from what I remember.
>
> Q Okay. And then, you went to sleep?
>
> A Yes. Tr. at 59-60; Order at 3 ¶25.

Similarly, the ALJ found credible Arciniega's testimony that when the decedent and Ladner had returned to the Fairfield Inn, they stopped by the front desk, and the decedent requested a new key as his did not work. When Arciniega noticed that the decedent's key card was for the SpringHill Suites and told him he was at the wrong hotel, that is when the decedent and Ladner left to go upstairs to Ladner's room. Order at 6-7.

Thus, the ALJ's factual findings support the conclusion that by the time the decedent was involved in the collision, his personal deviation had ended. That is, the decedent had ended his drinking, he and Lander had called for an Uber to return them to the Fairfield Inn, and the decedent had returned to lodging in Ladner's hotel room. *See Pat's Power Tongs, Inc. v. Miller, supra; Continental Airlines v. Industrial Commission, supra; Wild West Radio, Inc. v. Industrial Claim Appeals Office, supra; Phillips Contracting v. Hirst*, 905 P.2d at 12 ("once the errand is completed and the employee has returned to a normal travel routine, he is once again under continuous workers' compensation coverage").

Moreover, we do not view *Bunn* as dictating a contrary result. In *Bunn*, the ALJ found that the employer required the claimant to travel from his home in Greeley, Colorado, to a remodeling jobsite in Steamboat Springs, Colorado. Because the job required the claimant and his coworkers to remain overnight, the employer provided two motel rooms. While working, the claimant became acquainted with Dallas Sims, an employee of another subcontractor. The ALJ found that the claimant agreed to "go out on the town" with Sims after work. Between 7 p.m. and 8 p.m., the claimant and Sims drove up to the motel and offered a coworker some beer. The coworker noted that the claimant was having difficulty driving his vehicle and appeared to be intoxicated. The claimant then departed with Sims. Later that evening, the claimant parked his vehicle at Sims' cabin, which was located three to four miles northwest of Steamboat. The claimant and Sims then left the cabin and began driving around in a truck. The claimant testified that Sims drove into the mountains so the claimant could see the lights of Steamboat. At approximately 12:20 a.m., the claimant and Sims stopped at a 7-11 where they attempted to buy beer, but they were unsuccessful because of the late hour. They then proceeded north away from town and the claimant's motel, but in the general direction of Sims' cabin. The claimant testified that he intended to return to the cabin, pick up his car, and drive back to the motel. However, Sims rolled the truck and the claimant was seriously injured.

The ALJ concluded that, although the claimant was in "travel status," he departed from the course of his employment on a personal errand, and the errand had not ended at the time of the injury. The ALJ found that at the time of the accident, the claimant was heading back to the cabin to get his car and return to the motel. However, the ALJ was unpersuaded that this fact established an end to the deviation because the claimant was headed away from the motel, and had just attempted to purchase additional beer.

On appeal, the Panel held that the ALJ was not required to find that the personal deviation was over simply because the claimant was in the process of heading to the cabin to retrieve his car. As the ALJ found, at the time the accident, the claimant was not proceeding directly to his place of lodging, but was headed away from it. Moreover, the ALJ resolved conflicts in the evidence to find that shortly before the accident, the claimant and Sims attempted to purchase additional beer. The Panel held that the ALJ could logically infer from this evidence that, although the claimant was contemplating the end of the deviation, the deviation was not over at the time of the injury.

Conversely, here, and as detailed above, the ALJ found that the decedent had finished drinking at approximately 2:00 a.m. on February 15, 2018, the decedent and

Ladner had called for an Uber to return to Ladner's hotel, and the decedent and Ladner had returned to Ladner's hotel. The ALJ further found that after attempting to obtain a new key from Arciniega and Arciniega explaining that the decedent was at the wrong hotel, the decedent and Ladner left to go upstairs. While the decedent had not returned to the SpringHill Suites, he nevertheless had returned to lodging in Ladner's hotel room. *See Phillips Contracting, Inc. v. Hirst, supra* (ministering to personal needs while away from home are considered incidental to, and within the scope of, the traveling employee's employment). Consequently, we reverse the ALJ's ruling denying and dismissing the dependents' claim. *See* §8-43-308, C.R.S.

II.

The dependents further argue that the ALJ erred in ruling that the decedent's consumption of alcohol in itself is such a "personal nature" that he cannot be determined to be within the course and scope of employment. Conversely, the respondents argue that the ALJ did not rule that the consumption of alcohol alone resulted in a personal deviation. We agree with the dependents and conclude the ALJ erred in this regard.

In *Wild West Radio*, the Colorado Court of Appeals specifically addressed whether the consumption of alcohol itself can constitute a personal deviation sufficient to remove the employee from travel status. The Court rejected the argument, ruling in pertinent part as follows:

> Their argument is that, after her personal excursion, [the claimant] could not return to the scope of her employment until she attained sobriety. We do not agree that such return was not possible.
>
> Here, the ALJ found that the claimant, at the time her injuries occurred, was traveling to Steamboat Springs with the intention of appearing at a certain company for the purpose of conducting business on behalf of her employer. He concluded that, if there had been a personal deviation, such deviation had ceased and that she was acting on behalf of her employer at the time the accident occurred.
>
> The finding that claimant had returned to her employment was based on evidence that she had business appointments that afternoon, including an appointment with a specific customer, that she made a telephone call to tell that customer she was running late, that there were business papers in her car, that she was wearing business attire, and that the accident occurred on the road to the customer's location.

> This is more than sufficient evidence to support the ALJ's finding that the claimant had returned to her employment. *See F.R. Orr Construction Co. v. Rinta*, 717 P.2d 965 (Colo. App. 1985).
>
> We further note that the purpose and goal of the Workers' Compensation Act is to provide medical and disability benefits to injured workers based on a mutual renunciation of common law rights and defenses. Section 8-40-102, C.R.S. (1994 Cum. Supp.). We find no basis in either the Act or the cases construing it to engraft new principles to the concept of the scope and course of employment. We also agree with the Panel that the General Assembly has not evidenced an intent to preclude all compensation for excessive levels of intoxication. *See Harrison Western Corp. v. Claimants in re Death of Hicks*, 185 Colo. 142, 522 P.2d 722 (1974) (reduced death benefits awarded although blood alcohol level of decedent was .225%).[3]

Wild West Radio, Inc. v. Industrial Claim Appeals Office, 905 P.2d at 8-9.

Here, as detailed above, in her order, the ALJ ruled that the decedent was in a personal deviation at the time of the accident "due to hours of consuming alcohol." She specifically held that the decedent's ongoing consumption and resulting intoxication amounted to a "continuous deviation." However, as explained by the Court in *Wild West Radio*¸ Colorado's Workers' Compensation Act does not preclude an injured claimant benefits on the basis that his or her injury occurred while intoxicated. Importantly, the Court held that "the General Assembly has not evidenced an intent to preclude all compensation for excessive levels of intoxication." *Id.* Accordingly, we conclude the ALJ erred in ruling that the claimant was in a personal deviation or a continuous personal deviation "due to hours of consuming alcohol."

III.

[3] We recognize that the Colorado Court of Appeals stated in *Pacesetter Corp. v. Collett*, 33 P.3d at 1234 "that in some circumstances the act of consuming alcohol, by itself, can constitute a personal deviation sufficient to remove the claimant from the scope of employment." However, we conclude that *Pacesetter* is distinguishable because the evidence in that case supported the ALJ's conclusion that the claimant's deviation did not end prior to the accident. Conversely, here, the ALJ's factual findings support the conclusion that the decedent's personal deviation had ended by the time of the collision.

Last, the claimant argues that the ALJ erred in overruling a Prehearing ALJ's (PALJ) order *in limine* regarding the decedent's toxicology/blood alcohol levels. The claimant contends that §8-42-112.5, C.R.S. requires a duplicate toxicology sample for evidence to support an intoxication penalty, and the parties stipulated no such duplicate sample existed.[4]

The PALJ's order struck evidence of the toxicology/blood alcohol levels while focused solely on the applicability of §8-42-112.5, C.R.S. The PALJ explained that a "second sample" is a prerequisite to reduce compensation under the statute. Prior to hearing, the respondents filed a motion to strike the PALJ's order. During the hearing, the ALJ verbally reversed the PALJ and admitted evidence of the toxicology/blood alcohol levels. She specifically ruled as follows:

> When I read section 8-42-11 point. . . dash 112.5 of the Colorado Revised Statutes, which concerns limitation on payments and the use of controlled substances, I disagree with [the PALJ], and find that the presence of a second sample is only required if the Respondents are relying on the presumption of intoxication; and that in that event, a second test must be made available to the Claimant's side, and then they're able [to] rebut the presumption by clear and convincing evidence.
>
> I don't find that proof of intoxication is governed generally by this statute. Rather, a party can prove intoxication by a preponderance of the evidence, as they could prove any other issue and any other claim; and that the second sample is required only if Respondents try to avail themselves of a presumption of intoxication at a blood alcohol content level of .10 percent.
>
> So I find that the general rule of proving intoxication was the larger rule and that this statute, 8-42-112.5, carves out an exception when the responding parties are trying to rely upon the presumption of intoxication. Tr. at 6-7.

In their brief in opposition, the respondents argue that the ALJ properly admitted evidence of the toxicology/blood alcohol levels as it was material to other defenses,

[4] Prior to the hearing in this matter, the parties filed a stipulation of facts. Pursuant to this stipulation, it states that "[a] blood sample was taken while Decedent was receiving treatment at University of Colorado Hospital. No second sample of the blood was preserved." Stipulation at 2 ¶13.

including safety rule violation and personal deviation. However, in her written order, the ALJ did not mention the admissibility of the evidence as to whether a safety violation occurred. Instead, in her written order, the ALJ referenced that the personal deviation effectively continued during the duration of the claimant's purposed intoxication. To that extent, the ALJ properly admitted the evidence. However, to the extent the ALJ verbally ruled that the toxicology reports were sufficient to establish intoxication under §8-42-112.5, C.R.S., she erred.

Section 8-42-112.5, C.R.S., the provision governing the limitation of nonmedical benefits for the use of controlled substances, provides in pertinent part as follows:

> Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours . . . of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

The requirements of §8-42-112.5, C.R.S. are safeguards designed to protect an injured worker from unwarranted reductions in compensation, and their existence must be established before the presumption applies. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000).

Based on the plain language of §8-42-112.5, C.R.S., the fifty percent reduction applies only when the following factors are satisfied: (1) where the injury results from the presence in the worker's system, during working hours . . . of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests; and (2) a duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. However, here, the parties stipulated that a duplicate sample was not preserved for purposes of a

second test to be conducted. Since there was no showing that a duplicate sample was preserved and available for the dependents' testing, there can be no basis for reduction of the dependents' nonmedical benefits under §8-42-112.5, C.R.S. *See Ray v. New World Van Lines*, W. C. No. 4-520-251 (Oct. 12, 2004)("there was no showing that a duplicate sample was preserved and available for the claimant's testing. Thus, there is no basis for reduction of the claimant's compensation under § 8-42-112.5."); *see also Stohl v. Blue Mountain Ranch Boys Camp*, W. C. No. 4-516-764 (Feb. 25, 2005)("The statute does not permit proof of intoxication without preservation of a second blood test. Therefore, the respondents presented no evidence sufficient to prove intoxication."). We therefore agree with the dependents that the intoxication defense enunciated in §8-42-112.5, C.R.S. cannot be applied here. Consequently, to the extent the ALJ ruled that the toxicology/blood alcohol levels reports were admissible for proving the intoxication defense enunciated in §8-42-112.5, C.R.S., this was in error. However, the reports are conceivably relevant to the issue of the decedent's personal deviation. Thus, in this regard, we perceive no error in the ALJ's admission of the evidence.

In light of our order above, we do not address the remaining arguments raised by the dependents on appeal.

IT IS THEREFORE ORDERED that the ALJ's order dated March 20, 2019, is reversed.

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

9/10/19 by TT .

THE SAWAYA LAW FIRM, Attn: KATHERINE E MCCLURE ESQ, 1600 OGDEN STREET, DENVER, CO, 80218 (For Claimant)
LEE & BROWN LLC, Attn: JOSHUA D BROWN ESQ, C/O: WILLIAM M STERCK ESQ, 3801 E FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-073-295-002

IN THE MATTER OF THE CLAIM OF:

TED MARTINEZ,

Claimant,

v.

FINAL ORDER

CITY OF COLORADO SPRINGS,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Edie (ALJ) dated April 1, 2019, that determined the claimant sustained a compensable injury to his spine, including the resultant infection and determined the treatment the claimant received in connection therewith was reasonable and necessary. We affirm the ALJ's order.

This matter went to hearing on the issues of compensability of the claimant's injury, reasonable and necessary medical benefits, and temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant has a history of an upper gastrointestinal bleed in 2016 related to multiple gastric ulcers and in the setting of heavy alcohol use and NSAIDs. Upon discharge from the 2016 hospitalization the claimant was specifically instructed to avoid alcohol and NSAIDs. The claimant admitted at hearing that he has not stopped drinking and continues to take NSAID medications, including Aleve and Advil.

The claimant was employed for the respondent employer as an Instrumentation & Electrical Control Specialist. On March 20, 2018, the claimant returned to park his work truck at the employer's facility. The claimant got out of the truck, walked behind it to the passenger side and opened the door so he could access the equipment he needed to remove and bring with him into the employer's facility. The claimant reached in and got

his "Druck" pressure transmitter calibrator from the truck's center console. This device weighed 20-25 pounds. The claimant had the Druck in his left hand then reached over and picked up his laptop computer bag from the floor of the truck with his right hand. He then backed away from the door and tried to shut the door with his hip. When he did that, he felt a pop in the lower right side of his back.

The claimant put both pieces of equipment on the ground and closed the door. When he reached down to pick up the Druck he felt pain in the middle of his back but was able to pick up and carry the Druck and the laptop inside the building. The claimant took a single Aleve tablet. The claimant had severe back pain about two hours later and reported the injury to his supervisor.

The claimant went to the authorized treating provider, Dr. Neubauer, on March 26, 2018. Dr. Neubauer noted that the claimant had been self-treating with Aleve but it was not helping his pain. Dr. Neubauer referred the claimant to physical therapy but the claimant did not attend any sessions before the next appointment with Dr. Neubauer on April 4, 2018. In this examination Dr. Neubauer noted referred pain but no sensory deficit and normal strength in the upper and lower extremities. Dr. Neubauer diagnosed the claimant with a muscle strain related to work activities and prescribed ibuprofen, physical therapy, and imposed work restrictions.

On April 11, 2018, the claimant was admitted to St. Francis Hospital due to an upper gastrointestinal bleed. The claimant was diagnosed with a brisk upper gastrointestinal bleed, likely secondary to peptic ulcer disease in the setting of resumption of alcohol intake and NSAID use. There was no obvious cause of sepsis or infection noted at this time. The claimant was again counseled to avoid NSAID's and quit alcohol indefinitely.

The claimant went to his personal physician, Dr. Robertson, on April 23, 2018 with complaints of back pain. Dr. Robertson referred the claimant to Dr. Sung. The claimant saw Dr. Sung's assistant, Mr. Falender PA-C, on April 25, 2018. X-rays of the spine showed diffuse degenerative changes with osteophytes from the mid-thoracic to the upper lumbar spine. Mr. Falender recommended physical therapy.

The claimant was admitted to the emergency room on May 8, 2019, for unrelenting back pain. The notes from the emergency room indicated that the claimant had severe mid-back pain which was progressively worsening. The social history on the admission form indicated that the claimant self-related that he was typically drinking 21 cans of beer and seven standard drinks per week.

Dr. Peter Brookmeyer, an infectious disease specialist, evaluated the claimant in the hospital on May 9, 2018. Dr. Brookmeyer reported that the claimant had progressively worsening back pain since his discharge from the upper GI bleed. A CT Scan showed discitis and osteomyelitis of the spine at T9-10 and L3-L4. The claimant was noted to have strength in his lower extremities and blood cultures were negative at this point.

On May 11, 2018, a blood culture showed the presence of the staphylococcus lugdunensis bacteria (staph infection). Photographs on May 13, 2018, showed no open wounds on the claimant's lower extremities. Dr. Brookmeyer reported that organism in the blood was the likely causative organism. The claimant refused a biopsy to confirm the causative organism. Dr. Brookmeyer also noted that the claimant felt better and the inflammation markers were improving. On May 22, 2018, the claimant was discharged to Terrace Gardens acute rehabilitation. The discharge report notes that the source of the infectious culprit was at the claimant's bilateral lower extremity venostasis ulcerations. The claimant later moved to Healthcare Resort and stayed there until June 5, 2018, when he was re-admitted emergently to Penrose Hospital.

Dr. Serak, at Penrose, noted that the claimant continued to have severe pain and was losing function in his lower extremities. An MRI revealed severe stenosis and an epidural abscess at T9-10 and L3-4. A laminectomy and foraminotomy for decompression was performed on June 7, 2018. On June 9, the claimant underwent surgery for evacuation of a hematoma at L3-4. The claimant was left with the complete inability to move his lower extremities. The claimant was eventually discharged to Capron Rehabilitation on June 18, 2018, and stayed there until September 2018.

Dr. Brookmeyer testified by deposition in this matter. In Dr. Brookmeyer's opinion the claimant had a transient blood infection that landed or seeded in the claimant's back. Dr. Brookmeyer stated that his group has noted that there seems to be a correlation between somebody getting injured and subsequently developing infection in that area. The group's "hypothesis" or thought is that if you sustain an injury in the area, that area becomes inflamed with increased blood flow and probably increases the risk of that area being infected.

According to Dr. Brookmeyer, the claimant's infection started in the days prior to the hospital admission in April and was partially attenuated by the ceftriaxone that he received during the hospitalization. Dr. Brookmeyer testified that the likely theory is that

there was a skin source of the bacteria that got into the claimant's blood but that the work injury to the spine made it more likely that the spine was seeded with the infection.

The respondent expert, Dr. Mogyoros, offered two theories for the claimant's spinal infection. The first was that the spine infection was present at the time of the work injury and when the claimant bent down the twisting motion caused the previously infected and inflamed muscle to spasm and essentially unmasked the pre-existing infection. Dr. Brookmeyer discounted this theory because the claimant's staph infection was an aggressive bacteria that typically becomes symptomatic very early and the claimant had no pain, fever or chills prior to his spine injury.

Dr. Mogyoros' alternative theory was that the spine was seeded after the work injury and is not related to the events of March 20, 2018, or the subsequent GI bleed. Dr. Mogyoros stated that there is nothing in the records that suggests a connection between the lower extremity cellulitis and the prior work injury and subsequent GI bleed. Dr. Brookmeyer believed this to be the more likely scenario but maintained his opinion that the work injury made it more likely that the staph infection seeded in the spine.

The ALJ was not persuaded by Dr. Mogyoros' first theory because there was no evidence that the claimant had any sort of spine infection prior to the March 20, 2018 date of injury. The ALJ found Dr. Mogyoros' second theory at least partially persuasive, that the onset of the cellulitis likely occurred between April 11 and May 8 and it was possible that during this period the aggressive pathogen entered the claimant's body, seeded the spine, and began the destruction of the claimant's T9-10 and L3-4 regions.

The ALJ also was persuaded by Dr. Brookmeyer's testimony that there was a connection between the work injury and the infection because the injury caused the vertebrae to become inflamed and consequently the vertebrae were more receptive to allow the spread of the pathogens.

The ALJ concluded that the claimant's blood became infected through his skin when the skin lesions were first noticed by medical personnel sometime between April 11 and May 8, which was after the industrial work injury. The ALJ further concluded that the injury created the conditions conducive to the seeding of the inflamed areas by the staph infection which caused lasting damage to the claimant's spine. The ALJ therefore determined that the injury and resultant infection are compensable.

The ALJ also determined that the respondents were liable for the Penrose hospitalizations because they were reasonable, necessary and related to the work injury.

The ALJ found that the upper GI bleed treated on April 11, 2018, was not related to the work injury, nor was it the likely cause of the entry of the staph infection into his bloodstream.

The ALJ also awarded temporary total disability benefits beginning May 8, 2018, and continuing.

On appeal the respondent contends that the findings of fact are not sufficient to support the ALJ's determination that the claimant established that the staph infection and treatment are compensable. The respondent argues that the ALJ erred by not addressing whether the staph infection arose from or occurred within the course of the claimant's employment and that the ALJ erred in finding that the claimant's need for treatment was reasonable, necessary and related to the claimant's work injury. We perceive no error in the ALJ's order.

It is well established that the claimant bears the burden to prove his entitlement to benefits. *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). To sustain his burden, the claimant was required to prove that his symptoms are the "proximate and natural consequence" of an industrial injury. *See Vanadium Corporation of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (Colo. 1957). When an industrial injury leaves the body in a weakened condition and the weakened condition causes additional physical injury, the additional injury may be considered the result of the industrial injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *see also Subsequent Injury Fund v. Industrial Claim Appeals Office*, 131 P.3d 1224 (Colo. App. 2006). An industrial injury is the "proximate cause" of a subsequent disability if it is the "necessary precondition or trigger of the disability." *Subsequent Injury Fund v. State Compensation* Insurance Authority, 768 P.2d 751 (Colo. App. 1988).

The question of whether the claimant suffered an industrial injury which left his back in a weakened condition and whether the weakened condition is the proximate cause of the claimant's current symptoms is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence or inferences. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). Accordingly, where the ALJ's pertinent findings are

supported by the record, the mere existence of evidence in the record which, if credited, might support a contrary determination, does not afford us a basis to grant relief. *See F.R. Orr Construction v. Rinta, supra.*

Under the substantial evidence standard we must review the evidence in the light most favorable to the prevailing party, and accept the ALJ's resolution of conflicts in the evidence, as well as the plausible inferences which he drew from the evidence. *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *Metro Moving & Storage Co. v. Gussert, supra.* This standard also affords the ALJ broad discretion in assessing the weight and sufficiency of the evidence, and we may not disturb the ALJ's credibility determinations unless there is hard, certain evidence directly contrary to the testimony which the ALJ found credible. *See Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

Here, relying on Dr. Brookmeyer's testimony, the ALJ found the claimant proved a causal connection between the March 20, 2018, industrial injury and the seeding of the staph infection. The ALJ concluded that the work injury created the conditions conducive to the seeding of the inflamed areas by the staph infection which caused lasting damage to the claimant's spine. The respondent contends that the ALJ "completely overlooked the overwhelming evidence that established that neither the March 20, 2018, work incident nor the claimant's employment with Colorado Springs Utilities caused or contributed to claimant's contraction of the staph infection." We disagree.

The ALJ's legal analysis is consistent with applicable standards for situations in which it is alleged that the claimant's weakened condition from an initial injury caused a subsequent injury. A subsequent injury may be compensable where it is found to have resulted or "flowed" from an original work injury. *See Standard Metals Corp. v. Ball, supra* (refractured leg compensable where causal connection exists between original leg injury and subsequent refracture). Additional injuries that result from a claimant's weakened condition caused by an initial injury are compensable because they are the natural, albeit not necessarily the direct, result of the first injury. *Id.*

In *Standard Metals Corp. v. Ball*, the claimant's right leg was fractured in an admitted accident in the course of his employment. Thereafter, the claimant underwent corrective surgery, including a bone graft. Fourteen months later, the claimant slipped and fell on an icy sidewalk, refracturing his right leg. The medical testimony in that case showed that the second fracture probably would not have occurred except for the

weakened condition of the bone and the weakened musculature of the leg caused by the initial fracture and resulting surgery. The ALJ found that there was a causal connection between the second fracture and the original compensable injury, and the award of benefits for the second fracture was upheld by the Colorado Supreme Court. As the Supreme Court noted, "Once the injury is determined to have arisen out of and during the course of claimant's employment obviously the results flowing proximately and naturally therefrom come under the aegis of the statute." *Standard Metals Corp. v. Ball*, 172 Colo. at 515, 474 P.2d at 625.

Thus, a second injury stemming from a weakened condition due to an original injury may be found to be causally related to the earlier injury and compensable. *See Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1086 (Colo. App. 2002) (holding worsened condition as result of litigation stress not compensable and observing that "chain of causation" analysis limited to case in which industrial injury leaves body in a weakened condition, which plays causative role in subsequent injury); *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992) (in placing burden on employer to prove contribution of non-industrial condition to disability from occupational disease, court noted employer responsible for increased disability from pre-existing weakened condition).

The ALJ credited Dr. Brookmeyer's testimony that if the claimant did not have the work injury, the odds of the claimant developing this infection would have been substantially less likely. Dr. Brookmeyer depo. at 35. It is clear from the ALJ's order that he properly considered whether the claimant's prior industrial injury was causally related to his subsequent staph infection. *See Employers Fire Ins. v. Lumbermens Mut.*, 964 P.2d 591, 593 (Colo. App. 1998) (observing that if second injury results from weakened condition, question is "simply one of causation").

The respondent also contends that Dr. Brookmeyer's testimony is not substantial evidence because Dr. Brookmeyer testified that his theory of how the claimant's spine infection occurred was an "unproven and unsubstantiated hypothesis." We perceive no error in the ALJ's reliance on Dr. Brookmeyer's opinion and testimony.

Dr. Brookmeyer testified that the work injury resulted in inflammation which then caused the claimant's spine to become hyper-vascularized and that this increased blood flow is what attracted the bacteria and allowed it to seed and develop into an infection. The disputed evidence was based on Dr. Brookmeyer's professional experience and personal observation. Thus, the disputed evidence is not "novel scientific" evidence of the type that could be deemed inadmissible. *See Frye v. United States*, 293 F. 1013 (D.C.

Cir. 1923); *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Rather, this is a case where the ALJ had to determine whether Dr. Brookmeyer had sufficient knowledge, skill, experience, training or education to render an expert medical opinion on the cause of the staph infection and then determine the weight to give this testimony. As was his prerogative, the ALJ found Dr. Brookmeyer's opinion credible and more persuasive than the opinion of the respondent's medical expert.

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In fact, the finding of a compensable injury may be upheld where the exact medical cause of the injury remains shrouded in mystery, but the circumstantial evidence as a whole is sufficient to justify the inference that it was work-related. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

However, to the extent medical testimony is presented it is the ALJ's province to assess its weight and credibility. *Rockwell International v. Turnbull*, *supra*. Insofar as the medical testimony is subject to conflicting interpretation, we are bound by the ALJ's resolution of those inconsistencies and the plausible inferences the ALJ drew from the conflicts. *Wierman v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941) (ALJ considered to possess expert knowledge which renders him competent to evaluate medical evidence and draw plausible inferences from it); *Metro Moving & Storage Co. v. Gussert*, *supra.*

The respondent's argument notwithstanding, the record contains substantial evidence to support the ALJ's finding of a causal relationship between the work-related injury and the claimant's spine infection. It follows that the ALJ's determination that the medical benefits to treat the claimant's infection were reasonable, necessary and related is also supported by substantial evidence. We, therefore, have no basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order is dated April 1, 2019, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris A. Sanko

CERTIFICATE OF MAILING

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

9/12/19 by TT .

TURNER ROEPKE & MUELLER LLC, Attn: ROYCE W MUELLER ESQ, 1259 LAKE PLAZA DR SUITE 260, COLORADO SPRINGS, CO, 80906 (For Claimant)
RUEGSEGGER SIMONS & STERN LLC, Attn: LORI R MISKEL ESQ, 1700 LINCOLN STREET SUITE 4500, DENVER, CO, 80203 (For Respondents)

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-063-000-002

IN THE MATTER OF THE CLAIM OF:

JEFFREY BUTLER,

Claimant,

v.

FINAL ORDER

AT&T,

Employer,

and

SEDGWICK CLAIMS MANAGEMENT SERVICES INC,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Turnbow (ALJ) dated March 11, 2019, that awarded the claimant disfigurement benefits. We affirm.

This matter went to hearing on March 11, 2019, on the claimant's application for permanent disfigurement benefits under §8-42-108, C.R.S. The record discloses that the Notice of Disfigurement Hearing was sent to counsel for the parties. The respondents did not appear at the hearing.

After the hearing, the ALJ entered an order finding that as a result of the claimant's November 14, 2017, work injury, he suffered a visible disfigurement to the body consisting of bilateral nystagmus and having to wear dark glasses when exposed to any light. The ALJ determined that the claimant sustained a permanent disfigurement to areas of the body normally exposed to public view and ordered the respondents to pay the claimant $4,500 for his disfigurement.

The respondents file a petition to review the ALJ's order.

Initially, we note that the respondents have attached documents to their brief in support of the petition to review. However, we may not consider the attached documents submitted by the respondents which were not part of the record before the ALJ. Our

review is restricted to the record before the ALJ, and the documents and factual assertions made on appeal by the respondents may not substitute for evidence which is not in the record. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995) (appellate review limited to the record before the ALJ); *see also Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988).

On appeal, the respondents argue that they were denied due process of law by the ALJ's award of disfigurement benefits based on an "undiagnosed medical condition." The respondents reason they had no notice that the claimant's "bilateral nystagmus" would be under consideration for purposes of a disfigurement award. The respondents further argue that at the hearing, the ALJ stated she was going to do research prior to issuing her order. The respondents contend on appeal that they were not given an opportunity to submit position statements and/or additional evidence in response to the ALJ's decision to take the matter under advisement. We perceive no error.

Here, as noted above, the respondents did not appear at the March 11, 2019, hearing to raise their due process argument or to request a continuance to a later date to present additional evidence regarding the alleged undiagnosed medical condition. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 884 P.2d 1131 (Colo. App. 1994) (because issue was not raised below, it was not preserved for review); *see also* §8-43-207(1)(j), C.R.S. (ALJ may adjourn hearing to later date for taking of additional evidence for good cause shown). Further, the respondents do not contend that they failed to timely receive a copy of the claimant's application for a disfigurement hearing or that they were otherwise prevented from attending the hearing. *See Willmott v. Ted Holstein*, W.C. No. 4-369-164 (Dec. 3, 1998) (award payable by *pro se* respondent upheld where respondent failed to appear at hearing but did not deny receiving timely notice of hearing; factual representations in brief not evidence that could be considered on appeal); *see also* OAC Rule 23. Additionally, when ruling on a petition to review, the ALJ has authority to permit the presentation of additional evidence regarding the issues or matters raised in the petition. Section 8-43-301(5), C.R.S. However, the ALJ here did not enter a supplemental order for a further hearing to permit the respondents to present such additional evidence. *See Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, 440 (Colo. App. 2003) (citing *IPMC Transp. Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988) for the proposition that the ALJ has wide discretion in the conduct of evidentiary proceedings, including the decision to permit the taking of post hearing evidence). We perceive no abuse in the ALJ's discretion in this regard. *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985). Thus, under these circumstances, we have no basis to disturb the ALJ's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued March 11, 2019, 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

9/26/19 by TT .

LAW OFFICE OF OTOOLE & SBARBARO PC, Attn: JOHN A SBARBARO ESQ, 226 WEST TWELFTH AVENUE, DENVER, CO, 80204 (For Claimant)
POLLART & MILLER LLC, Attn: MICHELLE L PRINCE ESQ, C/O: ERIC J POLLART ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

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

COLORADO COURT OF APPEALS
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DENVER, CO 80203

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-030-057-02

IN THE MATTER OF THE CLAIM OF:

JOSE RODRIGUEZ,

Claimant,

v.

FINAL ORDER

SPARBOE FARMS INC,

Employer,

and

NATIONWIDE AGRIBUSINESS INS COMPANY,

Insurer,
Respondents.

The respondents seek review of an Amended Findings of Fact, Conclusions of Law, and Order of Administrative Law Judge Cayce (ALJ) issued approximately May 23, 2018, that determined the claimant sustained a compensable right shoulder injury and ordered the respondents liable for payment of the medical treatment provided by Dr. Julie Parsons and her referrals as set forth in the claimant's exhibit 2. We affirm the order of the ALJ.

This matter was previously before us. On April 9, 2018, we reviewed an October 19, 2017, order of the ALJ. That order was remanded due to the lack of a final appealable order (an absence of a specific order to pay medical benefits). On November 13, 2018, we remanded the matter again to complete the record.[1]

This matter went to hearing on whether the claimant sustained a compensable injury to his right shoulder on October 17, 2016, and was entitled to medical benefits. The parties reserved the issues of average weekly wage (AWW), and temporary disability benefits.

[1] We were unable to locate the Amended Order referenced by the parties, among other documents. After the return of the file, and upon further examination, we note both the claimant and the respondent advise that the ALJ's Amended Findings of Fact, Conclusions of Law and Order is, in fact, in the record. The ALJ mistakenly attached to the Amended Findings a copy of the original certificate of mailing dated October 20, 2017. The parties indicate they received the Amended Findings on May 23, 2018. We therefore adopt that date as applicable to the Order under review.

After the hearing, the ALJ found that the claimant worked for the respondent employer processing eggs. The claimant previously sustained an admitted injury to his left shoulder on November 13, 2014, and he subsequently underwent left shoulder rotator cuff repair surgery. Dr. Thurston placed the claimant at maximum medical improvement (MMI) for his left shoulder on June 21, 2016, with a 10% upper extremity permanent impairment rating.

In approximately July 2016, the claimant returned to light duty work. This work involved packaging eggs. The claimant retrieved eggs from a conveyor belt located at chest level, filled a box with approximately 12-15 egg cartons, and pushed the box onto a conveyor belt. The claimant filled a box approximately every 48 seconds.

The claimant subsequently underwent a Division sponsored independent medical examination (DIME) with Dr. Mathwich for his left shoulder injury on October 12, 2016. The claimant reported increased left shoulder pain after returning to work. Dr. Mathwich also noted that the claimant was "having some pain on the right side now as well." Dr. Mathwich further noted on physical examination that the claimant carried his left shoulder slightly lower than his right shoulder. Dr. Mathwich did not address the claimant's right shoulder any further in his DIME report. He placed the claimant at MMI for the left shoulder injury pending an MRI confirming no re-injury to the left shoulder.

On October 17, 2016, the claimant felt pain in his right shoulder at work while pushing a box of eggs onto a conveyor belt. He thought the oil on the conveyor belt had worn off, causing friction between the conveyor belt and the box when pushed. He believed that the boxes piled up too quickly causing him to work at a faster pace. The claimant reported the injury to the respondent employer, and the employer sent the claimant to Injury Care of Colorado.

The claimant eventually was evaluated by Dr. Parsons. On physical examination, Dr. Parsons noted tenderness and limited range of motion. Dr. Parsons diagnosed the claimant with a work-related right shoulder strain and referred the claimant to physical therapy. She released the claimant to return to light duty work and restricted lifting, carrying, and pushing/pulling to 15 pounds. The respondent employer accommodated the claimant's restrictions.

Dr. Mitchell subsequently performed an independent medical examination at the request of the respondents. The claimant denied to Dr. Mitchell a specific injury to his right shoulder and reported a gradual onset of right shoulder pain since July 2016 which

he attributed to favoring his left shoulder. The claimant reported that his pain worsened with working fast, and he denied any prior right shoulder problems. Dr. Mitchell noted a ruptured right biceps muscle, tenderness along the glenohumeral joint and of the right biceps tendon, and limited range of motion. The doctor diagnosed the claimant with longstanding right bicipital tendon and probable rotator cuff tears with no specific work injury. Dr. Mitchell concluded the claimant's modified work duties did not cause or significantly exacerbate his pre-existing bicipital tendon and rotator cuff tears. She instead observed that the claimant's high-riding right shoulder and Popeye deformity of the right bicep were indicative of chronic bicipital and rotator cuff tears, as the upper trapezius tends to overcompensate resulting in shoulder shrugging. She stated that such deformities generally do not occur with acute tears and that the vast majority of chronic tears are degenerative and not uncommon for someone of the claimant's age. Nevertheless, Dr. Mitchell acknowledged that the claimant's work duties could cause pain or discomfort even though they would not change the pathology of his shoulder.

The ALJ ultimately determined that the claimant "sustained a compensable injury to his right shoulder on October 17, 2016, in the form of an aggravation of a pre-existing condition." The ALJ credited Dr. Mitchell's opinion that the claimant had bicipital tendon and rotator cuff tears. The ALJ ruled the right tendon and rotator cuff tear were indeed pre-exiting conditions. However the ALJ also credited the claimant's testimony regarding the mechanism of injury and the absence of prior medical treatment to his right shoulder. The ALJ resolved the claimant did sustain an aggravation of a preexisting condition and that aggravation caused his need for medical treatment. It was observed: "The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment related activities and not the underlying pre-existing condition." The ALJ ordered the respondents liable to pay "for reasonably necessary and related medical treatment to cure and relieve the effects of Claimant's October 17, 2016 industrial injury *from Dr. Julie Parson's MD and her referrals as contained in Exhibit Two.*" The italicized phrase was added to the original decision by the Amended Findings and Order of May 23, 2018.

The respondents have appealed the ALJ's order. They contend that the ALJ's order is not supported by substantial evidence and her findings of fact are not supported by the record. The respondents point to the testimony of Dr. Mitchell and the doctor's assertion the description of the claimant's work and his activity on October 16 could not have caused the tendon and rotator cuff tears in the claimant's shoulder and would not, in fact, have placed any particular stress on those structures. These medical opinions, it is argued, establish the claimant's pain was not caused by work exertions but, instead, by the claimant's preexisting condition unrelated to work. To the extent the claimant did

not demonstrate 'objective' change in his condition, no mechanism for causing tissue damage and no structural anatomical changes in his shoulder, the respondents maintain there is insubstantial evidence in the record to support the ALJ's finding of a compensable shoulder injury. We are not persuaded by the argument.

A "compensable" industrial accident is one which results in an injury requiring medical treatment or causing disability. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004). A compensable injury may result from the aggravation of a pre-existing non-occupational condition. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant is not required to prove that the industrial exposure was either "substantial" or "permanent." To the contrary, a "temporary" aggravation of a pre-existing condition is compensable, as long as the industrial exposure is the proximate cause of the claimant's temporary disability or need for medical treatment. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Subsequent Injury Fund c. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988); S*ee also Conry v. City of Aurora,* W.C. No. 4-195-130, (April 24, 1996) (industrial ammonia exposure resulted in compensable temporary aggravation of pre-existing asthma).

Pain is a typical symptom from the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *See Clemons v. Harrison School District*, W.C. No. 4-357-814 (August 8, 2000); *Garcia v. Eastman Kodak*, W.C. No. 4-359-657 (October 23, 2000).

In the obverse situation, the development of an increase in symptoms may be properly attributed to a prior condition if the increase is found to be the natural and proximate progression of the original injury. In the face of such a finding there would not be a new injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 968 (Colo. App. 965); *Standard Metals Crop. V. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).[2]

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[2] We recently pointed out in *Martinez v. LKQ Holding Corp*. W.C. No. 5-007-001 and 5-066-360 (February 4, 2019), the findings by the ALJ did not logically support the ALJ's legal conclusion the claimant had not sustained a new injury as opposed to the natural progression of a prior injury. To illustrate the need to remand the matter, the opposing findings were contrasted.

> The ALJ found that the claimant reinjured his back on December 14, 2017. *ALJ Order at 3 P 4.* The ALJ further found that the "claimant exacerbated his symptoms in December of 2017 when he suffered a pop" while pushing a weight and leaning to his left. *ALJ Order at 6 P 19.* Based on these findings, the claimant's pain and need for medical treatment appears to be caused by a new injury on December 14, 2017, which is contrary to the ALJ's determination to deny the claim. *H & H Warehouse v. Vicory supra*.

However, in this matter the ALJ's findings are sufficient to justify the conclusion the claimant suffered a new injury. Here, the ALJ credited the testimony of the claimant that he encountered an episode of pain in his right shoulder on October 17, 2017, when he had occasion to push a loaded box of eggs on a conveyor belt that normally was greased but was not at the time. The next day, the ALJ found the claimant reported the injury to his employer and presented for medical treatment at Injury Care Colorado and to Dr. Parsons. The ALJ also found significant that the claimant testified he had received no prior medical care for his right shoulder. Finally, the ALJ noted that in response to the question: "But you would agree that the work would aggravate – aggravate the pain complaints?", Dr. Mitchell responded: "Sure." The ALJ resolved the claimant had demonstrated the conditions of employment had caused an episode of pain that generated his need to seek medical treatment. The injury and the resulting medical treatment with Dr. Parsons were deemed the liability of the respondents.

The question of whether the claimant has proven a compensable aggravation is one of fact for resolution by the ALJ, and the ALJ's findings must be upheld if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory or contrary inferences. *F.R. Orr Construction v. Rinta, supra*. Under this standard we must view the evidence in the light most favorable to the prevailing party, and accept the ALJ's resolution of conflicts in the evidence, as well as the plausible inferences which he drew from the evidence. *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *Metro Moving & Storage Co. v. Gusser*t, 914 P.2d 411 (Colo. App. 1995).

The claimant indicated the onset of increased pain in his shoulder corresponded to his efforts in pushing a box of eggs at work. He had no treatment for his shoulder prior to that accident. The pain led him to seek medical treatment. Under these circumstances, the ALJ could reasonably infer that the proximate cause of the claimant's need for treatment was the October 17 industrial incident. The respondents have failed to establish grounds to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's Amended Findings of Fact Conclusions of Law and Order issued May 23, 2018, is affirmed.

The ALJ, however, also found Dr. Fall's testimony persuasive that the claimant only suffered a flare-up or temporary increase in symptoms which she would expect to occur with a low back condition. This appears to support the ALJ's conclusion that the claimant did not sustain a new injury and that the need for medical treatment was a natural progression of the claimant's prior injury.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

10/1/19 by TT .

KAPLAN MORRELL LLC, Attn: BRITTON MORRELL ESQ, 6801 W 20TH ST STE 201, GREELEY, CO, 80634 (For Claimant)
HALL & EVANS LLC, Attn: DOUGLAS J KOTAREK ESQ, C/O: PAUL R POPOVIC ESQ, 1001 17TH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
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DENVER, CO 80203

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-964-260-001

IN THE MATTER OF THE CLAIM OF:

JOHN MCCARDIE,

Claimant,

v.

FINAL ORDER

TRANSIT MIX CONCRETE CO,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Spencer (ALJ) dated November 13, 2018, that directed the respondents to authorize and pay for a spinal cord stimulator (SCS) trial. We affirm.

Hearing was held on September 25, 2018, on the issues of:

1) whether the claimant proved by a preponderance of the evidence that a trial SCS is reasonable and necessary post-maximum medical improvement (MMI) treatment to relieve the effects of the industrial injury;
2) whether the respondents proved that the claimant waived the right to seek an SCS by not pursuing it before MMI; and
3) whether the respondents proved that the claimant's request for a trial SCS is barred by the equitable doctrine of laches.

The procedural and substantive history is extensive and complicated. As relevant to the issues before us, the ALJ's findings of fact are summarized below.

Claimant suffered an admitted low back injury on July 17, 2014, while he was shoveling sand off a conveyor belt and felt a pop in his low back. He underwent extensive diagnostic testing. An MRI was performed on August 29, 2014, which showed multilevel degenerative disc and facet changes. Dr. Baptist took over as the authorized

treating physician (ATP) on September 19, 2014. After lengthy physical therapy failed to improve the claimant's condition, Dr. Baptist requested a repeat MRI. The second MRI was performed on December 10, 2014, and showed increased synovitis and reactive edema around the right L4-5 facet joint. The edema tracked into the L4-5 foramen, possibly irritating the exiting right L4 nerve root. There was also a "borderline" central canal stenosis at L4-5. Bilateral SI injections were not helpful.

Claimant saw Dr. Sparr on December 18, 2014 for bilateral lower extremity electrodiagnostic testing. The testing was "markedly abnormal," and Dr. Sparr opined, "The findings . . . are evidence of a long-standing process. He likely has sensory/motor, axonal and demyelinating peripheral neuropathy which has caused denervation diffusely within the lower extremity. These findings are not related to his work in any way." Dr. Sparr further noted, "He reports that he did not have lower extremity symptoms until after his work injury. I find that hard to fathom given the global nature of the findings and chronic denervation."

The ALJ found that despite Dr. Sparr's suppositions, there was no persuasive evidence demonstrating claimant was symptomatic or required any treatment for polyneuropathy before the accident at work. The claimant was able to maintain a physically demanding job with the employer for more than 20 years. Although Dr. Sparr thought the leg pain was unrelated, he opined the low back pain was caused by the accident and recommended "aggressive physical therapy."

Dr. Rudderow took over as the ATP in January 2015. Dr. Rudderow referred claimant to Dr. Murk for a neurosurgical evaluation. She also noted Dr. Sparr's opinions regarding the peripheral neuropathy and recommended claimant discuss it with his personal care physician. Upon a follow-up visit, Dr. Rudderow diagnosed that claimant's symptoms were most likely a reactive synovitis unrelated to his back strain.

Dr. Murk evaluated the claimant and opined that claimant had "very complex pain, most of which may well be myofascial in nature, with some elements of radiation of the right lower extremity . . . somewhat reminiscent perhaps of an L4 distribution." Dr. Murk requested a repeat EMG, a selective right transforaminal L4-5 nerve root injection, and a selective facet block at L4-5. The repeat EMG was consistent with polyneuropathy. The claimant realized no pain relief from the injections.

Claimant returned to Dr. Murk on July 10, 2015. Dr. Murk did not believe claimant was a surgical candidate but he referred the claimant to Dr. Bhatti for a second opinion and consideration of a SCS.

On July 14, 2015, Dr. Bhatti diagnosed right L4 lumbar radiculopathy and lumbar disc disease. The doctor found the etiology of the pain to be unclear. He did not feel there was a surgical option of treatment. Dr. Bhatti indicated that "The patient may be a candidate for epidural spinal cord stimulation. I have recommended that he be evaluated for a trial for stimulation."

Claimant was referred to Dr. Lippert for the SCS trial and to Dr. Mann for a pre-trial psychological evaluation. Dr. Mann found no psychological contraindications to proceeding with the trial SCS.

Dr. Lippert evaluated the claimant on September 11, 2015, and noted "low back pain and bilateral leg pain, right greater than left." Dr. Lippert opined that claimant "is a good candidate . . . for spinal cord stimulation trialing."

Respondents commissioned a review of Dr. Lippert's request with Dr. Primack on September 18, 2015. Dr. Primack opined that SCS was not related to the work injury. He concluded that SCS may be reasonable to address the polyneuropathy, but opined, "In no way, shape, or form would a spinal cord stimulator be considered specific to this work injury." Respondents denied Dr. Lippert's request for SCS trial based on Dr. Primack's report.

Claimant followed up with Dr. Rudderow on October 13, 2015. Dr. Rudderow noted, "Patient's peripheral neuropathy and back pain is significant and would recommend he pursue a neurostimulator through his private insurance. His peripheral neuropathy and synovitis is unrelated to his back injury."

Dr. Rudderow found MMI status had been reached on November 10, 2015, and recommended "pain management" for maintenance care. She referred the claimant to Dr. Baptist for an impairment rating. On December 10, 2016, Dr. Baptist evaluated the claimant and opined:

> [T]his patient is a very complex patient, almost totally refractory to any treatment modalities. I think his prognosis for improvement is extremely poor. He does have a pre-existing polyneuropathy which undoubtedly contributed to his problems . . . [H]is only help for pain relief I believe at this point, is the implantable spinal stimulator, as recommended by Drs. Murk, Leppart (sic), and Mann. I realize he had an IME which opines that a spinal stimulator was not indicated; however, I do not agree with this, and I am currently siding with the other three specialists who did recommend it, confirmed the need."

Dr. Baptist recommended maintenance care and opined, "He must be allowed to get an implantable spine stimulator as specified above." Dr. Baptist assigned a 29% whole person impairment rating.

Respondents requested a Division sponsored independent medical examination (DIME). Dr. Stieg performed the DIME on June 21, 2016. He assigned a 5% whole person impairment rating under Table 53 of the AMA Guides. He did not assign any impairment for neurological problems. He denied any rating for lumbar range of motion based on his perception of claimant's exaggerated and nonphysiologic presentation. Although outside the parameters of his review, Dr. Stieg commented on the SCS recommendation. He agreed with Dr. Primack that claimant was not a candidate for SCS because the majority of the pain is in the back and not the legs. He opined that the SCS would be largely ineffective for the symptoms in the legs due to polyneuropathy.

The respondents filed a Final Admission of Liability (FAL) based on the DIME opinion. Claimant challenged the FAL. A hearing was held before ALJ Lamphere in February 2017. ALJ Lamphere found claimant overcame the DIME rating by clear and convincing evidence, and awarded PPD based on Dr. Baptist's original 29% whole person impairment rating. The ALJ also reserved jurisdiction over all issues not decided.[1]

On May 31, 2018, the claimant filed an application for hearing seeking approval of the trial SCS recommended by Dr. Lippert.

Dr. Rudderow testified in an evidentiary deposition on September 10, 2018, and reconsidered and changed some of the causation opinions expressed in her previous reports. When asked whether the SCS trial was related to the work injury, she opined, "I think a neurostimulator would help his back pain. I don't think it would help his neuropathy." When challenged by respondents' counsel that she had previously recommended that claimant pursue an SCS under his health insurance, Dr. Rudderow testified:

> I think my opinion then and my opinion now might slightly differ. Because at the time I wrote that, I did feel like most of his findings were from an underlying medical problem. But as I reflect on his injury, I think that his pain was real and his pain does seem to have

[1] We note that ALJ Lamphere's order is not part of the record on review. However, neither party herein disputes the findings of fact referenced by ALJ Spencer regarding said order.

> been triggered by the WC injury. And if a neurostimulator would help that, I think it's reasonable.

Ultimately, Dr. Rudderow opined, "I think spinal stimulation is appropriate for pain management" for the underlying work-related back injury. Dr. Rudderow opined that claimant remains at MMI, and does not expect the SCS to significantly increase his functioning except incidentally due to pain relief.

Dr. Primack testified, "the main contraindication for someone with spinal stimulation is . . . axial low back pain . . . . [T]he last thing that you ever want to do is to do a trial or implant for someone with back pain." He further opined that the purpose of a SCS is to remedy leg pain and "[it] does nothing for your back." He cited the Chronic Pain Medical Treatment Guidelines (MTG) for the proposition that SCS is "never" appropriate for a patient with predominantly axial back pain. Dr. Primack reiterated SCS might be appropriate to treat claimant's peripheral neuropathy but is not related to the admitted injury. Regardless of causation, Dr. Primack opined SCS "isn't a maintenance care procedure. That's like saying a hip replacement is maintenance care for hip pain, and there's no way we would treat such a dramatic procedure as maintenance care."

The ALJ was expressly persuaded by the opinions of Drs. Baptist, Lippert, Bhatti, and Rudderow (as expressed in her deposition) on the questions of reasonable necessity and causation. The ALJ was not persuaded by the contrary opinions expressed by Drs. Primack and Stieg.

Citing to Section 8-42-101, C.R.S., the ALJ concluded that respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. *Sims v. Indus. Claim Appeal Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988).

The ALJ further concluded:

> [S]urgery is frequently directed to 'curing' a claimant's condition rather than simply 'relieving' or preventing deterioration of their condition. But the type of treatment is not determinative of liability for post-MMI treatment. The dispositive question is the ***purpose*** for which treatment is provided rather than the 'nature' of the treatment. If the treatment is designed to relieve the effects of the work injury,

> the insurer must cover it. Furthermore, liability is not limited only to treatment that 'maintains' a claimant's condition. Surgery can be a permissible form of post-MMI treatment, if it is undertaken for the purposes outlined in *Grover*. *E.g.* - *Shipman v. Larry's Transmission Center*, W.C. No. 4-721-918 (August 25, 2008) (surgery to correct a leg-length discrepancy approved as post-MMI treatment); *Hayward v. UNISYS Corp*., W.C. No. 4-230-686 (July 2, 2002), *aff'd, Hayward v. ICAO*, (Colo. App. No. 02CA 1446, January 9 2003) (not selected for publication) (knee surgery may be curative or may be *Grover*-style maintenance treatment designed to alleviate deterioration of the claimant's condition).
> (Selective citations omitted)

The ALJ further concluded that the claimant proved a causal nexus between his chronic leg pain and the industrial accident. The ALJ stated:

> Claimant's leg pain likely results from a combination of peripheral polyneuropathy and L4 nerve root irritation as noted by Dr. Baptist. It is impossible to tease out the precise percentage of contribution from each factor, but the ALJ was persuaded claimant's injury substantially contributed to the persistence and severity of his leg pain. An injury need not be the sole cause of a claimant's need for treatment, as long as there is a 'direct causal relationship' to the industrial accident. Claimant's work accident either caused new pathology and led to the development of leg pain, or substantially aggravated his pre-existing polyneuropathy, or both. Thus, claimant proved the requisite 'direct causal relationship' to support an award of medical benefits.
> (Internal citations omitted)

Ultimately, the ALJ resolved that the trial SCS is an appropriate form of post-MMI pain management. The ALJ credited the opinions of Drs. Baptist and Rudderow. The ALJ held that the SCS is primarily intended to relieve claimant's pain, rather than cure any underlying pathology. "The mere fact that palliative treatment may incidentally increase claimant's level of function does not negate the fact it is being prescribed for a purpose consistent with *Grover*." The ALJ determined that the claimant had proven that a trial SCS is reasonably necessary post-MMI treatment to relieve the effects of his industrial injury.

The ALJ considered the respondents' argument that the claimant had waived his right to pursue the trial SCS because he did not take the SCS issue to hearing before ALJ Lamphere. The ALJ concluded that ALJ Lamphere's order explicitly reserved jurisdiction over all issues not decided therein, "which necessarily includes post-MMI medical treatment." Accordingly, the ALJ herein rejected respondents' argument that claimant waived his right to pursue the trial SCS.

The ALJ also considered and rejected the respondents' argument that the trial SCS issue was barred under the doctrine of laches. The ALJ concluded that the respondents did not prove they were prejudiced by claimant's delay in pursuing the trial SCS. Dr. Rudderow testified that she changed her opinions based on further "reflection," rather than lack of familiarity as the result of the delay. The ALJ concluded that the respondents failed to prove laches.

The respondents filed a timely petition to review. In its brief, respondents raise four contentions of error:

1. The ALJ erred in concluding claimant met his evidentiary burden of proving entitlement to a SCS as post-MMI maintenance treatment because claimant did not submit a post-MMI prescription for said treatment.
2. The ALJ's conclusion that the SCS was prescribed for *Grover* purposes was unsupported by the evidence and contrary to applicable law.
3. The ALJ erred in concluding that a SCS is appropriate post-MMI treatment based on the 2017 Chronic Pain Disorder Medical Treatment Guideline.
4. The ALJ erred in concluding that the claimant did not waive his right to seek a SCS because he did not prosecute the issue when the SCS was first prescribed in 2015.

In their brief, Respondents flatly assert that the claimant "did not submit a post-MMI recommendation for a SCS as medical maintenance treatment into evidence at hearing… Absent any post-MMI prescription in the record, there is not substantial evidence supporting the ALJ's order awarding a SCS as a medical maintenance treatment."

It is uncontroverted that several of the claimant's treating physicians prescribed a SCS trial prior to the date the claimant reached MMI on November 10, 2015, so as to provide some measure of pain control for the claimant. Further, the claimant did not file an application for hearing to obtain said procedure until May 31, 2018. The claimant did not receive a trial of SCS prior to the date of MMI. However, contrary to respondents' assertions that no post-MMI prescription for SCS exists, Dr. Baptist

renewed/reiterated/recommended the SCS in his December 10, 2015 report. This renewal of the prescription was made as part of Dr. Baptist's recommended regimen for post-MMI pain management. We note that Dr. Baptist did not disagree with or challenge the date of MMI when essentially pleading for the procedure—"He must be allowed to get an implantable spine stimulator…." We agree with the ALJ that the SCS at this juncture of his medical condition is for post-MMI pain control and not pre-MMI curative treatment.

In the second allegation of error, the respondents invite us to singly credit the opinion of Dr. Primack regarding that the SCS can only be considered a curative (or pre-MMI) medical procedure because of the extent of the invasiveness of the procedure. Such an invitation requires us to overrule the ALJ's determination that Dr. Primack's opinions were not persuasive. We decline to do so.

The ALJ's assessment of the probative value of the evidence and his credibility determinations are matters solely within his province. We may not set aside a credibility determination unless the testimony of a particular witness, although direct and unequivocal, is "so overwhelmingly rebutted by hard, certain evidence directly contrary" that a fact finder would err as a matter of law in believing the witness. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). That is not the case here and, therefore, we have no basis to disturb the ALJ's order on this ground.

Here, respondents concede that Dr. Baptist stated that claimant should be permitted a SCS, but argues that this opinion is immaterial as to whether the treatment is properly considered medical maintenance treatment, "for Dr. Baptist did not address 'the purpose [the treatment] is meant to achieve." The claimant was referred to Dr. Baptist for post-MMI maintenance care, specifically pain control. We conclude that it was reasonable for the ALJ to infer that Dr. Baptist's purpose was ongoing pain control, which the ALJ found is a maintenance protocol. The fact that the procedure may not simply maintain the pain level but may (in all hope) reduce it, does not change our view.

In the third allegation of error, the respondents argue that the type of SCS (high frequency versus traditional SCS stimulation) was not part of the evidence adduced at hearing. Thus, they contend that it cannot be determined that the procedure is appropriate under the 2017 Chronic Pain Disorder Medical Treatment Guideline and accordingly the order is unsupported by substantial evidence. Further, the respondents advance that the 2017 guidelines were not in existence at the date of the injury and thus the ALJ should have used the 2012 version of the guidelines. Respondents argue, ". . . the revised

version of the guideline in 2017 is not relevant, and the ALJ's reliance on the 2017 guideline is misplaced." We find this argument unfortunate and not dispositive. The medical treatment guidelines are not statutes that must be considered as legally applicable based on the date of injury. Rather, we view them as guidelines that reflect the most current developments (and presumably advancements) of medical science. Whereas the 2012 guidelines simply state SCS is "not recommended" for axial back pain; the 2017 guidelines distinguish between so-called "traditional" SCS and "high frequency" SCS. The 2017 guidelines (in pertinent part) state: "High-frequency stimulator may be used for patients with predominately axial back pain."

In addition, palliative[2] pain control is not just a pre-MMI medical concern; it is also a post-MMI medical concern. In our view, the recommended SCS is palliative care which if successful, may improve function and reduce pain. While the SCS, according to claimant's treating physicians, will not cure the underlying condition, it is intended to "relieve" the claimant from the effects of the injury. We concur with the ALJ, that the hoped for improvement of the claimant's pain level, which may have the incidental effect of increasing functionality, does not negate the fact that it is prescribed for a purpose consistent with *Grover*. The mere fact that the claimant receives additional treatment after MMI does not necessarily vitiate a finding of MMI. *See Grover v. Industrial Comm'n*, *supra*; *Murphy v. Industrial Mfg. & Installation*, W.C. No. 4-308-553 (April 10, 1998).

In the fourth allegation of error, respondents argue that the claimant is barred from raising the issue of SCS in 2018 because of waiver and laches. It is true that the claimant's physicians recommended and requested authorization for a SCS prior to the claimant reaching MMI; and that such procedure was denied by the respondents. The record is devoid of any explanation or reason why the claimant did not challenge the respondents' denial of the procedure when such was first denied or at the hearing before ALJ Lamphere in February 2017.

A waiver is the intentional relinquishment of a known right, which may be express or implied. *Johnson v. Indus. Comm'n*, 761 P.2d 1140 (Colo. 1988). To constitute an implied waiver, conduct must be free from ambiguity and clearly manifest the intent not to assert the benefit. *Burlington Northern Railroad Co. v. Stone Container Corp.*, 934 P.2d 902, 905 (Colo. App. 1997). Waiver is an affirmative defense and must be proved by a preponderance of the evidence. CRCP 8(c); *Pfaff v. Broadmoor Hotel*, W.C. No. 4-105-774 (October 15, 2003).

[2] Palliative is defined as: "alleviating pain and symptoms without eliminating the cause." Encarta English Dictionary 2019.

The ALJ was not persuaded that the claimant waived his right to pursue the trial SCS by failing to try the issue at hearing before ALJ Lamphere. The ALJ here cited to *Hire Quest, LLC v. Industrial Claim Appeals Office*, 264 P.3d 632 (Colo. App. 2011). We find the facts of *Hire Quest* to be directly on point and dispositive to the issue of waiver. In that case, the parties had a hearing on the respondents' challenge to a DIME rating. The ALJ found the respondents failed to overcome the DIME and awarded PPD benefits. The claimant had not raised any issue of *Grover* benefits, so the ALJ did not address it. However, the order expressly reserved jurisdiction over all issues not decided. Six months later, a second ALJ held a hearing on the claimant's request for Grover benefits. The second ALJ determined the claimant had waived the right to post-MMI medical benefits by failing to try the issue at the prior hearing. On appeal, a panel of this Office reversed based on the reservation clause in the first ALJ's order. The Court of Appeals affirmed the Panel and held, "under the clear and unambiguous language of that order, the issue of *Grover* medical benefits was reserved for future determination and therefore not waived by claimant." In addition, the court stated, "we are unwilling to presume that the reservation clause at issue here was 'mere surplus,' especially given the absence of any evidence in the record indicating that the first ALJ added that clause to his order without any basis for doing so."

Respondents claim that the SCS issue was ripe when the February 2017 hearing took place. Respondents contend that Hire Quest is inapposite as that case did not address a challenge to a FAL or analyze the application of § 8-43-203(2)(b)(II)(A), C.R.S (case closed as to issues admitted in FAL if the claimant does not contest the FAL and request a hearing on any disputed issues that are ripe for hearing). Claimant did not prosecute the SCS prior to MMI. A myriad of possible reasons are easily hypothesized as to why the claimant did not want to litigate the SCS issue in 2015 or in 2017. The claimant's decision not to do so, for whatever reason, does not negate his right to make a claim for post-MMI *Grover* maintenance benefits.

We concur with the ALJ that ALJ Lamphere expressly reserved jurisdiction over all issues—which includes, but is not limited to, post-MMI treatment. We reject respondents contention that the claimant waived his right to pursue the trial SCS.

Although respondents raised the equitable doctrine of laches at the hearing, the respondents have not raised this issue in either the petition to review or in the brief in support thereof. Accordingly, we decline to address it. *See, e.g., Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 599 (Colo. App. 2007) (a court of appeals will not address contentions that were not raised in the opening brief).

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

IT IS THEREFORE ORDERED that the ALJ's order issued November 13, 2018 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

10/1/19 by TT .

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