COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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September Case Law Update

Presented by Judge Elsa Martinez-Tenreiro and Judge David Gallivan

This update covers COA and ICAO decisions issued from
August 22, 2019 to September 12, 2019

Court of Appeals

Industrial Claim Appeals Office

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DATE FILED: September 12, 2019
CASE NUMBER: 2018CA2308

SUMMARY
September 12, 2019

2019COA146

No. 18CA2308, *Packard v. Industrial Claim Appeals Office* — Limitation of Actions; Labor and Industry — Workers' Compensation — Notices and Procedures — Notice of Injury

A division of the court of appeals holds that section 8-43-103(2), C.R.S. 2018, is a statute of limitations applicable to the Workers' Compensation Act of Colorado. It requires a claimant seeking disability or indemnity benefits to file a "notice claiming compensation" within two years of discovering the work-related nature of the claimant's injuries, or within three years if the claimant can establish a reasonable excuse for late filing and the employer suffered no prejudice as a result. *Id.* To satisfy the statutory requirement, the "notice claiming compensation" must notify the Division of Workers' Compensation and the opposing party of a claimant's intent to seek compensatory benefits. *Id.*

Consequently, documents which do not provide this information — including an employer's first report of injury or notice of contest, a claimant's service of interrogatories or claimant's counsel's entry of appearance, or the Division's assignment of a claim number — do not satisfy the Act's statute of limitations for claiming compensation.

COLORADO COURT OF APPEALS **2019COA146**

Court of Appeals No. 18CA2308
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-925-466

Joseph Packard,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and City and County of Denver, Colorado,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE ROMÁN
J. Jones and Martinez*, JJ., concur

Announced September 12, 2019

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

Philip J. Weiser, Attorney General, Evan P. Brennan, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Kristin M. Bronson, City Attorney, J.P. Moon, Assistant City Attorney, Stephen J. Abbott, Assistant City Attorney, Denver, Colorado, for Respondent City and County of Denver

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

¶ 1 In this workers' compensation action, we are asked to address whether certain documents constitute a "notice of injury" such that claimant, Joseph Packard, beat the statute of limitations of the Workers' Compensation Act of Colorado (Act), set forth in section 8-43-103(2), C.R.S. 2018. We agree with the Industrial Claim Appeals Office (Panel) that neither a notice of contest nor a first report of injury satisfies the statute of limitations and that to satisfy the statutory mandate a document must notify the Division of Workers' Compensation (Division) and the opposing party that a claimant is "claiming compensation" within the meaning of the statute. We therefore affirm the Panel's final order.

I. Background

¶ 2 Claimant is a firefighter for the City and County of Denver. In July 2013, he was diagnosed with melanoma of the trunk. On July 24, 2013, he advised the City of his cancer diagnosis and asserted his belief that the melanoma was related to or caused by his work as a firefighter for the City. The City filed its first report of injury with the Division on August 5, 2013. The next day, the City filed a notice of contest indicating it needed to further review the claim and claimant's medical records.

¶ 3 On August 7, 2013, the Division notified claimant that a notice of contest had been filed. The Division's form letter to claimant included the following language:

> Because your claim for benefits has been denied, you may file for an expedited hearing and have an Administrative Law Judge decide if benefits should be awarded. You must file an Application for Expedited Hearing within forty-five (45) days from the date on the Notice of Contest form. If you request a hearing after this date, your hearing will be held between 80 and 100 days after a hearing date is set.
>
> * * * * *
>
> If you have not filed a Workers' Claim for Compensation, you may wish to do so.

¶ 4 One year after claimant's diagnosis, Dr. Annyce Mayer, a physician with National Jewish Health Medical, concluded that claimant was at maximum medical improvement (MMI) "with a 10% whole person impairment." She opined that there is "increasing epidemiologic evidence for increased risk of melanoma in firefighters, particularly in [claimant's] age group." Weighing claimant's occupational and nonoccupational risk factors for developing melanoma, Dr. Mayer concluded that "his increased risk for melanoma due to non-occupational risk factors does not

establish the 'cause' for his developing malignant melanoma on a medically probable basis."

¶ 5 In May 2017, Dr. Mayer followed up her initial opinion with a supplemental report. She concluded that claimant's "melanoma meets the medical requirements of the Colorado Firefighter Presumption Statute, [section] 8-41-209, C.R.S. [2018,] . . . and that his underlying risk factors do not render it more probable that his melanoma arose from a source outside of the workplace, to a reasonable degree of medical probability." She also opined that claimant's melanoma remained in remission.

¶ 6 Claimant filed an application for hearing on October 6, 2017, seeking medical and temporary total disability benefits. The City eventually admitted compensability, but asserted a statute of limitations defense, arguing that the claim was barred because claimant filed his application more than four years after learning of his melanoma and reporting it to the City.

¶ 7 An administrative law judge (ALJ) concluded that the Division's assignment of a claim number to the claim, along with the City's filing of the first report of injury and a notice of contest,

demonstrated that the City was on notice of the claim before the running of the statute of limitations.

¶ 8 But the Panel rejected this conclusion and set aside the ALJ's order. The Panel instead held that neither the first report of injury nor the notice of contest satisfied claimant's statutory obligation to file a "notice claiming compensation." Likewise, the Panel held, the Division's assignment of a claim number to the case could not "substitute for the filing of a workers' claim for compensation." The Panel observed that none of these actions — the filing of the first report of injury, the filing of the notice of contest, or the assignment of a claim number — indicated whether "the claimant had missed any time from work, was alleging any permanent impairment, or was seeking medical treatment." In short, the Panel held, the forms did not put the City or the Division on notice that claimant was claiming compensation for his occupational disease.

II. Statute of Limitations

¶ 9 Claimant contends that the Panel misinterpreted the applicable statute of limitations, section 8-43-103(2). He argues that the City had adequate notice of his intent to pursue compensation through the Division's assignment of a claim number

to the case, the City's filing of the first report of injury and notice of contest, and his filing of several documents. He identifies several documents his counsel filed on his behalf on February 4, 2015, which, he asserts, fulfilled his notice obligation: (1) a notice pursuant to section 8-41-203(4), C.R.S. 2018,[1] stating that his injuries arose "from an injury and/or occupational disease occurring on 7/24/2013"; (2) a notice of objection to verbal communications with claimant, treating physicians, or healthcare providers; (3) combined ongoing production requests and interrogatories; (4) an objection to admissions; and (5) his counsel's entry of appearance. We are not persuaded that the Panel misinterpreted or misapplied the statute.

A. Applicable Statute: C.R.S. 8-43-103

¶ 10 The Act imposes notice requirements and a general statute of limitations which applies to nearly all requests for compensation and benefits pursued thereunder. *See* § 8-43-103. The relevant portions of the statute provide as follows:

[1] Section 8-41-203(4), C.R.S. 2018, requires a claimant who believes another party may be liable for any claimed injuries to notify the affected employer of such belief and identify any third party who may be so liable.

(1) Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury . . . . If no such notice is given by the employer, as required by articles 40 to 47 of this title, such notice may be given by any person. Any notice required to be filed by an injured employee . . . may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time. Such notice shall be in writing and upon forms prescribed by the division for that purpose and served upon the division by delivering to, or by mailing by registered mail two copies thereof addressed to, the division at its office in Denver, Colorado. Upon receipt of such notice from a claimant, the division shall immediately mail one copy thereof to said employer or said employer's agent or insurance carrier.

(2) The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title. . . . *[T]he right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury . . . a notice claiming compensation is filed with the division.* This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for

> the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section; but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee . . . until the required report has been filed with the division.

Id. (emphasis added).

B. Rules of Statutory Construction and Standard of Review

¶ 11 When we analyze a provision of the Act, "we interpret the statute according to its plain and ordinary meaning" if its language is clear. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). "[W]e give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

¶ 12 We review an issue of statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). Although we defer to the Panel's reasonable interpretations of the statute it administers, *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006), we are "not bound by the Panel's interpretation" or its earlier decisions, *United Airlines v. Indus. Claim Appeals Office*, 2013 COA 48, ¶ 7; *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). "[T]he Panel's interpretation will be set aside only if it is inconsistent with the clear language of the statute or with the legislative intent." *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998).

C. Law Governing the Act's Statute of Limitations

¶ 13 To be timely under the Act, section 8-43-103(2) mandates that a claim for workers' compensation must be filed within two years of the alleged injury by filing a "notice claiming compensation." A "notice claiming compensation" is commenced when a claimant notifies the division of his or her alleged injuries and intent to pursue compensation. *See Pinkard Constr. Co. v. Schroer*, 487 P.2d 610, 612 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f))

(supplemental report of injury prepared, signed, and filed by the claimant with Industrial Commission was sufficient to constitute a notice claiming compensation even though the claimant did not use prescribed form). Accordingly, to timely commence his action, claimant had to file a notice with the Division advising it of the nature of his claim and his intent to seek compensation.

¶ 14 "[T]he limitation period commences when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury." *City of Durango v. Dunagan*, 939 P.2d 496, 498 (Colo. App. 1997); *see also City of Boulder v. Payne*, 162 Colo. 345, 351, 426 P.2d 194, 197 (1967); *City of Colorado Springs v. Indus. Claim Appeals Office*, 89 P.3d 504, 506 (Colo. App. 2004).

¶ 15 In other words, section 8-43-103(2) requires that claims for workers' compensation be filed within two years of a claimant's discovery of a work-related injury. The two-year statute of limitations deadline may be extended for one additional year, but only if the claimant establishes a reasonable excuse for failing to timely file and that the employer was not prejudiced by the claimant's late filing. *See Silsby v. Tops Drive In Rest.-Dutton*

Enters., Inc., 160 Colo. 549, 551, 418 P.2d 525, 526 (1966) ("A 'legally justifiable' excuse is one which the Commission . . . finds to be reasonably sufficient to excuse the delay.").

D. The Statute of Limitations Applies and Bars Claimant's Claim

¶ 16 Claimant informed the City that there was a connection between his work fighting fires and his melanoma shortly after his 2013 diagnosis. Dr. Mayer strongly suggested such a connection in her 2014 report. As *Dunagan* and *Payne* make clear and the parties do not dispute, the statute of limitations commenced running in 2013 because claimant knew then the nature of his illness and its connection to his work. *See Payne*, 162 Colo. at 351, 426 P.2d at 197; *Dunagan*, 939 P.2d at 498. Based on claimant's admission that he knew in 2013 that his firefighting duties may have caused his melanoma, he needed to file his claim by 2015 to comply with the two-year statute of limitations, or by 2016 if he could establish a reasonable excuse for failing to file within two years. Because he did not file his application for a hearing with the Division until October 2017, section 8-43-103(2) barred his claim.

¶ 17 Claimant argues, however, that the City's filing of a first report of injury and a notice of contest, as well as the Division's

assignment of a claim number, satisfied his obligation to file a notice claiming compensation. He also points to the documents his counsel filed on his behalf on February 4, 2015, as evidence that the City and the Division were on notice of his intent to litigate his claim and pursue compensation. He asserts that because Colorado is a "notice pleading" state, no further notice was required of him. We are not persuaded, for three reasons.

¶ 18 First, none of the documents to which claimant points — not the notice of contest, the first report of injury, nor any of the documents his counsel filed — indicated that claimant was "claiming compensation" within the meaning of section 8-43-103(2). Nor did any of the identified documents provide an impairment rating or indicate that claimant had sustained a permanent impairment. Section 8-43-103(2) expressly excludes from the definition of "compensation" "the furnishing of medical, surgical, or hospital treatment by the employer." It is therefore limited to claims for disability (also known as indemnity) benefits based on partial or total impairment. *See Hussion v. Indus. Claim Appeals Office*, 991 P.2d 346, 347 (Colo. App. 1999) ("[T]he term 'compensation,' as used in the Act, may refer to benefits paid for

both temporary and permanent disabilities or impairments."). Disability and medical benefits are thus treated differently by the legislature in this section, a distinction evident in other sections of the Act, as well, which often "treat medical benefits separately from indemnity benefits." *Support, Inc.*, 968 P.2d at 176 (use of the term "compensation" in the forfeiture clause of section 8-43-402, C.R.S. 2018, did not apply to medical benefits so claimant did not forfeit her right to ongoing medical benefits because of a felony conviction); *see also Wild W. Radio, Inc. v. Indus. Claim Appeals Office*, 905 P.2d 6, 9 (Colo. App. 1995) (rejecting the employer's contention that reduction in "compensation" under section 8-42-112, C.R.S. 2018, for a safety violation or intoxication applies to medical benefits). None of the documents claimant points to specifies that claimant was seeking compensation as that term is defined in section 8-43-103. Consequently, none satisfied section 8-43-103(2)'s requirement of providing notice that claimant was "claiming compensation."

¶ 19 The Panel reached this same conclusion. In reaching its decision, the Panel followed a decades-old decision issued by this court. In that decision, a division of this court held that an

employer's first report of injury was insufficient "to constitute a notice of claim." *Martin v. Indus. Comm'n*, 43 Colo. App. 521, 524, 608 P.2d 366, 369 (1979). The division observed that the employer's notice of injury filed with the Industrial Commission "was merely a report of the accident, and, while it may contain information such as the name of the worker and the date and details of the accident, it [did] not assert that a compensable injury ha[d] occurred nor give notice that compensation [wa]s expected." *Id.*

¶ 20 Since *Martin*, the Panel has consistently ruled that a first report of injury form filed by an employer does not satisfy the statutory requirement that claimants file a notice claiming compensation.

¶ 21 We agree with the Panel that neither a first report of injury nor a notice of contest constitutes a "notice claiming compensation" within the meaning of section 8-43-103(2). The Act requires employers to file a report — not a claim — containing information mandated by the director of the Division "upon forms prescribed by the division for that purpose." § 8-43-101(1), C.R.S. 2018. If an employer "fails, neglects, or refuses to report said injury to the

division" by providing the mandated information on the prescribed division form, "*this statute of limitations shall not begin to run against the claim of the injured employee*." § 8-43-103(2) (emphasis added). "'Claim' is a term of art which is defined broadly as 'the aggregate of operative facts which give rise to a right enforceable in the courts.'" *Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 15 (quoting *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513, 516 (Colo. App. 2008)). Under the express statutory language, then, the statute of limitations continues to run even when an employer files a first report of injury form.

¶ 22 Similarly, a notice of contest contains no information about a claimant's claim for indemnity or disability benefits. It simply advises the Division and the claimant that an employer or insurer believes a claim may not be covered for any number of reasons. Thus, nothing in section 8-43-103 suggests that an employer's filing of a first report of injury or notice of contest absolves a claimant's burden to file a "notice claiming compensation."

¶ 23 Because the Panel's interpretation is consistent with the clear language of the statute, we perceive no basis for straying from it here. *See Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶

31 ("[W]e defer to the Panel's 'reasonable interpretations' of its own regulations, and only set aside the Panel's interpretation 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" (quoting *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 37)).

¶ 24 We also reject claimant's assertion that the assignment of a claim number constituted a notice of claim. Contrary to claimant's suggestion, we see nothing in the assigning of a claim number by the Division that satisfies a claimant's obligation to notify the Division and the employer of his intent to seek compensation. Neither party receives or provides any information concerning benefits, impairment, or disability through the assignment of a claim number. Thus, the critical information conveyed when "a notice claiming compensation is filed with the division" is not provided by the assignment of a claim number. *See* § 8-43-103(2).

¶ 25 Second, claimant's proposed construction would render the statute of limitations meaningless, a result which is also prohibited. *See Pineda-Liberato v. People*, 2017 CO 95, ¶ 39 ("We cannot, however, interpret statutory provisions so as to render any of their words or phrases meaningless or superfluous."); *Berthold v. Indus.*

Claim Appeals Office, 2017 COA 145, ¶ 32. As the City points out, claimant's proposed construction would completely vitiate the statute of limitations because the statute would not commence running if an employer failed to file a first report of injury but would stop running as soon as an employer filed a first report of injury. In other words, if the statutorily required first report of injury served to satisfy the statute of limitations, a claimant would have unlimited time within which to file an application for hearing because the statute would never be triggered — if the employer filed a first report of injury — or would always be tolled — if the employer failed to file the required report. Permitting a first report of injury to satisfy the statute of limitations would thus improperly render the statute of limitations meaningless and without effect. *Pineda-Liberato*, ¶ 39; *Berthold*, ¶ 32.

¶ 26 And, third, we agree with the City and the Panel that section 8-43-103(1) imposes filing obligations on employers, while section 8-43-103(2) applies to claimants. As we read the statute, subsection (1) requires employers to file a first report of injury, providing the timeline within which employers must take that action. In contrast, subsection (2) — the statute of limitations

subsection — states that it "shall not apply to any claimant to whom compensation has been paid," suggesting that the converse is also true: the subsection *applies* to any claimant who has not received compensation. *See* § 8-43-103(1), (2). Because the legislature put the parties' obligations in separate subsections of the statute, we conclude that the legislature did not intend for a document that subsection (1) requires an employer to file — the first report of injury — to satisfy a claimant's obligation under subsection (2).

¶ 27 The case on which claimant relies in support of his position, *Colorado Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966), is distinguishable. Claimant cites *Newton* for the proposition that a "mere irregularity" in a filing form does not prevent a claim from proceeding. *Id.* at 122, 414 P.2d at 485. When the deficiency is only as to form, there can be a waiver of a statute of limitations defense based on inadequate notice of a claim. *Id.* However, in *Newton*, the notice, albeit "irregular," and the hearing both occurred before the expiration of the statute of limitations. Because the hearing had been held within the statutory time limit, the supreme court held that the employer had

waived any objection to the "technical deficiencies" in the notice. *Id.*

¶ 28 Accordingly, we conclude that although employer filed a first report of injury and a notice of contest, claimant nonetheless had to file a timely claim for compensation — such as an application for hearing — with the Division to ensure that his claim was not barred by the statute of limitations. It is undisputed that claimant did not file his application for hearing until more than four years after his melanoma diagnosis and his notice to the City and the Division that he believed his cancer was work related. By then, both the applicable two-year statute of limitations, as well as the additional year permitted for a reasonable excuse, had lapsed. *See* § 8-43-103(2). We therefore agree with the Panel's conclusion that claimant's claim is barred by the statute of limitations.

III. Claimant's Remaining Arguments

¶ 29 In addition to his primary contention that the Panel misinterpreted and misapplied the statute, claimant raises several other contentions. They are as follows:

(1) The Panel's order disregarded the Act's mandate "to assure the quick and efficient delivery of disability and medical

benefits to injured workers." *See* § 8-40-102(1), C.R.S. 2018. He points out that the firefighter cancer presumption statute, section 8-41-209, does not contain a statute of limitations, and that, by imposing a limit on firefighters, the Panel frustrated the legislature's intent.

(2) The City should have been required to show prejudice before the statute of limitations was applied.

(3) The City's notice of contest form should have estopped it "from asserting a violation of [section] 8-43-103 because it informed [claimant] that the only requirement for moving forward with his claim was to apply for hearing."

None of these arguments persuade us to reach a different result.

A. Effectuating the Act's Purpose

¶ 30 The stated goal of the Act is "to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." § 8-40-102(1). "In construing the language of the [Act], we have previously held that the Act is 'intended to be remedial and beneficent in purpose, and should be liberally construed in order to

accomplish these goals.'" *Ray*, 145 P.3d at 668 (quoting *Davison*, 84 P.3d at 1029).

¶ 31 Claimant contends that the Panel violated these principles when it barred his claim on statute of limitations grounds. He argues that barring his claim thwarts the legislature's intent that firefighters be compensated for their work-related cancers. Further, he contends, the firefighter cancer presumption statute under which he asserted his claim, section 8-41-209, contains no specific statute of limitations.

¶ 32 Although claimant correctly distills the Act's stated purpose and goal, that purpose does not negate the specific statute of limitations set out in section 8-43-103(2). A declaration of legislative intent "cannot override a statute's elements." *People in Interest of T.B.*, 2016 COA 151M, ¶ 42, *aff'd*, 2019 CO 53. As to claimant's contention that section 8-41-209 does not expressly set forth a statute of limitations, claimant does not point us to any provision in the Act that includes its own statute of limitations, and we know of none. Rather, section 8-43-103(2) makes clear that, with the exception of certain injuries caused by radioactive materials, it applies to all claims for "compensation and benefits

provided by . . . articles [40 to 47 of this title]." Thus, by its express language, section 8-43-103(2) applies to section 8-41-209.

¶ 33 For these reasons, we conclude that the Panel did not violate the Act's legislative declaration.

B. Prejudice

¶ 34 Claimant next contends that the City should have been required to show prejudice before his claim was dismissed as time barred. He argues that the prejudice provision in section 8-43-103(2) applied and cites to *Newton* and *Colorado Fuel & Iron Corp. v. Industrial Commission*, 129 Colo. 287, 269 P.2d 696 (1954), in support of his position. Claimant is mistaken.

¶ 35 Section 8-43-103(2) does require an employer to show prejudice if a claimant is seeking to file a claim for compensation within a year of the expiration of the two-year statute of limitations. It states that the two-year statute of limitations "shall not apply . . . if it is established to the satisfaction of the director within three years after the injury . . . that a reasonable excuse exists for the failure to file such notice claiming compensation *and* if the employer's rights have not been prejudiced thereby." § 8-43-103(2) (emphasis added). Contrary to claimant's assertion, this provision

only applies when a claimant files a claim after the two-year statute of limitations has expired but before a third year has elapsed. It does not apply to claims filed outside that three-year limit.

¶ 36 Nor do the cases claimant cites support his position. *Colorado Fuel & Iron* concerned a claim filed outside the then-applicable one-year statute of limitations, but before the expiration of the additional grace year which, like the current version of the statute, granted claimants one additional year within which to file a claim for compensation if they showed "that a reasonable excuse exists for the failure to file such notice claiming compensation, and the employer's rights have not been prejudiced thereby." 129 Colo. at 290, 269 P.2d at 697. It therefore did not involve the assertion of a claim for compensation beyond the extra one-year window.

¶ 37 *Newton* is likewise distinguishable. It held that the statute of limitations did not bar a claim because the referee's order joining the employer to the workers' compensation action sufficiently notified the employer and its insurer of the claim for compensation. Because that order was issued only five months after the accident at issue occurred, the employer and insurer were notified that the claimant was "claiming compensation" well within the statute of

limitations. *Newton*, 160 Colo. at 116-17, 414 P.2d at 482. Therefore, it, too, does not support claimant's contention.

¶ 38 Prejudice is not a statutorily required factor for application of the statute of limitations after the time period has fully expired, and we decline to read such a provision into section 8-43-103(2). *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (The appellate courts of this state have "uniformly held that a court should not read nonexistent provisions into the . . . Act."); *see also Kieckhafer*, ¶ 16.

C. Estoppel

¶ 39 Last, claimant contends that the City should have been estopped from asserting a statute of limitations defense because the notice of contest form it filed "informed [claimant] that the only requirement for his moving forward with his claim was to apply for hearing." Claimant points to language on the form which advises claimants that they "may request an expedited hearing on the issue of compensability by filing an Application for Hearing and Notice to Set *and* a Request for Expedited Hearing with the Office of Administrative Courts." We are not persuaded that this language estopped the City from raising the statute of limitations.

¶ 40 True, a party may be equitably estopped from asserting the statute of limitations. *See Thurman v. Tafoya*, 895 P.2d 1050, 1058 (Colo. 1995). But claimant had to establish several factors to successfully invoke the doctrine.

> To invoke the doctrine of equitable estoppel, a party who relies to his detriment on an affirmative promise must show that the promisor may have reasonably expected to induce action or forbearance of a material character. Moreover, the claimant must show that reasonable reliance on these assertions discouraged the claimant from bringing suit within the applicable time period. A party, however, may not rely on the mere non-committal acts of another in order to establish equitable estoppel.

Id. at 1058 (citations omitted).

¶ 41 As both the City and the Panel point out, claimant has not established these elements. In particular, claimant has not shown that (1) the City made any "affirmative promise" to him; (2) the City "reasonably expected" him to rely on its (undisclosed) promise; (3) he was discouraged from pursuing his claim because he relied on the City's unidentified promises; or (4) he relied on that language when he delayed filing his claim. *See id.* The City's notice of contest was filed on a Division-prepared form. The City did not

draft any of the boilerplate language contained therein, including the instructions for requesting an expedited hearing. Because the City never expressly directed the boilerplate language to claimant, he cannot now claim it constituted a promise from the City to him or that the City had any expectation that he would rely on it to his detriment.

¶ 42 More importantly, claimant admits that he filed his claim for compensation late because "the filing of an Application for Hearing awaited the decisions of the Colorado Supreme Court concerning burdens of proof under [section] 8-41-209." He thus implicitly concedes that his decision to file his application for hearing after the statute of limitations had expired was unrelated to the advisement addressing expedited hearings in the City's notice of contest form, and he cannot now claim that language in the notice of contest induced him to delay filing his claim. In the absence of any detrimental reliance, claimant cannot establish equitable estoppel.

¶ 43 Accordingly, we reject this contention, as well.

IV. Conclusion

¶ 44 The order is affirmed.

JUDGE J. JONES and JUSTICE MARTINEZ concur.

COLORADO COURT OF APPEALS

DATE FILED: August 22, 2019
CASE NUMBER: 2018CA1894

Court of Appeals No. 18CA1894
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-001-904

Stanzi Miller,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Recob & Associates,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE VOGT*
Richman and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 22, 2019

The McCarthy Law Firm, P.C., John D. McCarthy, Arvada, Colorado, for Petitioner

No Appearance for Respondents

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 In this workers' compensation action, claimant, Stanzi Miller, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed the order of an administrative law judge (ALJ) denying and dismissing claimant's claim for penalties. We affirm.

I. Background

¶ 2 Claimant worked for employer, Recob & Associates, as a paralegal. She sustained injuries to her head and neck when she hit her head on a metal shelf in December 2015. Employer, who was uninsured at the time of claimant's injury, denied liability, and the case went to hearing.

¶ 3 By order dated January 13, 2017, ALJ Michelle Jones awarded claimant her reasonable and necessary medical benefits and temporary total disability benefits for the period from December 21, 2015, to March 31, 2016. Pursuant to section 8-43-408(1), C.R.S. 2016,[1] ALJ Jones also increased the award by 50% to penalize employer for failing to carry workers' compensation insurance. The

[1] Section 8-43-408(1), C.R.S. 2016, was substantially amended effective July 1, 2017, and no longer provides for a 50% penalty against uninsured employers payable to injured workers.

total amount due under the order was $16,813.17. Claimant concedes that employer paid the award in full in compliance with the order. Employer did not seek review of ALJ Jones's order. It therefore became final and unappealable.

¶ 4 On March 1, 2017, an employee of the Division of Workers' Compensation Claims Management Unit sent employer a letter advising it that "[p]ursuant to Rule 5-5(C)(1), [f]ollowing any order . . . becoming final which alters benefits being paid under the [W]orkers[']' [C]ompensation [A]ct, an admission consistent with the order shall be timely filed." Employer did not respond to the letter and did not file an admission at that time. A follow-up letter was sent on April 18, 2017, again advising employer:

> We are requesting a response regarding:
> Comply with Rule 5-5(C)(1)
>
> Following any order . . . becoming final which alters benefits being paid under the [Act], an admission consistent with the order shall be timely filed.

Thereafter, on May 1, 2017, employer filed a general admission of liability (GAL).

¶ 5 However, the GAL was filed more than thirty days after the ALJ issued her order. Under Rule 5-5(C)(1) of the Workers'

Compensation Rules of Procedure, an admission must be filed within thirty days of a resumption or increase in benefits, or "timely filed" after the issuance of an order "which alters benefits being paid." Dep't of Labor & Emp't Rule 5-5(C)(1), 7 Code Colo. Regs. 1101-3. Because employer's GAL was filed more than three months after ALJ Jones entered her order, claimant sought penalties against employer for its alleged violation of Rule 5-5(C).

¶ 6 ALJ Timothy Nemechek heard testimony and argument on claimant's penalty claim. He concluded that employer did not violate the rule and therefore denied and dismissed the penalty claim. The ALJ reasoned that no admission was required because employer had not paid any benefits until being ordered to do so; thus, there were no "benefits being paid" prior to the order's issuance, and no "resumption or increase" of benefits as required by the rule. (In so concluding, ALJ Nemechek observed that employer's proposed interpretation would "require an employer or insurer to file admission after every order.") He further held that even if claimant's interpretation of Rule 5-5(C)(1) was correct, employer's actions were "objectively reasonable."

¶ 7 Affirming ALJ Nemecheck's order on review, the Panel concluded that the rule at issue did not apply because ALJ Jones's order did not "alter benefits being paid" — rather, the order "instituted benefits that were not being paid." In so concluding, the Panel also observed that the Division had "misinterpreted the rules and erroneously notified [employer] that an admission was required."

II. Analysis

¶ 8 Claimant contends that ALJ Nemechek and the Panel misinterpreted Rule 5-5(C)(1) and erred in failing to afford deference to the Division's construction of the rule — a construction evidenced by the two letters in this case and by the Division representative's testimony at the rulemaking hearing. Under a proper reading of the rule, claimant asserts, an admission must be filed "whenever there is a change in workers' compensation benefits." She reasons that because employer had paid no benefits whatsoever prior to being ordered to do so, her benefits increased from zero to over $16,000, triggering the rule. We are not persuaded to set aside the Panel's decision.

A. Applicable Law

¶ 9 Penalties of up to one thousand dollars per day may be imposed against a party who

> (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel.

Pena v. Indus. Claim Appeals Office, 117 P.3d 84, 87 (Colo. App. 2004); *see also* § 8-43-304(1), C.R.S. 2018. The failure to comply with a procedural rule is a failure to obey an "order" within the meaning of section 8-43-304(1). *Pioneers Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97, 98 (Colo. App. 2005).

¶ 10 The relevant portions of Rule 5-5(C) provide:

> (C) Upon the termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation prior to the next scheduled date of payment, regardless of the reasons for the termination or reduction. An admission shall be filed within 30 days of any resumption or increase of benefits.
>
> (1) Following any order . . . becoming final which alters benefits being paid under the workers compensation act, an admission consistent with the order shall be timely filed.

¶ 11 Resolving the issue before us requires that we determine whether that rule applies here, which would render employer's failure to file a timely admission a violation warranting a penalty.

¶ 12 In construing an administrative rule or regulation, we apply the same rules of construction as we would in interpreting a statute. *Winter v. Indus. Claim Appeals Office*, 2013 COA 126, ¶ 9. Thus, where the language is clear, we interpret the statute or rule according to the plain and ordinary meaning of the words. *Id.* at ¶ 8.

¶ 13 Although our review is de novo, when we interpret an administrative regulation, we bear in mind the principle that "an administrative agency's interpretation of its own regulations is . . . entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with such regulations." *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002).

¶ 14 How to apply that principle is not always clear in cases where, as here, the Panel and the Division have disagreed on the interpretation of the relevant regulation. Depending on the circumstances, cases from the supreme court and this court afford

deference variously to one entity or the other. *See, e.g.*, *City of Manassa v. Ruff*, 235 P.3d 1051, 1056 (Colo. 2010) (deferring to panel); *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) (deferring to division); *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006) (deferring to position of division as set forth in its interpretive bulletin); *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ("We also give due deference to the interpretation of the statute adopted by the Panel as the agency charged with its enforcement, although we are not bound by that interpretation if it is inconsistent with the clear language of the statute or legislative intent.").

¶ 15 In these circumstances, we interpret Rule 5.5(C) in accordance with general principles of statutory interpretation as set forth above, without necessarily deferring either to the Panel or the Division.

B. Application

¶ 16 Applying those principles, we conclude, as did the ALJ and the Panel, that the rule does not require an admission under the facts presented here.

¶ 17 The plain language of the first paragraph of the rule requires an admission within thirty days of "any resumption or increase" of benefits. Dep't of Labor & Emp't Rule 5-5(C), 7 Code Colo. Regs. 1101-3. ALJ Jones's order did not result in a "resumption" of benefits because none had been paid up to that point; that phrase of the rule is thus clearly inapplicable. Nor do we agree with claimant that the phrase requiring a new admission whenever an "increase" in benefits occurs applied because benefits "increased" from zero to more than $16,000.

¶ 18 The dictionary definition of "increase" is "something that is added to an original stock or amount by augmentation or growth (such as offspring, produce, profit)." Merriam-Webster Dictionary, https://perma.cc/9XKP-JRQK. The Panel's conclusion that "increase" means "giving more than was already being given, not giving something where nothing existed" is consistent with that dictionary definition. We also agree with the Panel that, because no benefits had previously been paid to claimant, ALJ Jones's order constituted an initial institution of benefits, not the "augmentation or growth" of an "amount" already in place.

¶ 19 Subsection (1) of Rule 5-5, which requires an admission to be timely filed after the issuance of an order altering "benefits being paid," by its plain language does not apply to claimant's situation. Dep't of Labor & Emp't Rule 5-5(C)(1), 7 Code Colo. Regs. 1101-3. Because no benefits had been paid to claimant at all before ALJ Jones issued her order, the order did not in any way change benefits "being paid" to claimant. Although claimant argues that the situation or status quo was altered by issuance of ALJ Jones's order, the rule requires that the order alter *benefits* being paid, not that it alter a situation or the status quo.

¶ 20 We therefore conclude that neither Rule 5-5(C) nor Rule 5.5(C)(1) applied to the situation presented here. Employer consequently did not violate any rule by waiting more than three months after ALJ Jones's order to file its GAL. Where no rule violation occurred, no penalty can be imposed. *See Pena*, 117 P.3d at 87.

¶ 21 In light of our resolution of this issue, we do not reach the additional arguments raised by claimant on appeal.

III. Conclusion

¶ 22 The order is affirmed.

JUDGE RICHMAN and JUDGE HARRIS concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-047-467-002

IN THE MATTER OF THE CLAIM OF:

JOSE CRUZ VERDEJA,

Claimant,

v.

FINAL ORDER

BAKERS TRANSMISSION SERVICE,

Employer,

and

TECHNOLOGY INSURANCE COMPANY INC,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Sidanycz (ALJ) dated May 1, 2019, that denied his claim for permanent total disability benefits. We affirm the decision of the ALJ.

The claimant worked for the respondent employer as a diesel and auto mechanic. On May 19, 2017, the claimant slipped from a ladder while working on a repair and fell six feet onto his rear and his back. He sustained a compression fracture of the L1 vertebrae in his low back.

The claimant's treatment included injections, acupuncture, chiropractic treatments, physical therapy, pool therapy, a TENS unit, a compound cream and pain medications. The claimant was twice evaluated for possible surgical procedures. On both occasions surgery was not recommended. The claimant's treating physician, Dr. Stagg, placed the claimant at maximum medical improvement as of March 29, 2018, and assigned a 17% permanent medical impairment rating. Dr. Stagg suggested permanent work restrictions limited to the light duty physical demand classification. These restrictions indicated the claimant should observe a maximum lift of 20 pounds and other limits described in a Functional Capacity Exam (FCE) performed on February 6, 2018, at Grand Junction Therapies.

The respondents submitted a Final Admission of Liability corresponding to the MMI date and impairment rating provided by Dr. Stagg. The claimant disputed the Admission and asserted he was permanently and totally disabled pursuant to §§ 8-40-201(16.5)(a) and 8-42-111(1), C.R.S. A hearing was conducted on December 11, 2018, and the deposition testimony of several witnesses was taken subsequent to that date.

In addition to the FCE of February 6, the respondents arranged for a second FCE at Peak Form Physical Therapy on September 5, 2018. The respondents also requested the claimant undergo a second opinion independent medical examination by Dr. McCranie on July 18. The claimant presented a vocational report and testimony from Robert Van Iderstine. The respondents obtained a vocational report and submitted testimony from Kristine Harris.

The testimony was undisputed that the claimant was 60 years old on the date of the hearing. He was born and raised in Mexico and immigrated to the United States in 1978. He is a permanent resident alien. The claimant testified in English and participated in interviews with doctors and with the vocational experts in English. At the time of his arrival in the U.S. he worked in agricultural jobs and crop harvesting. The claimant completed a diesel mechanic correspondence repair course in 1982. In 1989 he graduated from a Delta Montrose Area Vocational Technical Center auto repair course. In the succeeding 30 years the claimant worked primarily as an auto and truck repair mechanic. At different points he also worked as a hotel housekeeper and as a sandwich maker in a restaurant. In addition to working as a mechanic for several vehicle repair and auto dealerships, the claimant ran his own auto repair business for several years.

The parties presented conflicting evidence concerning the extent of the claimant's permanent physical restrictions, his ability to write in English, the nature of his transferable job skills, his capacity with computers and the availability of jobs suitable for the claimant. The ALJ found most credible and persuasive the testimony of Dr. McCranie, Ms. Harris and Vida Baker, the claimant's last employer. The ALJ noted Dr. McCranie's opinions the claimant could work in a variety of vocational situations that featured lifting to 20 pounds, limited kneeling and stair climbing and a combination of occasional walking and standing. Ms. Harris identified and testified regarding a dozen jobs she located in the Grand Junction area she determined were available to the claimant. Many were specifically approved by Dr. McCranie. Ms. Baker described the claimant as being sufficiently familiar with English that he could successfully speak, read and complete documents. The claimant was also indicated to be adept at the routine use of the internet on his phone such that he used it for work purposes every day. Accordingly, the ALJ concluded the claimant was able to earn wages in his commutable

labor market despite his work injury limitations. The request for permanent total disability benefits was denied.

On appeal, the claimant contends the findings of the ALJ are not supported by the evidence in the record. It is asserted both the FCE reports limit the claimant to only 20 pounds lifting and occasional sitting and standing which means 20 minutes of sitting or standing at one time. The claimant argues these limits were referenced by Dr. Stagg. The claimant also maintains that he attempted to apply for a number of the jobs listed by Ms. Harris but when he informed the employer contact of his restrictions he was advised he was not suited for the position. The claimant insists the descriptions of the jobs identified by Ms. Harris are on their face beyond his capacities. It is argued Mr. Van Iderstine's opinion that there are no opportunities for the claimant to earn wages, is the only conclusion justified by the medical records and the claimant's description of his restrictions.

Section 8-40-201(16.5) (a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant has the burden of proof to establish permanent total disability. In determining whether the claimant has satisfied that burden of proof, the ALJ may consider a number of "human factors." *Christie v. Coors Transportation Co*., 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education, and the availability of work the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The overall objective of this standard is to determine whether, in view of all these factors, employment is reasonably available to the claimant under his particular circumstances, which includes the claimant's complaints of pain.

Because the issue of permanent total disability is generally factual, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This standard of review requires that we consider the evidence in the light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 91 P.3d 1117 (Colo. App. 2003).

Dr. McCranie testified the FCEs in this case were not conclusive in regard to many of the restrictions listed. She pointed out that the Grand Junction Therapy FCE routinely terminated a physical test solely on the basis of the claimant's subjective request. It was not stopped due to an increase in heart rate which would have signaled a maximal physical exertion on the part of the claimant. Depo. at 19, 27-28. The doctor pointed out that at several points in the claimant's medical records he lifted more than he did in the FCE. However, Dr. McCranie noted there would have been no particular reason to explain why his level of function should have declined by the time he participated in the FCE. Depo. at 23. She pointed to the presence of positive results for three out of five Waddell signs when she examined the claimant. These were described as indications of a nonphysiologic component to the claimant's participation in the examination. "There's something not anatomical or pathological going on with the pain. It could be psychological. It could be an effort – effort related." Depo. at 22. The claimant was noted to have driven for 5 ½ hours from Grand Junction to Denver to attend Dr. McCranie's exam. However, the claimant asserted he could sit for only 15 minutes. Depo. at 29. In one of the FCE's the claimant lifted 24 pounds despite his subjective statement he could only lift 5 to 10 pounds. Depo. at 25. The doctor concluded the claimant was regularly underestimating his abilities. Depo. at 28.

Dr. McCranie was asked to review the specific jobs Ms. Harris had located as acceptable for the claimant. The doctor rejected jobs as a Sears auto customer service advisor and as a Taco Bell attendant as inappropriate. She characterized a server job at a Golden Corral restaurant and a highway construction flagger job as not clearly indicated. Dr. McCranie observed that on a part time basis the claimant could perform jobs as a dishwasher at a Chili's restaurant, as a Domino's pizza delivery driver, as a Qdoba line server, as a Craftworks dishwasher and as an Outback Steakhouse dishwasher. Full time jobs that were approved included as a Holiday Inn concierge, a Regal movie theatre box office attendant, a Trandev bus driver, an Avis Rental Car driver and a parking service specialist at Colorado Mesa University.

Ms. Harris testified the claimant's background revealed several transferable skills that would assist his employment in different light duty jobs. It was pointed out the claimant's completion of his motor vehicle technician training was accomplished largely through materials in English. The claimant had in the past been promoted to supervisory positions. His ability to run his own business indicated past organizational and customer relation success. Ms. Harris also relied on the absence of sitting, standing or walking limitations recommended by Dr. Stagg for long periods of time. Tr. at 29. She noted the FCE's did not, in fact, test for tolerances to sitting, standing or walking. Tr. at 33. Any recommendations in regard to those categories were derived solely from the claimant's

subjective reports. Tr. at 33. Ms. Harris therefore, concluded the claimant could perform several jobs that did feature longer periods of standing, walking and sitting insofar as they did not require lifting over 20 pounds.

Ms. Baker testified she spoke with the claimant every day at work in English. Tr. at 277. She described how the claimant was required to complete forms for each job on which he worked. This form required the claimant to enter information detailing the diagnostic information obtained, the work done and what he was recommending to repair a vehicle. Tr. at 278, 281. The claimant regularly used his phone to locate parts and to verify spelling. Tr. at 278. The claimant testified he has a computer at home and he knows how to select You Tube videos and Netflix shows on the internet. He also knows how to locate information through the Google web site. Tr. at 110, 112.

The ALJ's reliance on the testimony of Dr. McCranie, Ms. Harris and Ms. Baker represents a determination premised on substantial evidence. This testimony supports the ALJ's conclusion the claimant's background, training and residual abilities allow him to earn wages in his locale regardless of the physical restrictions accompanying his injury.

To the extent the ALJ did not make specific findings of fact concerning evidence supporting the claimant's contention that he is unable to work due to an absence of accommodation for his pain complaints, that does not establish grounds for appellate relief. The ALJ is not required to expressly cite evidence he rejected as unpersuasive. *Jefferson County Public School v. Dragoo*, 765 P.2d 636 (Colo. App. 1988). Evidence not specifically credited is implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ's findings reflect that she resolved the pertinent conflicts based upon her credibility determinations. *See Ralston v. Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991)(ALJ not required to resolve all conflicts in the evidence but only pertinent conflicts). We may not reweigh the evidence on appeal. *Rockwell v. International Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Neither may we substitute our judgment for that of the ALJ concerning the credibility of the expert witnesses. Therefore, we may not interfere with the ALJ's determination that Dr. McCranie's or Ms. Harris's testimony was more credible than the testimony of the claimant's vocational expert. The claimant's further arguments on this issue do not alter our conclusions.

It was the claimant's burden to persuade the ALJ that he is unable to earn any wages, and therefore is entitled to permanent total disability benefits. *See McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). The claimant's

evidence failed to persuade the ALJ, and we cannot say the evidence compels a contrary determination. The ALJ's order reflects the proper application of the law and is supported by substantial evidence and the denial of benefits was, therefore proper.

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

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

8/19/19 by TT .

LAW FIRM OF JOANNA JENSEN, Attn: JOANNA C JENSEN ESQ, 844 GRAND AVE SUITE A, GRAND JUNCTION, CO, 81501 (For Claimant)
MCCOLLUM CROWLEY MOSCHET MILLER & LAAK LTD, Attn: KIMBERLY A ALLEGRETTI ESQ, 1999 BROADWAY STE 1425, 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
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. 5-034-047-001

IN THE MATTER OF THE CLAIM OF:

JAMES JONES,

Claimant,

v.

FINAL ORDER

THE MITRE CORPORATION,

Employer,

and

AMERICAN CASUALTY,

Insurer,
Respondents.

The self-represented (*pro se)* claimant seeks review of an order of Administrative Law Judge Edie (ALJ) dated April 26, 2019, that determined he failed to overcome the opinions of the Division sponsored independent medical examination (DIME) physician on maximum medical improvement (MMI) and permanent impairment, and denied and dismissed his claim for permanent partial impairment benefits. We affirm.

This matter went to hearing on the following issues: (1) what was the DIME physician's true opinion regarding permanent impairment and MMI; and (2) did the claimant overcome the DIME opinions by clear and convincing evidence.

After the hearing, the ALJ made the following factual findings. On October 1, 2016, the claimant sustained a mild concussion and nose abrasion when he ran into a door at his home. He sought treatment with this primary care physician, Dr. Silveira. The claimant missed work on Monday and Tuesday that same week due to this injury.

On Thursday, October 6, 2016, the claimant was working when he decided to dispose of three hard drives from a computer. The hard drives stored data on a medium encased in a metal container roughly three-and-a-half inches in size. The claimant threw the drives from a position of approximately 12 feet above the ground on which the dumpster rested, and from the other side of a railing which separated his position from the opening below where the dumpster was located. The claimant asserted the shattering

of the hard drives resulted in an extremely loud blast of sound which the hurt his ears and caused tinnitus and hearing loss.

Several weeks later, on November 3, 2016, the claimant sought treatment with Dr. Yohanan. The claimant detailed his October 1, 2016, concussion and nose abrasion. He presented for evaluation for a "forehead, head, and neck injury," making no mention of any intervening cause, or the alleged work injury. The claimant described accidentally walking into the side of a door striking the bridge of his nose. The injury resulted in a healed abrasion to the nose and a mild concussion. At this time, the claimant complained of bilateral ear pain and ringing in the ears. Dr. Yohanan concluded that he saw "no primary otologic disorder, nor would [he] expect one with this mechanism of injury." There was no mention of the October 6, 2016, noise incident at work.

Dr. Yohanan's February 16, 2017, report does mention the claimant's dumpster incident. Dr. Yohanan opined, however, that the claimant did not have hearing loss. Rather, Dr. Yohanan stated that the claimant had the "perception of hearing loss." Dr. Yohanan opined that the dumpster incident only "temporally and theoretically played a role in [claimant's] symptoms."

The claimant eventually completed a Worker's Compensation Claimant's Report on January 16, 2017. The claimant claimed he had tinnitus and hearing loss in his right ear. At no point did the claimant reference a neck injury.

Subsequently, ALJ Lamphere issued an order finding the claimant's claim to be compensable but denied the hearing loss claim. Instead, ALJ Lamphere found that the claimant "suffered a compensable injury to his neck and ears, in the form of tinnitus." ALJ Lamphere specifically held that "[w]hile Claimant's exposure to a loud gunshot like sound probably did not cause a primary injury to the neck, [he was] persuaded that his ear pain and tinnitus indirectly caused the need for neck treatment." The respondents appealed ALJ Lamphere's order and the Panel affirmed. *Jones v. The Mitre Corp.*, W.C. No. 5-034-047-01 (March 19, 2018).

The claimant began treating with Dr. Ramaswamy. He was placed at MMI on June 26, 2018, and provided a 4% whole person impairment rating for the cervical spine.

The respondents requested a DIME, and Dr. Fall was selected.[1] Dr. Fall conducted an examination on September 20, 2018. During this examination, the claimant

[1] In his order the ALJ mistakenly stated that the claimant requested a DIME.

presented Dr. Fall with ALJ Lamphere's prior order. While Dr. Fall did not specifically reference ALJ Lamphere's order in her DIME report, she noted in her opening paragraph as follows: "The medical records provided were reviewed. [The claimant] also brought in additional documents which were reviewed." The claimant provided ALJ Lamphere's order to Dr. Fall without leave of an ALJ, permission of the Division of Workers' Compensation, or by agreement of the parties. Dr. Fall's DIME report dated September 20, 2018, provided the claimant with a 14% whole person impairment rating for the cervical spine. However, Dr. Fall did not include any analysis on why this was related to the noise incident of October 6, 2016.

The respondents subsequently moved for leave to schedule a *Samms* conference with the DIME physician. *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). On November 28, 2018, ALJ Lamphere signed an order authorizing the *Samms* conference and specifically authorized Dr. Fall to issue a supplemental letter "clarifying her DIME report." The respondents then asked Dr. Fall the following seven questions, which she answered on February 14, 2019, as follows:

> 1. Did [the claimant] present you with a copy of the Findings of Fact, Conclusions of Law, and Order from the above-captioned workers compensation case when he presented for the DIME with you on September 20, 2018:
> A: Yes
>
> 2. Did your review of that Order influence your opinions in this matter concerning the extent of Claimant's injuries and medical causation in this case?
> A: Yes
>
> 3. Without the influence of that Order upon your independent medical judgment, would you have reached a different conclusion concerning the extent of Claimant's injuries and medical causation in this case?
> A: Yes
>
> 4. Based on your independent medical judgment, would Claimant's cervical injury be related to the noise incident at issue in this case?
> A: No

> 5. Based on your independent medical judgment, what would [the claimant's] permanent impairment rating be in this case? Please explain.
> A: It would be no impairment caused by the incident in this case.
>
> 6. Based on your independent medical judgment, what would [the claimant's] date of maximum medical improvement be? Please explain.
> A: 2/16/17 as per the report of Dr. Yohanan, neck pain to the injury prior to work event, and no hearing loss.
>
> 7. Based on your independent medical judgment, would [the claimant] require any medical maintenance care? Please explain.
> A: No. I would not have found causation for a cervical injury.

At the request of the respondents, Dr. Burris performed a record review independent medical examination. Dr. Burris noted numerous inconsistencies in the medical records. He also opined that Dr. Fall's revised opinion was consistent with the medical records and his own review of the case.

The ALJ first determined that during the DIME, the claimant tendered to Dr. Fall the order of ALJ Lamphere with the intent that it influence her medical opinion on causation, in violation of Workers' Compensation Rule of Procedure 11-4(B)(2) and (7) then in effect. He ruled that the claimant was presumed to know applicable statutes and rules and is required to act accordingly. The ALJ held that the claimant's actions had the effect he desired. Dr. Fall deferred to ALJ Lamphere's order on the issue of causation instead of using her independent medical judgment. The ALJ then determined that in response to ALJ Lamphere's ruling at the *Samms* conference, that Dr. Fall revised or clarified her prior impairment rating based on her independent medical judgment. He found that Dr. Fall's true medical opinion was that the noise incident did not cause the claimant a cervical injury. The ALJ further held that during the hearing, the claimant presented no evidence to the contrary. The ALJ therefore ruled that the claimant reached MMI as of February 16, 2017, with no permanent impairment. He held that the claimant failed to overcome the DIME physician's opinions on MMI and permanent impairment and denied and dismissed his claim for permanent partial impairment benefits.

Initially, we note that the claimant has attached documents to his brief in support that were not presented to the ALJ during the hearing. Because these documents were not presented to the ALJ, they are not a part of the appellate record and, therefore, we

may not consider them in this appeal. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo.App.1987).

I.

On appeal, the claimant first argues that the ALJ misapplied the burden of proof. He explains that since the respondents appealed the opinions of the DIME physician and endorsed the issue of overcoming the DIME on causation in their case information sheet, it was their burden to overcome the DIME physician's opinions by clear and convincing evidence. We perceive no error.

The DIME physician's findings concerning the date of MMI and the degree of permanent medical impairment are binding on the parties unless overcome by clear and convincing evidence. Sections 8-42-107(8)(b) (III) & (8)(c), C.R.S. Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's findings of MMI, permanent impairment, and causation consist not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328, 330-331 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *cf. Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported).

Once the ALJ determines the DIME physician's opinion concerning MMI and impairment, then the party seeking to overcome those opinions bears the burden of proof by clear and convincing evidence. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra.* We may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; §8-43-301(8), C.R.S.

Here, we reject the claimant's argument that the ALJ erred in shifting the burden of proof to him to overcome the DIME physician's true opinions. It is true, as the claimant argues, that the respondents filed an application for hearing to overcome the DIME on permanent impairment and "the extent of the injury as it relates to causation," and they also filed a case information sheet identifying the same issues for hearing. However, as detailed above, when a DIME physician offers conflicting opinions concerning MMI, impairment, or causation, as the DIME physician did here, it is for the ALJ to resolve the conflict and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. The ALJ found, with record support, that Dr. Fall's true opinions were that the noise incident did not cause a cervical injury, and that the claimant reached MMI as of February 16, 2017, with no permanent impairment. Ex. C at 21-22. Consequently, the burden shifted to the claimant to overcome these opinions of Dr. Fall. *Id*. We therefore have no basis to disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

II.

Next, the claimant argues that the ALJ's findings of fact are not supported by the evidence. He specifically argues that the ALJ's findings #1, #3, #4, #5, #6, #9, #10, #11, #12, #13, #14, #15, #16, and #17 are either false, inaccurate, or somehow in error. However, we perceive no error.

We must uphold the ALJ's evidentiary findings that are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Further, the ALJ is not held to a "crystalline standard" in expressing his findings of fact. All that is required is for the ALJ to make findings of fact concerning the facts which he determines to be dispositive of the issues, and that we are able to ascertain the basis of the order from those findings. *Magnetic Engineering, Inc., v. Industrial Claim Appeals Office*, *supra*; *Riddle v. Ampex Corp*., 839 P.2d 489 (Colo. App. 1992).

A condensed summary of the claimant's allegations of error regarding the ALJ's factual findings are as follows:

> #1. The ALJ's factual finding #1 addresses the claimant's October 1 home injury and his subsequent treatment with Dr. Silveira. The claimant argues that this finding is inaccurate because the ALJ did not

mention that Dr. Silveira stated the claimant's "symptoms have cleared."

#3. The ALJ's factual finding #3 addresses the claimant's treatment with Dr. Yohanan and states that he presented for an evaluation of the "forehead, head, and neck injury." The claimant argues that this finding is inaccurate because it ignores that he "agreed to a Standard Form 312 Classified Information Nondisclosure Agreement (NDA) with the US Air Force as part of his honorable separating on this date." Also, the claimant contends this finding ignores "the logical inference" that the claimant was discussing his work injury or injured ears with Dr. Yohanan, an ENT doctor.

#4. The ALJ's factual finding #4 addresses the claimant's visits with Dr. Rudderrow and Dr. Knox and states that there is no mention of the October 6 work incident. The claimant argues that this finding is false because he did discuss his neck injury with Dr. Rudderrow. Also, the claimant contends that Dr. Knox shares an ENT practice with Dr. Yohanan who initially saw the claimant for his October 6 work injuries, and he deferred and recommended that neck and other issues regarding his work injuries should be discussed with Dr. Yohanan. The claimant argues that Dr. Knox's intent to focus on a specific issue- ear cyst- and not muddle a worker's compensation neck and ear case that already involved another ENT in his practice is not reflected in this finding.

#5. The ALJ's factual finding #5 addresses Dr. Yohanan's report which states that the claimant had the "perception of hearing loss" and relates the claimant's neck symptoms to his October 1 home injury and not his October 1 dumpster incident.[2] The claimant argues that these findings are false because the dumpster incident occurred on October 6 and not on October 1. Further, the claimant argues that Dr. Yohanan's opinion is that a state of "hypersensitivity to sound" occurred because of the October 1 incident at home and made him susceptible the work injury on October 6. The claimant contends that "[s]usceptibility to injury is not an injury."

[2] The ALJ mistakenly referred to the claimant's work injury occurring on October 1 rather than October 6.

#6. The ALJ's factual finding #6 states that the claimant acknowledged he did not report the work injury until after he saw Dr. Yohanan in November 2016 and he did not reference a neck injury. The claimant argues these findings are false because the claimant clearly stated he was being treated by Cornerstone Physical Therapy for injuries, and those receipts show the treatments are for his "neck and ear." Also, the claimant alleges he did not know the neck injury would become chronic at this initial assessment, but his neck injury was discussed and the respondents knew he wanted reimbursement for his physical therapy treatments.

#9. The ALJ's factual finding #9 states that the "[c]laimant requested a DIME." The claimant contends this finding is false because the respondents requested the DIME. Also, he argues that the documents and sequence referenced in this finding are unclear.

#10. The ALJ's factual finding #10 states that Dr. Fall's initial DIME report provided a 14% whole person impairment rating for the cervical spine but did not include any analysis on why this was related to the October 6 noise incident. The claimant argues that this finding is false because Dr. Fall did provide analysis by stating the claimant's "prior neck injury (2003) was not work related or independent disabling and therefore, there is no apportionment."

#11. The ALJ's factual finding #11 refers to the respondents' request for a *Samms* conference and ALJ Lamphere's order allowing clarification of Dr. Fall's DIME opinion. The claimant argues that he doubts Exhibit C- the supplemental letter from the respondents to Dr. Fall asking her to respond to questions- was written independently by Dr. Fall. The claimant instead argues that Exhibit C is a "regurgitation of the Respondents' inaccurate position and suggests that Dr. Fall was directed by respondents as to the answers they wanted."

#12. The ALJ's factual finding #12 addresses Dr. Fall's February 14, 2019, answers to the respondents' supplemental letter. The claimant argues this finding does not show the "haphazardness" of Dr. Fall's answers. Also, the claimant argues that per the AMA Guides, the MMI date must come after an examining physician is chosen and

none had been chosen as of this date. Further, the claimant contends that Dr. Fall's answer to question 6 shows a level of undue influence by the respondents.

#13. The ALJ's factual finding #13 refers to Dr. Burris' "record review IME" at the respondents' request. The claimant alleges this finding is inaccurate because Dr. Burris did not perform an IME. Rather, Dr. Burris is the respondents' advocate.

#14. The ALJ's factual finding #14 states that the claimant attributed his symptoms of pain behind his ears to his home injury on October 1. The claimant essentially argues this finding is inaccurate because he received security training regarding not to discuss details of his work unless and until otherwise determined by an authorized official or court ruling. The claimant contends that this includes not correcting individuals when details relating to his work are incorrect. Since the employer has classified and sensitive information which makes the dumpster "a valuable target for the espionage technique called dumpster diving," it would be standard for him not to correct an individual outside of a legal setting. The claimant contends the ALJ ignored the logical inference that given he injured his ears during work, he is discussing his work injuries with Dr. Yohanan.

#15. The ALJ's factual finding #15 addresses the claimant's statements to his employer claiming tinnitus and hearing loss with no mention of a neck injury or neck pain. The claimant contends this finding is false because he clearly stated he was being treated by Cornerstone Physical Therapy for injuries, and those receipts show the treatments are for his "neck and ear." Also, the claimant alleges that he did not know the neck injury would become chronic at this initial assessment, but his neck injury was discussed and the respondents knew he wanted reimbursement for his physical therapy treatments.

#16. The ALJ's factual finding #16 addresses the MRI of the claimant's cervical spine revealing degenerative changes and no acute abnormalities associated with the October 6 noise incident. The claimant contends this finding is inaccurate because the MRI finds C2-C3 small central disc protrusion and C5-C6 posterior disc

> osteophyte complex and ligamentum flavum hypertrophy results in moderate canal stenosis.
>
> #17. The ALJ's factual finding #17 refers to the claimant not presenting any evidence at the hearing challenging Dr. Fall's revised opinion. The claimant argues this finding is inaccurate because he did present a review of Dr. Fall's initial DIME report by M. Janelle Limon who found it to be "thorough and [she] agree[d] with a whole person impairment rating of at least 14 percent using the AMA Guides for his work-related injuries."

Here, the claimant's specific allegations of error concerning the ALJ's factual findings are essentially a request for us to reweigh the evidence. However, the Panel has no authority to reweigh the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990)(reviewing court bound by resolution of conflicting evidence regardless of existence of evidence which may support contrary result). Likewise, we have no authority to substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of the evidence. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The claimant's arguments notwithstanding, our review of the record persuades us that the ALJ's factual findings are supported by the evidence, and he made reasonable inferences from the evidence. Section 8-43-301(8), C.R.S.; *Metro Moving and Storage Co. v. Gussert*, *supra*. Further, to the extent the claimant argues that the ALJ failed to address or cite to certain evidence, he is not required to do so. It is well settled that the ALJ is not obligated to cite or discuss every piece of evidence in his order. *Crandall v. Watson-Wilson Transportation System, Inc*., 171 Colo. 329, 467 P.2d 48 (1970). Rather, the ALJ is only required to enter findings concerning the evidence which is found to be dispositive of the issues involved, which the ALJ did here. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Additionally, we recognize that the ALJ mistakenly referred to the work incident occurring on October 1 instead of on October 6, and mistakenly referred to the claimant requesting the DIME rather than the respondents. However, we conclude that such errors are harmless. Section 8-43-310, C.R.S. (harmless error to be disregarded). Consequently, we have no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated April 26, 2019, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

David G. Kroll

CERTIFICATE OF MAILING

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

8/27/19 by TT .

JAMES JONES, 645 FERNGLEN CT, COLORADO SPRINGS, CO, 80906 (Claimant)
RITSEMA & LYON PC, Attn: DAVID BENNETT ESQ, 111 S TEJON STREET SUITE 503, COLORADO SPRINGS, CO, 80903 (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. 5-081-615-001

IN THE MATTER OF THE CLAIM OF:

BRADLEY RUSH,

Claimant,

v.

FINAL ORDER

ENTERPRISE LEASING COMPANY,

Employer,

and

TRAVELERS CASUALTY INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Margot Jones (ALJ) dated March 28, 2019, that found the claimant was injured within the course and scope of employment, awarded the claimant temporary disability benefits and medical benefits, and ruled Dr. Leach was an authorized physician. We reverse the decision insofar as it authorized Dr. Leach, and otherwise affirm the order of the ALJ.

The claimant worked for the respondent employer as an auto detailer at the employer's car rental store in Grand Junction. The claimant was injured on June 29, 2018, when the car in which he was riding became involved in a single car accident. The claimant injured his right shoulder, sustained a concussion and a laceration of his spleen.

The claimant received emergency treatment at St. Mary's Hospital. The respondents did not provide the claimant with a list of physicians to provide care pursuant to § 8-43-404(5)(a)(I)(A) C.R.S. Claimant treated with Dr. Hanley until he moved back to Denver in August 2018. He then was evaluated and received treatment from Dr. Cheyne at SCL Medical Associates. When the claimant's group health insurance expired upon the termination of his employment, he no longer could afford to continue with Dr. Cheyne. Upon the advice of his attorney the claimant went to see Dr. Leach in December 2018.

The respondents contested the claim asserting the claimant was injured while he and another employee were joy riding in one of the employer's cars. The respondents contend the claim is not compensable as it was due to horseplay activities representing a deviation from work duties. The respondents also contend that while the ability to choose a treating physician may have passed to the claimant initially, the claimant then chose to treat with Dr. Cheyne. Therefore, it is argued the claimant was required to seek approval from the respondents before he chose to switch treatment to Dr. Leach. Because the claimant did not do so, the respondents maintain the ALJ was without authority to authorize Dr. Leach.

The ALJ concluded the claimant was involved with his work duties washing cars on June 29. While doing so, another employee, Wiley McCallister, signaled to the claimant to get into the employer's Mercedes rental car Mr. McCallister was driving. The claimant was noted to be asked often to drive with other employees, including Mr. McAllister, to the local Firestone auto maintenance facility to pick up rental cars the employer left there to be serviced. The ALJ determined the claimant believed that to be the purpose of Mr. McCallister's trip. The ALJ found Mr. McCallister began driving towards the Firestone shop. He then turned the car onto a county road. After turning off the car's traction control he accelerated down the road at a high rate of speed, lost control, and caused the Mercedes to roll five times injuring the claimant. The ALJ resolved the claimant was within the course and scope of his work due to his understanding he and Mr. McCallister were driving to the Firestone store to either service the Mercedes or to pick up other cars for the employer.

I.

The respondents argue the ALJ was in error in finding the claimant's injuries occurred within the course and scope of employment. They contend the ALJ failed to apply the analysis set forth in *Lori's Family Dining v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995), and the ALJ mistakenly relied on the subjective belief of the claimant to serve as the standard to distinguish acts that are within the duties of the job from those that are not.

Injuries do not arise out of and in the course of employment if, at the time of the injury, the employee is engaged in a personal deviation for his sole benefit. *Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986). In *Lori's Family Dining*, the Colorado Court of Appeals established a four-part test to determine whether a claimant's participation in horseplay is so far removed from the duties and circumstances of

employment that resulting injuries do not arise out of the employment. The decision examined:

> (1) The extent and seriousness of the deviation;
> (2) The completeness of the deviation, i.e., whether it was commingled with the performance of a duty or involved abandonment of duties;
> (3) The extent to which the practice of horseplay had become an accepted part of the employment; and
> (4) The extent to which the nature of the employment may be expected to include some horseplay.

In *Panera Bread , LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006), the court pointed out that only the first two of the criteria are critical, specifically the extent and seriousness of the deviation, and the completeness of the deviation.

The respondents contend the claimant's deviation from work activities was extensive. They argue the claimant was aware of the employer's policy that no employee is to leave the store premises without the permission of a supervisor. The claimant knew Mr. McCallister did not have permission from a supervisor to leave with a car. In the alternative, the respondents assert the claimant was willfully ignorant of Mr. McCallister's violation of the employer's policy. They then point to the fact of an expensive car being routed down a country road not on the way to the auto repair shop as an obvious demonstration of an extensive and serious deviation. The respondents maintain the deviation was complete to the extent the excursion down the county road was not in any fashion commingled with work duties.

However, the respondents' contentions do not acknowledge there was considerable evidence to the contrary appearing in the record. The claimant testified a regular portion of his duties involved traveling to the Firestone garage with another employee to retrieve the employer's cars from the shop. Tr. at 14, 16. In those instances he stated there was no explicit permission given by the manager but it was obvious that leaving the premises was necessary to perform this function of his job. Tr. at 19, 32-33, 43. Mr. McCallister clearly indicated to the claimant he needed to get in the Mercedes and Mr. McCallister headed down the road following the route to the Firestone store. Tr. at 15-16, 19, 34. The claimant was not told by Mr. McCallister he had any plans to depart from this route to Firestone. Tr. at 33, 34-35. Mr. McCallister turned off on the county road, stopped and fiddled with the traction control. Tr. at 19-20. The claimant said he

thought that was the reason they had pulled off. Tr. at 21, 35. He told Mr. McCallister he did not think the Mercedes even had a traction control engaged and that they needed to get going to the Firestone. Tr. at 20, 35. The claimant then described how Mr. McCallister immediately placed the car in gear, sped off down the county road, lost control, and crashed the car. Tr. at 20.

The ALJ found the claimant's version of the events to be credible and persuasive. She concluded the claimant reasonably believed he was involved in a work activity when he left the employer's premises with Mr. McCallister. While Mr. McCallister may have been involved in horseplay or a deviation from work, the ALJ deemed the claimant "did not deviate from the course and scope of his employment at the time of the injury." Finding of Fact ¶ 18. Rather, the claimant was a victim of his co-employee's horseplay.

The question of whether horseplay is a deviation significant enough to remove the claimant from the course and scope of employment is one of fact for determination by the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*. Accordingly, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in a light most favorable to the prevailing party and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The testimony of the claimant represents substantial evidence to support the findings of the ALJ.

The testimony of the claimant indicates the deviation from employment initiated by Mr. McCallister was extensive. Mr. McCallister worked at the rental desk dealing with customers and assigning them cars. In retrospect, his intention was to do some off-road driving in one of the employer's expensive models. That activity was an extensive departure from his work. However, the claimant also indicated that because the claimant was responsible for different job duties than those assigned to Mr. McCallister, there was no deviation at all from the claimant's work. He followed an apparently routine request from Mr. McCallister to accompany him to the Firestone store to retrieve other of the employer's cars. It was not until the last minute of that trip that he was made aware Mr. McCallister was taking him on an unauthorized joy ride. The claimant was not in a position to stop or mitigate the excursion. The claimant ended up in the hospital due to Mr. McCallister's reckless adventure. The record supports the ALJ's conclusion the claimant was not involved in a deviation from work and to the extent he was it was coextensive with the performance of his employment duties.

The respondents also argue the ALJ relied solely on the claimant's subjective belief his participation in the work deviation was a part of his work obligations. They rely on *Olivas-Ruiz v. Norris Concrete Contractors LLC*, W.C No. 4-312-963 (September 18, 1997) and *Schniedwind v. Rite of Passage, Inc*., W.C. No. 5-051-507-03 (September 18, 2018), and contend a claimant's belief as to the scope of their work duties must be measured by an objective standard. Therefore, insofar as the ALJ did not find that a reasonable person similarly situated with the claimant would have shared his view of those duties, they insist the ALJ was in error. Neither *Olivas-Ruiz* nor *Schniedwind* indicate a claimant's subjective belief is insufficient to establish the claimant was involved in work duties and not in a work deviation. Rather, the determination as to whether the claimant was engaged in a deviation from work is to be based upon substantial evidence in the record. *See*, *Nava v. Mesa Concrete*, W.C. No. 4-363-140 (March 29, 1999)(the claimant's belief as to the scope of his employment was reasonable based on customs in the trade and in the absence of the employer's contrary direction); *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6,8 (Colo. App. 1995); *Pueblo County v. Industrial Claim Appeals Office*, 413 P.3d 348, 351 (Colo. App. 2017). Here, the ALJ did note that part of the basis for assigning credibility to the claimant's testimony was that the belief appeared reasonable in the context of the evidence. In the ALJ's conclusion of law ¶ 5, it was found "… Claimant reasonably assumed his co-worker operating the vehicle had authorization to operate the vehicle". In conclusion of law ¶ 8, the ALJ resolved " … Claimant reasonably believed he was on a routine errand to assist his co-worker in getting Employer's vehicle to Firestone for servicing or to pick up one of Employer's vehicles from being serviced." However, the ALJ also found the claimant's job required that he accompany other employees to retrieve cars being serviced at the Firestone garage. She noted the claimant previously had driven with Mr. McCallister on such errands. It was the testimony of the employer's witness that all vehicles take a common route off the airport property, F of F ¶ 12. Accordingly, the conclusion of the ALJ that the claimant was acting within the scope of his employment was not premised exclusively on the subjective view of the claimant. Given the ALJ's findings of fact, as well as their support in the record by the claimant's testimony, the ALJ was not in error to find the claimant felt compelled by his job responsibilities to comply with Mr. McCallister's direction to accompany him while he drove the Mercedes off the employer's premises. Section 8-43-301(8), C.R.S.

The ALJ's determination the claimant was not involved in a deviation from work while at the same time finding the corresponding party in the horseplay was in such a deviation is not without precedent. 1A Larson, Workmen's Compensation Law § 23.10 explains that "non-participating' victims of horseplay are entitled to compensation because the employment placed them in the "zone of danger" created by the horseplay.

Kitchen v. Department of Labor & Employment, 29 Colo. App. 374, 486 P.2d 474 (1971)(employee accidently shot by a co-employee's hunting rifle at work "had not at any time stepped aside from the course of employment:"); *Thomas v. Politte*, W.C. No. 4-246-664 (December 15, 1995). In *Industrial Commission v. Employers Casualty Co*., 136 Colo. 396, 318 P.2d 216 (Colo. 1957), the claimant was hit in the eye by a rock thrown at him by a co-employee. The claimant had not thrown any rocks and was not engaging in any rock throwing. The Court quoted from its previous decision in *Gates Rubber Co. v. Industrial Commission*, 112 Colo. 480, 150 P.2d 301 (Colo. 1944), and reasoned:

> Question to be Determined.
>
> Where an employee while on duty suffers an injury which is caused by playful actions of a fellow employee, in which the injured person was not a participant; can such injured workman recover compensation for accidental injury 'arising out of and in the course of his employment,' under pertinent provisions of the Workmen's Compensation Law, C.R.S. '53, 81-1-1 et seq.? [8-40-101 C.R.S. et. seq.]
>
> The question is answered in the affirmative.
>
> **…**
>
> [In the *Gates* case] this court affirmed the award of the Commission … "they show merely a thoughtless, careless, unconsidered act by the fellow employee that undesignedly and unfortunately resulted in claimant's injury. From claimant's standpoint the injury occurred not only while he was employed, but because he was employed and engaged in the work he had been directed to do. He was where he had a right to be; he was discussing the work with his fellow employee at the machine and waiting for expert help to clear up their difficulties; he was doing the natural thing for a workman during the temporary intermission--sitting on an available object near the machine. He had no authority, so far as the record discloses, to hire or control other employees in the plant. He was merely one workman among many, doing the work he was directed to perform. An accident resulting

> proximately from the conditions under which the business is carried on and under which the employee necessarily does his work, is one 'arising out of * * * his employment' within the intent and meaning of those words as used in the Compensation Act defining a compensable injury." 312 P.2d at 217-218.

Accordingly, the Court ruled "… the controlling element is whether claimant was a participant in the playful conduct which caused the injury. … If he was not a participant he will not be denied such benefits on the sole ground that playful conduct of a fellow workman caused the injury." *Id*. at 219. The circumstances in this case are not significantly different. The ALJ found the claimant was engaged in the obligations of his employment when he was injured by the horseplay of his co-employee. The fact that the co-employee was engaged in a deviation from activities of work, does not necessarily lead to a conclusion the victimized claimant also was engaged in a deviation. The ALJ's implicit conclusion that the test from *Lori's Family Dining* has little application to this case, primarily because the claimant himself was not involved in horseplay or a deviation from employment, is supported by the record and serves as a reasonable determination of the issue.

II.

The respondents argue that regardless of their failure initially to offer a choice of physicians to treat the claimant pursuant to § 8-43-404(5)(a)(I)(A) C.R.S., the claimant selected Dr. Cheyne as the physician authorized to treat and the claimant may not unilaterally switch to a new physician without obtaining the consent of the respondents or an ALJ in accordance with § 8-43-404(5)(a)(VI)(A). Accordingly, the respondents contend the claimant's selection of Dr. Leach without a referral from Dr. Cheyne, or the acquiescence of the respondents, renders that doctor's treatment as unauthorized and the respondents are not liable for the cost of his care.

The ALJ ruled that because the right to select an authorized physician passed to the claimant upon the initial failure of the respondents to provide a list of authorized physicians to treat, the claimant's selection of Dr. Cheyne to provide treatment signified the doctor was authorized. When the claimant was required to cease treating with Dr. Cheyne for financial reasons, upon the termination of his group health insurance, the ALJ ruled the claimant could select a new doctor to provide medical care. The ALJ found the claimant's selection of Dr. Leach sufficient to authorize Dr. Leach's treatment. Conclusion of Law ¶ 17.

We previously have held that in similar situations the absence of the respondents original provision of a list of treating doctors does not subsequently extinguish their rights to object to a claimant's attempt to change physicians. In *Tidwell v. Spencer Technologies*, W.C. No. 4-917-514 (March 2, 2015), the right of selection passed to the claimant. The claimant treated at a Kaiser Permanente clinic and then informed the respondents he was going to switch his care to Dr. Yamamoto. The respondents did not agree. Following a hearing the ALJ determined the claimant had made a selection of Kaiser Permanente for authorized treatment and regardless of the original passing of the right to selection to the claimant, once he made that selection in favor of Kaiser, any change in the authorized treating physician was subject to the approval of the respondents or an ALJ. *See Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Dr. Yamamoto's treatment was therefore characterized as unauthorized. The same result was reached in identical situations in *Loy v. Dillion Companies*, W.C. No. 4-972-625 (February 19, 2016), and in *Rivas v. Cemex Inc*. W.C. No. 4-975-918-01 (March 15, 2016). In this matter the record similarly does not establish the respondents agreed to the change in physician to Dr. Leach. The ALJ also made no findings of a "proper showing" to allow the claimant to change physicians pursuant to § 8-43-404(5)(a)(VI)(A). Therefore, the ALJ was in error to authorize Dr. Leach as a physician to treat the claimant.

The finding by the ALJ that the claimant sought a change of physician for the reason his health insurance was no longer available to pay Dr. Cheyne is not a basis under the statute to justify a change of physician. Effective July 1, 2014, the statute was amended to add § 8-43-404(10). That section provides that the employer may designate a new authorized physician within 15 calendar days following receipt of a written notice from the injured employee or his legal representative "that an authorized physician refused to provide medical treatment to the injured employee … for nonmedical reasons …". The written notice must be sent by certified mail, return receipt requested. Here, there is no evidence or allegation that the claimant ever sent such a written notice to the respondents. Accordingly, the 15 days the respondents have to designate a new authorized physician have never begun to run. The claimant's attempt to nominate Dr. Lynch as an authorized physician prior to the provision of this statutory notice is to no avail. *Rivas v. Cemex Inc*., *supra*.

We therefore set aside the determination of the ALJ that Dr. Leach is an authorized treating physician.

IT IS THEREFORE ORDERED that the ALJ's order issued March 28, 2019, is reversed insofar as it authorized Dr. Leach as a treating physician and is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

9/6/19 by TT .

THE SAWAYA LAW FIRM, Attn: SEAN M KNIGHT ESQ, 1600 OGDEN STREET, DENVER, CO, 80218 (For Claimant)
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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. 5-061-844-01

IN THE MATTER OF THE CLAIM OF:

GRAHAM HANSEN,

Claimant,

v.

FINAL ORDER

BAVARIAN INN RESTAURANT INC,
DBA SHOTGUN WILLIES, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Margot Jones (ALJ) dated September 25, 2018, that determined the claimant was responsible for his termination from employment and that he was thereby responsible for his wage loss. The ALJ denied and dismissed the claimant's claim for temporary total disability (TTD) benefits. We affirm.

The ALJ conducted the evidentiary hearing over two sessions on June 22 and August 27, 2018. The hearing was held on the issue of whether the claimant was responsible for his wage loss under §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. In her order, the ALJ established findings of fact which are summarized below.

The claimant worked as a floor manager for the employer. On October 22, 2017, a violent fight broke out between employees of the employer and individuals attempting to enter the club. Gunshots were involved and a co-worker of the claimant was shot. Claimant was punched several times in the head area. Claimant continued to work in the days following the incident. The employer operates surveillance cameras both inside and outside of the employer's premises that digitally recorded the fight.

On November 4, 2017, the claimant was given permission to view surveillance videos of the fight by Ms. Poague, a manager/supervisor and human resources person for the employer. At that time, the claimant was writing a report regarding the October 22

incident. Ms. Poague asked if it would be helpful for claimant to view the videos in conjunction with writing his report, and he stated it would. Ms. Poague asked Mr. Gulbranson, the IT manager, to log in and permit the claimant to view the videos. During the evenings of November 4 and 5, the claimant attempted to upload the surveillance videos to his personal Google Drive account. On November 6, the employer could no longer access the surveillance video that the claimant had attempted to copy to his computer.[1] The ALJ found, contrary to the claimant's contentions, that Ms. Poague did not give claimant permission to copy the videos to a personal device. Claimant offered to help retrieve the lost data, and the employer accepted the offer. While the claimant was attempting to retrieve the lost surveillance video, the Glendale Police Department arrested him for destruction of evidence related to the October 22, 2017 fight. The claimant was terminated on or about November 9, 2017, for violating company policy by copying videos without permission.

Surveillance videos are considered by the employer to be confidential information. Administrative password access are required to view saved surveillance videos, such as those of the October 22 fight. The only persons with access to the surveillance videos were Ms. Poague; Mr. Gulbranson; Mr. Orick; and Mr. Trubowitz.

The employer's written policies prohibited disclosure, distribution, transmission, or copying of confidential information. This policy encompasses surveillance videos. The claimant signed a document affirming his knowledge of this policy. Confidential information is defined as any information an employee learns of as a result of working for the employer that is not publicly available. The employer's surveillance system includes extremely sensitive information due to video taken inside the club and inside the locker rooms. Copying the videos would render the secure files insecure, which was not allowed under the confidentiality policy. Ms. Poague also permitted other employees to view the videos of the fight to assist them in completing their statements. Ms. Poague credibly testified that only Messrs. Trubowitz and Gulbranson had authority to copy videos. Claimant, as one of the employer's managers himself, had been advised that any videos to be copied had to be accessed by either Messrs. Trubowitz or Gulbranson. Even though Mr. Gulbranson had logged claimant in so that he could view the videos on November 4, Ms. Poague did not believe the claimant could regain access at a later date because he did not have the administrative password.

When Mr. Gulbranson arrived at work on the morning of November 5, he saw a Google Drive login associated with the claimant's personal account open on the

[1] The ALJ interchangeably used the terms uploaded and downloaded several times in her order. We recognize each term to mean the movement of a computer file from one computer to a separate computer.

company's computer. The open tabs on the computer showed what appeared to be multiple video files which had been copied to the claimant's Google Drive. Claimant had attempted to upload 38 surveillance video files. Mr. Gulbranson notified Ms. Poague on November 5 that the claimant's personal Google Drive was open on the employer's computer and he was uploading files to his personal drive.

On November 6, Mr. Gulbranson arrived at work and noticed there were additional open files on the computer. Claimant's personal Google Drive was again open. Mr. Gulbranson observed that there was a "new folder" screen that had not previously existed, containing the video files. Mr. Gulbranson left the computer as he found it, and notified Ms. Poague of what he found. When he came back to the computer later that day to allow another employee to view the videos, the open screen and the "new folder" seen earlier were no longer there. Mr. Gulbranson assumed that instead of being simply copied, the files were actually dropped into the new folder, the folder was attempting to make a compressed file of the data into the Google Drive, and once the compression was completed, it removed the "new folder" and the files were no longer on the computer. He notified Ms. Poague that the files were missing. Mr. Gulbranson testified that he could not have accidentally deleted the files because the files went missing without him performing any additional activities on the computer.

On November 9, the claimant agreed to assist the employer in recovering the files. On that day, claimant had been attempting to retrieve the data for several hours. Ms. Poague was worried that claimant's retrieval effort was taking so long and in that process claimant had taken apart the employer's computer. Ms. Matthews, the majority owner of the employer, had previously informed the Glendale PD that there had been an issue with the videos being lost due to claimant's actions. Ms. Matthews called the Glendale PD on November 9 and asked if it was okay for claimant to have taken apart the employer's computer. She was told it was not okay, and the police chief was sending officers to stop what claimant was doing. Claimant was arrested and was later terminated by Ms. Poague. The claimant was terminated for violating the employer's non-disclosure of confidential information policy by copying the surveillance files, thus rendering them non-secure.

Ms. Matthews testified that no employee had permission to copy the surveillance videos, and if claimant had requested permission, she would not have allowed it due to the videos being evidence in an attempted murder investigation. She also testified that the non-disclosure of confidential information policies encompassed the surveillance videos claimant had attempted to copy and made inaccessible. The videos would have been confidential regardless of whether there had been a criminal investigation. She

testified that all managers are instructed that surveillance videos are considered to be confidential information. Ms. Matthews testified that the claimant would have been terminated whether or not he had been arrested on November 9.

Claimant testified that he was granted permission to view the videos because he needed to clarify how close he was standing to the employee who had been shot. The claimant testified that his floor manager password allowed him to access not just the employer's computer, but also the surveillance videos. He testified that he requested permission to copy the videos to watch them at home. Claimant wanted to watch the videos to deal with his PTSD and did not want to take up time at work watching "hours and hours" of videos.

Claimant admitted that he was uploading 38 video files to his Google Drive account during his November 4-5 shift. During the November 5-6 shift, he attempted to compress the files to upload. He testified that he compressed 41 files. Claimant testified that he did not believe he required permission to copy the videos, even though he allegedly asked for, and was granted permission to do so. Claimant testified that he did not believe the videos were potential evidence in the investigation of the October 22 fight because Glendale PD already had all copies of the video they needed. Claimant admitted the videos were password protected. Claimant admitted signing the confidentiality policy and pledge. He agreed that "technically" the surveillance videos were information that was not otherwise publicly available, but would not agree videos would constitute confidential information.

The ALJ specifically found the collective testimony of Ms. Poague, Mr. Gulbranson, Ms. Matthews, Mr. Mintz, and Lt. Martin to be more credible than that of the claimant. The ALJ found that the claimant possessed a superior knowledge of computers than even the employer's IT manager, human resources manager, and majority co-owner. The ALJ ultimately found that the claimant was provided permission to view the surveillance video but was not given permission to upload any of the surveillance files to his personal Google Drive account. The ALJ found that the claimant used his superior computer knowledge to upload videos in violation of the employer's policies regarding the non-disclosure of confidential information.

The ALJ found that the claimant was apprised of the employer's policies and was terminated as a direct result of both his violation of these policies, and his subsequent arrest for destruction of evidence—a direct result of his violation of the employer's policies.

Based on the findings of fact, the ALJ concluded that the employer had sustained its burden of proof to establish by a preponderance of the evidence that claimant was responsible for his termination from employment. It was further concluded that claimant was thus responsible for his wage loss and was not entitled to any TTD benefits. The ALJ found and concluded that claimant's actions in uploading confidential surveillance videos was proven to be a volitional act which led to his termination from employment. The ALJ denied and dismissed the claimant's claim for TTD.

Claimant's counsel moved to withdraw his representation on October 9, 2018. Nonetheless, the claimant, through counsel, filed a Petition to Review on October 15, 2018. The claimant listed one alleged error and objection to the order: "Claimant believes the September 25, 2018, order is not supported by substantial evidence." The ALJ approved counsel's withdrawal as attorney of record on October 26, 2019.

The record reflects that after the claimant filed his petition to review and a transcript of the hearing was prepared, a briefing schedule was issued by the Office of Administrative Courts on April 26, 2019. In accordance with § 8-43-301(4), C.R.S., the claimant was advised, in writing, that he had twenty days to file a brief in support of the petition to review. The claimant did not file a brief within the twenty-day period, which expired on May 16, 2019. The respondents filed a brief in opposition to the petition to review on June 5, 2019.

On June 24, 2019, the claimant submitted a brief in support of his petition to review. Claimant made no application for an extension of time to submit his brief with the OAC, nor did the claimant provide either the OAC or the Panel any excuse or reason for the late filing of his brief.

We first address the claimant's untimely brief. Section 8-43-301(4), C.R.S. states (in pertinent part):

> When the record upon which a petition to review has been filed is complete, the parties shall be notified in writing. The petitioner shall have twenty days after the date of the certificate of mailing of the notice to file a brief in support of the petition. The opposing parties shall have twenty days after the date of the certificate of mailing of the petitioner's brief to file briefs in opposition thereto.

When interpreting statutes, the objective is to implement the legislative intent. In order to do so, we must first examine the statutory language and afford the words their plain and ordinary meanings. *Weld County School District v. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). If the meaning of the statute is unambiguous, there is no need to resort to interpretive rules of statutory construction. *City of Thornton v. Replogle*, 888 P. 2d 782 (Colo. 1995). Where possible, we should avoid forced, subtle, or strained construction of statutory language. *Miller v. Industrial Claim Appeals Office*, 985 P.2d 94 (Colo. App. 1999).

The plain and ordinary meaning of §8-43-301(4) is to institute deadlines under which the parties must file their respective briefs. However, the courts have held that an untimely pleading may be accepted where "unique circumstances" exist for the late filing. *See P.H. v. People*, 814 P.2d 909 (Colo. 1991); *Converse v. Zinke*, 635 P.2d 882 (Colo. App. 1981). In *P.H. v. People*, *supra*, the Supreme Court concluded that unique circumstances permitted the Court of Appeals to accept a late filed notice of appeal where counsel reasonably relied on a trial court's erroneous action in purporting to extend the deadline for filing a notice of appeal. Furthermore, the court held that the Court of Appeals abused its discretion in failing to find excusable neglect to justify an extension of time to file the notice of appeal. *Id*., 635 2d at 913.

Here, we perceive no "unique circumstances" for the claimant's late submission of his brief in support of the petition to review. Claimant has provided no explanation whatsoever for his failure to comply with the statutory deadline for said submission. Consequently, we will not consider the late brief. *See Saenz v. Gold Star Sausage Co., Inc.*, W.C. No. 4-109-501 (October 4, 1996), (Panel refused to consider a claimant's late-filed brief). *See also Bohan v. Direct Connection Executive Courier Services, Inc.*, W.C. No. 4-355-119 (October 22, 1998).

Absent a timely filed brief, the effectiveness of our review is limited. *Valdez v. Colo. Dept. of Transportation*, W.C. No. 4-420-445 (February 21, 2001); see also *Cordova v. Industrial Claim Appeals Office*, 55 .3d 186, 191 (Colo. App. 2002) (party must advance sufficient legal argument to indicate basis of claims for relief).

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

Sections 8-42-105(4)(a), C.R.S., and 8-42-103(l)(g), C.R.S., (the so-called "termination statutes") contain identical language, stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 , 1064 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." A finding of fault requires the ALJ to determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

The termination statutes provide an affirmative defense to a claim for TTD benefits, and the respondents bear the burden of proof to establish their applicability. *Witherspoon v. Metropolitan Club*, W. C. No. 4-509-612 (Dec. 16, 2004). Generally, the question of whether the claimant acted volitionally and, therefore, is "responsible" for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances. *See Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). By adding the identical language to §8-42-103 and to §8-42-105, we infer that the General Assembly intended that the termination from employment be a potential factor both in the threshold entitlement determination and in the termination of temporary total disability benefits once begun. *See*, *Palmer v. Borders Group, Inc*., W.C. Nos. 4-751-397, 4-723-172 (November 28, 2008), *Hassan v. Cargill Meat Solutions*, W.C. No. 4-871-670-3 (April 11, 2013)."

We must uphold the ALJ's factual determinations if supported by substantial evidence in the record. *Christie v. Coors Transportation Co.*, 919 P.2d 857 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997). 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. *See Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992). This is a narrow standard of review which requires us to view the evidence in a light most favorable to the prevailing party, and to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Additionally, we may not reweigh the evidence. *See Gelco Courier v. Industrial Commission*, 702 P.2d 295 (Colo. App. 1985)(if two equally plausible inferences may be

drawn from the evidence, we may not substitute our judgment for that of the ALJ). Further, the ALJ's credibility determinations are binding 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);

Further, inconsistencies and contradictory evidence are not uncommon in workers' compensation claims, and it is the ALJ's sole prerogative as the fact finder to resolve any inconsistencies in the testimony. In resolving inconsistencies, the ALJ may credit all, part, or none of a witnesses' testimony, and the ALJ's failure to cite a witnesses' testimony inherently reflects that the ALJ did not find it persuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Numerous witnesses for the employer, all credited by the ALJ, testified that the claimant had permission to view the surveillance video and did so. The employer's witnesses also testified that the claimant did not have permission to copy any of the videos to his personal computer or otherwise. Copying of the videos to claimant's personal Google Drive renders them insecure and violated the employer's confidentiality policies. The claimant's discharge was justified because he violated the employer's confidentiality policies. This evidence is substantial and is consistent with the ALJ's findings of fact.

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. All of the ALJ's findings of fact 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 September 25, 2019 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

David G. Kroll

CERTIFICATE OF MAILING

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

9/4/19 by TT .

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PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS & STERN, Attn: JEFF STAUDENMAYER ESQ, 1700 LINCOLN ST SUITE 4500, DENVER, CO, 80203 (For Respondents)

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