BROWN BAG SEMINAR

Thursday, June 19, 2014

(third Thursday of each month)
Noon - 1 p.m.
633 17th Street

12th Floor Conference Room

Note Different Location Again This Month

1 CLE (including .4 ethics)

Presented by

Craig Eley
Manager of Director’s Office
Prehearing Administrative Law Judge
Colorado Division of Workers’ Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued from
May 9, 2014 through June 12, 2014

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The respondents seek review of an order of Administrative Law Judge ALJ Felter (ALJ) dated January 13, 2014, that denied the respondents’ contention that the claimant was responsible for his termination. We affirm the ALJ’s order.

A hearing was held on the issues of average weekly wage, temporary total disability benefits from July 11, 2013, and continuing. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted work-related injury to his right arm on April 30, 2013. The respondents paid temporary total disability benefits from May 1, 2013, through June 16, 2013, based on the stipulated average weekly wage of $680.

The claimant returned to work until he was terminated on July 10, 2013. On the evening of July 9, 2013, the claimant had discussions with the owner, Nate Mares, about his job assignment for the next day. The claimant’s work day usually began between 7:30 and 9:00 am, with no set work hours. On the morning of July 10, 2013, the claimant was supposed to pick up a co-employee, David Sims, as usual, to drive him to work. The claimant testified that he was running late that morning, due to difficulty sleeping, the pain medications he was taking for his injury and feeling sick the night before. The claimant asked his ex-wife to pick Sims up and drive him to the claimant’s house, which she did. The ex-wife and Sims arrived at the claimant’s house between 9:30 and 10:00 am. The ex-wife testified that the claimant’s car was packed up and running and Sims got in and they drove off to the job site. According to Sims, they were supposed to be at the jobsite at 8:30 am but they did not get there until approximately 10:00 am. The parts
at the home were not the right parts for the job and the claimant then had to go to Home Depot to buy the correct parts. The claimant had to call Mares to pay for the parts with Mares’ credit card, contributing to the delay in completing the job. The claimant and Sims finally began work at the jobsite around 11:00 am.

After lunch on July 10, 2013, Mares called the claimant to meet with him and told the claimant that he was terminating the claimant’s employment because the jobs were taking too long and he was late on that date. The claimant was subsequently placed on work restrictions by the authorized treating provider and has not earned any wages since July 10, 2013.

The ALJ determined that the claimant was fired for being late but that being late was not the result of the claimant’s volitional conduct. Rather, the ALJ found that the claimant’s being late was the result of a “series of misadventures” beyond his control and consequently, the claimant was not responsible for his termination for purposes of §8-42-103 and §8-42-105(4), C.R.S. The ALJ, therefore, ordered the respondent to pay temporary disability benefits commencing July 11, 2013, and continuing.

On appeal, the respondents contend that the ALJ misapplied the law in rejecting their claim that the claimant was responsible for termination and that the ALJ’s findings are not supported by substantial evidence. The respondents specifically contend that the claimant's discharge was not based solely on being late but, also on the reports that the claimant asked Sims to blow in his car’s breathalyzer the morning he was late and speculation that the claimant was intoxicated. The respondents argue that under the totality of circumstances the claimant was at fault. We are not persuaded the ALJ erred.

Sections 8-42-105(4)(a), C.R.S., and 8-42-103(l)(g), C.R.S., 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 (Colo. App. 2002), the court held that the term “responsible” reintroduced into the Workers’ Compensation Act the concept of “fault.” A finding of fault requires the ALJ to consider the totality of the circumstances and determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. Cf. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) *aff’d after remand* 908 P.2d 1185 (Colo. App. 1995). The burden to show that the claimant was responsible for his discharge is on the employer. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

The question of whether the claimant was “at fault” is usually one of fact for
determination by the ALJ. See Gilmore v. Industrial Claim Appeals Office, 187 P.3d 1129 (Colo. 2008). Consequently, 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 defer to the ALJ’s resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. The mere fact that the ALJ might have made other findings and reached a different result affords no basis for relief on appeal. Wilson v. Industrial Claim Appeals Office, 81 P.3d 1117 (Colo. App. 2003).

Here, the ALJ found that the claimant was ultimately terminated because he was late for work and Mares was frustrated with the claimant on July 10, 2013. ALJ Order at 3 ¶5. The ALJ’s determination in this regard is supported by the evidence. The claimant testified that he was told by Mares that he was taking too long on jobs and that he needed to let him go. Tr. at 32. Mares further testified that the claimant was fired for being late while also speculating that the claimant was intoxicated on July 10, 2013.

The ALJ went on to find that the claimant was late to work and in completing the job on July 10, 2013, because of a “series of misadventures.” ALJ order at 3 ¶ 5. The ALJ credited the claimant’s testimony that he was running late on the morning due to difficulty sleeping the night before because of the pain medications he was taking for the pain in his right arm and feeling sick the night before. ALJ Order at 2 ¶4; Tr. at 26. The claimant also had to pick up Sims for work which was out of his way, so he asked his ex-wife to pick Sims up and bring him to the house. Tr. at 29. The ALJ also credited the claimant’s testimony that the job was delayed due to the wrong parts being at the job and the fact that the claimant had to go purchase the correct parts at Home Depot. ALJ Order at 3 ¶7. Under the totality of the circumstances, it was plausible for the ALJ to infer that the claimant was terminated for reasons beyond his control and that his conduct was not volitional.

Contrary to the respondents' argument, we do not read the factual record as compelling the finding that the claimant was responsible for his termination. The respondents provided the testimony of Mares and Sims. Although Mares stated that the claimant was terminated for being late and for allegedly being intoxicated, the ALJ rejected Mares assertion that the claimant was intoxicated the morning of July 10, 2013. ALJ Order at 3 ¶ 5. Sims similarly testified that on the morning of July 10, 2013, the claimant asked Sims to blow in the breathalyzer on his car so in order to get it started. Noting that this contradicted the ex-wife’s testimony that the claimant’s car was running when Sims and the ex-wife reached the claimant’s house, the ALJ nonetheless believed Sims testimony that the claimant asked him to blow into the breathalyzer. As we understand the ALJ’s order, the ALJ determined that the claimant was not fired for asking Sims to blow in the breathalyzer, nor was he fired for allegedly being intoxicated.
Thus, we agree with the ALJ’s statement that the credibility determination on the breathalyzer issue is superfluous and irrelevant to the findings of the reason the claimant was terminated from his employment.

The proximate cause of the claimant's discharge is determinative of whether the claimant was “at fault.” See Eckart v. Industrial Claim Appeals Office, 775 P.2d 97 (Colo. App. 1989); Castillo v. Monfort Inc., W.C. No. 4-181-292. 4-185-214 (July 1, 1994). In determining whether the claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. See Rodriguez v. BMC West, W.C. No. 4-538-788 (June 25, 2003). The ALJ in this case explicitly considered the totality of the circumstances in resolving the fault issue and although he may have credited Sims testimony that the claimant asked him to blow in the breathalyzer, the record in this case, nonetheless, supports the ALJ's determination that the proximate cause of the claimant’s termination was the claimant’s late arrival and delayed completion of the job on July 10, 2013, and that the claimant was not at fault for either of these. The mere existence in the record of evidence that would support a contrary result does not form a basis for relief on appeal. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). Consequently, we must uphold the ALJ's determination that the claimant was not “at fault” for the termination. Section 8-43-301(8), C.R.S.

The respondents' arguments notwithstanding, the ALJ's order reflects his understanding and application of the proper legal standard. Thus, we are not persuaded to disturb the ALJ's order awarding temporary disability benefits.

**IT IS THEREFORE ORDERED** that the ALJ’s order dated January 13, 2014, is affirmed.
CERTIFICATE OF MAILING

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

6/3/2014 by KG.

DONALD ADAMSON, 1635 JULIAN ST, DENVER, CO, 80204 (Claimant)
MNM PLUMBING, C/O: NATE MARES, 1186 CARDINAL CIR, BRIGHTON, CO, 80601 (Employer)
MARKEL INSURANCE COMPANY, C/O: RYAN MCGRANE, PO BOX 3188, OMAHA, NE, 68103 (Insurer)
JANICE M. GREENING, LLC., C/O: JANICE M. GREENING, ESQ., 900 E LOUISIANA AVE., STE 100, DENVER, CO, 80210 (For Claimant)
RITSEMA & LYON P.C., C/O: DAWN YAGER, ESQ., 999 18TH ST., STE 3100, DENVER, CO, 80202 (For Respondents)
IN THE MATTER OF THE CLAIM OF

SCOTT FISKE,

Claimant,

v.

ECHOSTAR COMMUNICATIONS CORP.,

Employer,

and

GALLAGHER BASSETT SERVICES,

Insurer,

Respondents.

The respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated February 12, 2014, that ordered the respondents to pay the claimant disfigurement benefits. We affirm the order.

The respondents contend the claimant did not satisfactorily establish entitlement to disfigurement benefits due to the absence of a medical opinion linking the claimant’s Dengue fever to his disfigurement. The respondents also assert the ALJ incorrectly placed the burden of proof on the respondents to show the claimant was not eligible for disfigurement benefits.

The ALJ found the claimant was assigned by the employer to work on a job site in India. While there, the claimant was bitten by a mosquito and developed Dengue fever. The date of injury was determined to be November 2, 2012. After the claimant received treatment and was placed at maximum medical improvement, he challenged the respondents’ denial of a disfigurement award in their Final Admission of Liability. The ALJ noted the claimant testified to joint pain in his knees. The claimant complained that this joint pain affected his gait and caused him to limp. The claimant believed the joint pain was a consequence of his Dengue fever.

The respondents submitted a report from the claimant’s treating doctor, Dr. Michael Levine. The report discussed the Dengue fever disease and the research studies of the condition which did not support the claimant’s view that the disease caused his joint pain. The claimant had sent to Dr. Levine an article he had found in a medical journal describing a case study featuring one case where it was believed joint pain was a
consequence of Dengue fever. Dr. Levine criticized the paper as inadequate to substantiate the claimant’s assertion his joint pain was related to his Dengue infection.

The ALJ found the claimant’s testimony persuasive and awarded $750 in benefits to compensate for his limp. The ALJ observed that there was an absence of evidence to show the claimant’s knee pain was derived from a cause other than Dengue fever. In light of that lack of an alternative cause, the ALJ surmised the claimant’s unrebuted testimony was sufficient to establish a causal link between the Dengue fever and the claimant’s limp.

The ALJ did not place the burden of proof on the respondents to make the initial showing that the disfigurement was ‘not’ caused by the work injury. The ALJ implicitly reasoned the claimant had made a prima facie case for benefits through his testimony that his joint pain arose after his infection and was a symptom of the fever. The ALJ then resolved that the respondents had not successfully overcome the claimant’s evidence through their report from Dr. Levine.

Disfigurement benefits are provided for in §8-42-108, C.R.S. Section 8-42-108(1), permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view ….” The ALJ may award up to $8,000 for “extensive body scars” and other conditions expressly provided for in §8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S

Here, we cannot say the ALJ’s order exceeds the bounds of reason. The ALJ’s evaluation of the claimant’s disfigurement and the corresponding award are consistent with the statutory provision governing such an award, §8-42-108(1), C.R.S. The ALJ’s order indicates he considered the claimant’s limp which featured a slow, stiff gait pattern favoring the right leg. The limp was noted “to be slight, but visibly perceptible.” Where, as here, the appealing party fails to procure a transcript of the relevant hearing, we must presume the pertinent findings of fact are supported by substantial evidence. Nova v. Industrial Claim Appeals Office, 754 P.2d 800 (Colo. App. 1988).

The respondents contend that when there is an absence of medical evidence to establish a link between a work injury and an asserted disfigurement, the claimant has failed to carry his burden of proof. In support, the respondents cite to the decision in DeLeon v. Environmental Restoration, W.C. No. 4-902-368 (December 13, 2013). The respondents’ emphasis on the opinion in DeLeon is misplaced. That decision only notes that the element of causality in a disfigurement award is a question of fact for resolution by the ALJ. The decision pointed out that medical evidence in the record could be
characterized as substantial evidence to support the ALJ’s factual conclusion. It did not hold medical evidence to be a prerequisite to satisfying either parties’ burden of proof. There is no requirement the claimant present medical evidence to link his work injury to his disfigurement.

It has long been held there is no specific requirement that a claimant submit medical evidence to prove a compensable injury. See Apache Corp. v. Industrial Commission, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that employment caused his heart attack); Colorado Fuel & Iron Corp. v. Industrial Commission, 151 Colo. 18, 379 P.2d 153 (1962). Medical evidence has also not been necessary to substantiate a change in condition for the purpose of reopening. See, Savio House v. Dennis, 665 P.2d 141 (Colo. App. 1983); nor to establish eligibility for temporary disability benefits, Lymburn v. Industrial Claim Appeals Office, 952 P.2d 831 (Colo. App. 1997). We are aware of no holding requiring such evidence to qualify for disfigurement benefits. Moreover, the statute involved, § 8-42-108, does not specify any separate burden of proof requirement mandating medical substantiation. The General Assembly however, in other contexts has included such a reference to medical evidence when such was found necessary, see, § 8-41-301(2)(a) (a claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist); § 8-42-107(8)(b)(I) (treating physician shall made a determination of MMI); § 8-42-105(3)(c) (attending physician release to full duty will end eligibility for temporary disability benefits). If intended, the General Assembly could easily have included a similar standard to the disfigurement section. However, it did not do so. Therefore, in the absence of a specific requirement for such proof in the disfigurement article, we decline to amend the statute by requiring medical evidence in this case.

Based on his findings, the ALJ concluded that the claimant sustained a serious permanent disfigurement to areas of the body normally exposed to public view and he awarded the claimant $750 for disfigurement. We may not substitute our judgment for that of the ALJ. The ALJ’s evaluation of the claimant’s disfigurement and the corresponding award are supported by the facts and law. Section 8-42-108(1), C.R.S.

Thus, we are unable to conclude that the ALJ abused his discretion in awarding disfigurement benefits.

IT IS THEREFORE ORDERED that the ALJ’s order issued February 12, 2014 is affirmed.
David G. Kroll

Brandee DeFalco-Galvin
CERTIFICATE OF MAILING

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

_________ 6/10/2014 __________ by _____ KG __________.

SCOTT FISKE, 132 CAPTAINS WAY, REEDVILLE, VA, 22539 (Claimant)
ECHOSTAR COMMUNICATIONS, C/O: MS. KENDALL SMITH, 100 INVERNESS TERRACE EAST, ENGLEWOOD, CO, 80112 (Employer)
GALLAGHER BASSETT SERVICES, C/O: MS. ELLEN D. SAPP, PO BOX 4068, ENGLEWOOD, CO, 80155 (Insurer)
KEATING WAGNER POLIDORI FREE, P.C., C/O: BRADLEY UNKELESS, ESQ., 1290 BROADWAY, STE 600, DENVER, CO, 80203 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN, LLC., C/O: FRANK CAVANAUGH, ESQ., 1407 17TH ST, #900, DENVER, CO, 80202 (For Respondents)
The claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated January 17, 2014, that granted the respondents’ motion to dismiss the claimant’s claims with prejudice. We affirm.

The claimant filed two claims for occupational diseases to her upper extremities, which allegedly were caused by repetitive motion and/or strain. The first claim was reported on or about September 16, 2009, with a date of onset of September 15, 2009. The claim is designated as W.C. No. 4-865-972. The second claim was reported on or about October 7, 2010, with an illness date of October 7, 2010. This claim is designated as W.C. No. 4-851-350. The respondents denied both claims.

On September 15, 2011, the claimant’s counsel entered his appearance and filed a Worker’s Claim for Compensation in W.C. No. 4-865-972. After filing the claim, however, the claimant took no further steps to prosecute either of her claims. On April 24, 2013, the respondents filed Petitions to Close each claim for failure to prosecute pursuant to Workers' Compensation Rule of Procedure Rule 7-1(C).

Thereafter, on May 8, 2013, the claimant filed a Motion to Consolidate and an Application for Hearing on both claims. On May 10, 2013, the Director of the Division of Workers’ Compensation issued Show Cause Orders on both claims. The Division then consolidated the claims for purposes of hearing.

The claimant eventually filed her response to the Director’s Show Cause Orders, and attached an Application for Hearing on both claims on the same date. The Director
ultimately denied the respondents’ Petitions to Close Claims, finding the parties had engaged in activity furthering the prosecution of the claims.

On May 9, 2013, the respondents forwarded to the claimant’s attorney, authorizations for medical and employment records for the claimant’s signature. On June 14, 2013, the respondents also submitted to the claimant’s attorney interrogatories and requests for production of documents on both claims. On October 3, 2013, the respondents filed a motion to compel the claimant’s responses, and to compel authorizations for release of records on both claims. A prehearing ALJ (PALJ) entered an order dated October 24, 2013, granting the respondents’ motion to compel. The PALJ ordered the claimant to provide discovery responses and signed authorizations for release of records within 10 days from the date of his order. The claimant, however, failed to comply with the discovery order compelling her to respond and provide releases.

A hearing ultimately was set for February 6, 2014. Prior to the hearing, however, the respondents filed a motion to dismiss both of the claimant’s claims with prejudice, arguing that such a sanction was warranted due to the claimant’s willful failure to comply with the PALJ order. On January 17, 2014, the ALJ granted the respondents’ motion to dismiss with prejudice. The ALJ found that the claimant had ignored the procedural rules requiring the return of signed releases which initially were sent to the claimant’s attorney on May 9, 2013. The ALJ further found that the claimant failed to answer interrogatories and requests for production of documents which were propounded to the claimant’s attorney on June 14, 2013. The ALJ found that dismissal was warranted since the respondents were highly prejudiced by the claimant’s failure to comply with the PALJ’s discovery order.

I.

On appeal, the claimant argues that her due process rights were violated. She contends that the Workers’ Compensation Act precludes the summary disposition of controversies without a hearing. As such, the claimant argues that the ALJ’s order must be vacated since no hearing was held and the factual controversies were never resolved. We are not persuaded the ALJ erred.

Workers' Compensation Rule of Procedure 9-1 applies to discovery in workers' compensation procedures. Rule 9-1(E) provides that “[i]f any party fails to comply with the provisions of this rule and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule.” Further, §8-43-207(1)(e), C.R.S. permits an ALJ to impose the sanctions provided in the rules of civil procedure for the “willful failure to comply with permitted discovery.” In order for a discovery violation to be considered “willful” the ALJ must determine that the conduct was deliberate or exhibited “either a flagrant disregard of discovery obligations or constitutes
a substantial deviation from reasonable care in complying with discovery obligations.” Reed v. Industrial Claim Appeals Office, 13 P.3d 810, 813 (Colo. App. 2000). Rule 9-1(G) also provides that the failure to comply with an order to compel shall be presumed willful.

The sanctions that can be imposed for the willful failure to comply with permitted discovery are various and range from the assessment of costs and fees to the outright dismissal of a claim or defense. See C.R.C.P. 37. The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. See §8-43-207(1)(e) and (p), C.R.S.; Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991). While it is true that dismissal of one or more claims for relief may be a proper sanction under C.R.C.P. 37 (b)(2)(C), it is “the severest form of sanction” available. See Prefer v. PharmNetRx, 18 P.3d 844, 850 (Colo. App. 2000); see also Sheid v. Hewlett Packard, supra. Because the ALJ's determinations in this respect are discretionary, however, we may only disturb the ALJ's order if it exceeds the bounds of reason, such as where it is wholly unsupported by the evidence or is contrary to applicable law. Coates, Reid & Waldron v. Vigil, 856 P.2d 850 (Colo. 1993); Pizza Hut v. Industrial Claim Appeals Office, 18 P.3d 867 (Colo. App. 2001).

The claimant’s argument notwithstanding, we conclude that her due process rights were not infringed upon when the ALJ granted the respondents’ motion to dismiss without holding a hearing. As noted above, the Workers’ Compensation Rules of Procedure, the Rules of Civil Procedure, the Act, and pertinent case law specifically provide for the imposition of sanctions, including the dismissal of claims, when a party fails to comply with her discovery obligations even though a hearing has not been held. Workers' Compensation Rule of Procedure 9-1(E); C.R.C.P. 37 (b)(2)(C); §8-43-207(1)(e) and (p), C.R.S.; Prefer v. PharmNetRx, supra; Sheid v. Hewlett Packard, supra. As stated by the Colorado Court of Appeals in Sheid, “[a] court is justified in imposing a sanction which terminates litigation at the discovery phase if a party's disobedience of discovery orders is intentional or deliberate or if the party's conduct manifests either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations.” Sheid v. Hewlett Packard, 826 P.2d at 399. Here, the ALJ found, with record support, that the claimant had no intention of responding to discovery requests and providing signed releases that have been in her attorney’s possession for over six months. Thus, the ALJ ruled that the claimant’s failure to comply with the PALJ’s discovery order was willful and that dismissal of her claims was warranted. Order at 3.
Additionally, the record discloses that the claimant was provided with notice and an opportunity to be heard regarding the respondents’ motion to dismiss and to provide the basis for her failure to respond to the proffered discovery requests and the requested releases, and to comply with the PALJ’s discovery order. See Hendricks v. Industrial Claim Appeals Office, 809 P.2d 1076 (Colo. App. 1990). In their motion to dismiss, the respondents argued that the PALJ gave the claimant 10 days from the date of his order to provide authorizations and responses to discovery requests, but the claimant failed to comply with the PALJ’s order. The respondents argued that the claimant’s refusal to obey the PALJ’s discovery order was willful and, therefore, constituted proper grounds for dismissal of her claims. The record discloses that the claimant was granted additional time, up to and including January 9, 2014, to file her response to the respondents’ motion to dismiss, and the claimant’s response subsequently was received by the Office of Administrative Courts. We further note that despite the claimant’s insinuation in her petition to review to the contrary, the ALJ did not deem the motion to dismiss as confessed.

Moreover, under the particular facts and circumstances of this action, we are unable to conclude that the ALJ abused his discretion in dismissing the claimant’s claims with prejudice. As noted above, the ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. See §8-43-207(1)(e) and (p), C.R.S.; Sheid v. Hewlett Packard, supra. Further, it is true that dismissal of the claimant’s claims for relief is a severe sanction. The claimant’s argument notwithstanding, however, the claimant’s failure to respond to discovery requests and to provide releases for over six months was not harmless. The ALJ found that the respondents’ were highly prejudiced by the claimant’s failure to comply with discovery. He found the respondents were unable to obtain medical and employment records, a medical history, and details surrounding the circumstances of the two occupational diseases. The ALJ also found that the respondents were unable to identify potential witnesses and other evidence necessary to defend against the claimant’s claims. Under these circumstances, therefore, we will not disturb the ALJ’s order. Section 8-43-301(8), C.R.S.

II.

To the extent the claimant argues that the ALJ abdicated his quasi-judicial discretionary authority by adopting the respondents’ proposed order, we again are not persuaded there is any error. Parties routinely submit proposed orders to the ALJs in the Office of Administrative Courts, and Colorado’s appellate courts have declined to reverse orders because they originally were drafted by one of the parties. See Ficor, Inc. v. McHugh, 639 P.2d 385 (Colo. 1982); Uptime Corp. v. Colorado Research Corp., 161 Colo. 87, 93, 420 P.2d 232, 235 (1966)(“[I]f, [a]fter careful study, the trial judge
concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own.”); cf. Barnett v. Elite Properties of America, Inc., 252 P.3d 14 (Colo. App. 2010); see also Johnston v. Hunter Douglas, Inc., W.C. No. 4-879-066-01 (April 29, 2014). Merely because a party’s proposed order was adopted by the ALJ does not dictate the conclusion that the ALJ abdicated his discretionary authority. Rather, it is presumed that the ALJ examined the proposed order and agreed that it correctly stated the facts as he found them to be. As explained by the Court in Ficor, otherwise, the ALJ would not have adopted them as his own. We further note that the ALJ did not adopt the respondents’ proposed order verbatim. Thus, it is presumed that the order correctly reflects the independent determinations of the ALJ and, therefore, we will not disturb the ALJ’s order on this ground. Section 8-43-301(8), C.R.S.

III.

The claimant also raises numerous arguments in her petition to review, but we are not persuaded by any of these arguments.

The claimant contends that the ALJ should have recused himself from this case. She argues that the ALJ previously worked for the law firm which represents the respondents in this action. It is well settled, however, that ALJs are presumed to be unbiased and their actions are entitled to a presumption of integrity, honesty, and impartiality, unless the contrary is shown. Wecker v. TBL Excavating, Inc., 908 P.2d 1186 (Colo. App. 1995). Due process requires that there be a neutral and detached decision maker, and the presumption of regularity is a rebuttable one. deKoevend v. Board of Education, 688 P.2d 219 (Colo. 1984). A party or the party's attorney may be entitled to have an ALJ recuse himself if sufficient facts are alleged from which it may be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased against a party or the party's attorney. S.S. v. Wakefield, 764 P.2d 70, 73 (Colo. 1988). Mere opinions and conclusions regarding the judge's alleged bias, such as those that are raised here in the claimant’s petition, however, are insufficient. Goebel v. Benton, 830 P.2d 995 (Colo. 1992). We further note that the claimant did not file a motion for recusal of the ALJ prior to the ALJ entering his order. See C.R.C.P. 97 (waiver may exist if motion for disqualification is not timely made); People ex rel. A.G., 262 P.3d 646 (Colo. 2011). Thus, not only is the claimant’s allegation of bias insufficient, it also was not timely presented. Thus, we will not disturb the ALJ’s order on this ground. Section 8-43-301(8), C.R.S.

Further, to the extent the claimant argues in her petition to review that the ALJ erred in failing to address the “Claimant’s Motion for Such Additional Time as may be Necessary to Cure Any Prejudice Asserted by Respondent Regarding Discovery,” or
“Claimant’s Opposition to the Motion to Dismiss Claims with Prejudice,” we are not persuaded there was any error. While the ALJ’s order does not expressly reference either the “Claimant’s Motion for Such Additional Time” or the “Claimant’s Opposition to the Motion to Dismiss Claims with Prejudice,” it is presumed that when making his determination, he considered all of the pleadings, arguments, and evidence that were in the record. See Crandall v. Watson-Wilson Transportation System, Inc., 171 Colo. 329, 467 P.2d 48 (1970)(ALJ is presumed to have considered entire record). We further add that the ALJ is not obligated to make specific findings of fact concerning evidence which he concludes is not persuasive. It is only required that the ALJ enter findings concerning the evidence which is found to be dispositive of the issues involved. Evidence not mentioned in the order presumably was rejected. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000). As such, we will not disturb the ALJ’s order on this ground. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ’s order dated January 17, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko
CERTIFICATE OF MAILING

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

________________________ 06/12/2014 ___________ by __________ SF __________.

CAROLINA G GONZALES, 710 SHERRY DRIVE, FORT COLLINS, CO, 80525 (Claimant)
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TRAVELERS INDEMNITY CO, C/O: CHERYL SWING, PO BOX 173762, DENVER, CO,
80217 (Insurer)
INGOLD LAW, LLC., C/O: CHRIS L. INGOLD, ESQ., 340 S LEMON AVE #7213,
WALNUT, CA, 91789 (For Claimant)
RITSEMA & LYON, P.C., C/O: DOUGLSA L. STRATTON, ESQ & ANDREW E.
BANTHAM, ESQ., 2629 REDWING RD., STE 330, FORT COLLINS, CO, 80526 (For
Respondents)
IN THE MATTER OF THE CLAIM OF

KARYN (KAREN) MILAZZO (TRUJILLO),

Claimant,

v.

TOTAL LONGTERM CARE, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,

Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated January 21, 2014, that determined the agreement between the claimant and the respondents to resolve a subrogation lien did not include the $8,451.08 overpayment of temporary disability benefits. We affirm.

This matter went to hearing on the issues of permanent partial disability, disfigurement and overpayment. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted work-related injury on August 2, 2010. The respondents paid temporary disability benefits at the rate of $320.53 per week from May 20, 2011, to June 7, 2011, and from January 12, 2012, to October 5, 2012, for a total amount of $12,746.97. The claimant worked at Parkview Medical Center between November 19, 2011, and September 28, 2012, earning $18,174.91. The ALJ determined that the claimant was no longer entitled to receive temporary total disability benefits as of November 19, 2011. The respondent insurer, however, paid temporary total disability benefits from February 1, 2012, through October 5, 2012, in the amount of $11,355.92 to which the claimant was not entitled. From this amount, the respondent insurer deducted $482.16 for temporary partial disability payments, $2,122.68 for permanent partial disability benefits and $300.00 for disfigurement benefits leaving $8,451.08 as the net overpayment.
A Division Independent Medical Examination (DIME) physician determined that the claimant reached maximum medical improvement (MMI) on August 15, 2012, and provided a two percent upper extremity rating for both the right and left upper extremities. The respondents filed a final admission of liability on July 16, 2013, consistent with the DIME physician’s report. The final admission of liability also specifically reserved the right to credit the $8,451.08 overpayment against future benefits.

The claimant pursued a third-party tortfeasor in this matter. The respondent insurer asserted a lien of $44,739.39 paid in medical and indemnity benefits. Tr. at 42-43. The parties presented evidence that the third-party’s insurance company offered the policy limit of $50,000 to settle the claim. Tr. at 24. The parties entered into an agreement resulting in the claimant receiving $13,000, Pinnacol Assurance receiving $18,000 and the claimant’s former attorney receiving the remainder of the third-party settlement. Tr. at 15. The respondents continued to assert that the claimant was overpaid $8,451.08. The claimant asserted that the overpayment was included in the agreement to resolve the subrogation lien. The ALJ, however, agreed with the respondents and determined that the overpayment was neither negotiated nor included in the settlement of the third party settlement proceeds. The ALJ, therefore, concluded that the claimant had been overpaid $8,451.08 and the respondent insurer is entitled to recoup the overpayment from future benefits.

On appeal, the claimant does not challenge the ALJ’s findings regarding the fact that she received temporary disability when she was not entitled to receive those benefits, nor does she dispute the ALJ’s calculation of the overpaid amount. The claimant, instead, contends that substantial evidence does not support the ALJ’s finding that the overpayment was not included in the resolution of the subrogation lien. We are not persuaded the ALJ erred.

Section 8-41-203(1), C.R.S., provides that a compensation insurer's payment of workers' compensation benefits operates as “an assignment of the cause of action against such other persons” to the compensation carrier. The purpose of this statute is to adjust rights between workers' compensation insurers and claimants by requiring the insurer to be reimbursed out of the claimant's recovery against a third-party tortfeasor for benefits it has paid, leaving the claimant with any excess. Colorado Compensation Insurance Authority v. Jorgensen, 992 P.2d 1156 (Colo. 2000) The statute operates to assign liability to the ultimate wrongdoer while preventing double recovery of workers' compensation benefits and tort damages by claimants. See Jordan v. Fonken & Stevens, P.C., 914 P.2d 394 (Colo. App. 1995). The actual payment of compensation triggers the assignment, and before payment the right to proceed against the third-party remains with the claimant. Metcalfe v. Bruning Division of AMI, 868 P.2d 1145 (Colo. App. 1993); Brickell v. Business Machines, Inc., 817 P.2d 536 (Colo. App. 1990). Consequently, if the compensation insurer settles with a third-party, it still retains the
right to offset the claimant's third-party recovery against liability for future benefits. *Metcalfe v. Bruning Division of AMI*, supra.

Although the workers' compensation insurer may waive, or be estopped from asserting, its' right to credit the claimant's third-party settlement proceeds against liability for future compensation benefits, *see Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996), it must demonstrate a voluntary, knowing, and intelligent waiver of the right. *See Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988).

Whether the respondent intended to waive the right to recoup the overpayment in this case is largely a factual matter for determination by the ALJ. *Id.* Consequently, we must uphold the ALJ's resolution of these issues if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Under this standard of review, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, the evidence fully supports the ALJ's finding the settlement of the third-party proceeds did not include the overpayment. The testimony of Pinnacol's subrogation attorney, Thy Nguyen, supports the ALJ's finding that the overpayment was not considered or negotiated as part of the resolution between the claimant and the respondent insurer. Nguyen’s testimony is corroborated by February 18, 2013, memorializing letter which does not mention the overpayment. Claimant’s Exhibit 2. The ALJ implicitly was most persuaded by Nguyen’s testimony that she never engaged in any conduct which conveyed Pinnacol’s intent to surrender the right of overpayment. Nguyen testified that she had no authority to waive the right to recoup an overpayment without consulting others. Tr. at 44. She further testified that had Pinnacol intended to waive the overpayment, she would have sent a confirming letter outlining the terms of the overpayment recovery which was not done here. Tr. at 44. In our view, the ALJ reasonably concluded that Pinnacol’s agreement to accept $18,000 to satisfy its subrogation lien did not include waiving the right to recoup the overpayment against the payment of future benefits.

The fact that the claimant may have presented some evidence which if credited would support a contrary result, provides no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Because the ALJ’s order is supported by substantial evidence and applicable law, we have no basis to disturb the order on review. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ’s order dated January 21, 2014, is affirmed.
INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko
CERTIFICATE OF MAILING

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

_________ 6/11/2014 __________ by _____ KG __________.

KARYN (KAREN) MILAZZO (TRUJILLO), 1112 N. LINDA LN., PUEBLO WEST, CO, 81007 (Claimant)
TOTAL LONGTERM CARE, INC., C/O: PAULA ANSON, 8950 EAST LOWRY, DENVER, CO, 80230 (Employer)
PINNACOL ASSURANCE, C/O: HARVEY D. FLEWELLING, ESQ., 7501 EAST LOWRY BLVD, DENVER, CO, 80230 (Insurer)
LAW OFFICE OF MICHAEL W. SECKAR, P.C., C/O: LAWRENCE D. SAUNDERS, ESQ., 402 W. 12TH ST, PUEBLO, CO, 81003 (For Claimant)
RUEGSEGGER, SIMONS, SMITH & STERN, LLC, C/O: FRANK M. CAVANAUGH, ESQ., 1401 17TH ST, STE 900, DENVER, CO, 80202 (For Respondents)
The claimant seeks review of a Supplemental Order of the Director of the Division of Workers’ Compensation dated March 5, 2014, which denied the claimant’s request to reopen and to re-determine benefits. We affirm.

The claimant sustained an admitted injury in 1999. In 2004, the respondents admitted that the claimant was permanently and totally disabled. Following this admission, the claimant filed an application for a lump sum award. The respondents calculated the lump sum benefits and asserted an offset of $25,618.99. On June 1, 2004, the Director granted a lump sum award in the amount of $37,560, ordered the respondents to reduce weekly benefits by $34.39 for the lump sum discount and allowed the respondents to take credit for any overpayment.

On June 22, 2004, a hearing was held before an ALJ regarding the claimant’s average weekly wage (AWW) at which the claimant sought to have her health insurance included in the AWW calculation. After a series of hearings and appeals, the court of appeals held that the value of the health insurance must be calculated as part of the claimant’s AWW and remanded the matter for recalculation. Moran v. Industrial Claim Appeals Office, Colo. App. No. 05CA0275 (Nov. 23, 2005)(NSOP).
In 2007, an ALJ reopened the issue of AWW to allow the respondents to prospectively modify the claimant’s AWW to reflect certain health insurance costs. December 21, 2007, ALJ Order. The claimant appealed the ALJ’s order to the Industrial Claim Appeals Office (panel) which affirmed reopening of the issue but remanded on the issue of past due benefits. *Moran-Butler v. Healthone*, W.C. No. 4-424-488 (August 21, 2008).

On remand, an ALJ held a hearing on past due benefits. The ALJ issued a Summary Order on August 25, 2010, which included detailed instructions regarding payment of past due benefits. The Summary Order addressed issues related to permanent disability, AWW and the offset discussed in the Director’s 2004 Lump Sum Order. Although the Summary Order gave directions on how to calculate the benefits owed to the claimant, it left it to the respondents to make the actual calculation. Finally, the Summary Order specified that if either party desired specific findings of fact and conclusions of law, a request had to be “made…within seven working days of service of the Summary Order.” Section 8-43-215, C.R.S. The claimant did not file a timely request. The claimant subsequently moved for an extension of time to request a Full and Final Order and for a Full and Final Order, stating that the claimant’s attorney had been in trial and had not reviewed the Summary Order until after the time for appeal had passed. The claimant’s motions were denied. The claimant filed a petition to review and a motion for a Supplemental and Corrected Order which also were denied. The matter went to the court of appeals and the court rejected the claimant’s arguments and concluded that the Summary Order was a final non-appealable order. *Moran-Butler v. Industrial Claim Appeals Office*, Colo. App. No. 11CA1309 (Oct. 18, 2012)(NSOP). The Supreme Court denied certiorari on August 19, 2013. *Moran-Butler v. Healthone Spalding Rehabilitation Hospital*, Colo. No. 12SC876 (Aug. 19, 2013).

On November 18, 2013, the claimant filed a motion for proper calculation of benefits under the July 1, 2004, lump sum order and for a determination as to whether respondents are taking excessive offsets and credits. The claimant alleged that she had been underpaid and the respondent had overstated the amount of the overpayment for which they were taking credit. The Director denied the motion, determining that the proper amount of benefits to be paid was already determined by the August 25, 2010, Summary Order. The Director granted the claimant’s motion for an order to determine whether the respondents were taking an excessive credit for the lump sum and concluded that the lump sum credit was appropriate. The claimant appealed and the Director issued the March 5, 2014, Supplemental Order now under review.

The Director’s March 5, 2014, Supplemental Order notes that although the claimant did not appear to request that the issue be reopened in the initial motion, the claimant was making the argument on appeal. The Director determined that reopening
was not appropriate under the circumstances of this case as the claimant failed to prove a mistake of fact that warranted reopening. The Director further found that the relief requested by the claimant was barred by the doctrine of issue preclusion.

As we understand the claimant’s arguments on appeal, she initially contends that the issue of the overpayment was not addressed in the prior orders and, therefore, issue preclusion does not apply. The claimant also argues, apparently in the alternative, that a mistake occurred in the calculation of benefits that justifies reopening the orders. We are not persuaded the Director erred.

I.

We reject the claimant’s assertion that the prior orders did not address the issue of overpayment. ALJ Harr’s 2007 Order specifically discusses the $25,718.99 overpayment alleged by the respondents and finds that the claims adjuster persuasively testified at hearing that the overpayment occurred because the claimant received a large retroactive award of SSDI benefits. The ALJ also states that “Insurer’s offset of its overpayment against claimant’s lump sum was proper under the director’s Lump Sum Award Order dated June 1, 2004.” ALJ December 21, 2007 Order at ¶8. The ALJ’s August 25, 2010, Summary Order allows the respondent to credit the award of permanent partial disability benefits in the amount of $13,227.43 which it paid in September, 1999. The Summary Order also stated that that permanent total disability benefits should be paid in the amount of $139.05 from, June 1, 2004, and addressed the lump sum discount of $34.39.

To the extent the claimant attempts to reargue that the benefits should be recalculated, we agree with the Director that re-litigation of this issue is precluded by issue preclusion. Under issue preclusion, often referred to as collateral estoppel, “once a court has decided an issue necessary to its judgment, the decision will preclude re-litigation of that issue in a later action involving a party to the first case.” Youngs v. Industrial Claim Appeals Office, 297 P.3d 964, 974 (Colo. App. 2012)(quoting People v. Tolbert, 216 P.3d 1, 5 (Colo. App. 2007)); see also Sunny Acres Villa, Inc. v. Cooper, 25 P.3d 44, 47 (Colo. 2001). Issue preclusion completely bars re-litigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom issue preclusion is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Sunny Acres Villa, Inc. v. Cooper, 25 P.3d at 47. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. Id.
We agree with the Director’s determination that all elements for issue preclusion to apply have been established. As discussed above, the claimant is seeking to re-litigate the same issue addressed in the 2007 and 2010 orders, the parties were the same in the prior proceedings, the 2007 and 2010 orders became final orders and the claimant had a full and fair opportunity to litigate the issues in the prior proceedings. The relief requested by the claimant is, therefore, barred by issue preclusion.

II.

The claimant also argues on appeal that the issue should be reopened based on mistake. In this regard, the issues would not be identical and issue preclusion would not apply. See, Feeley v. Industrial Claim Appeals Office, 195 P.3d 1154 (Colo. App. 2008); Handson v. Northwest Pipe Company, 4-559-615 (April 2, 2009)(issue preclusion rarely applicable in the context of reopening). We, nonetheless, are not persuaded that the Director abused his discretion in denying the claimant’s request to reopen the claim.

Section 8-43-303(1) C.R.S., authorizes the Director to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. Heinicke v. Industrial Claim Appeals Office, 197 P.3d 220 (Colo. App. 2008); Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). Reopening may be granted based on any mistake of fact which calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; Standard Metals Corp. v. Gallegos, 781 P.2d 142 (Colo. App. 1989). When a party alleges that a prior award is based on mistake, the Director must determine whether a mistake was made, and if so, whether it is the type of mistake which justifies reopening the case. Travelers Insurance Co. v. Industrial Commission, 646 P.2d 399 (Colo. App. 1981). In determining whether a particular mistake of fact or law justifies reopening, the Director may consider whether the mistake could have been avoided if the party seeking reopening timely exercised procedural or appellate rights prior to entry of the award. Industrial Commission v. Cutshall, 164 Colo. 240, 433 P.2d 765 (1967); Klosterman v. Industrial Commission, 694 P.2d 873 (Colo. App. 1984).

However, the failure to exercise procedural or appellate rights is not dispositive, and an ALJ may conclude that reopening is appropriate even though a party failed to exercise procedural rights, See Standard Metals Corp. v. Gallegos, supra. Indeed, one of the purposes of reopening is to permit equitable adjustments in the amount of compensation. Ward v. Azotea Contractors, 748 P.2d 338 (Colo. 1987); Kuziel v. Pet Fair, Inc., 948 P.2d 103 (Colo. App. 1997); Koch Industries, Inc. v. Pena, 910 P.2d 77 (Colo. App. 1995).
Generally, the authority to reopen a claim under §8-43-303(1), C.R.S., is discretionary with the Director. Thus, we may not interfere with the order unless there is fraud or a clear abuse of discretion. Renz v. Larimer County School District Poudre R-1, 924 P.2d 1177 (Colo. App. 1996). An abuse is not shown unless the order is beyond the bounds of reason, as where it is unsupported by the law or contrary to the evidence. See Coates, Reid & Waldron v. Vigil, 856 P.2d 850 (Colo. 1993).

Here, the Director found that there was no mistake. The Director concluded that the calculation of benefits in 2007 and 2010 was fully litigated and resulted in final orders and that the respondents have complied with the calculation of benefits in those orders. The Director further found that even if there was a mistake as alleged by the claimant, it was not the type of mistake that justified reopening. The claimant alleges that the testimony given by the adjuster in 2007 to support the respondents’ assertion of an overpayment was inaccurate and did not take into account adjustments made pursuant to an order issued in 2004. However, we agree with the Director that the adjuster was subject to cross-examination at the time of the hearing and thus, the claimant had the opportunity to correct the alleged inaccuracies in the testimony. The Director further noted the claimant’s failure to timely file a request for a full order in 2010. We agree that the “mistakes” alleged by the claimant are not the type of mistakes which justify a reopening. See Department of Agriculture v. Wayne, 30 Colo. App. 311, 493 P.2d 638 (1971) (ALJ does not abuse discretion if he denies petition to reopen because facts and evidence existed at time of prior order, and should have been within the knowledge of parties at that time); Notz v. Notz Masonry, W.C. No. 4-158-043 (May 13, 1998).

We, therefore, conclude that the Director did not abuse his discretion in denying the claimant’s petition to reopen.

III.

The respondents request sanctions pursuant to §8-43-301(14), C.R.S., arguing that the claimant’s assertions are not well grounded in fact and law. Pursuant to §8-43-301(14), C.R.S., attorney fees and costs may be awarded against an attorney who submits a petition to review or brief in support of a petition which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. We agree that there may be some merit to the respondents’ contention with regard to the claimant seeking a re-determination of benefits. However, we cannot say that the claimant’s arguments regarding reopening are so lacking in merit that they may be classified as not well grounded in fact or law. We, therefore, decline to award attorney fees. See BCW Enterprises, Ltd. v. Industrial Claim Appeals Office, 964 P.2d 533 (Colo. App. 1997); Brandon v. Sterling Colorado Beef Co., 827 P.2d 559 (Colo. App. 1991) (resort to judicial review is not considered frivolous or in bad faith as long as
there is a reasonable basis for party to challenge the ALJ's order).

**IT IS THEREFORE ORDERED** that the Director’s Supplemental Order dated March 5, 2014, is affirmed.

**IT IS FURTHER ORDERED** the respondents request for attorney fees and costs is denied.

INDUSTRIAL CLAIM APPEALS PANEL

[Signature]
Brandee DeFalco-Galvin

[Signature]
Kris Sanko
CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on 
_________ 6/5/2014 __________ by _______ KG __________.

MARIQUITA MORAN-BUTLER, 7075 LEETSDALE DR #J-21, DENVER, CO, 80224 (Claimant)
HEALTHONE/SPALDING REHABILITATION HOSPITAL, Attn: KATHY WILLIAMS, 900 POTOMAC, AURORA, CO, 80011 (Employer)
TRANSPORTATION INSURANCE COMPANY, C/O: CAN INSURANCE, P.O. BOX 8317, CHICAGO, IL, 60680 (Insurer)
BISSET LAW FIRM, Attn: JENNIFER E BISSET, ESQ., 1720 S BELLAIRE ST STE 500, DENVER, CO, 80222 (For Claimant)
SENTER GOLDFARB & RICE, Attn: WILLIAM M. STERCK, ESQ., 1700 BROADWAY STE 1700, DENVER, CO, 80290 (For Respondents)
IN THE MATTER OF THE CLAIM OF
MARGARITA SOLIS,
Claimant,
v.
SCHWARTZ'S KRAUTBURGER KITCHEN, INC.,
Employer,
and
TRUCK INSURANCE EXCHANGE,
Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Henk (ALJ) dated August 30, 2013, that found the permanent impairment rating of the DIME physician to be invalid and ordered an award of permanent partial disability benefits based upon ratings provided by treating and reviewing physicians. We affirm the order.

The ALJ considered in her order two separate work injuries sustained by the claimant. On June 6, 2009, the claimant injured her right hand when she caught it in a mixer. On June 15, 2009, the claimant was rear ended while stopped at a red light while making a delivery. The claimant asserted the latter injury affected her low back and cervical spine.

The claimant was referred by the employer for treatment by Dr. John Charbonneau. Dr. Charbonneau treated the claimant with anti-inflammatory and pain medications and physical therapy. Throughout his treatment, Dr. Charbonneau made notations pertinent to complaints of pain and limitations by the claimant which were inconsistent with his examinations, his observation of her unguarded movements and objective medical tests. The doctor concluded the claimant’s presentation should be characterized as involving “symptom magnification”, “replete with inconsistencies” and including “non-organic features.” Dr. Charbonneau ordered an MRI of the claimant’s spine, an EMG study of her arm, an evaluation with Dr. Douglas Scott, a psychological evaluation by Dr. Bruns and a surgical evaluation by Dr. Nieves and Dr. Beard. Dr. Nieves read the MRI as showing degenerative disease of the spine and the EMG revealed
some nerve slowing in the right arm. He provided injections to the cervical spine. Noting “inappropriate illness behavior” he placed the claimant at MMI on April 2, 2010.

Dr. Charbonneau reviewed his medical records previous to June, 2009. These records documented the claimant’s previous back injuries at work in 2001 and in 2008. She was treating with pain medication just weeks prior to her June, 2009, work injuries. Dr. Charbonneau reviewed surveillance video of the claimant taken in August, 2009, which he felt showed movements inconsistent with the claimant’s reports given to him in his office. The videos suggested no restrictions in the claimant’s ability to move or to function. Dr. Charbonneau determined the claimant was at MMI as of November 23, 2009, and assigned her a permanent impairment rating of 3% of the right upper extremity. The respondents filed a Final Admission of Liability for this rating.

The claimant’s injury was reviewed through a Division Independent Medical Exam (DIME) conducted by Dr. Caroline Gellrick. On March 23, 2010, Dr. Gellrick determined the claimant was not at MMI for her right arm injury. Following that review, Dr. Charbonneau ordered a repeat MRI and sought surgical opinions from Dr. Nieves and Dr. Beard. The MRI showed no evidence of radiculopathy. Dr. Nieves and Dr. Beard reasoned the claimant was not a surgical candidate. Dr. Charbonneau concluded the claimant was still at MMI.

Dr. Gellrick completed a follow up DIME report on August 9, 2011. The claimant informed Dr. Gellrick she had undergone an L 4-5 fusion surgery on her lumbar spine in June, 2011, performed by Dr. Dhupar. This surgery was pursued without request to, authorization of, or payment by the respondents. Dr. Gellrick found the claimant to be at MMI. The doctor calculated a 13% upper extremity impairment rating for her right hand and wrist. After being advised she was to provide an impairment rating for injuries to the claimant’s spine as well, Dr. Gellrick saw the claimant a third time on April 3, 2012. On that date the doctor determined the claimant had accumulated a 10% rating due to her surgically operated spine and a 12% rating for a lack of range of motion. Combined, the claimant was credited with a 21% whole person rating for the lumbar spine. Dr. Gellrick found no rating could be derived from the claimant’s cervical spine condition or from psychiatric impairment.

Prior to Dr. Gellrick’s determination of MMI, a medical review and examination was performed by Dr. Marc Steinmetz at the behest of the respondents. In his report, Dr. Steinmetz reviewed the considerable records of medical treatment the claimant received for her lumbar spine prior to June of 2009. Dr. Steinmetz also noted the inconsistencies in the claimant’s histories given to her various medical providers. The histories were said to be inconsistent with both the medical records and her own statements. The doctor then reviewed the surveillance video tape previously viewed by Dr. Charbonneau. He agreed with the conclusion of Dr. Charbonneau that the video showed normal function by the
claimant insofar as her lumbar or cervical spine was concerned. In his reports and in his
deposition testimony, Dr. Steinmetz pointed out flaws in the DIME report of Dr. Gellrick. He reasoned the rating by Dr. Gellrick which included a table 53 diagnosis of an operated back and related range of motion deficits was not correct. Dr. Steinmetz offered the opinion that Dr. Gellrick was misled by the instructions she was given by the parties’ legal counsel in the case. She wrote that she participated in a conference with the respective attorneys after her second DIME report. Dr. Gellrick related in her final report of April 3, 2012, that “request was made to consider any ratable impairment on the spine.” Dr. Steinmetz observed that, as a result of Dr. Gellrick’s interpretation of this instruction, she did not make determinations as to whether there was a contribution by the work injury of June 15, 2009, to the spine condition she was rating. Dr. Steinmetz pointed to the instruction present in Table 53 of the *AMA Guides* when it references the presence of “pain and rigidity” “with medically documented injury.” The doctor noted the June 15, 2009, auto accident occurred at a very low speed and the only damage to the vehicles involved was a broken taillight on the claimant’s vehicle. The claimant’s description of her reaction to the collision varied in every account given. Because prior documentation of treatment for a lumbar pain condition was extensive and subsequent MRIs did not reveal any acute findings, it was clear her lumbar condition was preexisting. The opinions of Dr. Charbonneau, Dr. Nieves and Dr. Beard found that not only was surgery not related to the MVA, but any surgery to the lumbar spine was also not reasonable or necessary. Dr. Steinmetz deduced then, that the 10% rating from Table 53 was not due to the work injury, and was also premised on a completely gratuitous and unnecessary surgery. Similarly, the 12% rating for the loss of range of motion was derived from deficits caused by the unrelated, unnecessary, surgery. Dr. Steinmetz surmised that no rating could be accurately assigned to the 2009 motor vehicle accident, but he conceded Dr. Charbonneau’s 5% rating for the lumbar spine could be arguably supported.

The ALJ ruled that Dr. Steinmetz’ opinion was persuasive and constituted clear and convincing evidence that the DIME opinion of Dr. Gellrick was in error and was not prepared in accordance with the *AMA Guides*. Because the lumbar surgery was unrelated to the work injury, it was deemed incorrect to include it in the diagnosis based rating taken from Table 53 of the *Guides*, and to include a rating derived from range of motion measurements affected by that surgery. The respondents had stipulated to accepting the 5% rating allowed by Dr. Steinmetz and Dr. Charbonneau, and the 13% extremity rating from Dr. Gellrick. Accordingly, the ALJ ordered permanent partial disability benefits calculated through the use of those ratings.

On appeal, the claimant contends the respondents failed to provide all the medical records available to the DIME physician, that the respondents did not depose the DIME physician as allowed by the ALJ, that the claimant’s lumbar range of motion “has likely
increased since her lumbar surgery”, and the respondents did not cite any authority holding it was improper to reference Table 53 IIE of the *AMA Guides* after the performance of an allegedly unauthorized surgery.

The claimant’s complaint that the respondents did not provide to the DIME doctor medical records, primarily those documenting treatment prior to the date of the work injury, is unavailing. The claimant also had copies of those records. W.C. rule of Procedure 11-3 (I), 7 Code Colo. Reg. 1101-3, provides that in the event the respondents fail to timely submit medical records, the claimant may request cancellation of the DIME appointment or the claimant may submit all medical records she has available. Because the claimant did neither in this case, she has waived the right to complain at this juncture of the absence of additional records. A party is not allowed to wait until the IME review is finished to make an objection based on their dissatisfaction with the results of the review. *Hester v. Eco Express, LLC*, W.C. No. 4-838-236 (March 11, 2014).

The record of the November 9, 2012, hearing reveals the respondents did not request a deposition of Dr. Gellrick, the DIME physician. The claimant requested that deposition. The ALJ did authorize the deposition. However, the claimant cannot assert as a reason to question the ALJ’s order the respondent’s failure to take the deposition when the opportunity to take the deposition was afforded to the claimant, and not the respondents.

The claimant testified the lumbar surgery performed was a spine fusion procedure. She also stated it provided no long term benefit. Dr. Steinmetz pointed out in his deposition that a fusion surgery would serve to increase the stiffness in the claimant’s spine. Therefore, the claimant’s argument that the claimant’s lumbar range of motion “has likely increased since her lumbar surgery” is not based on any evidence in the record. In addition, an ALJ could only speculate as to whether any increased spinal range of motion would likely increase or reduce the impairment rating assigned.

The claimant argues there is no authority in the AMA Guides to preclude the use of an impairment rating from Table 53 in the case of an unauthorized surgery to the claimant’s back. The respondent’s position, and that of Dr. Steinmetz, was to say the surgery involved was not necessary, and that it was not required by the work injury. It was not critical that the surgery was ‘unauthorized’. The *American Medical Association Guidelines to the Evaluation of Permanent Impairment, Third Edition, Revised* (AMA Guides) direct that causation and aggravation must be determined for purposes of devising an impairment rating pertinent to its use in benefit systems. (Appendix A, pg. 244). The impairment determination is to evaluate changes that have occurred over a period of time because of injury or disease. (Section 1.2, pg. 3). Dr. Steinmetz noted this instruction is also present in Table 53 of the Guides when it references the presence of
“pain and rigidity” “with medically documented injury.” (Section 3.3, pg. 80). The pertinent “injury” is that incurred by the claimant related to work and is the subject of the claim. This is consistent with the statute when it provides for indemnity benefits due to injuries “proximately caused by an injury or disease arising out of and in the course of the employee’s employment.” Section 8-41-301(1)(c), C.R.S. The ALJ was correct in holding that the application of Table 53 must be justified by the effect of a compensable “injury” before an impairment rating may be derived.

Section 8-42-107(8)(b)(III) and (c), C.R.S. provide that the DIME physician’s finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician’s finding must produce evidence showing it is highly probable the DIME physician is incorrect. Metro Moving & Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995). The ALJ’s decision that the DIME physician’s determination of permanent medical impairment was successfully overcome was supported by substantial evidence in the record. We may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. See Sullivan v. Industrial Claim Appeals Office, 796 P.2d 31, 32-33 (Colo. App. 1990). Given the nature of the record and the medical dispute involved, we cannot say the ALJ committed error in setting aside the DIME’s impairment rating and affirming the stipulation of the respondents that the correct rating was 5% whole person for the lumbar spine and 13% for the right upper extremity.

IT IS THEREFORE ORDERED that the ALJ’s order issued August 30, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll
Kris Sanko
CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on __________ 3/18/2014 ________ by _____ KG ________.

SCHWARTZ'S KRAUTBURGER KITCHEN, INC., Attn: DAVE SCHWARTZ, 820 39TH STREET, EVANS, CO, 80620 (Employer)
TRUCK INSURANCE EXCHANGE, Attn: ELIZABETH NEU, C/O: WORKER'S COMPENSATION BCO-DENVER, PO BOX 108843, OKLAHOMA CITY, OK, 73101-8843 (Insurer)
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K BLUNDELL, ESQ, 1233 EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)
HUNTER & ASSOCIATES, Attn: JOE ESPINOSA, ESQ., 1801 BROADWAY, STE 1300, DENVER, CO, 80202-3878 (For Respondents)
The respondent seeks review of an order of Administrative Law Judge Friend (ALJ) dated September 24, 2013, that ordered the claim was not barred by the statute of limitations and ordered the respondents to provide the claimant evaluation and treatment by Dr. George. We affirm.

The respondent appeals the ALJ’s order of compensability on the basis that a September 12, 2012, worker’s claim for compensation pertinent to an injury occurring January 19, 2010, is barred by the two year statute of limitations provided in § 8-43-103(2), C.R.S.

The claimant injured her right hip when she slipped and fell on ice on January 19, 2010, while working as a bus driver for the respondent. The claimant reported the injury a few days later to the employer’s human resources manager. She was referred to Dr. Lawrence George at High Country Healthcare. Dr. George ordered an X-ray of the hip and later, an MRI. The doctor referred the claimant to physical therapy, chiropractic treatments and acupuncture. Dr. George also prescribed ibuprofen. Dr. George maintained the claimant on full duty at work. The claimant last saw Dr. George on June 28, 2010. She treated with the chiropractor through November, 2010. The claimant reported some improvement to Dr. George, but she testified at hearing that she continues to perceive pain in her hip.

The claimant later complained of stiffness in her neck which she believed was due to the need to look above eye level to monitor controls in the bus and because her bus routinely slipped out of gear thereby jostling the claimant’s neck and head. On January
11, 2011, the claimant saw Dr. Adele Morano, a partner of Dr. George at High Country Healthcare. The claimant complained to Dr. Morano about her neck and her hip. Dr. Morano recommended a modified duty restriction of “no job requiring neck extension”.

The claimant continued to experience pain in her hip. On September 12, 2012, she filed with the Division of Workers’ Compensation a Worker’s Claim for Compensation form. The respondent completed a Notice of Contest on September 26, 2012. On May 15, 2013, the claimant submitted an application for a hearing endorsing as issues compensability and medical benefits. The respondent added the issue of the statute of limitations. At the August 13, 2013, hearing, the claimant requested an order of compensability and an order that she be able to see Dr. George for additional treatment. The respondents did not deny the claimant suffered an injury to her hip on January 19, 2010, but asserted the claim for benefits was now time barred and that the claimant’s current symptoms were not related to the 2010 fall on the ice.

The ALJ submitted a summary order and then a full findings of fact, conclusions of law and order on September 24, 2013. He concluded the claim was compensable and not precluded by the statute of limitations in § 8-43-103(2). The ALJ found the two year limitations period referenced in that section did not begin to run until the claimant became aware that her injury was such that it would require her to miss more than three days from work in the future, or lead to permanent impairment. He observed that the medical treatment the claimant received in 2010 was not sufficient to put the claimant on notice that her injury was serious enough to justify missing that much time from work, or permanent impairment. The ALJ noted the claimant did not receive any restrictions pertaining to her job until January 11, 2011. Because that date was less than two years prior to the September 12, 2012, date of her claim for compensation, the claim was deemed as timely filed and was not barred.

On appeal, the respondent contends the evidence reveals a reasonable claimant would have been advised within the first six months of her medical treatment that she had suffered a disabling injury. The respondent also argues the ALJ’s finding that January 11, 2011, was the date the claimant was found to have been aware of the seriousness of her injury, and that it would be disabling, is in error because the treatment and restrictions recommended on that date pertained solely to the claimant’s neck injury.

The respondents review the treatment the claimant received prior to June of 2010, and argue the circumstances would have informed a reasonable person of the seriousness of the claimant’s hip injury. The respondents cite the securing of both an X-ray and an MRI and the small amount of relief the claimant states she obtained from the physical therapy, acupuncture and chiropractic treatments.
Section 8-43-103(2), C.R.S., provides that the right to workers’ compensation benefits is barred unless a formal claim is filed within two years after the injury. The statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967). For purposes of the statute of limitations, a "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. City of Boulder v. Payne, supra; Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the claimant must appreciate a causal relationship between the employment and the condition. The claimant must also know that the injury is disabling and may entitle her to disability benefits. Temporary disability benefits are payable if the injury causes the claimant to miss more than three shifts from work. Section 8-43-103(1)(a), C.R.S.; City of Englewood v. Industrial Claim Appeals Office, 954 P.2d 640 (Colo. App. 1998); Grant v. Industrial Claim Appeals Office, 740 P.2d 530 (Colo. App. 1987). Entitlement to disability benefits also occurs in the case of a fatality or permanent physical impairment. Sections 8-43-101(1) and 8-43-203(1)(a).

In City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967), the claimant was injured while working as a fireman for the employer and was treated on the date of his accident. He did not, however, file a claim for benefits until six years later. The Court found the claim was not barred by the statute of limitations. The evidence showed that despite the receipt of medical treatment, the claimant did not receive a diagnosis that linked his inability to work at his job to his work accident until many years after the accident. The court ruled that an ‘injury’ was distinct from the definition of an ‘accident’.

Accident is the cause and Injury is the effect. It does not follow in every instance that the two occur simultaneously. At least, in many instances, the total or ultimate effect is not immediately apparent. The slow, progressive development of the ultimate effect in the instant case was neither apparent to several doctors who treated claimant nor to the claimant. Surely, it was not contemplated by the legislature that a workman have greater medical perception than a physician.

... 

Since no benefits flow to a workman merely because he has been the victim of an Accident and since Injuries must be of sufficient magnitude to prevent him from working for
more than [three] days before they are compensable, it follows that the term ‘injury,’ as it is employed in [8-43-103(2)], means Compensable injury. In fact, the statute so states, in slightly different verbiage. It requires notice to be given ‘of an injury, for which compensation and benefits are payable * * * 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.’ Id. at 350-351.

The fact then, that the claimant received physical therapy, acupuncture and chiropractic treatments after the time of her accident in January, 2010, would not necessarily lead to the conclusion she was reasonably to be aware she had a compensable injury which would justify the need to file a claim for compensation. While knowledge of a compensable claim may also be seen as present when the claimant recognizes she will be required by her injury to miss more than three days from work in the future, Born v. University of Denver, 4-337-504 (May 9, 2001), Ficco v. Owens Brothers Concrete, 4-546-848 (November 20, 2003), the claimant did not receive that type of medical recommendation until she was seen for neck pain in January, 2011. Prior to that date she had always been given a full duty return to work release by her physician.

The determination of when the claimant recognized the probable compensable character of the injury is a question of fact for resolution by the ALJ. Therefore, we must uphold the ALJ’s determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2000. Kerstiens v. All American Four Wheel Drive, W.C. No. 4-865-825 (August 1, 2013). Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985). The finding by the ALJ in this claim that the claimant was not aware of the compensable nature of her injury until some point after September of 2010, is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

The respondent asserts a disabling injury is not solely one that requires the payment of compensation benefits. The respondent points to Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999), as stating that “medical incapacity” is a form of ‘disability’ and to Ortiz v. Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998), as authority that an inability to work only insofar as the ability to perform regular job duties is affected is also a ‘disability’ for purposes of the statute of limitations in § 8-43-103(2).
The respondents misconstrue a statement in *Culver* to arrive at their assertion. The Court did make an observation in that case that:

> The “disability concept is a blend of two ingredients, … The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is wage-earning incapacity evidenced by an employee's inability to resume his or her prior work. *Culver*, 971 P.2d at 649.

The ‘medical incapacity’ to which the Court refers is the award of permanent partial disability benefits premised upon “permanent medical impairment” as ascertained by use of the *AMA Guides to the Evaluation of Permanent Impairment*. See § 8-42-107(8)(b.5)(II), C.R.S. (Section 8-42-107 is titled “permanent partial disability benefits” and specifies those benefits are comprised of compensation calculated using a medical impairment rating either from a ‘scheduled injury’ listed in subsection (2), or by use of an equation involving the impairment rating, age and wage rate of the claimant as set forth in subsection (8)(d)). The ‘medical incapacity’ then, as used in the *Culver* decision, is indeed a reference to ‘compensation’, not simply to functional restrictions.

The Court of Appeals in *Ortiz v. Charles J. Murphy* was not discussing the statute of limitations in § 8-43-103(2). That decision dealt with a determination of the date of injury, or ‘onset’, of an occupational disease. Unlike the terms of § 8-43-103(2) which turns on a disabling injury, §8-43-303(1) sets forth that the time limit for reopening begins to run from the “date” the accident occurred or the ‘onset,’ which is the equivalent in cases of an occupational disease. Where the claimant’s injury is in the nature of an occupational disease, the rights and liabilities of the parties are governed by the law in effect at the "onset of disability," and the disease is not compensable unless it causes disability. *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991). However, an occupational disease may cause "disability" which does not entitle the claimant to disability benefits. This is true because the claimant suffers the onset of disability when the occupational disease impairs the claimant’s ability to effectively and properly perform his regular employment. *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991). Under such circumstances, the claimant is "disabled" but not necessarily entitled to disability benefits if modified work is provided at the claimant’s pre-injury wage. Accordingly, the "onset of disability" rule does not govern the statute of limitations for filing a workers’ compensation claim. *Ficco v. Owens Brothers Concrete Co.*, W.C. No. 4-546-848 (November 20, 2003), *rev’d in part, Ficco v. Industrial Claim Appeals Office*, (Colo. App. No. 2005CA2269, November 24, 2004) (not selected for
publication), and *Ficco v. Owens Brothers Concrete Co.*., W.C. No. 4-546-848 (January 5, 2006).  *Contra, Ott v. Pediatric Services*, W.C. No. 4-705-444 (January 14, 2009).

The standard then, that applies is that set forth in *City of Boulder v. Payne*, *supra*, that the statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury," with “compensable” meaning entitlement to the payment of compensation benefits.

Finally, the respondents assert the ALJ was in error in making a finding that the claimant was not adequately put on notice as to the compensable nature of her claim until January 11, 2011. The respondents point out that on that date the claimant saw Dr. Morano with complaints pertaining to a neck injury, and the work restrictions provided were explicitly directed at the neck condition. Regardless of the merits of this contention, it is not critical to the finding of the claimant’s knowledge she may have a disabling injury as compared to the date she filed her claim for compensation. The ALJ did not find the claimant should have been aware she sustained a disabling injury as compared to the date she filed her claim for compensation. The ALJ’s finding was that “the fact that claimant received several medical and chiropractic treatments after the time of her accident in 2010 would not necessarily lead to the conclusion she was reasonably to be aware she had a compensable injury which would justify the need to file a claim for compensation.” (Conclusions of law, ¶ 7). This was the treatment the claimant received prior to September 12, 2010. Accordingly, the ALJ’s finding that the claim for benefits was timely filed is supported by his findings of fact and conclusions of law. The reference to work restrictions imposed in January, 2011, would be of no consequence to the statute of limitations issue. As noted above, we find the ALJ’s conclusion the claimant was not aware she suffered a disabling injury within two years of the date of her claim for compensation is supported by substantial evidence in the record. It may eventually turn out that the claimant’s hip injury never entitles her to compensation benefits. That eventuality however, does not affect her ability to file her claim for benefits in 2012.

Based upon the ALJ’s findings, supported by the record, we agree the claimant’s claim for benefits was timely filed and the ALJ’s award of medical benefits need not be set aside.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued September 24, 2013, is affirmed.
INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko
CERTIFICATE OF MAILING

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

_________ 3/18/2014 __________ by _______ KG __________.

TRINA TAYLOR, PO BOX 2333, BRECKENRIDGE, CO, 80424 (Claimant)
SUMMIT COUNTY, Attn: DONNA CORBETT, PO BOX 68, BRECKENRIDGE, CO, 80424 (Employer)
SELF INSURED, Attn: DEBBIE MCDERMOTT, C/O: CTSI, INC., 800 GRANT ST #400, DENVER, CO, 80203 (Insurer)
THE BREWER LAW OFFICES, P.C., C/O: AMY L. BREWER, ESQ., PO BOX 2309, BRECKENRIDGE, CO, 80424 (For Claimant)
DWORKIN, CHAMBERS, WILLIAMS, Attn: DAVID J. DWORKIN, ESQ., C/O: YORK, BENSON & EVANS, P.C., 3900 EAST MEXICO AVE, STE 1300, DENVER, CO, 80210 (For Respondents)
The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 1, 2013, that denied and dismissed the claimant’s claim for workers’ compensation benefits. We affirm the ALJ’s order.

A hearing was held on the issues of compensability, medical benefits and whether benefits should be reduced by 50 percent for willfully misleading the employer. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as an on-site truck driver for the employer. On February 17, 2012, at approximately 2:45 a.m., the claimant allegedly sustained an injury to her right shoulder while closing the door of a trailer at work. The claimant reported the incident to her supervisor, Mr. Rivers. The claimant did not request medical care but sought to go home. At about 5:15 a.m. on this date, the claimant visited the Lutheran Emergency Room because of severe right shoulder pain. The claimant reported that she was lifting a 100 gallon fish tank and experienced a burning sensation down her right arm. The doctor suspected a right rotator-cuff tear and referred the claimant to her personal physician, Dr. Maybach. The claimant visited Dr. Maybach later that day and again reported that she had injured her right shoulder after moving a heavy fish tank four days earlier.

The claimant had a prior workers’ compensation injury to her right shoulder with a different employer in 2008. The claimant was placed at maximum medical improvement
(MMI) for this injury with permanent work restrictions of no lifting in excess of 15 pounds, occasional reaching away from the body and occasional overhead reaching with the right arm. The claimant settled this claim on a full and final basis. Rivers, and co-worker Jim Horton, testified at hearing that the claimant had difficulties performing her job with the respondent employer because her right shoulder would pop in and out from the old injury and prior surgery.

On February 21, 2012, the claimant visited Dr. Erickson for an evaluation. Dr. Erickson treated the claimant for the 2008 workers’ compensation injury. Dr. Erickson stated that the claimant’s “case was closed, but she was still having significant difficulties.” Referring to the 2008 injury, Dr. Erickson further stated that, “I believe that her current problems are a continuation of her work injury.” Dr. Erickson continued that, “as the patient never reached a point where her shoulder was functioning anywhere close to normal and still painful, I believe that she was placed at MMI without justification and that her condition, even while she attempted to continue working, has progressed. I believe her current condition is definitely related to her prior work injury.” On February 22, 2012, the claimant prepared a statement for the respondent employer reiterating that her right shoulder condition was an old injury and that she was recently advised that she required shoulder replacement surgery and that this was not the responsibility of the respondent employer.

On May 4, 2012, Dr. Erickson authored a letter in which he stated that he had changed his opinion and that the claimant actually sustained all of the damage to her shoulder while performing work activities for the respondent employer. Dr. Erickson later stated on August 14, 2012, that there had been a significant error with the claimant’s clinical history because the claimant’s friend had erroneously completed registration sheets. In Dr. Erickson’s opinion, the February 17, 2012, incident actually “caused a severe aggravation, requiring joint replacement.”

The claimant testified at hearing that she initially told medical providers that she injured her right shoulder while lifting a fish tank because she did not want to be treated by workers’ compensation. The claimant also stated that she told Dr. Erickson about trailer door incident but that Dr. Erickson initially attributed her condition to the prior work injury because the claimant’s roommate’s daughter incorrectly completed her registration paperwork.

Dr. Shih conducted an independent medical examination of the claimant and noted the numerous discrepancies in the claimant’s explanation of her right shoulder symptoms. According to Dr. Shih, the medical records were inconsistent regarding the mechanism of the claimant’s right shoulder injury and he was unable to attribute the right shoulder symptoms to the February 17, 2012, incident.
The ALJ found the opinion of Dr. Shih more credible and persuasive than the opinion of Dr. Erickson and the testimony of the claimant. The ALJ, therefore, concluded that the claimant failed to demonstrate that her employment duties on February 17, 2012, aggravated, accelerated or combined with her pre-existing right shoulder condition to produce the need for medical treatment.

On appeal the claimant asserts that the ALJ erred in his determination to deny the claim. The claimant argues that the respondents conceded there was an incident on February 17, 2012, and that the evidence compels a conclusion that the claimant aggravated her pre-existing shoulder condition on this date. We are not persuaded the ALJ erred.

As the claimant correctly points out, a pre-existing condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury.  

_H & H Warehouse v. Vicory_, 805 P.2d 1167 (Colo. App. 1990). However, where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits are sought.  


The ALJ is charged with making pertinent factual determinations, including those concerning liability for benefits, under a preponderance of the evidence standard. Section 8-43-201, C.R.S. Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied.  

_Metro Moving and Storage Co. v. Gussert_, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied.  

_Id._

Because the question of whether the claimant met her burden to prove compensability is factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in 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.  

_Panera Bread, LLC v. Industrial Claims Appeals Office_, 141 P.3d 970, 972 (Colo. App. 2006). We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal.  

Here, the ALJ determined that the claimant failed to prove she sustained an injury at work on February 17, 2012. The ALJ’s order reflects that he considered the claimant’s explanations as to how she injured her right shoulder and the discrepancies in her reporting of the alleged injury and that he rejected those explanations. In rejecting the claimant’s testimony and Dr. Erickson’s opinion, the ALJ’s order pointed out the numerous inconsistencies in the claimant’s version of events. It was for the ALJ to resolve any inconsistencies and assign such weight and credibility as the ALJ determined was appropriate. See Monfort, Inc. v. Rangel, 867 P.2d 122 (Colo. App. 1993). The mere fact the evidence might support a different result affords no basis for relief on appeal. University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). We may not interfere with the ALJ’s decision to credit the testimony of witnesses unless, in extreme circumstances, the testimony is overwhelmingly rebutted by such hard certain evidence the ALJ would err as a matter of law in crediting it. Arenas v. Industrial Claim Appeals Office, 8 P.3d 558 (Colo. App. 2000). That is not the case here.

The claimant contends that the respondents conceded at hearing that her injury occurred at work. The respondent’s attorney, however, stated at hearing, “Respondents concede that she sustained an incident at work,” with the trailer door. February 19, 2013, Tr. at 17 (emphasis added). Contrary to the claimant’s assertion, we do not understand the respondents to have conceded that the claimant sustained an injury as a result of this incident and that was the issue for ALJ’s resolution. See City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967) (no benefits flow to the victim of an industrial accident unless the accident results in a compensable injury.)

We conclude that the ALJ’s dispositive findings are supported by substantial evidence and that the ALJ did not abuse his discretion in making his findings. The ALJ’s findings, in turn, support his decision to deny the claimant’s claim for benefits and we perceive no basis upon which to disturb the order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ’s order dated July 1, 2013, is affirmed.
INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll
CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on________       1/23/2014             ______

by _____       RP        ________.

LUCRETIA WILCOX, 8511 FRANKLIN STREET, DENVER, CO, 80229 (Claimant)
ZURICH AMERICAN INSURANCE COMPANY, Attn: SHARON CAMARA, C/O:
GALLAGHER BASSETT INSURANCE COMPANY, P O BOX 4068, ENGLEWOOD, CO,
80155 (Insurer)
DARRELL S. ELLIOTT, P.C., Attn: ROBERT F. JAMES, ESQ., 1600 PENNSYLVANIA
STREET, DENVER, CO, 80203 (For Claimant)
THE KITCH LAW FIRM, Attn: MARSHA A. KITCH, ESQ., 3064 WHITMAN DRIVE,
SUITE 200, EVERGREEN, CO, 80439 (For Respondents)
The claimant seeks review of an order of Administrative Law Judge Cain (ALJ) dated December 2, 2013, that ordered the respondents to pay temporary partial and temporary total benefits based on an average weekly wage (AWW) of $849. We affirm the order of the ALJ.

The claimant takes issue on appeal with the ALJ’s calculation of the AWW. He contends the ALJ erred in excluding from the determination of the AWW a bonus the claimant was paid in April, of 2012.

The claimant injured his low back on December 6, 2012. The respondents admitted liability for the injury and paid temporary benefits. The claimant disputed the admitted AWW for the reason that the respondents did not include in their calculation weeks which were representative of the wages earned during the employer’s busy season. The claimant also asserted the bonus he received on April 15, 2012, in the amount of $2,316.12, should be added to his wages and thereby increase the AWW. The ALJ did raise the AWW to reflect the seasonal wages. However, the ALJ held the bonus should not be included in the calculation of wages because it was more appropriately characterized as a fringe benefit rather than wages.

The ALJ found the claimant, as well as the other employees in his branch location, were awarded a bonus if their branch showed a profit in the previous calendar year. Some years did not result in any bonus due to the absence of a profit from that branch. Each employee at the branch would receive a bonus if the branch showed a profit and the amount of the bonus check was calculated by applying a percentage figure to the total
amount of the employee’s wages paid in 2011. The bonus check is not paid until four months after the end of the calendar year so that the profits realized by the branch may be calculated. An employee was required to be still employed at the time of the bonus distribution in order to receive the bonus. Relying upon Meeker v. Provenant Health Partners, 929 P.2d 26 (Colo. App. 1996) and Orrell v. Coors Porcelain, W.C. No. 4-251-934 (May 22, 1997), the ALJ reasoned the bonus did not have a present day cash equivalent value, the claimant did not have access to the proceeds of the bonus on a day to day basis, and did not have an immediate expectation of receiving the bonus. Accordingly, the bonus was identified as a fringe benefit. Section 8-40-201(19)(b) provides any items not specifically referenced in the definition of wages is considered a “fringe benefit.” It is excluded from the definition of “wages” and is therefore not included in the AWW.

The present definition of ‘wages’ in § 8-40-201(1(19) was adopted in 1989. The version as enacted sought to limit the types of payments made to employees that could be considered in calculating the AWW. The term includes the money rate at which the employee’s services are recompensed under the contract of hire. The term also includes the cost of continuing participation in the employer’s group health plan, gratuities reported to the IRS and the value of employer provided room and board. But any similar advantage or fringe benefit not specifically enumerated is not considered as wages. The Meeker court reviewed an employer’s policy that featured personal employee time, which was in lieu of sick or vacation time. The court found a specific dollar amount per hour of work was credited to the employee’s account. The personal employee time had no maximum cap on it and it could not be forfeited. When the employee left employment, the balance of the personal employee time was paid out to the employee. Because this payment possessed a present cash equivalent value and the claimant had reasonable access to that benefit on a day to day basis, the court determined the personal employee time was tantamount to wages and was included in the AWW.

However, in City of Lamar v. Koehn, 968 P.2d 164 (Colo. App. 1998), the claimant sought to have vacation and sick time, as well as employer contributions to his pension added to the AWW. The vacation and sick time had a calculated value but they were subject to a maximum cap and any time accrued past that limit was forfeited. The respondents asked that the Meeker analysis be set aside for the reason that the Meeker court had adopted its test from case law established prior to the 1989 amendments to § 8-40-201(1(19). The Koehn court disagreed and deemed the Meeker test to be easily applicable to the newer version of the statute. However, in Koehn, the Meeker test led to the exclusion of the disputed payments from the calculation of wages. The court observed that because “the value of claimant’s leave time is dependent upon actual usage, and will decline if in fact it is not used, it cannot be considered a cash equivalent” such as was the case in Meeker. They were then, not added to the AWW. Insofar as the pension
contributions were concerned, the Koehn court did not apply the Meeker test but, instead, noted the legislative history which showed a House committee voted against including life insurance and pension contributions in the AWW. Accordingly, the court reasoned the pension contributions in that case would not be considered wages.

The value of a profit sharing plan was reviewed in Orrell v. Coors Porcelain, W.C. No. 4-251-934 (May 22, 1997). The plan called for each employee to receive eighty hours of pay in the event the employer achieved 100% of its profit goal. If a lesser percentage was obtained the eighty hours was multiplied by that lesser percentage and paid accordingly. The employee also was required to be employed on the date the profit sharing period concluded in order to be eligible. The Panel applied the Meeker test to the plan. It was determined the plan had no present day cash equivalent value. Because it could not be determined until the end of the fiscal quarter whether or not the employer would make a profit, the value was incipient. The claimant also possessed no ability to cash out any accrued profit sharing due to the need to be employed at the end of the quarter. As a consequence, the profit sharing plan was seen as a fringe benefit and not a wage to be added to the AWW.

The ALJ compared the claimant’s bonus in this case to the profit sharing plan in Orrell. The right to receive any payment pursuant to the bonus was contingent on the profitability of the employer’s branch. This could not be determined until the end of the calendar year. Accordingly, the bonus had no present day cash value to the claimant. The presence of the bonus could not be immediately determined and the claimant could not cash out any value because he was required to be employed on the date of the bonus distribution. As in Orrell, the ALJ found the bonus was a fringe benefit and would not be included in the AWW calculation.

We agree with the ALJ that the analysis in Orrell applies to the circumstances of this case. The employer’s bonus is specifically a profit sharing plan as was the benefit in Orrell. Those plans are characteristically premised on the realization of a profit over a defined period of time. Until that period is complete, the existence of any additional pay is entirely contingent. In addition, both the plan in Orrell and the plan in this matter require the employee to still be employed by the employer when the profit sharing is paid out. This represents a further barrier to the existence of any present day cash value. These qualifications also precluded the claimant from enjoying an immediate claim to a bonus. He would not have known the status of any profit calculation nor would he have known his future employment status with the employer. Neither part of the Meeker test was achieved by this bonus. The bonus did not have a present day cash equivalent value. The claimant did not have access to the proceeds of the bonus on a day to day basis, and did not have an immediate expectation of receiving the bonus. The ALJ correctly concluded the bonus was a fringe benefit and not wages.
On appeal, the claimant points to *Simmonds v. Eastman Kodak Co.*, 781 P.2d 140 (Colo. App. 1989), and *Feeley v. Century Communications*, W.C. No. 4-393-063 (April 5, 2000). The respondents note that whereas *Simmonds* did deal with a bonus and held that payment was to be included in the AWW, *Simmonds* construed the statute as it existed before its amendment in 1989. The previous version of the statute did not exclude fringe benefits from the computation of wages, but it did specify that gratuities were not included. The *Simmonds* opinion held that an annual bonus was not a ‘gratuity’. However, that case did not have the opportunity to compare the bonus to a ‘fringe benefit’. Because that is the issue in this case, *Simmonds* does not provide much insight. The *Feeley* case is distinguishable as it dealt with a sales bonus calculated upon each individual sale completed by the claimant. The application of the *Meeker* test would find a bonus possessing a present day value because the sales were complete and the bonus determined. The claimant could also cash out that bonus since it was finite and complete. Those cases do not convince us the analysis in *Orrell* is inapplicable here. Unlike in *Feeley*, the bonus in this case did not have a present day cash value. The very existence of a bonus here could not be determined until months later. Accordingly, we affirm the decision of the ALJ finding the claimant’s bonus is a fringe benefit and is not to be included in the calculation of the AWW.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued December 2, 2013, is affirmed.

**INDUSTRIAL CLAIM APPEALS PANEL**

[Signature]
David G. Kroll

[Signature]
Kris Sanko
CERTIFICATE OF MAILING

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

________ 5/16/2014 _________ by _____ KG ________.

DAN YEX, 10305 DOVER ST APT #1025, WESTMINSTER, CO, 80021 (Claimant)
ABC SUPPLY COMPANY, 333 1ST AVE, LONGMONT, CO, 80501 (Employer)
ACE/ESIS INSURANCE, C/O: MS ANITA F. MONTOYA, PO BOX 6569, SCRANTON, PA, 18505 (Insurer)
THE FRICKEY LAW FIRM, Attn: JANET FRICKEY, ESQ., C/O: KIMBERLEE KELEHER, ESQ., 940 WADSWORTH BLVD 4TH FLR, LAKEWOOD, CO, 80214 (For Claimant)
LEE & KINDER, LLC., Attn: JESSICA C. MELSON, ESQ., C/O: JOSEPH W. GREN, ESQ., 3801 E FLORIDA AVE, STE 210, DENVER, CO, 80210 (For Respondents)
The respondent seeks review of an order of Administrative Law Judge Walsh (ALJ) dated January 14, 2014, that found the claimant’s request for a cervical surgery was reasonable, necessary and related. We affirm the ALJ’s order.

The sole issue for hearing was whether the cervical surgery recommended by Dr. Janssen was reasonable, necessary and related medical treatment. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to her neck and right shoulder area on October 27, 2009, when she was involved in a motor vehicle accident while working as a deputy for the respondent. The authorized treating physician, Dr. Kurz, placed the claimant at maximum medical improvement (MMI) with no permanent impairment on February 11, 2010.

The claimant underwent a Division Independent Medical Examination (DIME) with Dr. Arnold on July 8, 2010. The DIME physician determined that the claimant was not at MMI for her work-related condition and recommended additional medical treatment. The respondent did not contest the DIME. Dr. Williams then became the claimant’s authorized treating physician. Dr. Williams noted the claimant’s continued cervical and shoulder pain and ordered a MRI. The MRI revealed right posterolateral C5-6 disc herniation with compression of the right ventral margin of the spinal cord at the right C6 nerve root exit zone with associated lateral recess stenosis and right C6 nerve compression. Dr. Williams referred the claimant to Dr. Janssen. According to Dr.
Janssen the claimant’s neck and upper extremity symptoms were consistent with C6 radiculopathy, the structural loss of integrity at C5-6 and C6-7, and the disc herniation at C5-6 with C6 nerve root impingement. Dr. Janssen recommended cervical surgery which was originally denied by the respondent. After an independent medical examination (IME) with Dr. Ogin, the respondent eventually agreed to pay for the claimant’s surgery. On September 21, 2011, Dr. Janssen fused the vertebra at C5-6 and replaced the disc at C6-7. The claimant subsequently had related shoulder and carpal tunnel surgery.

The claimant continued to experience pain in her cervical spine. A March 20, 2013, EMG showed possible right C-6 radiculopathy. Dr. Janssen determined that there were probably some neural foraminal encroachment and possibly a spur against the C6 nerve root because the fusion had consolidated. Dr. Janssen, therefore, recommended a second cervical surgery to address the problems. The respondent denied the request and filed an application for hearing.

At the respondent’s request, Dr. Olsen examined the claimant. Dr. Olsen testified that he did not believe the surgery was reasonable and necessary and, in his opinion, the claimant’s neck condition was not causally related to the industrial accident. Dr. Janssen, in contrast, issued a narrative report outlining his treatment history and provided objective evidence for his determination that the second cervical surgery was reasonable, necessary, and related. The ALJ found the opinion of Dr. Janssen more credible and persuasive than the medical opinions to the contrary. Based on these findings, the ALJ determined the claimant had proven that the cervical surgery recommended by Dr. Janssen was reasonable, necessary, and related to the claimant’s industrial injury.

On appeal, the respondent argues that the ALJ erred by not requiring the claimant to overcome the DIME physician’s opinion on relatedness of the claimant’s cervical condition by clear and convincing evidence, and that the ALJ’s findings are not supported by substantial evidence. We are not persuaded the ALJ erred.

Section 8-42-101(1)(a), C.R.S., provides that the respondent is liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. Yeck v. Industrial Claim Appeals Office, 996 P.2d 228 (Colo. App. 1999). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997). Because these questions are factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.
The existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeal Office*, 55 P.3d 186 (Colo. App. 2002).

Here, the ALJ relied on Dr. Janssen’s opinion to conclude that the claimant’s need for a second cervical surgery was reasonable, necessary, and related. Dr. Janssen noted that the claimant’s work-related injury was a head-on collision and that diagnostic studies clearly demonstrated a two-level subaxial cervical spine compressive pathology, disc herniation, and advanced compression at the C5-6 and C6-7 levels. In Dr. Janssen’s opinion, the indications for surgery were very clear and 100 percent related to the work-related injury. Claimant’s Exhibit 2 at 9. Dr. Janssen’s opinion provides substantial evidence and valid support for the ALJ’s determination that the cervical surgery was reasonable, necessary, and related. Section 8-43-301(8), C.R.S.

The respondent contends that the claimant was required to overcome the DIME physician’s findings of relatedness by clear and convincing evidence. The respondent alleges the DIME physician’s opinion on relatedness is separate and distinct from the determination of MMI. We disagree. The opinions of a DIME physician are only subject to presumptive weight when expressly required by the statute, which is for MMI and medical impairment. *Cordova v. Industrial Claim Appeals Office*, supra.; §8-42-107 (8)(b) and (c), C.R.S. It is true, as the respondent argues, that the DIME physician's opinion on the relatedness of particular components of a claimant's overall impairment and whether the claimant has reached MMI for those particular components carry presumptive weight. *Leprino Foods v. Industrial Claim Appeals Office*, 134 P.3d 475 at 482 (Colo. App. 2005) (a DIME physician's opinion concerning causation will be given presumptive weight because MMI and impairment “inherently 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 *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). However, neither the claimant’s MMI status nor her impairment is at issue here. The Act contains no requirement for presumptive weight with respect to the reasonableness, necessity, and relatedness of requested medical treatment. *Id.*

Once a DIME physician determines that a claimant is not at MMI, and that decision is not challenged, the DIME process remains open. *See Sanco Industries v. Stefanski*, 147 P.3d 5 (Colo. 2006); *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006). The claimant then returns to the authorized treating physician for additional treatment. During this time, the DIME physician’s opinion is not subject to the presumptive weight normally afforded to the DIME physician’s MMI or medical impairment determinations because the claimant is not at MMI. *Cordova v. Industrial Claim Appeals Office*, supra.

Moreover, in our view, the ALJ’s determinations here are not inconsistent with the DIME physician’s opinion that the claimant was not at MMI. The DIME physician diagnosed the claimant with a cervical sprain and no radiculopathy and determined that the claimant needed additional treatment in the form of injections. The DIME physician’s report simply stated that the claimant’s “cervical strain is caused by the motor vehicle accident. Degenerative changes are pre-existing.” The DIME physician further stated that the claimant “certainly is not a surgical candidate.” Respondent Exhibit B. However, at the time of the first request for surgery, Dr. Janssen explained that the DIME physician did not have the benefit of an MRI, EMG, or diagnostic injections. After the DIME physician determined the claimant was not at MMI, the claimant received the recommended injections which led to the first surgery performed by Dr. Janssen at C5-6 and C6-7. The healing of that fusion created stenosis which needed to be fixed by the recommended second cervical surgery. Claimant Exhibit 2 at 8. Based on the evidence, it was plausible for the ALJ to determine that the second cervical surgery was reasonable, necessary, and related.

Regardless, as noted above, there is substantial evidence in the record to support the ALJ’s finding that the cervical surgery was reasonable, necessary, and related. The existence of contrary evidence, even specific recommendations pertaining to medical benefits, from a DIME physician affords no basis for relief on appeal. Section 8-43-301(8), C.R.S.; Cordova v. Industrial Claim Appeals Office, supra. As such, we will not disturb the ALJ’s order on this issue.

IT IS THEREFORE ORDERED that the ALJ’s order issued January 14, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko
CERTIFICATE OF MAILING

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

________ 5/14/2014 ________ by ________ KG ________.

TERRY ZITTEL, 317 W CASPER DR, PUEBLO, CO, 81007 (Claimant)
PUEBLO COUNTY, 215 W 10TH ST, PUEBLO, CO, 81003 (Employer)
ROBERT D. BAUMBERGER ESQ., C/O: KONCILJA AND KONCILJA PC, 125 W B ST,
PUEBLO, CO, 81003 (For Claimant)
DAVID DWORKIN ESQ., C/O: DWORKIN CHAMBERS & WILLIAMS, 3900 E MEXICO
AVE SUITE 1300, DENVER, CO, 80210 (For Respondents)
CTSI, Attn: DEBBIE MCDERMOTT, 800 GRANT ST SUITE 400, DENVER, CO, 80203
(Other Party)
City and County of Denver,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Russell Andrews,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE GRAHAM
Bernard and Berger, JJ., concur

Announced May 8, 2014

Scott Martinez, City Attorney, Christian M. Lind, Assistant City Attorney, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Law Office of O'Toole & Sbarbaro, P.C., Neil D. O'Toole, Denver, Colorado, for Respondent Russell Andrews
This case raises a question of statutory interpretation that has not yet been addressed by any division of this court or by the Colorado Supreme Court: What constitutes “employment” for purposes of calculating the five-year time period under the “firefighter cancer presumption statute”? § 8-41-209, C.R.S. 2013.

Petitioner here, the City and County of Denver (also referred to as the Denver Fire Department or Denver), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed the order of an administrative law judge (ALJ) awarding claimant, Russell Andrews, medical benefits and temporary and permanent disability benefits. The Panel held claimant was entitled to the presumption of compensability created by section 8-41-209. The Panel included claimant’s four years of service as a volunteer firefighter and emergency medical technician (EMT) for the Elbert Fire Protection District and his training at the Rocky Mountain Fire Academy when it calculated the five years of “employment as a firefighter” needed to apply the statutory presumption. Denver contends the Panel improperly calculated claimant’s length of service and argues that the presumption should not have been
applied to claimant’s case. We agree with the Panel’s interpretation, however, and conclude that the presumption applies to claimant’s claim. We therefore affirm the Panel’s decision.

I. Background

¶ 3 The facts in this case are not disputed. Claimant is a first grade firefighter for the Denver Fire Department. He was hired by Denver on October 1, 2004. Prior to taking his oath of office as a firefighter for Denver in February 2005, claimant completed a seventeen-week course at the Rocky Mountain Fire Academy as a probationary firefighter for Denver. Claimant also garnered four years’ experience as a volunteer firefighter and EMT for the Elbert Fire Protection District before entering the fire academy.

¶ 4 In October 2009, claimant experienced flu-like symptoms, which were attributed to a virus. Although the flu-like symptoms dissipated, claimant continued to feel tired and weak, and, in the following months, lost about twenty pounds. After an episode of acute shoulder and abdominal pain in late January 2010, claimant sought treatment in the emergency room.

¶ 5 On February 12, 2010, claimant was diagnosed with chronic
myelogenous leukemia (CML). He filed a claim for workers’ compensation benefits under section 8-41-209 for his cancer treatments, invoking the statute’s presumption that certain cancers contracted by firefighters with five or more years of service are compensable occupational diseases. Relying on the testimony of Denver’s medical expert, the ALJ found the onset of claimant’s CML occurred in November 2009.

¶ 6 At the hearing, Denver argued that claimant did not meet the statute’s mandate of five-years of “employment as a firefighter” to trigger the presumption. The ALJ disagreed, however, finding that claimant’s four years as a firefighter in Elbert County and his time spent at the fire academy could be included in the length-of-employment calculation, giving claimant more than the required five years’ service. The Panel affirmed, and this appeal followed.

II. Analysis

¶ 7 Denver contends that the ALJ and Panel misinterpreted section 8-41-209(1) by including in the length of claimant’s “employment as a firefighter” both (a) the entire length of time claimant served as volunteer firefighter and (b) his time training at
the fire academy. It argues that it did not “employ” claimant as a firefighter, within the meaning of section 8-41-209(1), until he took his oath of office as a firefighter in February 2005. Therefore, it maintains, claimant does not meet the statutory requirement for five years of service, and the presumption is inapplicable to his situation. We disagree.

¶ 8 The firefighter cancer presumption statute provides:

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter’s employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter’s employment if the firefighter’s employer or insurer shows by a preponderance
of the medical evidence that such condition or impairment did not occur on the job.

§ 8-41-209 (emphasis added). The statute does not indicate what service qualifies when calculating the five-year period nor does it state how the service should be calculated. Denver urges us to read “employment” narrowly so as to exclude time not in service and time spent in training, and to permit home rule municipalities to define the term themselves. For the reasons set forth below, we decline to do so.

A. Rules of Statutory Interpretation

¶ 9 The parties have not identified any case law addressing what activities satisfy the requirement that an individual complete five years of “employment as a firefighter” before the statutory presumption applies, and we have found none. See § 8-41-209(1). Consequently, we must turn to the rules of statutory construction and interpretation to determine the legislature’s intended meaning.

¶ 10 As with all statutory construction, when we interpret a provision of the Workers’ Compensation Act (Act), if its language is clear “we interpret the statute according to its plain and ordinary meaning.” Davison v. Indus. Claim Appeals Office, 84 P.3d 1023,
1029 (Colo. 2004). In addition, “when examining a statute’s plain language, we give effect to every word and render none superfluous . . . because ‘[w]e do not presume that the legislature used language idly and with no intent that meaning should be given to its language.’” Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 597 (Colo. 2005) (quoting Carlson v. Ferris, 85 P.3d 504, 509 (Colo. 2003) (some internal quotation marks omitted)).

¶ 11 While we are not bound by the Panel’s interpretation or its earlier decisions, Olivas-Soto v. Indus. Claim Appeals Office, 143 P.3d 1178, 1180 (Colo. App. 2006), and review 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), we give deference to the Panel’s reasonable interpretations of the statute it administers. Sanco Indus. v. Stefanski, 147 P.3d 5, 8 (Colo. 2006); Dillard v. Indus. Claim Appeals Office, 121 P.3d 301, 304 (Colo. App. 2005), aff’d, 134 P.3d 407 (Colo. 2006). In general, “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).  The Panel’s interpretation will therefore be set aside only “if it is inconsistent with the clear language of the statute or with the legislative intent.”  

**B. Service as a Volunteer Firefighter**

¶ 12  Denver acknowledges that the definition of “employee” set out in the Act expressly includes “all members of volunteer fire departments.”  § 8-40-202(1)(a)(I)(A), C.R.S. 2013.  But, it points out, the same statutory definition applies “while said persons are actually performing duties as volunteer firefighters or as members of such volunteer rescue teams or groups.”  *Id.*  Relying on this provision, Denver argues that only those days that claimant actually worked suppressing fires for the Elbert Fire Protection District — not the entire period during which he volunteered his skills and stood ready to serve — should be included in the calculation of his length of employment.  However, it cites to no authority in support of its position.
¶ 13 The Panel rejected Denver’s suggested interpretation. It observed that defining volunteer firefighters as “employees” while they are “performing duties . . . is little more than a requirement that any injury an individual sustains must have arisen out of and in the course of the employee’s volunteer employment if it is to be deemed compensable.” In the Panel’s view, then, the definition’s limitation is merely another iteration of the general requirement that a worker be engaged in work-related activity when injured in order for the injury to be compensable. See § 8-41-301(1), C.R.S. 2013. In contrast, the Panel noted, the five-year requirement serves a different purpose: to ensure claimants are involved in the firefighting process and thus periodically exposed to the carcinogens found in fires. We find the Panel’s reasoning sensible and consistent with the legislative intent. See Sanco Indus., 147 P.3d at 8; Jiminez, 51 P.3d at 1093.

¶ 14 By including volunteer firefighters in the definition of “employee,” the legislature made clear its intent that injuries sustained by volunteer firefighters in the course and scope of their volunteer work be compensable under the Act. Nothing in the
firefighter cancer presumption statute suggests that the legislature intended to put the presumption beyond volunteer firefighters’ reach. Given the express intent to include volunteer firefighters in the definition of employees, and the absence of any express exclusion of volunteer firefighters from the scope of the firefighter cancer presumption statute, in our view, the legislative purposes of both of these statutes can only be accomplished if a volunteer firefighter’s entire time of service, not just the time of active engagement, is included when calculating length of service under section 8-41-209(1). If the time period of service for volunteer firefighters were calculated in the manner suggested by Denver — which, in this case, was at the rate of 19 days of service over 31 months or 7.6 days of service per year — it would take a volunteer firefighter 240 years to reach 5 years of active service. Thus, volunteer firefighters would be effectively excluded from the benefits of the presumption, an outcome at odds with the legislature’s intent to include them in the definition of “employee.”

¶ 15 The hypothetical situations Denver advances do not persuade us to reach a contrary conclusion. Although it is true that counting
the time period a volunteer firefighter is available for service, rather than the number of days spent actively engaged in firefighting, may result in the presumption being applied to volunteers who have only fought one or two fires, we believe considering a volunteer firefighter’s total volunteer time carries out the legislature’s intent. In our view, Denver’s position is undermined by the fact that: (1) the legislature relied on years of service, not number of fires fought by a firefighter, when establishing a limit on the presumption; and (2) the presumption of compensability for cancer suffered by a volunteer firefighter who had fought few, if any, fires can be rebutted by medical evidence demonstrating the lack of causality between the cancer and the volunteer firefighter’s firefighting activities.

¶ 16 Accordingly, we agree with the Panel that length of firefighting service under section 8-41-209 should begin to run from the date on which a volunteer firefighter fights his or her first actual or training fire.

C. Time Spent at the Fire Academy

¶ 17 Denver also contends that it did not employ claimant “as a
firefighter” until he took his oath of office in February 2005. It argues that because probationary firefighters, as it refers to its recruits in its appointment letter, are not full-fledged firefighters, their time at the fire academy should not count toward the presumption’s calculation of “employment as a firefighter.” See § 8-41-209(1). It cites to no Colorado statutory or precedential case law in support of its position, however. Rather, it relies upon a California case, City of Sacramento v. Workers’ Compensation Appeals Board, 115 Cal. Rptr. 2d 63 (Cal. Ct. App. 2002). We are not persuaded by this California precedent.

¶ 18 In City of Sacramento, the California Court of Appeal held that “fire recruits do not engage in firefighting” and therefore are not entitled to “enhanced benefits” statutorily provided to firefighters because fire recruits are separately classified from firefighters. Id. at 66. Unlike the statute at issue here, though, firefighter and fire recruit are each specifically defined in the applicable California and Sacramento codes. Moreover, although the recruit was not entitled to “enhanced” benefits provided to firefighters, he was considered an employee and received standard workers’ compensation benefits.
for his injuries. *Id.*

¶ 19 Here, in contrast, the question is not whether claimant was a firefighter or a recruit. The only question presented is whether claimant had “five or more years of employment as a firefighter” for purposes of section 8-41-209(1). The parties do not dispute that claimant was employed by Denver while he trained at the fire academy. Indeed, the record establishes that claimant’s probationary employment period commenced October 1, 2004, when Denver hired him. It appears undisputed that Denver paid him from that date.

¶ 20 Denver has not pointed us to any regulation or code it may have defining “probationary firefighter.” It does not argue that a “probationary firefighter” injured while at the fire academy would not receive benefits. It points to no code or regulation excluding probationary firefighters from the realm of full-fledged firefighters. It claims only that time spent at the academy should not count toward “employment” under section 8-41-209(1).

¶ 21 The Panel expressly rejected this contention. The Panel noted that under Denver’s reasoning, days training to be a volunteer
firefighter counted, but “the several months spent training at the Denver Fire Academy are ignored.” It also observed that probationary firefighters are exposed to numerous, albeit controlled, fires as part of their training. For these reasons, the Panel found Denver’s analysis excluding time at the fire academy “not persuasive.”

¶ 22 We find the Panel’s interpretation to be reasonable and consistent with the legislative intent. Absent a showing that the legislature intended to exclude probationary firefighters, we perceive no basis to set aside the Panel’s conclusion that time spent at the fire academy should be included in determining a firefighter’s length of service. See Sanco Indus., 147 P.3d at 8; Jiminez, 51 P.3d at 1093.

D. Home Rule Authority to Define Firefighters’ Employment

¶ 23 Lastly, Denver contends that its status as a home rule municipality gives it the right and authority to define “firefighter” and “probationary firefighter” as it sees fit. It argues that article XX, section 1 of the Colorado Constitution grants it broad powers to set the qualifications for its employees, including firefighters.
¶ 24 While we agree that home rule municipalities are granted broad authority to govern themselves and set the scope of their employees’ duties, training, and qualifications, see Fraternal Order of Police v. City & Cnty. of Denver, 926 P.2d 582, 592 (Colo. 1996), Denver has not pointed to any definition within its code expressly defining “firefighter,” “probationary firefighter,” “firefighting recruit,” or any other term that it may apply to firefighters-in-training. Its reliance on City & County of Denver v. State, 788 P.2d 764 (Colo. 1990), is therefore misplaced.

¶ 25 In that case, Denver sought to uphold a provision in its City Charter requiring city employees to be residents of the city. The Colorado Supreme Court determined that the residency of city employees was a matter of local concern, preempting the state’s attempt to prohibit residency requirements. Because residency was a matter of local concern, Denver, as home rule municipality, could “enact charter provisions or ordinances requiring employees to reside within the corporate limits of the municipality as a condition of continuing employment.” Id. at 772.

¶ 26 Here, in contrast, Denver has not codified its definition of
firefighter or probationary firefighter. It seeks to advance an interpretation that it favors here, but has not shown that the definition it puts forth is based on any previously stated qualifications. It relies on a scope of “firefighter” that benefits it here, without demonstrating that it applies these definitional differences uniformly, in other contexts, or for other purposes.

¶ 27 Section 8-41-209 makes no distinction between time served as a firefighter for different cities or districts. To the contrary, the statute makes clear that time spent employed as a firefighter “of any political subdivision” is included in calculating length of service. See § 8-41-209(1). Denver’s insistence, then, that it should define whom it considers a firefighter in its employ risks conflicting with another city’s or district’s stated interpretation. Because time spent in different firefighting districts collectively counts as “employment” under the statute, allowing a home rule municipality to impose its own definition of firefighter could result in varying outcomes, by which one city may include recruits as firefighters while another excludes them. To avoid such inconsistency, the scope of “employment as a firefighter” under the firefighter cancer
presumption statute must be considered a matter of state-wide concern which a home rule municipality may not supersede. Moreover, we note that workers’ compensation benefits are generally considered a matter of state-wide concern. See City & Cnty. of Denver v. Thomas, 176 Colo. 483, 486, 491 P.2d 573, 574 (1971).

III. Conclusion

¶ 28 Accordingly, we hold that the statute’s requirement that a claimant demonstrate “five or more years of employment as a firefighter” before the statutory presumption of compensability applies, runs from the time an individual commences service as a volunteer firefighter or commences training at the fire academy. Including this service when calculating claimant’s length of employment, results in more than five years of “employment as a firefighter” under section 8-41-209(1). Thus, the Panel correctly held that claimant was entitled to the statutory presumption of compensability for his CML.

¶ 29 The order is affirmed.

JUDGE BERNARD and JUDGE BERGER concur.
Western States Fire Protection/API Group, Inc. and Ace American Insurance Company, Petitioners,

v.


ORDER AFFIRMED

Division II
Opinion by JUDGE ASHBY
Casebolt and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 27, 2014

Thomas Pollart & Miller LLC, Brad J. Miller, Greenwood Village, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

The Eley Law Firm, P.C., Clifford E. Eley, Denver, Colorado, for Respondent Paul Olsen

In this workers’ compensation action, employer Western Fire
Protection Group, Inc., and its insurer, ACE American Insurance Company (collectively employer), seek review of the final order of the Industrial Claim Appeals Office (Panel), which affirmed the decision of the administrative law judge (ALJ) awarding claimant, Paul Olsen, medical benefits and temporary total disability (TTD) benefits. The ALJ found claimant sustained an occupational disease to his back as a result of sitting in and driving employer’s pick-up truck. Because we conclude that substantial evidence in the record supports these factual findings, we affirm.

I. Background

Claimant worked for employer as a NICET Level 3 fire life safety technician from January 12 through June 29, 2012. Employer issued claimant a company truck – a 2004 Chevrolet Colorado with approximately 180,000 miles on it – to drive from his home in Bailey, Colorado, to employer’s office in Fort Collins, and to his clients’ locations in northern Colorado and southern Wyoming. Claimant testified that he “repeatedly” complained to employer that the truck’s driver’s seat was uncomfortable and “very well worn,” that the truck’s “suspension was extremely rough,” and that the
more he drove the truck “the more it hurt [his] back.”

Claimant first noticed the back pain about a month after he commenced working for employer and driving the truck. Claimant testified that his back pain generally resolved itself after he got out of the truck and moved around. But, on June 29, 2012, after driving the truck approximately 400 miles and conducting a nearly two-hour conference call from the driver’s seat while the truck was parked on the side of the road, he experienced “extreme” back pain and required his wife’s assistance to get out of the truck. Since that date, claimant has not been able to return to work.

Employer contested claimant’s claim for benefits, arguing that claimant’s condition was preexisting and that the truck seat functioned properly and could not be the cause of claimant’s injury. The ALJ was not persuaded, however, and found that claimant had demonstrated by a preponderance of the evidence that his job duties had caused an occupational disease to his back. The ALJ therefore awarded claimant medical and TTD benefits, which were to continue until “termination thereof is warranted by law.” The Panel determined that substantial evidence supported the ALJ’s
decision and affirmed. This appeal followed.

II. Analysis

Employer contends that there is insufficient evidence to support the ALJ’s decision. It argues that the evidence presented can only lead to the conclusion that claimant did not sustain a compensable injury arising out of his employment. It further claims that the evidence overwhelmingly establishes that the truck seat was not defective and therefore could not have caused claimant’s occupational disease. We are not persuaded.

A. Governing Law

Under the Workers’ Compensation Act, an occupational disease is

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

§ 8-40-201(14), C.R.S. 2013. An occupational disease arises “from
a prolonged exposure occasioned by the nature of the employment.”


To prove the existence of a work-related occupational disease, a claimant must establish, by a preponderance of the evidence, that the disease “was directly and proximately caused by the claimant’s employment or working conditions.” *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251, 252 (Colo. App. 1999); *see also Cowin & Co. v. Medina*, 860 P.2d 535, 537 (Colo. App. 1992) (“[A] claimant must establish the existence of a disease, that it was directly and proximately caused by claimant’s employment or working conditions and resulted from exposure to a hazard presented by those conditions, and the extent of the resulting disability.”).

Whether a claimant has met this burden is a question of fact for determination by the ALJ. *See Subsequent Injury Fund v. Indus. Claim Appeals Office*, 131 P.3d 1224, 1228 (Colo. App. 2006) (whether worker’s death was caused by an occupational disease is a question of fact); *Rockwell Int’l v. Turnbull*, 802 P.2d 1182, 1183-84 (Colo. App. 1990) (affirming ALJ’s decision weighing evidence in
claimant’s favor). Like the Panel, we may not disturb the ALJ’s determination if it is supported by substantial evidence in the record. See Wal-Mart Stores, Inc., 989 P.2d at 252.

B. Substantial Evidence Supports the ALJ’s Decision

Employer argues that the evidence established that the truck’s seat was not defective and was not a hazard unique to claimant’s employment. It is true that an occupational disease must not arise from “a hazard to which the worker would have been equally exposed outside of the employment.” § 8-40-201(14); see also Anderson v. Brinkhoff, 859 P.2d 819, 823 (Colo. 1993) (noting the statutory elements of an occupational disease).

Here, the ALJ found that claimant had established the statutory elements of an occupational disease, with a last injurious exposure on the day claimant’s back condition became disabling. We conclude that the evidence supports this determination.

There is no evidence in the record that claimant was exposed to any other hazard or condition that aggravated his back. Employer asserts that claimant “would have been equally exposed” to the driving hazard “outside of his employment,” but offers no
evidence indicating where else claimant may have been exposed to an uncomfortable seat or other condition that may have contributed to his back injury. The evidence suggests a temporal connection between claimant’s back pain and his use of the truck, as both claimant and one of his coworkers testified that claimant began to complain of back pain caused by the seat within a month after he began driving the truck. Claimant also testified that his back, even with evidence of degenerative disc disease, was asymptomatic until he drove the truck. Indeed, it is undisputed that claimant’s severe and debilitating back pain commenced immediately after a particularly lengthy drive in the truck. This evidence supports the ALJ’s determination that the seat caused his occupational disease.

Contrary to employer’s contention, the lack of definitive evidence establishing that the seat was defective does not preclude compensation. We know of no authority, and employer has not pointed to any, mandating that claimant prove the seat was defective before benefits can accrue. As explained by a physician retained by claimant, Dr. Jeffrey Kleiner, a seat need not malfunction to be the cause of back pain; the seat could be the
source of the problem simply because it did not provide the right support for claimant “and his body habitus.”

Moreover, despite employer’s insistence that the evidence did not establish that the seat was defective, the ALJ concluded, with record support, that the tests conducted on the seat were inadequate and unpersuasive. An occupational therapist who examined the seat at employer’s request only analyzed if the seat’s mechanisms functioned; she did not drive the vehicle, observe how the seat fit claimant, or check its suspension or springs. Claimant was not present for any of the seat testing.

Employer’s own medical expert, Dr. Lawrence Goldman, testified that because claimant was not present for any of the testing of the seat, the tests did not meet his criteria or recommendation for an ergonomic evaluation. And, as Dr. Kleiner explained, because “everyone’s different,” an individual can sustain an injury “from things which wouldn’t hurt other people who are not susceptible.” Thus, Dr. Kleiner concluded, a normal, non-defective seat could cause a worker to sustain an injury like claimant’s. The record thus amply supports the ALJ’s conclusion
that the seat caused claimant’s injury.

Nor are we persuaded to reach a different result by employer’s suggestion that, henceforth, employers may be liable for an occupational disease to anyone who drives a couple of hours per day. In our view, this outcome is specific to the facts of this case, and the determination that the seat was a hazard to this claimant is supported by the evidence presented to the ALJ. Any future claim for back pain caused by a car’s seat would have to be evaluated on the totality of circumstances unique to that case and the credibility of the evidence weighed by an ALJ on its own merits. See Metro Moving & Storage Co. v. Gussert, 914 P.2d 411, 415 (Colo. App. 1995) (appellate court defers to the ALJ’s credibility determinations and resolution of conflicts in the evidence, including the medical evidence).

Finally, to the extent employer contends that the evidence does not support the conclusion that claimant sustained an injury, we note that the evidence here, too, amply supports the ALJ’s factual determination. In particular, Dr. Kleiner testified and opined that because claimant’s back pain became symptomatic after driving the
truck, it was medically probable that the truck’s seat caused claimant’s back injury. Although Dr. Goldman testified that it was only possible, but not medically probable, that the seat was the culprit, the ALJ was free to weigh the credibility of the physicians’ testimony. Doing so, the ALJ exercised his discretion when he concluded that Dr. Goldman’s opinion was less credible and persuasive than that of Dr. Kleiner. See Rockwell Int’l, 802 P.2d at 1183 (“[T]he weight to be accorded to [expert] testimony is a matter exclusively within the discretion of the [ALJ] as fact-finder.”).

Because the weight and credibility given expert witnesses is within the ALJ’s sound discretion, such findings “may not be disturbed absent a showing that the ALJ’s credibility determination is ‘overwhelmingly rebutted by hard, certain evidence’ to the contrary.” Heinicke v. Indus. Claim Appeals Office, 197 P.3d 220, 224 (Colo. App. 2008) (quoting Arenas v. Indus. Claim Appeals Office, 8 P.3d 558, 561 (Colo. App. 2000)). Consequently, we may not disturb the ALJ’s finding that Dr. Kleiner’s testimony and opinions were more credible and persuasive than Dr. Goldman’s.

Because substantial evidence supports the ALJ’s factual
findings and conclusions, we cannot set aside the ALJ’s decision.

See § 8-43-308, C.R.S. 2013; Wal-Mart Stores, Inc., 989 P.2d at 252 (where substantial evidence supported ALJ’s determination that claimant’s neck problems were work-related, decision would not be disturbed). Accordingly, we conclude that the Panel committed no error when it affirmed the ALJ’s order awarding claimant medical and TTD benefits. See § 8-43-301(8), C.R.S. 2013.

The order is affirmed.

JUDGE CASEBOLT and JUDGE RICHMAN concur.
I. INTRODUCTION

Von J. Phathong was seriously injured while working on a drilling rig in Garfield County, Colorado. Phathong sued Tesco Corporation ("Tesco"), the operator of the drilling rig, alleging a Colorado state-law claim for negligence.1

1Phathong’s wife, Jennifer Phathong, brought a claim for loss of consortium in the same complaint. In Colorado, “[l]oss of consortium is a derivative claim. Derivative claims are unique in that they depend entirely upon the right of the (continued...)
Prior to trial, Tesco sought summary judgment on the ground it was immune from common-law negligence liability because, inter alia, it was Phathong’s statutory employer under the provisions of Colorado’s Workers’ Compensation Act. See Colo. Rev. Stat. § 8-41-401. The district court denied Tesco’s motion, concluding the existence of disputed issues of material fact precluded summary judgment. The matter proceeded to trial. After the parties rested their cases, but before the matter was submitted to the jury, the district court, on its own motion, granted judgment as a matter of law to Phathong on the question of immunity. In so doing, it concluded “the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer” under § 8-41-401. The district court thereafter submitted Phathong’s negligence claim to the jury; the jury found in Phathong’s favor and granted him a substantial award of damages.² Tesco appeals, raising multiple challenges to both the district court’s legal rulings and the jury’s award of damages. This court concludes the record conclusively demonstrates Tesco was Phathong’s statutory employer and, therefore, immune

¹(...continued)
injured person to recover.” Colo. Comp. Ins. Auth. v. Jorgensen, 992 P.2d 1156, 1164 (Colo. 2000) (citation omitted). “The effect of being a derivative claim is that loss of consortium claims are subject to the same defenses available to the underlying personal injury claim.” Id. at 1164 n.6. Accordingly, the analysis set out in this opinion as to Phathong’s negligence claim applies equally to Jennifer Phathong’s claim for loss of consortium.

²The jury likewise found in favor of Jennifer Phathong on her loss-of-consortium claim and awarded her $75,000 in damages.
from Phathong’s negligence claims. This ruling obviates the need to address any of the other issues raised by Tesco on appeal. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court remands this case to the district court to vacate its judgment in favor of the Phathongs and, instead, enter judgment in favor of Tesco.

II. BACKGROUND

A. Factual Background

Phathong began working for Tesco as a “floor hand” on a particular drilling rig, the DTC2 rig, in October of 2005. At 3:30 a.m. on the morning of December 13, 2005, Phathong was seriously injured while working on DTC2. For purposes of resolving this appeal, it is unnecessary to set out the facts surrounding Phathong’s injury. Instead, it is sufficient to note the jury found Tesco’s negligence in the operation of DTC2 was ninety-percent responsible for Phathong’s injuries and awarded him a substantial amount of damages.

Tesco develops, manufactures, and services oil and gas rigs. As part of its normal business practices, Tesco would, at the time of the events at issue in this case, sign drilling contracts with owners of natural gas wells to provide drilling services, including the provision of drilling rigs and the personnel necessary to operate those rigs (the “casing drilling services business”). In April 2003, Tesco

3As will quickly become apparent, the date and time of this accident plays a critical part in this appeal.
entered into a Master Service Agreement with EnCana Oil & Gas (USA), Inc. (“EnCana”). This Master Service Agreement governed all subsequent contracts between Tesco and EnCana. Thereafter, in June 2005, Tesco and EnCana entered into a drilling contract (the “EnCana Drilling Contract”) covering Tesco’s natural gas casing drilling services operations on behalf of EnCana in Garfield County, Colorado. The EnCana Drilling Contract obligated Tesco, as the driller, to furnish all equipment, labor, and services necessary to dig wells to the depth of no less than 9500 feet, and no more than 10,000 feet. In particular, it mandated that Tesco use DTC2, a drilling rig leased by Tesco from Drillers Technology Corporation, for all work covered by the contract. The EnCana Drilling Contract also made Tesco responsible for making sure work on the rig was performed safely and obligated Tesco to carry adequate workers’ compensation insurance.

During the summer of 2005 (i.e., before Phathong was hired by Tesco and before the accident giving rise to Phathong’s injuries), Tesco entered into negotiations to sell the casing drilling services portion of its business to Turnkey E&P Corporation (“Turnkey”). At approximately 7:30 a.m. on the morning of December 13, 2005, Tesco and Turnkey closed on their Revised and Restated Acquisition Agreement (the “Acquisition Agreement”) and related Rig Personnel Supply Agreement (the “Rig Personnel Agreement”). Pursuant to the terms of the Acquisition Agreement, the deal became effective at 12:01 a.m. on the closing date (i.e., 12:01 a.m. on December 13, 2005, which is approximately three and
one-half hours before the accident giving rise to Phathong’s injuries).\textsuperscript{4} Turnkey acquired only the casing drilling services division of Tesco and, after the sale, Tesco remained in business. Specifically, Turnkey acquired four Tesco-owned drilling rigs and the drilling contracts associated with those rigs. Turnkey also acquired all employees who worked in Tesco’s casing drilling services division, including Phathong and the other DTC2 crew members.\textsuperscript{5} Importantly, however, Turnkey did not acquire the Master Service Agreement or EnCana Drilling Contract. Nor did Turnkey acquire Tesco’s lease of DTC2 or of the other two rigs Tesco leased from Drillers Technology Corporation. Thus, as of 12:01 a.m. on December 13, 2005, Tesco remained obligated to perform under its remaining

\textsuperscript{4}This provision of the Acquisition Agreement underpins Phathong’s arguments regarding the unavailability of immunity to Tesco under Colorado’s Workers’ Compensation Act. That is, if the agreement had become effective upon closing, rather than at 12:01 a.m. on the day of closing, there would be no doubt but that Tesco was Phathong’s actual employer at the time of the accident and, thus, entitled to immunity under the provisions of Colorado’s Workers’ Compensation Act. Because Tesco does not raise the argument on appeal, and because the record makes clear Tesco was Phathong’s statutory employer, this court need not address whether the arbitrary time frame for assigning corporate liabilities in the contract between Tesco and Turnkey served to strip Tesco of its status as an actual employer under Colorado law. \textit{See infra} n.5.

\textsuperscript{5}The Acquisition Agreement provided that Tesco would be responsible for all “liability, costs[,] and expenses” for employment claims, including workers’ compensation claims, “any employment-related tort claim,” or “other claims or charges of or by” a former Tesco employee that accrued prior to the effective time of the agreement. Likewise, the agreement provided Turnkey would be responsible for the same accruing after the effective time.
contracts with, inter alia, EnCana and its drilling rig leases with Drillers Technology Corporation.

To fulfil its contractual obligations to EnCana and others, Tesco entered into the Rig Personnel Agreement with Turnkey. The Rig Personnel Agreement first recited that Tesco (1) remained contractually obligated to perform under its agreements with EnCana and others, (2) continued to hold leases on drilling rigs owned by Drillers Technology Corporation, but (3) lacked the manpower to manage the rigs because of the sale of its casing drilling services business to Turnkey. In light of these facts, the parties agreed that “while [Tesco] provides services to its third party customers, [Turnkey] shall provide personnel services with respect to the” leased rigs. Tesco paid Turnkey every two weeks pursuant to the following formula: “[Turnkey] will be compensated for the Services at the rate of one hundred and fifteen percent (115%) of the total of the actual and reasonably documented costs to [Turnkey] of salary and employment benefits and related [workers’] compensation paid to (or on behalf of) those individual employees of [Turnkey] who provide Services to [Tesco] under this Agreement . . . .”\(^6\) The Rig Personnel Agreement imposed upon Tesco the

\(^6\)This billing arrangement stands in stark contrast to the billing arrangement Turnkey and Tesco reached as to drilling contracts assigned to Turnkey under the Acquisition Agreement. As to the assigned contracts, the Acquisition Agreement obligated Tesco to use its best efforts to secure consent from all its customers to the assignments. Until such consent was secured, Tesco was obligated to (continued...)
responsibility for designating to Turnkey the drilling locations for the rigs, the drilling schedule, and providing a safe workplace environment for the performance of the services under the agreement. Turnkey was responsible for ensuring its personnel acted in a “commercially reasonable, industry standard manner and endeavor in good faith to perform its responsibilities . . . with operational expertise” in accordance with Tesco’s direction, unless Turnkey “reasonably believes that such directions will cause the well to be drilled in an imprudent or unsafe manner, in which case [Turnkey] shall have the right to refuse to conduct the requested operation.” Finally, the Rig Personnel Agreement defined the relationship of the parties as “independent contractor[s],” with neither party “deemed for any purpose to be, the agent, servant[,] or representative” of the other party.

B. Procedural Background

The Phathongs filed suit against Tesco in the United States District Court for the District of Colorado claiming, inter alia, that Tesco’s negligence in operating the DTC2 drilling rig led to their injuries. Tesco eventually filed a motion for summary judgment, asserting the Phathongs’ common-law damages claims were barred by, inter alia, the immunity afforded to statutory employers by . . .

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continue invoicing customers for all services performed by Turnkey and to remit any payments it received to Turnkey. Ultimately, however, Tesco was not liable to Turnkey for any amounts a customer refused to pay on an invoice.
the Colorado Workers’ Compensation Act. See Colo. Rev. Stat. § 8-41-401. The district court denied Tesco’s motion and the case proceeded to trial. Prior to submission of the case to the jury, the district court sua sponte granted judgment as a matter or law to Phathong on the question of Tesco’s entitlement to immunity as a statutory employer. In so doing, it concluded “the only reasonable interpretation of the evidence in this case is that [Tesco] is not a statutory employer” under § 8-41-401. In that regard, the district court reasoned as follows:

The relationship [between Tesco] and Turnkey pursuant to that sale was not one of a general contractor and subcontractor . . . as envisioned by the Colorado Supreme Court in [Finlay v. Storage Technology Corp., 764 P.2d 62 (Colo. 1988)]. This was a sale of drilling operations, such that EnCana remained a general contractor, and Turnkey took over the subcontractor duties of running the drilling operations.

In these circumstances, [Tesco] is not the “statutory employer” entitled to immunity under the Colorado Workers’ Compensation Act.

III. ANALYSIS

A. Legal Background

“The primary purpose of [Colorado’s] workers’ compensation act is to provide a remedy for job-related injuries, without regard to fault. The statutory scheme grants an injured employee compensation from the employer without regard to negligence and, in return, the responsible employer is granted immunity from common-law negligence liability.” Finlay, 764 P.2d at 63 (citations
omitted). “Although a given company might not be [an injured party’s] employer as understood in the ordinary nomenclature of the common law, it nevertheless might be a statutory employer for workers’ compensation coverage and immunity purposes.” Id. at 64. The term “statutory employer” is defined in Colorado’s Workers’ Compensation Act as follows:

Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees’ dependents.

Colo. Rev. Stat. § 8-41-401(1)(a)(I). Section 8-41-401(1)’s “purpose is to prevent employers from avoiding responsibility under the workers’ compensation act by contracting out their regular work to uninsured independent contractors.” Finlay, 764 P.2d at 64. Thus, § 8-41-401(1) “makes general contractors ultimately responsible for injuries to employees of subcontractors.” Id. Along with this burden comes a corresponding benefit. Under the Colorado scheme, “[s]tatutory immunity goes hand in hand with statutory liability.” Buzard v. Super Walls,

7In Finlay, the Colorado Supreme Court was considering a predecessor version of the “statutory employer” provisions of the Workers’ Compensation Act, specifically Colo. Rev. Stat. § 8-48-101(1) (1986). Finlay v. Storage Tech. Corp., 764 P.2d 62, 64 (Colo. 1988). For all purposes relevant to this appeal, the current version of the Workers’ Compensation Act is identical to the version at issue in Finlay.
Inc., 681 P.2d 520, 523 (Colo. 1984). To qualify for the immunity afforded a statutory employer, § 8-41-401(1) imposes an obligation on general contractors to carry workers’ compensation insurance. Id. at 522.

Section 8-41-401(1) does not permit injured employees to obtain a double recovery. Finlay, 764 P.2d at 64. Instead, under Colorado’s Workers’ Compensation Act, “if a subcontractor has obtained insurance[,] its employee cannot reach upstream to the general contractor to establish tort liability; the general contractor is immune from suit as any insured employer would be.” Id. (quotations and alterations omitted). This aspect of Colorado law “encourages those contracting out work to require that contractors and subcontractors obtain workers’ compensation insurance.”8 Buzard, 681 P.2d at 523.

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8It is undisputed Tesco and Turnkey both carried workers compensation policies at the time of Phathong’s injuries. Phathong nevertheless argues Tesco is not entitled to the immunity ordinarily afforded a statutory employer under Colorado law because it “divested itself of any liability for workers’ compensation claims” in the Acquisition Agreement. This assertion is not persuasive. As the cases cited above make clear, Tesco had a statutory obligation to provide workers’ compensation insurance under Colorado’s Workers’ Compensation Act. Tesco was unable, as a matter of law, to contract away its workers’ compensation liability. See Peterman v. State Farm Mut. Auto. Ins. Co., 961 P.2d 487, 492 (Colo. 1998) (en banc) (holding that parties may not privately contract to abrogate statutory requirements or contravene public policy of Colorado). Contrary to Phathong’s suggestion, Tesco’s obligation to provide workers’ compensation insurance was not “divested by contract” simply because Tesco elected to allocate ultimate payment responsibility between itself and Turnkey for any future claims for workers’ compensation benefits.
Whether a corporation like Tesco is a statutory employer under the terms of § 8-41-401 is dependent upon the nature of the “work contracted out.” *Finlay*, 764 P.2d at 64. Colorado employs the “regular business test” to determine whether the party contracting out work is a statutory employee; the test is satisfied “where the disputed services are such a regular part of the statutory employer’s business that absent the contractor’s services, they would of necessity be provided by the employer’s own employees.” *Id.* at 66. The Colorado Supreme Court has described its “regular business test” as intentionally broad and has justified an inclusive test as necessary “to accommodate more fully the purposes of the workers’ compensation act.” *Id.*

9In this regard, the *Finlay* court noted as follows:

> From [more recent Colorado] cases there emerges a broader standard that takes into account the constructive employer’s total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. This broader standard ensures that an important purpose of section [8–41–101(1)]—that of making general contractors ultimately responsible for injuries to employees of subcontractors—will be fulfilled. That purpose, as well as the more general purpose of the workers’ compensation act to compensate injured employees for job-related injuries regardless of fault, would be frustrated were we to revert to the narrow standard applied in [an earlier Colorado case], and focus exclusively on whether the subcontracted activity *directly* relates to the alleged employer’s primary business. Such a narrow interpretation of the “regular business” test could potentially bar the recovery of an injured worker who is unable to show negligence and whose primary employer is uninsured and financially irresponsible. This result would clearly (continued...)
business test, courts should consider “the constructive employer’s total business operation, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer.” Id. The importance of the contracted service to the employer’s total business operation is demonstrated where, absent the contractor’s services, the employer would have to provide its own employees rather than forgo having the work performed. Id. at 67. In other words, where the work is so essential to the day-to-day business operations of the employer that it cannot continue to function without the task being performed, its importance to the total business operation is demonstrated.

B. Standard of Review

This court reviews de novo the district court’s sua sponte grant of judgment as a matter of law in favor of Phathong on the question of Tesco’s status as a statutory employer. Myklatun v. Flotek Indus., Inc., 734 F.3d 1230, 1233-34 (10th Cir. 2013); cf. Humphrey v. Whole Foods Mkt. Rocky Mountain/S.W., L.P., 250 P.3d 706, 708 (Colo. App. 2010) (holding that when the facts supporting an entity’s status as a statutory employer are undisputed, the trial court’s determination of that status from the undisputed facts is a question of law).

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contravene the long-recognized rule that the workers’ compensation act is to be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families.

Finlay, 764 P.2d at 66-67 (quotations and alteration omitted).
Under this standard, the question is whether “a reasonable jury would . . . have a legally sufficient evidentiary basis to find for” Tesco on the question of its status as a statutory employer. Fed. R. Civ. P. 50 (a)(1). The resolution of this case turns heavily on questions of contract interpretation, which are also questions of law subject to de novo review. *Level 3 Commc’ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008).

**C. Analysis**

The district court concluded that after the closing of the Acquisition Agreement, the relationship between Tesco and Turnkey was not one of a general contractor and subcontractor as envisioned in *Finlay*. Instead, according to the district court, Tesco completely exited the casing drilling services business, EnCana remained the general contractor, and Turnkey took over the subcontractor duties of running the drilling operations. The uncontested facts in the record do not bear out the district court’s conclusions. Tesco remained an active participant in the casing drilling services business after the closing of the Acquisition Agreement and, absent the labor provided by Turnkey, would have had to train or hire its own workers to conduct that business. *See Finlay*, 764 P.2d at 67. Thus, because the work performed by Turnkey for Tesco satisfies Colorado’s regular business test, the district court erred in ruling Tesco was not Phathong’s statutory employer.
At the moment of the closing of the Acquisition Agreement, Tesco continued to be engaged in the casing drilling services business. Taken together, the Acquisition Agreement and the Rig Personnel Agreement demonstrate Tesco remained obligated to perform its duties to EnCana under the terms of the Master Service Agreement and the EnCana Drilling Contract. There is no evidence in the record indicating Turnkey succeeded in any way to Tesco’s relationship with EnCana.\textsuperscript{10} Likewise, the Acquisition Agreement and the Rig Personnel Agreement makes quite clear that Turnkey did succeed to Tesco’s contractual relationships with those entities holding drilling contracts associated with the drilling rigs transferred by Tesco to Turnkey. See supra n.6 (noting Acquisition Agreement obligated Tesco to operate like a pass-through entity for the benefit of Turnkey for those drilling contracts associated with the rigs Turnkey acquired). All this demonstrates, however, is that after the parties closed on the Acquisition Agreement, Tesco’s footprint in the casing drilling services business was smaller than it was before the closing. To the extent Phathong argues the lack of an intent on the part of Tesco to continue operations in this sector of its business indefinitely prevents it from being a statutory employer, we note the argument is wrong as both a matter of law and fact. Phathong has not cited, and this court has not found, any indication in Colorado law that the definition of statutory employer set out in the Colorado Code is limited to employers that continue to operate indefinitely under their current business models. Furthermore, such a counterintuitive assertion is at odds with \textit{Finlay}’s statement that the regular business test should focus broadly on a potential statutory employer’s regular business operations, not on some narrow notion of its core or primary business. Even if the law were as Phathong imagines it, the record does not demonstrate Tesco intended to exit the casing drilling services business at the scheduled expiration of those drilling contracts associated with the Drillers Technology Corporation rigs. The Rig Personnel Agreement specifically provides as follows:

\begin{quote}
The term of this Agreement shall be coterminous with the longest term of the Equipment Leases with [Drillers Technology]
\end{quote}
Agreement make clear it was Tesco, not Turnkey, that was obligated to continue making lease payments to Drillers Technology Corporation on the three drilling rigs not transferred to Turnkey under the agreements. Tesco maintained the same role with regard to its business operations on DTC2 as it had prior to the effective date of the Acquisition Agreement: it was still responsible for safety on the rig, providing the labor and equipment necessary to operate the rig, and designating the drilling locations and schedule. The only salient difference flowing from the closing of the Acquisition Agreement was that Tesco no longer had sufficient staff to manage the operation of DTC2 and contracted with Turnkey, who became the crew’s direct employer and Tesco’s subcontractor, to provide those services. See Finlay, 764 P.2d at 67-68 (holding a janitor for a cleaning service was a statutory employee of a computer company because absent the provision of cleaning services by the janitorial company, the computer company would have had to hire new employees or trained its existing employees to do the job).

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Corporation]. If [Tesco] wishes to renew or extend the terms of one or more such Equipment Leases, it shall provide [Turnkey] with not less than 45 days prior written notice thereof and [Turnkey] shall advise [Tesco] in writing within 15 days of its receipt of such notice, whether it has elected to (i) terminate this Agreement at the end of the last initial term of the Lease Agreements, or (ii) extend the term of this Agreement, subject to the same terms and conditions, to coincide with the extended term or terms of the Lease Agreements. Such determination shall be made by [Turnkey] in its sole discretion and, if it elects not to extend the term of this Agreement, it shall have no further obligations to Tesco hereunder at the end of such term.
The nature of the billing process between Tesco and Turnkey also belies the
district court’s suggestion Turnkey simply took Tesco’s place in the employment
chain between EnCana and Phathong. Tesco paid Turnkey pursuant to a
contractual rate that was not tied in any regard to the rate EnCana paid Tesco
under the EnCana Drilling Contract. Likewise, under the Rig Personnel
Agreement, Tesco retained the responsibility for designating to Turnkey the
drilling locations for the rigs, setting the drilling schedule, and providing a safe
workplace environment for the performance of the services under the agreement.
See id. at 67 n.4 (recognizing this type of control by a statutory employer over the
work to be performed is indicative of, but not a necessary predicate to a statutory
employment relationship). Finally, the Rig Personnel Agreement defined the
relationship of the parties as “independent contractor[s],” with neither party
“deemed for any purpose to be, the agent, servant[,] or representative” of the
other party. There is absolutely no indication in the record that Tesco and
Turnkey acted in derogation of this contractual provision.

IV. CONCLUSION

The record in this case conclusively demonstrates the work contracted out
by Tesco to Turnkey was an important, routine, and regular part of Tesco’s casing
drilling services business. That being the case, the district court erred in sua
sponte granting judgment in Phathong’s favor on the immunity question and in
denying Tesco’s post-trial motion pursuant to Fed. R. Civ. P. 50. Thus, we
remand to the district court to vacate the jury’s verdict in favor of the Phathongs and to, instead, enter judgment in favor of Tesco.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge