SUMMARY
April 6, 2023

2023COA32

No. 21CA1780, *Madalena v. Zurich Am. Ins. Co.* — Administrative Law — Workers' Compensation — Findings of Fact and Conclusions of Law; Torts — Bad Faith Breach of Insurance Contract — Issue Preclusion — Claim Preclusion

A division of the court of appeals considers whether findings of fact and conclusions of law in workers' compensation proceedings are binding on an insurance company in the injured worker's subsequent bad faith litigation against that insurer. The division concludes that the issues for which the appellant in this case asserted issue preclusion were not identical to the issues actually litigated and necessarily adjudicated in the workers' compensation proceedings. (The issues litigated in the bad faith case did not include the compensability of the worker's injury or the benefits due to him under the Workers' Compensation Act of Colorado.) Similarly, the division concludes that the appellees did not have a

full and fair opportunity to litigate those issues in the prior proceedings. Therefore, the division holds that, under the facts of this case, the administrative determinations do not have preclusive effect in the bad faith case.

Rejecting the appellant's additional arguments, the division affirms the judgment of the district court.

COLORADO COURT OF APPEALS **2023COA32**

Court of Appeals No. 21CA1780
City and County of Denver District Court No. 17CV30788
Honorable Darryl F. Shockley, Judge

Aaron Madalena,

Plaintiff-Appellant,

v.

Zurich American Insurance Company and Gallagher Bassett Services, Inc.,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE LIPINSKY
Fox and Schock, JJ., concur

Announced April 6, 2023

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¶ 1 "It is a fundamental principle of American law that every person is entitled to his or her day in court." *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998). But this principle does not mean that a party who lost after receiving his or her day in court is entitled to a second day in the courthouse. *In re Weiss*, 235 B.R. 349, 360 (Bankr. S.D.N.Y. 1999) ("[E]very party is entitled to have a day in court, but, with respect to any given issue, only one day."), *aff'd*, 255 B.R. 115 (S.D.N.Y. 2000).

¶ 2 The courts developed the principles of claim and issue preclusion to further "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *see Currier v. Virginia*, 585 U.S. ___, ___, 138 S. Ct. 2144, 2156 (2018) (noting that the reference to judicial economy in *Parklane Hosiery* applies to both claim and issue preclusion).

¶ 3 While the doctrine of issue preclusion "prevents the re-litigation of discrete issues," the doctrine of claim preclusion "prevents the perpetual re-litigation of the same claim or cause of action." *Foster v. Plock*, 2017 CO 39, ¶¶ 12-13, 394 P.3d 1119,

1122-23. "Claim preclusion prevents parties from relitigating claims that were or that could have been litigated in a prior proceeding." *Gale v. City & Cnty. of Denver*, 2020 CO 17, ¶ 14, 500 P.3d 351, 354.

¶ 4 This case presents a novel question in Colorado: whether findings of fact and conclusions of law in a workers' compensation proceeding concerning issues other than compensability and benefits are binding on an insurance company in the injured worker's subsequent bad faith breach of an insurance contract claim against that insurer. (In this case, the worker, Aaron Madalena, characterized his bad faith claim as one for breach of the covenant of good faith and fair dealing.)

¶ 5 Madalena asserts that the workers' compensation insurer, Zurich American Insurance Company (Zurich), and its claims administrator, Gallagher Bassett Services, Inc. (Gallagher Bassett), are barred from relitigating certain of the findings of fact and conclusions of law entered in Madalena's favor in his workers' compensation proceedings (the administrative determinations). (The parties refer to Zurich and Gallagher Bassett as a single entity, as though they performed the same functions throughout the claim

administration process. While we cannot tell from the record whether this is factually accurate, we refer to Zurich and Gallagher Bassett jointly as the "Zurich defendants." In doing so, we do not intend to suggest they are not separate legal entities.)

¶ 6 We conclude that, under the facts of this case, none of the administrative determinations to which Madalena points has preclusive effect in his bad faith insurance case. For this reason, we affirm the judgment entered against him in this case.

I. Background and Procedural History

¶ 7 Madalena worked as an installer for SunTalk Solar (the employer). In October 2015, Madalena informed the employer that he had injured his back at work. The employer reported Madalena's claim to Gallagher Bassett. Following an investigation into the facts underlying Madalena's injury, the Zurich defendants initially disputed that Madalena had incurred an injury compensable under the employer's workers' compensation insurance policy and denied the claim. The Zurich defendants based their decision on information suggesting that Madalena had sustained the injury while working at a second job and not while working for the employer.

¶ 8 Following the denial of his claim, Madalena filed an application for a hearing under the Workers' Compensation Act of Colorado (the Act), sections 8-40-101 to 8-47-209, C.R.S. 2022. Two administrative law judges (ALJs) and an Industrial Claim Appeals Office (ICAO) panel presided over Madalena's workers' compensation proceedings. The ALJs and the ICAO panel issued five orders.

¶ 9 In the first proceeding, the ALJ concluded that Madalena was injured "in the course and scope of his employment," and that the Zurich defendants were "liable for medical treatment reasonably necessary to cure or relieve [Madalena] from the effects of the injury," including the cost of surgery. In addition, the ALJ awarded Madalena temporary total disability benefits. After the ICAO panel affirmed the ALJ's decision in the first proceeding, the Zurich defendants accepted liability for Madalena's claim by general admission.

¶ 10 The Zurich defendants later terminated Madalena's benefits, and Madalena challenged the termination in a second workers' compensation proceeding. At the conclusion of that proceeding, the second ALJ ruled that Madalena was entitled to permanent total

disability payments "for the rest of [his] natural life." By final admission, the Zurich defendants did not challenge the ALJ's determinations in the second proceeding.

¶ 11 Madalena then sued the Zurich defendants in district court for acting in bad faith by unreasonably denying him workers' compensation benefits and delaying the payment of benefits to him. He asserted that the Zurich defendants contemporaneously knew their position in the workers' compensation proceedings was unreasonable, or recklessly disregarded whether their position was unreasonable, and that the Zurich defendants' bad faith resulted in damages to Madalena separate and apart from the amount of benefits the ALJs had awarded to him.

¶ 12 The first bad faith case resulted in a mistrial, but the second trial resulted in a verdict for the Zurich defendants. The jury found that the Zurich defendants had unreasonably denied, or delayed in, providing Madalena with workers' compensation benefits to which he was entitled, either knowingly or in reckless disregard of his right to compensation, and that Madalena had damages. But the jury further found that the Zurich defendants' "denials and/or

delays" did not cause Madalena's damages. The court entered judgment in favor of the Zurich defendants based on the verdict.

II. Analysis

¶ 13 Although the jury found that Madalena suffered losses as a consequence of his injuries, and that the Zurich defendants unreasonably delayed or denied him benefits, the jury also concluded that the delays or denials did not cause any of his losses. Thus, we focus on Madalena's appellate arguments through the lens of causation. We consider his causation arguments first.

A. Issues Relating to Causation in the Bad Faith Case

¶ 14 Four of Madalena's arguments raise alleged errors that he contends impacted the jury's finding of lack of causation: (1) the trial court should have given preclusive effect to the administrative determinations; (2) the court erred by not admitting three of the ALJs' orders and the order of the ICAO panel (collectively, the administrative orders) into evidence; (3) the court erred by excluding evidence that he had asked the Zurich defendants to cover the costs of the surgery; and (4) the court erred by excluding certain expert testimony.

1. Issue Preclusion

¶ 15 We now turn to Madalena's contention that the trial court erred by refusing to give preclusive effect to the determinations reflected in the administrative orders.

¶ 16 Madalena filed a motion in limine asking the court to apply the doctrine of issue preclusion to bar "re-litigation of the issues detailed in the [administrative orders]." Specifically, Madalena listed twenty-one findings of fact and conclusions of law in the administrative orders that he said the court should have instructed the jury to "accept . . . as true for all of its decision-making in this case." Those determinations included the cause, severity, and compensability of Madalena's injury; the injury's occurrence "in the course and scope of his employment"; and Madalena's need for surgery and the fact he did not receive it. Madalena acknowledged, however, that the Zurich defendants could "properly refer to what they believed" during the pendency of the workers' compensation proceedings, "based on the evidence then in [their] possession." *See Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967, 970 (Colo. App. 1996) ("An insurer's decision to deny benefits to its insured must be evaluated based on the information before the insurer at

the time of that decision."), *aff'd*, 955 P.2d 1008 (Colo. 1998). But he nonetheless asserted that the Zurich defendants could not "argue or attempt to prove facts contrary to those found" in the workers' compensation proceedings.

¶ 17 The court denied Madalena's motion. In doing so, it noted that the legal issue underlying the bad faith insurance case — whether the Zurich defendants had breached their duty to deal with Madalena in good faith — was distinct from the legal issue underlying the workers' compensation proceedings — whether Madalena's injury was compensable under the Act. The court explained that resolution of Madalena's bad faith claim did not "depend upon the underlying workers' compensation claim." Accordingly, the court concluded that "presenting findings of fact and conclusions of law from the [administrative orders], as determinative of issues raised in this action, would preclude both parties from a full and fair opportunity to present their claims and defenses as to [Madalena's] bad faith claim."

¶ 18 On appeal, Madalena argues that this ruling improperly gave the Zurich defendants "free reign to relitigate the underlying workers' compensation case." He urges us to hold that "issue

preclusion applies to final administrative orders deciding workers' compensation benefits, including all determinations regarding compensability and causation, in a subsequent bad faith case."

a. Relevant Law and Standard of Review

¶ 19 The General Assembly enacted the Act "to assure the quick and efficient delivery of disability and medical benefits to injured workers . . . without the necessity of any litigation." § 8-40-102(1), C.R.S. 2022. The Act does not bar an employee from bringing a "tort action in state court for damages arising from bad faith in the processing of his request" for benefits under the Act. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1271 (Colo. 1985). This is so because "an order securing benefits does not and cannot remedy separate injuries caused by a . . . bad faith delay or denial of benefits." *Id.* at 1268.

¶ 20 There may be instances in which the doctrine of issue preclusion could spare a worker who sued his insurer for bad faith from relitigating certain issues decided in the worker's favor in a prior workers' compensation proceeding. *See Md. Cas. Co. v. Messina*, 874 P.2d 1058, 1061 (Colo. 1994) (recognizing that the determinations of "an administrative agency, acting in a judicial

capacity, *may* be binding on the parties in a subsequent proceeding if the agency resolved disputed issues of fact which the parties had an adequate opportunity to litigate," but concluding that the workers' compensation proceeding and the civil action at issue did not involve identical issues) (emphasis added); *Youngs v. Indus. Claim Appeals Off.*, 2012 COA 85M, ¶ 52, 297 P.3d 964, 974 ("Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims.").

¶ 21 The purpose of issue preclusion is "to bar relitigation of an issue." *Villas at Highland Park Homeowners Ass'n v. Villas at Highland Park, LLC*, 2017 CO 53, ¶ 29, 394 P.3d 1144, 1152. A party seeking to bar relitigation of an issue must show that

> (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) there was 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 issues in the prior proceeding.

Id. (quoting *Stanton v. Schultz*, 222 P.3d 303, 307 (Colo. 2010)).

¶ 22 An "issue" may be one of evidentiary fact, ultimate fact, or law. Restatement (Second) of Judgments § 27 cmt. c (Am. L. Inst. 1982); *accord Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 88 (Colo. 1999) ("We have recognized that the findings of fact and conclusions of law of an administrative agency, acting in a judicial capacity, may be binding on the parties in a subsequent proceeding if the agency resolved disputed issues of fact which the parties had an adequate opportunity to litigate.").

¶ 23 The Zurich defendants challenge the applicability of the first and fourth elements of the issue preclusion test. The first element is satisfied only "when a party properly raised the issue and a determination on that issue was necessary to the judgment" in the first proceeding. *In re Tonko*, 154 P.3d 397, 405 (Colo. 2007). Thus, a court cannot give preclusive effect to an adjudication that the "previous tribunal may not have taken the care needed to adequately determine" because the issue did not "affect the disposition of the case." *Id.* (quoting *Bebo Constr. Co.*, 990 P.2d at 86). "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues . . . is not precluded" because such decisions "have the characteristics of

dicta, and may not ordinarily be the subject of an appeal." *Messina*, 874 P.2d at 1062 (quoting Restatement (Second) of Judgments § 27 cmt. h).

¶ 24 Similarly, satisfaction of the fourth element — whether the party against whom issue preclusion is asserted had a "full and fair opportunity to litigate" in the earlier proceeding — depends on "whether the remedies and procedures of the first proceeding are substantially different" from those of the second proceeding, whether the party had sufficient incentive to "vigorously" litigate the issue, and "the extent to which the issues are identical." *Bebo Constr. Co.*, 990 P.2d at 87; *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001) (applying the factors in the context of a workers' compensation proceeding).

¶ 25 "Issue preclusion presents a question of law that we review de novo." *Villas at Highland Park Homeowners Ass'n*, ¶ 26, 394 P.3d at 1151.

b. Issue Preclusion Does Not Apply to the Bad Faith Case

¶ 26 We next apply the law of issue preclusion to Madalena's argument that the administrative determinations must be accorded preclusive effect in his bad faith insurance case.

i. The Administrative Determinations Do Not Bar Litigation of the Different Issues in Madalena's Subsequent Bad Faith Insurance Case

¶ 27 Madalena makes the sweeping argument that all the administrative determinations are binding on the Zurich defendants in his bad faith case. We disagree.

¶ 28 Because the Zurich defendants do not challenge the determinations of compensability and benefits resolved in the prior workers' compensation proceeding, issue preclusion does not apply to Madalena's bad faith case because there is insufficient overlap between the issues necessarily adjudicated in the two matters. "The duty of an insurer under the Act to provide benefits and compensation is factually and analytically distinct from its duty to deal in good faith with claimants, even though such duties necessarily involve a common underlying physical injury." *Savio*, 706 P.2d at 1270.

¶ 29 The scope of Madalena's first workers' compensation proceeding was limited to whether he "suffered a compensable on-the-job injury" and whether he was entitled to receive workers' compensation benefits under the Act. The ALJ found, and the ICAO panel affirmed, that Madalena had a compensable injury. The

second proceeding was limited to whether Madalena was permanently and totally disabled (PTD) because of that injury. In determining that Madalena's injury was compensable under the Act, the ALJ necessarily found, among other facts, that (1) at the time of his injury, Madalena was "performing service arising out of and in the course of [his] employment" and (2) the injury was proximately caused by an injury "arising out of and in the course of" Madalena's employment. § 8-41-301(1)(b)-(c), C.R.S. 2022. The Zurich defendants did not dispute these findings in the bad faith case.

¶ 30 In contrast, the bad faith case focused on how the Zurich defendants had administered Madalena's claim and arrived at their coverage decisions. Thus, Madalena could not prevail on his bad faith insurance claim unless the jury found that (1) the Zurich defendants unreasonably denied or delayed payment of workers' compensation benefits to which Madalena was entitled; (2) the Zurich defendants knew they were acting unreasonably or recklessly disregarded the unreasonableness of their position regarding Madalena's claim for benefits; (3) Madalena suffered damages; and (4) the Zurich defendants' denials or delays caused

those damages. *See Schuessler v. Wolter*, 2012 COA 86, ¶ 36, 310 P.3d 151, 161; *Lorenzen v. Pinnacol Assurance*, 2019 COA 54, ¶ 22, 457 P.3d 100, 104. The Zurich defendants expressly conceded compensability and the award of benefits before trial, thus negating any need for Madalena to assert issue preclusion to bar their relitigation. *See Villas at Highland Park Homeowners Ass'n*, ¶ 29, 394 P.3d at 1152. Instead, Madalena sought to assert issue preclusion to bar litigation of *other* issues that were not necessary to the ALJs' conclusions.

¶ 31 Because the factual and legal parameters of Madalena's workers' compensation proceedings were narrowly circumscribed, the issues "actually litigated and necessarily adjudicated" in those proceedings were not "identical" to the issues relevant to Madalena's bad faith insurance claim, and the Zurich defendants thus did not have a full and fair opportunity to vigorously litigate such issues in the workers' compensation proceedings. *Villas at Highland Park Homeowners Ass'n*, ¶ 29, 394 P.3d at 1152 (quoting *Stanton*, 222 P.3d at 307). For this reason, the first and fourth prongs of the test for issue preclusion are not satisfied.

¶ 32 Additionally, as both parties point out, the ALJs and ICAO panel lacked jurisdiction to consider and resolve issues beyond compensability and benefits. *See* § 8-43-201(1), C.R.S. 2022 (granting "[t]he director and administrative law judges employed by the office of administrative courts in the department of personnel" original jurisdiction over matters arising under the Act). While the parties do not dispute that the administrative orders were "final judgments," a tribunal's ruling on an issue over which it lacks subject matter jurisdiction cannot be a "final judgment" for purposes of the third element of the issue preclusion test — "a final judgment on the merits in the prior proceeding." *Villas at Highland Park Homeowners Ass'n*, ¶ 29, 394 P.3d at 1152; *see also Tonko*, 154 P.3d at 406 ("The district court entered no final judgment regarding [a third party's] water use rights to which the [appellants] have succeeded, because it had no jurisdiction to do so. The third element of issue preclusion is not satisfied."); *Messina*, 874 P.2d at 1064 ("[T]he workers' compensation case was not a final adjudication as to [the plaintiff's] claim to [personal injury protection (PIP)] benefits nor does an ALJ presiding over a workers'

compensation proceeding have the jurisdictional authority to decide the issue of entitlement to PIP benefits.”).

¶ 33 Madalena argues that we should adopt the reasoning of *Mendoza v. McDonald’s Corp.*, 213 P.3d 288, 306 (Ariz. Ct. App. 2009), which, according to Madalena, holds that final administrative orders in workers’ compensation proceedings have preclusive effect in a subsequent case against the employer for breach of the duty of good faith and fair dealing. But the facts in *Mendoza* were materially different from those in Madalena’s bad faith case. In the Arizona case, the employer argued at the bad faith trial that the employee “had not actually been injured at [her workplace] . . . , and had perpetrated a fraud by obtaining disability and medical benefits without suffering an actual and compensable injury.” *Id.* In contrast, in Madalena’s bad faith case, the Zurich defendants did not attempt to relitigate the determinations of compensability and benefits in the workers’ compensation proceedings. Not only is *Mendoza* distinguishable, but we are not bound by out-of-state decisions. *See State ex rel. Weiser v. JUUL Labs, Inc.*, 2022 CO 46, ¶ 62, ¶ 62, 517 P.3d 682, 695.

¶ 34 We therefore hold that, under the facts of this case, the administrative determinations do not have preclusive effect on the different issues the Zurich defendants actually litigated in the bad faith case.

ii. The Specific Administrative Determinations to Which Madalena Points Do Not Have Preclusive Effect in His Bad Faith Case

¶ 35 Madalena provides three examples of administrative determinations to which he contends the trial court should have given preclusive effect in the bad faith case. Although our rejection of Madalena's general argument on issue preclusion encompasses these administrative determinations, we explain below why they did not have preclusive effect in the bad faith case.

¶ 36 Specifically, Madalena asserts that the court in the bad faith case was bound by the ALJs' and the ICAO panel's determination regarding Dr. Lawrence Lesnack's credibility, the first ALJ's statements regarding the reason why Madalena did not proceed with surgery, and the second ALJ's statement regarding the anticipated impact of such surgery on Madalena. The dispute in the bad faith case centered on whether the Zurich defendants had unreasonably delayed covering Madalena's surgical expenses and, if

so, whether such delay had resulted in further injuries to Madalena. The parties did not contest in the bad faith case whether he was entitled to coverage for such expenses — as noted above, in the first proceeding, the ALJ determined that the Zurich defendants were liable for those expenses.

¶ 37 First, Madalena points to the testimony of Dr. Lawrence Lesnak, whom the Zurich defendants engaged to conduct an independent medical examination of Madalena. During the workers' compensation proceedings, the ALJs and the ICAO panel rejected Dr. Lesnak's opinion testimony that Madalena's injury was not work related and concluded, based on the testimony of other medical experts, that the "most credible explanation" was that Madalena's injury was work related and compensable. At the trial in the bad faith case, Dr. Lesnak reiterated his prior opinion testimony that Madalena's injury likely resulted from non-work-related causes.

¶ 38 The ALJs' rejection of Dr. Lesnak's opinion in the workers' compensation proceedings did not have preclusive effect on the issue for which he was called in the bad faith insurance case. Unlike in the workers' compensation proceeding, the Zurich

defendants did not proffer Dr. Lesnak's testimony in the bad faith case to establish that Madalena's injury was not work related, but, rather, to establish that the Zurich defendants had acted reasonably by initially disputing that the injury was compensable under the Act. In the bad faith case, the Zurich defendants sought to establish that Madalena's entitlement to workers' compensation benefits was "fairly debatable" at the time they investigated Madalena's claim, even if the subsequent outcome of the workers' compensation proceedings showed that the Zurich defendants had been mistaken regarding compensability. *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 496-97 (Colo. App. 2011) (quoting *Savio*, 706 P.2d at 1275). Thus, the Zurich defendants did not offer Dr. Lesnak's opinion in the bad faith case to establish an issue that had been "actually litigated and necessarily adjudicated" in the workers' compensation proceedings. *See Villas at Highland Park Homeowners Ass'n*, ¶ 29 (quoting *Stanton*, 222 P.3d at 307).

¶ 39 Further, the Zurich defendants did not have "a full and fair opportunity" in the workers' compensation proceedings to litigate their good faith basis for initially challenging Madalena's entitlement to workers' compensation benefits, because that issue

was outside the scope of the workers' compensation proceedings. Accordingly, the ALJs' findings regarding Dr. Lesnak's credibility have no preclusive effect under the first and fourth elements of the test for issue preclusion.

¶ 40 Second, Madalena points to the Zurich defendants' assertion in their opening statement and closing argument in the bad faith trial that they did not deny Madalena's request for coverage for surgical expenses because neither Madalena nor his doctors properly made such a request. Madalena alleges that these assertions contradicted the first ALJ's finding that Madalena "has been unable to go forward with the surgery" because "the case was on a denial from the Insurer" and "the surgery was not authorized."

¶ 41 However, whether Madalena properly requested that the Zurich defendants authorize surgery was not an issue "necessarily adjudicated" in the workers' compensation proceedings because it was not determinative of the limited issues before the ALJ — whether his injury was compensable under the Act and what benefits he would receive. Thus, the ALJ's finding on this issue has "the characteristics of dicta" rather than those of a binding determination. *Messina*, 874 P.2d at 1062 (quoting Restatement

(Second) of Judgments § 27 cmt. h). For similar reasons, in the workers' compensation proceedings, the Zurich defendants did not have a full and fair opportunity to litigate, or "sufficient incentive to litigate vigorously," whether Madalena had properly requested coverage for the cost of surgery because the determination of that issue was of no consequence to the ultimate determination of his entitlement to workers' compensation benefits. *Bebo Constr. Co.*, 990 P.2d at 87. Accordingly, this finding fails to satisfy the first and fourth elements of the test for issue preclusion.

¶ 42 Third, Madalena points to the testimony of Dr. Donald Corenman, whom the Zurich defendants called at the bad faith trial to testify that Madalena's symptoms, aside from a limp, are inconsistent with his claimed work-related injury. Madalena asserts that this testimony contradicts the second ALJ's finding that one of Madalena's doctors said that "if surgery had been performed earlier, [Madalena] would have gotten better, and that [Madalena] is unable to work now and will endure ongoing and permanent chronic pain. Because of this, [Madalena] will need help with the activities of daily living . . . for the remainder of his life."

¶ 43 We disagree with Madalena's argument that this finding precludes litigation of whether any delay in the surgery *attributable to the Zurich defendants'* coverage decisions exacerbated Madalena's injury. To determine Madalena's entitlement to workers' compensation benefits, the ALJ did not "necessarily adjudicate[]" this specific issue. *See Villas at Highland Park Homeowners Ass'n*, ¶ 29, 394 P.3d at 1152 (quoting *Stanton*, 222 P.3d at 307). For the same reason, the Zurich defendants lacked a sufficient incentive to vigorously litigate this point. The only issue concerning the nature of Madalena's injury properly before that ALJ was "whether [Madalena] is . . . PTD . . . because of a compensable back injury."

¶ 44 Thus, the ALJ in the second proceeding only "necessarily adjudicated" that Madalena "is unable to work now" and "will need help with the activities of daily living . . . for the remainder of his life." *See* § 8-40-201(16.5)(a), C.R.S. 2022 (PTD "means the employee is unable to earn any wages in the same or other employment."). The ALJ's reference to the doctor's opinion regarding the timing of surgery was dicta rather than a "necessarily adjudicated" finding; it did not determine whether Madalena's PTD resulted from Zurich's bad faith denial of Madalena's claim.

Causation based on "an injury . . . arising out of and in the course of the employee's employment" is distinct from causation based on an insurer's bad faith denial of or delay in approving a claim. *Compare* § 8-41-301(1)(c), *with Schuessler*, ¶ 36, 310 P.3d at 161, *and Lorenzen*, ¶ 22, 457 P.3d at 104. Thus, this issue lacks preclusive effect under the first and fourth elements of the test for issue preclusion.

¶ 45 Finally, to the extent that any of the ALJs' or ICAO panel's other findings underlying their compensability and benefit determinations could have had a preclusive effect in the bad faith case, Madalena does not explain how the court's failure to instruct the jury as to those findings prejudiced him. *See Gasteazoro v. Cath. Health Initiatives Colo.*, 2014 COA 134, ¶ 12, 408 P.3d 874, 877 ("In a civil case, a properly preserved objection to a particular instruction is subject to the harmless error rule," which "permits reversal only if a jury 'probably would have decided a case differently if given a correct instruction.'" (quoting *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo. App. 2009))).

¶ 46 For example, the Zurich defendants' counsel specifically told the jurors during her opening statement and closing argument that

they were "never going to be asked in this case to determine whether or not [Madalena] had a work-related injury" or whether he "should receive workers' compensation benefits." Rather, counsel explained that the jury would have to "judge whether the [Zurich defendants'] conduct was reasonable, based on the information . . . [they] knew at the time." Moreover, as noted above, the jury found that the Zurich defendants acted in bad faith in denying Madalena's claim and that Madalena suffered damages.

¶ 47 Although the jury found in favor of the Zurich defendants on the element of causation, that finding did not, as Madalena contends, create "a major inconsistency" (or any inconsistency) with the administrative orders because the causation questions were different. As explained above, the ALJs' analysis of whether Madalena's injury was work-related under the Act differed from the jury's analysis of whether the Zurich defendants' bad faith exacerbated that injury. We fail to see how, as Madalena contends, the jury "probably would have decided" that the Zurich defendants' bad faith denial of Madalena's claim caused him damages had the jury been instructed to accept the ALJs' finding that an accident on the job — not the Zurich defendants — caused Madalena's

underlying injury. *Harris Grp., Inc.*, 209 P.3d at 1195. Even if the court had given such an instruction, Madalena would still have been required to prove that the Zurich defendants' actions (or inaction) exacerbated the injury.

¶ 48 In sum, we conclude that none of the ALJs' specific findings and conclusions that Madalena raises on appeal had preclusive effect.

2. Admissibility of the Administrative Orders

¶ 49 Madalena next contends that the trial court erred by ruling that the administrative orders and "anything pertaining to the administrative hearing process" were inadmissible under CRE 403. We first address the Zurich defendants' argument that Madalena did not preserve this issue.

a. Preservation

¶ 50 "It is axiomatic that in civil cases, issues not raised in or decided by the trial court generally will not be addressed for the first time on appeal. If a party raises an argument to such a degree that the court has the opportunity to rule on it, that argument is preserved for appeal." *Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶ 21, 436 P.3d 597, 600 (citations omitted). "No

talismanic language is required to preserve an issue." *Owens v. Dominguez*, 2017 COA 53, ¶ 21, 413 P.3d 255, 261-62. If a party "presented to the trial court the sum and substance of the argument it now makes on appeal, we consider that argument properly preserved for appellate review." *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010). A party may timely object to, and thus preserve for appeal, the admission of evidence through a motion in limine without a later trial objection so long as "the issue of the admissibility of the specific evidence was fully argued to the trial court on the same grounds argued by the non-prevailing party on appeal." *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330-31 (Colo. 1986).

¶ 51 We conclude that Madalena partially preserved this argument. In a motion in limine, Madalena indicated that he "fully intend[ed] to present evidence concerning the ALJ determinations in his workers compensation case." And Madalena argued in the trial court that the administrative orders were admissible in the bad faith case.

¶ 52 A special master recommended that the court hold that the administrative orders were inadmissible under CRE 403 because

"the admission of such orders will confuse the jurors and potentially mislead them." However, the special master did not address whether specific "findings and conclusions within the . . . administrative orders" might be admissible and suggested that the court make that determination "on a finding by finding, conclusion by conclusion basis." The special master also rejected Madalena's argument that "he needs to have the actual written orders admitted in order to cross examine certain witnesses" and instead stated that Madalena could "use the administrative orders to impeach . . . without admitting the . . . orders into evidence."

¶ 53 Although Madalena objected to these recommendations, the court adopted the special master's ruling.

¶ 54 The Zurich defendants correctly assert that, although the trial court denied the admission of the ALJs' orders into evidence, it permitted Madalena to use the orders for impeachment. The Zurich defendants argue that, because Madalena never attempted to use the administrative orders to impeach witnesses, "the trial court was not given the opportunity to decide whether the [administrative] orders could be used for a particular impeachment purpose actually attempted at trial," and thus the issue was not preserved.

¶ 55 We hold that, through his pretrial filings, Madalena preserved his argument regarding the general admissibility of the ALJs' orders into evidence. However, we agree with the Zurich defendants that the trial court's order allowed Madalena to use the administrative orders for impeachment and note that Madalena does not cite to any instance at trial where he attempted to use them for such purpose. Although Madalena cites to the trial court's broad language that "the contents of [the administrative orders] are off limits" and the "expectation would be that we not talk about any of the specifics of that decision by the administrative law judge," the court never made such statements in the context of the possible use of *portions* of the ALJs' orders for impeachment. Thus, we decline to address Madalena's argument that the court erred by not permitting him to use the ALJs' orders for impeachment.

b. Relevant Law and Standard of Review

¶ 56 A court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of . . . confusion of the issues" or "misleading the jury." CRE 403.

¶ 57 We review evidentiary rulings for an abuse of discretion. *Ronquillo v. EcoClean Home Servs., Inc.*, 2021 CO 82, ¶ 12, 500 P.3d

1130, 1134. We reject Madalena's argument that we should review the court's order barring the admission of the administrative orders under the standard for mixed questions of law and fact. As we explain below, the special master, and thus the court, applied the correct legal standard — CRE 403 — to determine the admissibility of evidence. Therefore, there is no question of law for us to review de novo. Rather, we only review the court's application of CRE 403 for an abuse of discretion.

c. The Court Did Not Abuse Its Discretion by Excluding the Administrative Orders in the Bad Faith Case

¶ 58 We agree with the trial court (and the special master) that, even though "some of the findings and conclusions contained in the four administrative orders" may be "relevant to [Madalena's] claims that [the Zurich defendants] continued to breach[] their duty of good faith and fair dealing," the risk of confusing or misleading the jury by admitting the "actual paper orders" substantially outweighed the orders' probative value.

¶ 59 For the jury to determine that the Zurich defendants acted in bad faith, it had to find that the Zurich defendants acted unreasonably, "with knowledge of or reckless disregard for the fact

that no reasonable basis existed for [their] action." *Schuessler*, ¶ 36, 310 P.3d at 161. In other words, the jury had to consider what information was available to the Zurich defendants at the time of the challenged conduct. *State Farm Mut. Auto. Ins. Co. v. Reyher*, 266 P.3d 383, 390 (Colo. 2011).

¶ 60 Because Madalena argued that the Zurich defendants breached their duty of good faith and fair dealing not only when they initially denied Madalena's claim, but also when they continued to dispute it during the pendency of the workers' compensation proceeding, several different time periods are relevant in this case. The trial court reasoned that each administrative order would be irrelevant to establish the Zurich defendants' knowledge of the facts supporting Madalena's workers' compensation claim before the date of such order. "For instance, . . . [the] February 21, 2018 Order is not relevant to whether [the Zurich defendants] acted unreasonably more than a year *earlier* in appealing [the November 21, 2016] Supplemental Order, and thus is not admissible, but [it] is relevant to whether [the Zurich defendants] acted unreasonably after February 21, 2018." The court was correct in noting that admission of the administrative

orders could have led the jury to assume — erroneously — that the findings in any one of the orders reflected what the Zurich defendants knew about Madalena's workers' compensation claim weeks, months, or years earlier.

¶ 61 Thus, the trial court did not abuse its discretion when it concluded that the "risk of the admission of the four actual administrative orders confusing and misleading the jury is apparent."

¶ 62 We also reject Madalena's contention that the exclusion of the orders allowed the Zurich defendants to "advance[] multiple false narratives" during trial. Admission of the orders would have risked the jury giving preclusive effect to the administrative determinations, which, as explained above, would have been improper. The jurors could have assumed that they were not at liberty to disagree with the contents of an order signed by a judicial officer.

¶ 63 In sum, we hold that the trial court did not abuse its discretion by excluding the administrative orders from evidence.

3. Claim Preclusion and Jurisdiction Over the Surgery Request Issue

¶ 64 Madalena next contends that the Zurich defendants' "arguments that Madalena failed to properly request surgery should have been barred for lack of jurisdiction and claim preclusion." We review decisions on jurisdiction and claim preclusion de novo. *Colo. Jud. Dep't, Eighteenth Jud. Dist. v. Colo. Jud. Dep't Pers. Bd. of Rev.*, 2022 CO 52, ¶ 18, 519 P.3d 1035, 1039; *Foster*, ¶ 10, 394 P.3d at 1122.

¶ 65 Determinations about subject matter jurisdiction and claim preclusion require an analysis of a claim as a whole rather than review of discrete issues. *See People v. C.O.*, 2017 CO 105, ¶ 24, 406 P.3d 853, 858 (explaining that subject matter jurisdiction "concerns the court's authority to deal with the *class* of cases in which it renders judgment, not its authority to enter a particular judgment within that class"); *Foster*, ¶ 12, 394 P.3d at 1122 ("[C]laim preclusion prevents the perpetual re-litigation of the same *claim or cause of action*.") (emphasis added).

¶ 66 Whether Madalena properly requested coverage for surgery is not a claim; it is a discrete factual issue subsumed within the

broader claim. *Compare* Black's Law Dictionary 275, 311 (11th ed. 2019) (defining "cause of action" as "[a] *group* of operative facts giving rise to one or more bases for suing" and cross-referencing the synonym "claim," defined as "[a]n interest or remedy recognized at law") (emphasis added), *with* Restatement (Second) of Judgments § 27 cmt. c (explaining that an "issue on which relitigation is foreclosed" under the doctrine of issue preclusion "may be one of evidentiary fact, of 'ultimate fact' . . ., or of law").

¶ 67 The trial court, not the ALJs, had jurisdiction over Madalena's bad faith claim. *Compare* Colo. Const. art. VI, § 9(1) (vesting district courts "with general jurisdiction," including original jurisdiction in all civil cases), *with* § 8-43-201(1) (vesting ALJs who decide workers' compensation matters with "original jurisdiction to hear and decide . . . matters arising under" the Act).

¶ 68 The Zurich defendants could not have asserted a defense to Madalena's bad faith breach of insurance contract claim in the workers' compensation proceedings because ALJs in workers' compensation cases lack jurisdiction over bad faith claims. § 8-43-201(1); *Savio*, 706 P.2d at 1268 ("[A]n order securing benefits [under the Act] does not and cannot remedy separate

injuries caused by a prior bad faith delay or denial of benefits.”). The manner in which the Zurich defendants reviewed and processed Madalena’s claim was not relevant to the Zurich defendants’ arguments regarding compensability and benefits — the only issues properly before the ALJs and the ICAO panel.

¶ 69 Moreover, a claim preclusion analysis would involve a determination of the preclusive effect of Madalena’s workers’ compensation “claim or cause of action” as a whole. *Foster*, ¶ 12, 394 P.3d at 1122. The doctrine applies when “(1) the judgment in the prior proceeding was final; (2) the prior and current proceedings involved identical subject matter; (3) the prior and current proceedings involved identical claims for relief; and (4) the parties to the proceedings were identical or in privity with one another.” *Gale*, ¶ 14, 500 P.3d at 354 (quoting *Meridian Serv. Metro. Dist. v. Ground Water Comm’n*, 2015 CO 64, ¶ 36, 361 P.3d 392, 398). Because the two proceedings involved neither “identical subject matter” nor “identical claims for relief,” the second and third elements of the claim preclusion test are not satisfied.

¶ 70 Thus, the scope of the trial court’s jurisdiction over Madalena’s bad faith claims and the doctrine of claim preclusion

did not bar the Zurich defendants from litigating in the bad faith insurance case whether Madalena sought their authorization for surgery.

4. Limitation of Medical Causation Testimony

¶ 71 Madalena contends that the court erred by limiting the testimony of urologist Jeffrey Snyder. Madalena sought to call Dr. Snyder at trial to provide an opinion regarding the cause of Madalena's urological conditions. Before trial, the Zurich defendants moved to exclude Dr. Snyder's testimony, in part because Madalena had not properly disclosed his opinions pursuant to C.R.C.P. 26(a)(2)(B). Specifically, the Zurich defendants argued that Dr. Snyder "offered opinions on causation for the first time during [his] deposition," including the opinion that Madalena's urological problems were caused by cauda equina syndrome. (Cauda equina syndrome is caused by compression of the cauda equina bundle of nerves. 1 J. E. Schmidt, *Attorneys' Dictionary of Medicine*, LexisNexis (database updated Oct. 2022). Its symptoms include "pain in the lower limbs and in the perineum . . . , loss of sensation in the buttocks and thighs, and, occasionally, bowel and bladder disturbances." *Id.*) The special

master recommended partially granting the Zurich defendants' motion to strike the causation opinion that Dr. Snyder disclosed for the first time during his deposition. The trial court adopted the recommendation.

¶ 72 "We review evidentiary rulings, including a ruling on the admissibility of expert testimony, for an abuse of discretion." *Dorsey & Whitney LLP v. RegScan, Inc.*, 2018 COA 21, ¶ 39, 488 P.3d 324, 333. We will reverse only if an erroneous evidentiary ruling "substantially influenced the outcome of the case." *Id.* (quoting *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 458 (Colo. App. 2003)).

¶ 73 We need not determine whether the trial court erred by excluding Dr. Snyder's testimony on causation because the court's ruling could not have "substantially influenced the outcome of the case." *Id.* (quoting *Genova*, 72 P.3d at 458). The jury heard substantially similar testimony to the opinion testimony that the court excluded. For example, the court allowed Dr. Snyder to testify about Madalena's urological problems and to opine that a "neurological deficit" caused them. Additionally, another expert linked Madalena's symptoms to cauda equina syndrome.

¶ 74 Moreover, we disagree with Madalena's assertion that Dr. Snyder's "diagnosis and medical causation opinions directly address[ed]" the causation element of his bad faith breach of insurance contract claim. Dr. Snyder merely opined that Madalena's urological impairments indicate he "has a partial cauda equina syndrome." But to prevail on his bad faith insurance claim, Madalena needed to prove a different fact: that *the Zurich defendants' actions or inactions* caused his damages. *See Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 417 (Colo. 2004) ("Insureds . . . should be able to proceed to the jury on all damages that flow from a breach of the duty of good faith and fair dealing."). As it turned out, that was the determinative issue. Madalena does not explain how Dr. Snyder's struck testimony would have established *this* causal link. To the contrary, Madalena acknowledges that, during Dr. Snyder's deposition, the doctor "did not offer a causation opinion related to [the Zurich defendants'] conduct and the denial of [coverage for] surgery." Thus, Dr. Snyder's testimony would merely have supported a finding that Madalena had incurred damages, an issue on which Madalena prevailed.

¶ 75 Therefore, the court's exclusion of Dr. Snyder's testimony on causation does not require reversal of the judgment entered in favor of the Zurich defendants.

B. Issues Not Pertaining to Causation

¶ 76 Because we conclude that the court did not commit reversible error in its rulings on the causation-related issues Madalena raises on appeal, we need not reach Madalena's remaining arguments. Those arguments address elements of Madalena's claim on which the jury found in his favor. *See Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 275 (Colo. App. 2000) (declining to decide whether a jury instruction was erroneous where "the jury ultimately found in favor of defendant with regard to [that] claim" and thus "any error was harmless").

¶ 77 Specifically, Madalena argues the court erred by "precluding evidence of Madalena's economic damages and . . . striking all elements of his life care plan at trial," "allowing [the Zurich defendants'] economist to testify that Madalena's loss of income was fully covered by his workers' compensation benefits," "denying Madalena's motion to amend his complaint to add a claim for exemplary damages," and "excluding a former Gallagher Bassett

employee from testifying at trial." (Although the Zurich defendants argue that Madalena did not preserve his argument regarding their economist's testimony, we need not reach such preservation issue in light of our analysis below.)

¶ 78 Madalena does not explain how these alleged evidentiary and procedural errors could have "substantially influenced the outcome of the case" by impacting the jury's finding of lack of causation, or how they otherwise "impaired the basic fairness of the trial itself." *Bernache v. Brown*, 2020 COA 106, ¶ 26, 471 P.3d 1234, 1240 (quoting *Laura A. Newman, LLC v. Roberts*, 2016 CO 9, ¶ 24, 365 P.3d 972, 978). These alleged errors may have been relevant to the element of bad faith or calculation of damages. But the jury found in favor of Madalena on the element of bad faith and found no causation. In light of our conclusion that the trial court did not err in its rulings relevant to causation, we need not reach Madalena's argument regarding damages. *See Dunlap v. Long*, 902 P.2d 446, 448 (Colo. App. 1995) ("[A] jury determination that a defendant is not liable renders harmless any error that might have occurred with respect to the issue of the plaintiff's alleged damages."). Thus, we hold that these alleged errors do not require reversal.

III. Disposition

¶ 79 The judgment is affirmed.

JUDGE FOX and JUDGE SCHOCK concur.