SUMMARY
June 29, 2023

2023COA62

No. 22CA1663, *Rosten v. ICAO* — Workers' Compensation — Medical Impairment Benefits — Final Admission of Liability — Division-Sponsored Independent Medical Examination

As a matter of first impression in Colorado, a division of the court of appeals addresses whether the failure to conduct an in-person examination invalidates a doctor's report finding that a claimant has no permanent impairment. The division concludes that, while a record review without a personal examination is not the preferred method of conducting an impairment rating, any associated deficiencies or limitations are relevant to the report's persuasiveness, not its validity. Thus, the issuance of a final admission of liability (FAL) predicated upon such a report does not render the FAL invalid, and the claimant's deadline for filing a timely division-sponsored independent medical examination (DIME)

was triggered by the FAL's filing. Because the claimant did not timely file a DIME, the division affirms the panel's decision that the administrative law judge was without jurisdiction to consider the claimant's contentions concerning the merits of the doctor's permanent impairment rating.

COLORADO COURT OF APPEALS **2023COA62**

Court of Appeals No. 22CA1663
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-128-609

Keith Rosten,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, City of Durango, and Colorado Intergovernmental Risk Sharing Agency,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE SCHUTZ
Harris and Lipinsky, JJ., concur

Announced June 29, 2023

Crane and Tejada, P.C., Bethiah Crane, Durango, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Pollart Miller, LLC, Brad Miller, Kristi Robarge, Greenwood Village, Colorado, for Respondents City of Durango and Colorado Intergovernmental Risk Sharing Agency

¶ 1 In this workers' compensation action, claimant, Keith Rosten, seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel affirmed the determination of the administrative law judge (ALJ) that the final admission of liability (FAL) filed by Rosten's employer, City of Durango, and its insurer, Colorado Intergovernmental Risk Sharing Agency (collectively respondents), was valid. We affirm the Panel's order. In doing so, we determine — as a matter of first impression in Colorado — that a doctor's failure to examine a claimant in person does not render the doctor's report finding no impairment, or the FAL premised on that report, invalid.

I. Background

¶ 2 The following facts are undisputed. Rosten, a bus driver, was injured at work on January 22, 2020, when he slipped and fell on ice in his employer's parking lot. He claimed to have suffered a traumatic brain injury and a neck injury as a result. He received treatment for his injuries through Centura Centers for Occupational Medicine (Centura) in Durango, where Kelly MacLaurin, a physician

assistant, and Dr. Adam Owens, a level II accredited physician,[1] treated him.

¶ 3 On October 19, 2020, Dr. Owens saw Rosten and noted that he was at maximum medical improvement (MMI) and was tentatively scheduled to receive an impairment rating from a different Centura doctor. Dr. Owens also noted that (1) Rosten was not in acute distress; (2) he was alert to person, place, and time; and (3) the exams of his head, eyes, ears, nose, and throat were normal. In addition, the workers' compensation form 164 that Dr. Owens signed on the same date stated that Rosten had reached MMI, that he was released to full duty (but not cleared for Department of Transportation driving), and that an impairment rating for Rosten was pending physician review.

¶ 4 Sometime thereafter, Dr. Owens left Centura. Dr. Thomas Centi, the medical director for Centura, was the "next in line" to

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[1] The accreditation requirements for level II physicians are set forth in section 8-42-101(3.5), (3.6)(a)(II), C.R.S. 2022. The level II accreditation is important in Colorado workers' compensation cases because only level II accredited physicians are authorized to determine a permanent impairment rating for a claimant who has reached maximum medical improvement. *See* § 8-42-107(8)(c), C.R.S. 2022.

complete Rosten's impairment rating. Dr. Centi was a level II treating physician, and as counsel for both parties acknowledged, he was an authorized treating physician (ATP) for Rosten because he worked for Centura, a corporate medical provider. *See generally* § 8-43-404(5)(a)(I)(A), C.R.S. 2022 (authorizing corporate medical providers and defining them as "a medical organization in business as a sole proprietorship, professional corporation, or partnership"); Dep't of Lab. & Emp. Rule 8-2(B), 7 Code Colo. Regs. 1101-3 ("The designated provider list may include any combination of physicians and/or corporate medical providers . . . .").

¶ 5 Dr. Centi practiced medicine primarily at Centura locations in Colorado Springs and Pueblo. Because there were no level II accredited physicians at the Centura location in Durango, Dr. Centi would have needed to travel there to perform in-person impairment ratings for patients in that part of the state. However, in 2020, Centura prohibited its employees from traveling by air because of the COVID-19 pandemic. Moreover, Centura did not have the capability to conduct virtual health visits. As a result, Dr. Centi conducted a records review to obtain the information necessary to complete Rosten's impairment rating and medical report.

¶ 6 In that report, which was dated November 27, 2020, Dr. Centi noted that Rosten had been placed at MMI in October 2020, and he assigned a zero percent impairment rating to Rosten. Dr. Centi based this opinion, in part, on a neuropsychological exam that "estimated a mostly stable evaluation with mild cognitive impairment considered mostly related to sleep apnea" and "low consistency for traumatic brain injury."

¶ 7 On December 7, 2020, respondents filed the FAL, together with Dr. Centi's report and the workers' compensation form 164 completed by Dr. Owens. In addition, the FAL included forms for filing an objection to the FAL and for requesting a division-sponsored independent medical examination (DIME) if Rosten objected to the MMI date or impairment rating. The FAL also included the following admonition:

> [I]f you disagree with the Final Admission, WITHIN 30 CALENDAR DAYS of the date of the Final Admission you must complete the below Objection to Final Admission with a Certificate of Mailing. . . . Within the same 30 days, if you disagree with the date of Maximum Medical Improvement (MMI) and/or Whole Person Permanent Impairment[], you must complete the attached I. Notice and Proposal form and II. Application for Division Independent Medical Examination (DIME) and

> send it to the insurance carrier or self-insured employer.

¶ 8 Rosten filed an objection to the FAL on January 6, 2021, but he did not file a Notice and Proposal with an Application for a DIME (collectively, the DIME application) until seven days later. Respondents moved to strike the DIME application as untimely.

¶ 9 At a pre-hearing conference limited to the motion to strike, the pre-hearing administrative law judge (PALJ) noted that section 8-42-107.2(2)(b), C.R.S. 2022, requires that a DIME application be filed within thirty days of the mailing date of the FAL if any party disputes a finding of the ATP. The statute also mandates that the ATP's findings and determinations are binding if the application is not timely filed. Thus, because Rosten filed the DIME application more than thirty days after the FAL was mailed, the PALJ granted respondents' motion and struck the DIME application. Although Rosten had argued that the FAL was invalid, the PALJ declined to rule on that issue because it had not been noticed for the pre-hearing conference.

¶ 10 A hearing on the validity of the FAL was held in September 2021. At the hearing, Rosten argued that the FAL was invalid

because the medical report that placed his permanent partial impairment (PPI) rating at zero was based solely on Dr. Centi's record review and not on an in-person examination. This procedure, Rosten argued, was contrary to the Workers' Compensation Act of Colorado (Act), sections 8-40-101 to 8-47-209, C.R.S. 2022; the Workers' Compensation Rules of Procedure (WCRP), 7 Code Colo. Regs. 1101-3; and the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Rosten asserted that these authorities require that an impairment rating be completed only after an in-person examination of the claimant. In support of this assertion, Rosten noted that section 8-42-107(8)(b.5), C.R.S. 2022, is the only provision in the Act that expressly permits a record review impairment rating. But the section only applies if a claimant resides in another state. Rosten also sought to present testimony from his treating neurologist that would have contradicted Dr. Centi's and MacLaurin's testimony, but the ALJ did not allow that testimony.

¶ 11 In her written decision, the ALJ concluded that the FAL was valid. In reaching that conclusion, the ALJ rejected Rosten's

argument that the Act, WCRP, and AMA Guides require an impairment rating to be determined following an in-person examination. The ALJ also rejected Rosten's contention that an in-person examination was implicitly required because the statute expressly allows record reviews for out-of-state claimants.

¶ 12 Relying on section 8-42-107(8)(c), the ALJ found that any challenge to the impairment rating must be pursued through the timely filing of a DIME application, which initiates the DIME process. In addition, the ALJ found that, while relying upon prior medical records may not be the best practice for completing an impairment rating, nothing in the Act, the WCRP, or case law required Dr. Centi to physically examine Rosten before doing so, particularly because Dr. Centi determined that Rosten's impairment rating was zero. The ALJ found that the medical records and testimony from Dr. Centi and MacLaurin were credible and persuasive and, thus, that Dr. Centi's performance of the impairment rating was not so deficient as to render the FAL invalid.

¶ 13 Rosten filed a petition for review of the ALJ's order. As relevant to this appeal, he argued that (1) the timing of the DIME application was irrelevant to the issue of the validity of Dr. Centi's

impairment rating; (2) the ALJ erred by concluding that the Act does not implicitly require an in-person examination for an impairment rating of an in-state claimant simply because it allows record review impairment ratings for out-of-state claimants; and (3) the ALJ erred by excluding testimony from Rosten's treating neurologist.

¶ 14 The Panel affirmed the ALJ's order. Specifically, the Panel concluded that (1) the timing of Rosten's DIME application was relevant to the issue of Dr. Centi's report because Rosten's challenges to Dr. Centi's decision to place him at MMI and assess a zero permanent impairment rating must be resolved through the DIME process, after the timely filing of a DIME application; (2) the FAL that relied on Dr. Centi's report and permanent impairment rating was valid, and no provision in the Act, the WCRP, or the AMA Guides requires an in-person physical examination before an ATP can make an MMI finding and a permanent impairment rating; and (3) the ALJ did not err by prohibiting Rosten's witness from testifying because the testimony was offered to challenge or contradict Dr. Centi's MMI and impairment rating determinations,

but those arguments can only be addressed after a claimant timely requests and receives a DIME.

II. Standard of Review

¶ 15 We review de novo the ALJ's and the Panel's legal conclusions. *See Colo. Dep't of Lab. & Emp. v. Esser*, 30 P.3d 189, 193 (Colo. 2001). We must uphold the ALJ's findings of fact when they are supported by substantial evidence in the record. *See Leewaye v. Indus. Claim Appeals Off.*, 178 P.3d 1254, 1256 (Colo. App. 2007). But an agency's decision that misconstrues or misapplies the law is not binding. *Pena v. Indus. Claim Appeals Off.*, 117 P.3d 84, 88 (Colo. App. 2004). And, as relevant here, we may set aside the Panel's order only if "the findings of fact are not supported by the evidence," "the findings of fact do not support the order," or the "denial of benefits is not supported by applicable law." § 8-43-308, C.R.S. 2022.

III. The FAL is Valid

¶ 16 Rosten contends that the Panel erred by upholding the ALJ's determination that the FAL was valid. We perceive no basis to disturb the Panel's decision.

A. Requirements for a Valid FAL

¶ 17 Section 8-43-203(2)(b)(I), C.R.S. 2022, requires that an admission of liability contain the following information: (1) the amount of compensation to be paid; (2) the person to whom compensation will be paid; (3) the period for which the compensation will be paid; and (4) the disability for which compensation will be paid. Section 8-43-203(2)(b)(II), in turn, sets forth the necessary components of a FAL and specifically mandates that when a FAL is predicated upon medical reports, such reports shall accompany it. *See Paint Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429, 431 (Colo. App. 2010) (where rating physician prepared a worksheet on the same date as the examination, but employer failed to attach the worksheet to the FAL, the FAL was invalid). Department of Labor & Employment Rule 5-5(A), 7 Code Colo. Regs. 1101-3, repeats this requirement.

¶ 18 In *Paint Connection Plus*, 240 P.3d at 434, a division of this court concluded that the FAL was invalid because the employer failed to attach a doctor's worksheets that had been prepared on the same date as the examination, and which formed the basis of the permanent impairment rating. But notably, the division

distinguished that situation from an unpublished case in which the ATP's report did not reference any prepared worksheets. *See id.* (noting that the FAL in *Aguilar v. Colo. Flatwork, Inc.*, W.C. No. 4-741-897, 2009 WL 2441790 (Colo. I.C.A.O. Aug. 3, 2009) contained "all available documents" and "notified the claimant of all the factual predicates for the admitted liability").

B. Analysis

¶ 19 We begin by noting that Rosten does not contend that the FAL was invalid because it did not include required attachments. And although the FAL did not contain worksheets that are generally used to arrive at an impairment rating, it is undisputed that such worksheets were not prepared in this case. Thus, the failure to include worksheets that did not exist at the time the FAL was prepared did not render the FAL invalid. *Cf. id.*

¶ 20 Rather, Rosten asks us to hold as a matter of law that a FAL is invalid if the PPI was completed based solely on a record review, without an in-person exam. This challenge to the validity of the FAL is premised on Rosten's assertion that the Act, the WCRP, and the AMA Guides require that a physician conduct an in-person examination before completing a PPI assessment.

¶ 21 Rosten conceded at oral argument that the Act does not expressly require in-person examinations for PPI assessments. We agree that the concession is consistent with the Act. Nevertheless, Rosten argues that we should infer such a requirement because a physician who determines a PPI rating must use the instructions and forms contained in the AMA Guides. *See* Dep't of Lab. & Emp. Rule 12-4(B), 7 Code Colo. Regs. 1101-3. Those instructions and forms include various tests and assessments for scoring an impairment rating that ordinarily should be done during an in-person exam. Thus, Rosten argues, any PPI assessment necessarily must be done through an in-person exam. We decline to read such a requirement into the Act by implication.

¶ 22 While we agree with the ALJ and the Panel that a record review is not the preferred way to conduct a PPI assessment, neither the Act nor the WCRP imposes the requirement of an in-person examination on the physician doing the impairment rating. In reaching this conclusion, we do not express any opinion on the best practices for conducting PPI rating determinations or the

persuasiveness of Dr. Centi's report.[2] The relative persuasiveness of Dr. Centi's report would be appropriately addressed through the DIME process. But that did not occur here because Rosten's DIME application was tardy.

¶ 23 Moreover, while section 8-42-107(8)(c) instructs the ATP to determine the medical impairment rating using the AMA Guides, that directive only applies *if* the claimant is determined to have a permanent medical impairment. § 8-42-107(8)(c) ("When the injured employee's date of [MMI] has been determined . . . and there is a determination that permanent medical impairment has resulted from the injury, the [ATP] shall determine a medical impairment rating as a percentage of the whole person based on the revised third edition of the [AMA Guides]."); *see also* § 8-42-107(8)(b.5)(II) (providing that for an in-state claimant, if the ATP determines that the claimant has suffered a permanent impairment, a level II accredited physician shall determine a medical impairment rating

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[2] We note that Dr. Centi admitted that he wrote the report in a manner that could be construed to imply that he did an in-person exam of Rosten when he had not. While Dr. Centi denied any intention to deceive the reader, we disapprove of writing a report in a manner that creates such a misimpression.

based on the AMA Guides). Here, Dr. Centi determined that Rosten did not have any permanent physical impairment, so the statutory mandate to follow the AMA Guides for determining the percentage of impairment did not apply.

¶ 24 Rosten nevertheless argues that because section 8-42-107(8)(b.5)(I) expressly allows a permanent impairment rating for an out-of-state claimant to be based solely on a record review, the Act must necessarily require in-person impairment ratings for all in-state claimants. We are not persuaded that the statute mandates such a result.

¶ 25 The framework of the Act and the distinctions between in-state and out-of-state claimants inform our decision. While an ATP can determine whether a claimant has reached MMI, if a claimant has suffered a permanent impairment, only a level II accredited physician can determine the percentage of impairment for purposes of assigning a PPI rating. § 8-42-107(8)(b)(I), (8)(c); *see also* § 8-42-101(3.5), (3.6), C.R.S. 2022 (setting forth level II accreditation requirements). However, because the level II accreditation is Colorado-specific, this placed a substantial burden on injured employees who moved out of state while their claims were pending.

See § 8-42-101(3.5), (3.6). *See generally* Hearings on H.B. 96-1040 before the H. Bus. Affs. & Lab. Comm., 60th Gen. Assemb., 2d Reg. Sess. (Jan. 16, 1996) (discussing the fact that level II accredited physicians are unique to Colorado's Act).

¶ 26 Recognizing that, under the pre-1996 version of the Act, claimants who asserted a permanent impairment and subsequently moved out of state had to travel to Colorado to receive a PPI rating, the legislature enacted section 8-42-107(8)(b.5) to provide a mechanism for out-of-state claimants to have the option of receiving a permanent impairment rating by their out-of-state ATP without having to return to Colorado. *See* § 8-42-107(8)(b.5)(I)(A), (C); *see also* Hearings on H.B. 96-1040 before the H. Bus. Affs. & Lab. Comm., 60th Gen. Assemb., 2d Reg. Sess. (Jan. 16, 1996) (discussing how, before the enactment of section 8-42-107(8)(b.5), once an out-of-state claimant reached MMI, they had to travel back to Colorado to receive a PPI rating by a level II accredited physician). And once the out-of-state ATP performs the impairment rating, the records supporting that rating are transmitted to the insurer, which provides them to a level II accredited physician, who, based on a

review of those records, determines the claimant's PPI rating. § 8-42-107(8)(b.5)(I)(C).

¶ 27 Thus, while section 8-42-107(8)(b.5)(I) establishes a mechanism for an out-of-state claimant to have a PPI rating done by a level II accredited physician based on a record review, it appears that the impetus for that mechanism was to avoid requiring the claimant to travel back to Colorado for a level II accredited physician to do the impairment rating.

¶ 28 We recognize that section 8-42-107(8)(b.5) appears to set up a disparity or inequity between out-of-state and in-state claimants, with the former having the option to receive an impairment rating with an in-person examination and the latter having no such option. However, any disparity or inequity does not allow us to infer a requirement for in-person impairment ratings for in-state claimants. Such a policy decision rests with the General Assembly.

¶ 29 Accordingly, we reject Rosten's assertion that the statutory exception allowing for record reviews for out-of-state claimants reflects a legislative intention to require in-person exams for in-state claimants. Consequently, we agree with the ALJ and the Panel that, because the applicable authorities do not mandate that

a physician perform an in-person examination to determine a PPI rating when the physician determines the claimant has no impairment, the FAL entered in this case based on Dr. Centi's report was valid.

¶ 30 To the extent Rosten suggests that Dr. Centi's report "was so flawed in other ways" that it was invalid as a matter of law, and therefore rendered the FAL invalid, he cites no authority for this proposition. Moreover, Rosten does not articulate any workable standard by which an ALJ, the Panel, or a court could assess whether a particular report was so flawed that it must be deemed invalid. While we don't foreclose the possibility that a medical report upon which a FAL is predicated might contain such facially egregious problems that it could be deemed invalid as a matter of law (for example, the reviewing doctor was not licensed to practice medicine or the report was fabricated), such facts do not exist here. Rather, Rosten has simply argued that Dr. Centi's report is grossly deficient. But the Act contemplates that the dangers associated with a defective report can be remediated through the timely application for a DIME, not by declaring a defective report invalid as a matter of law.

IV. Challenge to the MMI and PPI Determinations

¶ 31 Related to his primary argument, Rosten also contends that because Dr. Centi's report and the FAL were invalid, the thirty-day time limit for pursuing a DIME had yet to be triggered because only the mailing of a valid FAL starts the clock for seeking a DIME. However, as discussed above, the FAL was valid. Thus, contrary to Rosten's contention, the Panel and ALJ properly concluded that he was foreclosed from challenging the MMI and PPI determinations because he did not file his DIME application within thirty days of the FAL's filing.

¶ 32 If a claimant does not contest the FAL in writing within thirty days of the FAL's mailing, the case automatically closes. § 8-43-203(2)(b)(II)(A); *see also Leewaye*, 178 P.3d at 1256 (noting that the statute provides for the automatic closure of issues raised in an uncontested FAL to promote, encourage, and ensure prompt payment of compensation to an injured worker without a formal administrative determination in cases where there is no legitimate controversy). Thus, a party may not litigate the issues of MMI and PPI unless the party disputing the determinations first timely requested and obtained a DIME. *See Town of Ignacio v. Indus.*

Claim Appeals Off., 70 P.3d 513, 515 (Colo. App. 2002) ("A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination.").

¶ 33 It is undisputed that Rosten filed his DIME application more than thirty days after the respondents mailed the FAL. We need not reach the issue of whether Rosten was required to file a timely DIME application if the FAL was invalid in light of our previous conclusion that the FAL was valid. Rosten's failure to file a timely DIME application precluded him from disputing both the MMI determination and the PPI rating. Consequently, the ALJ did not err by concluding that his substantive challenges to Dr. Centi's report were not properly subject to review.

V. No Error by Excluding Impeachment Testimony

¶ 34 Finally, Rosten contends that the ALJ erred by prohibiting him from presenting impeachment testimony from a doctor who would have challenged the accuracy of Dr. Centi's MMI determination and PPI rating. We disagree.

¶ 35 An ALJ has wide discretion to control the timing and conduct of administrative hearings, and we may not interfere with the ALJ's exclusion of evidence in the absence of an abuse of discretion. § 8-43-207, C.R.S. 2022; *Youngs v. Indus. Claim Appeals Off.*, 2013 COA 54, ¶ 40. An ALJ abuses their discretion when the ruling exceeds the bounds of reason such that it is not supported by the record or the applicable law. *Youngs*, ¶ 40.

¶ 36 Here, the sole issue before the ALJ was whether Rosten demonstrated that the respondents' FAL was invalid because it relied on Dr. Centi's report. As the Panel concluded, testimony from another doctor who may have contradicted Dr. Centi's medical report and PPI determination was not pertinent to the issue before the ALJ because such arguments must be resolved through a timely DIME application, and thus were irrelevant to determining the validity of the FAL. *See* § 8-42-107(8)(c). Thus, the Panel correctly determined that it had no basis to disturb the ALJ's order regarding that witness's testimony.

VI. Disposition

¶ 37 The order is affirmed.

JUDGE HARRIS and JUDGE LIPINSKY concur.