SUMMARY
April 11, 2024

2024COA36

No. 23CA1605, *Town of Kiowa v. Industrial Claim Appeals Office* — Labor and Industry — Workers' Compensation — Conditions of Recovery — Definitive Time, Place, and Cause of Injury

In this workers' compensation proceeding, a division of the court of appeals addresses and clarifies the proposition set forth in *Prouse v. Industrial Commission*, 69 Colo. 382, 194 P. 625 (1920), that a claimant must establish a definitive time, place, and cause of injury. Relying on *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 100, 108 P.2d 880, 883 (1940) ("A time reasonably definite is all that is required."), the Industrial Claim Appeals Office Panel concluded that the claimant sufficiently established a time reasonably definite through his testimony and that of his wife and his surgeon. The division concludes that substantial evidence

supported the Panel's conclusion that the employee established a definitive time, place, and cause of his injury.

COLORADO COURT OF APPEALS **2024COA36**

Court of Appeals No. 23CA1605
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-162-468

Town of Kiowa and Colorado Intergovernmental Risk Sharing Agency,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Kent Berends,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE MOULTRIE
Fox and Schutz, JJ., concur

Announced April 11, 2024

Treece Alfrey Musat, P.C., James B. Fairbanks, Chayla A. Witherspoon, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

The Babcock Law Firm, LLC, Stephanie M. Tucker, Denver, Colorado, for Respondent Kent Berends

¶ 1 In this workers' compensation proceeding, the Town of Kiowa (Kiowa) and its insurer, the Colorado Intergovernmental Risk Sharing Agency, seek review of the final order issued by the Industrial Claim Appeals Office (the Panel) awarding benefits to Kent Berends. We affirm.

I. Background

¶ 2 Kiowa employed Berends as a public works manager responsible for maintaining heavy machinery. On April 30, 2020, Berends was repairing a chain on a street sweeper (the street sweeper incident). He was on his side under the machine, having just fastened the chain. He then rolled over and started to stand up. A car lift was located about one foot away from the street sweeper. As Berends got up, he struck his right temple, just above his right ear, on the metal bar of the car lift. He immediately felt pain in his temple, felt "goofy," and "just sat there about a minute or two." He felt "dazed" and "wobbly" and noticed pain in his right temple as he attempted to complete the workday.

¶ 3 Berends did not immediately report the street sweeper incident to anyone at work. According to Berends, things were getting "fuzzy pretty fast" and he cannot remember whether he had any

subsequent work conversations about the accident. In the following days, both he and his wife, Karen Berends, noticed that he had difficulty remembering things, was shaky, and moved more slowly. These symptoms alarmed Mrs. Berends, and she encouraged him to go to the doctor. But he did not.

¶ 4 On May 26, 2020, Berends went to work, but Mrs. Berends called their family doctor because she noticed Berends was dragging his foot that morning. The doctor told her to take him to the emergency room. Mrs. Berends called the Town Manager, Maria Morales, who said that she had already sent Berends home. Once Berends arrived at home, Mrs. Berends took him to the Parker Adventist Hospital emergency room, where a CT scan revealed a large collection of fluid compressing the right side of his brain. Dr. Michael Rauzzino performed an emergency craniotomy for evacuation of a subdural hematoma (SDH). Berends was discharged three days later but then had a seizure. A CT scan revealed a recurrence of the SDH, and Dr. Rauzzino performed another craniotomy on June 2, 2020. Berends continues to have cognitive difficulties and has been unable to return to work.

¶ 5 Kiowa issued a first report of injury (FROI), completed by Lauren Connelly, Kiowa's Administrative Assistant. The FROI showed April 30, 2020, as both the date of injury and the date the injury was reported. Berends, through counsel, filed a worker's compensation claim, which also showed the date of injury as April 30, 2020. Kiowa then issued a document entitled "Employer's First Report of Injury," which was not completed using a Division of Workers' Compensation standard form (non-standard form). This document, like the FROI, showed the date of injury and the date of notification as April 30, 2020. Kiowa filed a notice of contest, denying that the injuries were work related. Berends requested a hearing before an administrative law judge (ALJ).

¶ 6 At the hearing, Mr. and Mrs. Berends were the only witnesses, and they were sequestered. The parties agreed to the submission of post-hearing depositions of Dr. Rauzzino and a doctor designated by Kiowa, Dr. Bruce Morgenstern. The ALJ reviewed over 2,000 pages of evidence, mainly consisting of medical records. On December 7, 2022, the ALJ issued findings of fact and conclusions of law (findings) concluding that Berends had suffered a work-related injury to his head on April 30, 2020, in the course and

scope of his employment. The ALJ ordered Kiowa to pay all authorized, reasonably necessary, and related medical benefits, and temporary total disability benefits beginning May 27, 2020, until terminated by law.

¶ 7 Kiowa petitioned for review, and both parties submitted briefs. On April 5, 2023, the ALJ issued supplemental findings of fact and conclusions of law (supplemental findings) pursuant to section 8-43-301(5), C.R.S. 2023. The supplemental findings expanded on certain areas of discussion but did not change the result of the findings. Kiowa then appealed to the Panel, which rejected Kiowa's arguments and affirmed the ALJ's order. Kiowa now appeals the Panel's order.

II. Analysis

A. Issues on Appeal

¶ 8 On appeal, Kiowa raises two primary issues: (1) whether the Panel correctly interpreted and applied the standards for establishing a compensable injury and (2) whether the Panel's order violated Kiowa's due process rights.

¶ 9 In its opening brief, Kiowa raises multiple sub-issues:

- "The course and scope of" employment element requires the claimant to establish a definitive time, place, and cause of a compensable injury.
- Berends was involved in multiple accidents "occurring in Springtime." These non-work-related incidents, and the safety equipment Berends wore at the time he struck the car lift, precluded a finding that substantial evidence supported the "place and cause" requirements.
- Impermissible evidence was admitted because (1) Dr. Rauzzino should have been allowed to testify only as to the medical records he authored; (2) Berends's testimony was "mischaracterized" by Dr. Rauzzino; and (3) Dr. Rauzzino's testimony was speculative and therefore inadmissible under CRE 702.
- The medical benefits were not authorized because Berends's right to select an authorized treating provider had not transferred to him and he had not chosen a provider from Kiowa's list.
- Kiowa's due process rights were violated by the Panel's "pro forma" review and "transfer of the burden" to Kiowa.

- The ALJ did not adequately consider overwhelming contrary evidence, violating Kiowa's due process rights.
- The "procedural process" in making an initial determination in this case proved that Kiowa's rights were violated.

B. Standard of Review

¶ 10 Under the Workers' Compensation Act of Colorado (the Act), an ALJ must determine whether a claim is established by a preponderance of the evidence. § 8-43-201(1), C.R.S. 2023. A "preponderance of the evidence" is that which leads the trier of fact, after considering all the evidence, to find that the existence of a contested fact is more probable than its nonexistence. *Town of Castle Rock v. Indus. Claim Appeals Off.*, 2013 COA 109, ¶ 21, *aff'd*, 2016 CO 26.

¶ 11 The Panel reviews the ALJ's decision under section 8-43-301(8), and this court reviews the Panel's decision under section 8-43-308, C.R.S. 2023.[1] Those sections provide that neither we nor the Panel may alter the ALJ's findings of fact if they are

[1] These sections are almost identical, except that the Panel may correct or remand an order in addition to setting aside or affirming the order.

supported by substantial evidence. Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, evidence that is probative, credible, and competent, such that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory testimony or inference, is considered substantial evidence. *City of Littleton v. Indus. Claim Appeals Off.*, 2016 CO 25, ¶ 52; *City of Loveland Police Dep't v. Indus. Claim Appeals Off.*, 141 P.3d 943, 950 (Colo. App. 2006).

¶ 12 Our standard of review is statutorily very narrow:

> Upon hearing the action, the court of appeals may affirm or set aside such order, but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

§ 8-43-308.

C. Law Governing Compensability

¶ 13 Under the Act, an employee is entitled to compensation for an "injury or death . . . proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." § 8-41-301(1)(c), C.R.S. 2023. The "in the course of" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando*, 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs in the course of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The term "arising out of" refers to the origin or cause of an injury. *Id.* There must be a causal connection between the injury and the work conditions for the injury to arise out of employment. *Id.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Id.*

¶ 14 Treatment is compensable when it is provided by an "authorized treating physician," and employers have the first right to identify a list of treating physicians from which an employee must choose a specific provider. § 8-43-404(5)(a)(I)(A), C.R.S. 2023; *Bunch v. Indus. Claim Appeals Off.*, 148 P.3d 381, 383 (Colo. App. 2006). However, in an emergency situation, an employee need not give notice to the employer or await the employer's list of providers before seeking medical attention. *Sims v. Indus. Claim Appeals Off.*, 797 P.2d 777, 781 (Colo. App. 1990). An employer is deemed to have notice of an injury when it has some knowledge of facts connecting the injury with the employment that would indicate to a "reasonably conscientious" manager that there might be potential for a compensation claim. *Bunch*, 148 P.3d at 383. If the employer does not timely designate treatment provider options once it has notice of the injury, the right of selection passes to the employee. *Id.*; *Loofbourrow v. Indus. Claims Appeals Off.*, 321 P.3d 548, 554 (Colo. App. 2011), *aff'd sub nom. Harman-Bergstedt, Inc. v. Loofbourrow*, 2014 CO 5.

D. Discussion

1. Proceedings Below

¶ 15 During the hearing, Berends described the street sweeper incident in detail and testified that, to the best of his recollection and estimation, it occurred on April 30. He could not recall much of his visit to the emergency room on May 26. He was cross-examined about three incidents that appeared in the intake records from that emergency room visit:

- an incident that occurred at work approximately three months before the emergency room visit, where he hit his head on the mirror of a motor grader (the grader incident);
- a second incident that occurred at home a week before the emergency room visit, where he scraped his forehead on the door of a shed (the shed incident); and
- a third incident that occurred at home the day before the emergency room visit, where he fell out of his boat while he was cleaning it (the boat incident).

¶ 16 Berends testified that he could not recall having any discussions about these incidents while at the emergency room. He

noted that his wife mostly communicated with the medical providers. He did remember the incidents themselves, however, and testified about them.

¶ 17 Regarding the shed incident, he recalled that he scraped his head on the shed, but it was just a scrape at the hairline, and he only remembered it because the shed had been there for twenty years and he usually ducked to enter it. He thought it was "weird" at the time that he did not duck, but he testified that it "was hardly an injury" and he did not have any bleeding or pain. Regarding the boat incident, he testified that he did fall over due to weakness, but he had a firm grip on the sides of the boat the whole time, and only rolled out of the boat. He could not remember if he hit his head. When asked about the grader incident, he testified that he "hit his head for sure" on the grader's mirror, but at the time it did not "seem significant" to him and he did not experience any immediate problems.

¶ 18 Mrs. Berends testified that before April 30, 2020, Berends had no memory issues or problems with bodily shaking. She became concerned during the first week of May when he had difficulty with simple things like opening a bag of chips. He could not find light

switches, was very weak, and was moving in slow motion. She became increasingly alarmed and, after witnessing his leg dragging on May 26, insisted that he go to the emergency room.

¶ 19 She testified that both she and her husband communicated with medical personnel at the emergency room, and that the intake information seemed inaccurate. She testified that she did not observe the shed incident but did witness the boat incident. She saw her husband "roll out of the boat" and land on his feet. She testified that he did not hit his head. She was aware of the grader incident, possibly because she was told about it while she was at work (Mrs. Berends worked part-time for Kiowa in the town hall building).

¶ 20 As to the street sweeper incident, Mrs. Berends testified that she was not initially aware that it had happened. She acknowledged that Berends had not told her about it right after it occurred and said that, though he participated in the communications with the medical providers, she could not recall whether he told them about it during the intake. Rather, she and her husband were trying to connect the symptoms he started

having after April 30 to injuries he might have sustained between that date and May 26.

¶ 21 Mrs. Berends testified that, on May 26, she spoke with both Morales and Connelly to advise them that Berends was undergoing surgery. When asked where she first heard April 30, 2020, as the date of the street sweeper incident, Mrs. Berends testified, "[T]hat is just what we tried to figure out, based on the rotating maintenance schedule." She explained that April 30, 2020, was probably a very accurate date. She noted that the town offices were open only four days a week, and that maintenance ran on a schedule. She said that April 30, 2020, was a Thursday, and the following week Berends would probably have started the street sweeping.

¶ 22 Mrs. Berends also testified that she began taking notes on her phone in early May 2020 when she started noticing things like her husband's memory loss, physical weakness, and slow-motion movement. Then, when they were in the hospital on May 26, 2020, she also started creating a timeline.

¶ 23 In his deposition, Dr. Rauzzino testified that over ninety percent of SDHs are caused by trauma to the head. He was called in on May 26 after the initial medical intake history was completed.

After the initial SDH was cleared by surgery, Dr. Rauzzino learned from Berends that he had hit his head at work in April. Dr. Rauzzino described the progression of a typical SDH as "people hit their head, they don't realize how hard they hit it, they shake it off, they just go about things, and they didn't realize they started a process which is going to lead . . . to potential death, which is what happens if these things aren't treated." Dr. Rauzzino testified that the type of hit Berends said he experienced in the street sweeper incident was more than sufficient to have caused the SDH, even if Berends was wearing a helmet.

¶ 24 Dr. Rauzzino said that, of the incidents Berends reported, the boat incident had no probability of causing the SDH because not enough time had passed between the incident and the development of the SDH. He testified that the shed incident could not have caused it either because the type of hematoma noted was older than a week. Dr. Rauzzino noted that it takes time for an SDH to grow, and individuals do not always show symptoms right away because it takes time for a blood clot to form to a point where the brain can no longer tolerate the change. He also testified that it would have

been typical for Berends not to have experienced symptoms of an SDH right away.

¶ 25 Dr. Morgenstern, a neurologist, performed a records review and completed an independent medical report in April 2021. He did not examine Berends or otherwise contact Mr. or Mrs. Berends. In his deposition, he opined that some SDHs are caused by falls, but some are also due to brain shrinkage, or atrophy, which can be caused by alcohol use. He said that falls can be caused by intoxication, and most SDHs are caused by trauma. He opined that, since the FROI said that Berends was wearing a helmet during the street sweeper incident, the hit to the car lift was unlikely to have caused the SDH. He concluded, after reviewing the medical records, that the boat incident would have been too recent (one day before the emergency room visit) to cause the SDH. Regarding the shed incident, Dr. Morgenstern said, "But it is possible that the incident the week before, one week out, in which he struck his — I believe his right parietal — which he struck his head on the shed could potentially be a cause . . . ." Regarding the grader incident, Dr. Morgenstern testified as follows:

> Now, when he is seen — what's interesting is when he is seen in the emergency department on May 26th, he describes again striking his head and not thinking anything of it. And that's described happening three months before, which is really on the way outside limit, not impossible, but in the outer limit of how long you could have a subdural hematoma before it becomes symptomatic. Not impossible, but outer limits, three months.

2. ALJ's Findings

¶ 26 After reviewing all the testimony and over 2,000 pages of evidence, the ALJ found Dr. Rauzzino's opinions, as a treating neurosurgeon, to be more credible and persuasive than those of Dr. Morgenstern. She noted that Dr. Rauzzino had found no brain atrophy or shrinkage of the brain, which was one of Dr. Morganstern's explanations for the SDH. She credited Dr. Rauzzino's testimony that it takes time for an SDH to grow, and that surgery revealed "chronic membranes" that would not have appeared after only a week, thus discounting the probability of the shed incident as a cause. She found that Dr. Rauzzino credibly opined that whether the work accident occurred one month or three months before Berends's May 26 emergency room visit, the CT scan indicated that the SDH was more than two weeks old but could

have been up to three months old due to the isodense blood (degradation of the blood).

¶ 27 While the ALJ acknowledged Dr. Morgenstern's opinion that people who abuse alcohol tend to fall, she noted that there was no history in Berends's medical records indicating that he had fallen while intoxicated. The medical records do not contain any evidence of Berends experiencing alcohol withdrawal symptoms. Rather, there were indications that Berends, while being discharged from the hospital, reported drinking daily, and hospital personnel advised him not to drink post-surgery. He and his wife both testified that he had followed those instructions and had not had anything to drink after surgery. The ALJ concluded that the "head trauma was probably caused by the work injury on April 30, 2020."

¶ 28 The ALJ found that Berends persuasively testified that the street sweeper accident occurred on or around April 30, because it was springtime and he needed to do maintenance to use the street sweeper. Mrs. Berends corroborated this date when she reviewed maintenance schedules and testified that April 30 was probably a very accurate date. The ALJ found persuasive that a Kiowa employee noted the date of injury and notification as April 30 on the

FROI, "and there was no credible evidence to contradict this." After considering all the evidence, the ALJ found the "date of the injury is determined to be April 30, 2020." The ALJ also concluded that Kiowa had notice of the injury as of April 30, 2020.

¶ 29 Finally, the ALJ concluded that, despite having notice of the injury, Kiowa failed to provide Berends with a list of medical providers in a timely manner. By the time Kiowa sent the designated list of medical providers (DLP) on February 11, 2021, Berends had already selected his provider, Franktown Family Medicine, and physician assistant Reiner Kremer as his authorized treating physician. The ALJ found that any providers within the chain of referral were thus also authorized. Physician Assistant Kremer referred Berends to Dr. Rauzzino and to other providers during the course of treatment.

3. The Panel Order

¶ 30 The Panel affirmed, noting that the ALJ had made lengthy and detailed factual findings, and that causation is generally a question of fact for the ALJ. The Panel held that, while Kiowa contended that the time of the accident was too indefinite to satisfy the law, the evidence before the ALJ was sufficiently definite, citing *Gates v.*

Central City Opera House Ass'n, 107 Colo. 93, 100, 108 P.2d 880, 883 (1940) ("A time reasonably definite is all that is required."). Specifically, the Panel held that

> to the extent [Kiowa] highlights inconsistencies in . . . testimony regarding the exact date of the injury, inconsistencies and contradictory evidence is not uncommon in workers' compensation claims. It is the ALJ's sole prerogative as the fact finder to resolve any inconsistencies and conflicts in the evidence. The ALJ's findings and conclusions are reasonable inferences drawn from the record and we may not disturb the order as a result. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 191 (Colo. App. 2002). Regardless, as explained above, inconsistencies in the evidence concerning the exact date on which the injury occurred do not render the claimant's testimony concerning the occurrence of the injury incredible as a matter of law. *See Halliburton Servs. v. Miller*, 720 P.2d 571, 578 (Colo. 1986).

¶ 31 The Panel also noted that the ALJ properly credited Dr. Rauzzino's opinions over those of Dr. Morgenstern because Dr. Rauzzino performed the surgeries and viewed firsthand the condition of the SDH and the surrounding brain tissue.

¶ 32 The Panel observed that the ALJ also found that Berends credibly testified when he described the street sweeper incident.

Regarding Kiowa's argument concerning whether Berends was wearing a helmet, the Panel stated as follows:

> To the extent [Kiowa] cites to the [FROI], which states that [Berends] was wearing a helmet when the incident took place and argue[s] that this means there could be no "hit to the head," the ALJ rejected this argument, with record support. In this regard, the ALJ credited Dr. Rauzzino's testimony that even if [Berends] was wearing a helmet at the time he struck his head, this would not change his opinion with regard to causation.

¶ 33 The Panel found that the ALJ credited the testimony from Berends and his wife that he started showing the effects and symptoms of the SDH shortly after the street sweeper incident, including changes in speech, slowness of reactions or actions, memory loss, and loss of function in his upper extremities. The Panel also noted that "even the Town Administrator noticed that something was not right as she was the one to send [Berends] home the day he was admitted to the emergency room at Parker Adventist on May 26, 2020." Therefore, the Panel affirmed the ALJ's conclusions that Berends showed that the proximate cause of the injuries to his head and brain was the work-related accident on

April 30, 2020, and that his injuries arose from such accident at work in the course and scope of his employment.

4. Substantial Evidence Supports the ALJ's Findings

¶ 34 Kiowa disagrees with the ALJ's findings as to causation, arguing that the record did not establish a definitive time, place, and cause of the SDH. Kiowa specifically posits that there were "multiple accidents occurring in Springtime" and that "safety equipment" precludes a finding that substantial evidence supports the "place and cause" requirements. Additionally, Kiowa asserts that, because the ALJ's determination that the date of Berends's injury was based in part on testimony insufficient to pinpoint April 30, 2020, as the exact date of injury, the ALJ's determination was not supported by substantial evidence.

¶ 35 This argument is an attack on the ALJ's credibility determinations and evaluation of the expert testimony. We, like the Panel, defer to the ALJ's credibility determinations and resolution of conflicts in the evidence, including the medical evidence. *See H & H Warehouse v. Vicory*, 805 P.2d 1167, 1170 (Colo. App. 1990) (the ALJ has great discretion in determining the facts and deciding medical issues). Circumstantial evidence that the ALJ determined

to be credible can constitute "substantial evidence." *See Arenas v. Indus. Claim Appeals Off.*, 8 P.3d 558, 561 (Colo. App. 2000) (plausible inferences from circumstantial evidence will not be disturbed); *Monolith Portland Cement v. Burak*, 772 P.2d 688, 689 (Colo. App. 1989) (affirming ALJ reliance on circumstantial testimony to support jurisdictional findings in death benefits action). As the Panel noted, the ALJ credited the treating physician's testimony that the most likely cause of the SDH was the street sweeper accident, and not the other "multiple accidents during Springtime," as argued by Kiowa. We will not disturb that credibility finding.

¶ 36 Further, the issue of causation is generally one of fact for determination by the ALJ. *Faulkner v. Indus. Claim Appeals Off.*, 12 P.3d 844, 846 (Colo. App. 2000); *see also City of Brighton v. Rodriguez*, 2014 CO 7, ¶ 11 (whether injuries arose out of employment is a question of fact for resolution by the ALJ). Like the Panel, we may not set aside an ALJ's findings on causation if they are supported by substantial evidence. *See City of Brighton*, ¶ 11. That is the case here.

¶ 37 Kiowa argues that the substantial evidence standard lacks clarity because there is no clear precedent defining the point at which evidence "cumulates" to become overwhelming evidence to rebut a determination that an ALJ's findings and conclusions are supported by substantial evidence. We disagree.

¶ 38 Consideration of whether a body of evidence constitutes "substantial evidence" to support a conclusion is not simply a quantitative exercise. *Knipe v. Heckler*, 755 F.2d 141, 145 (10th Cir. 1985). Rather, as noted, it requires consideration of whether the evidence presented is "probative, credible, and competent, such that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory testimony or inference." *City of Littleton*, ¶ 52. And it must be more than a scintilla of evidence. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). Divisions of this court have held that an ALJ's evidentiary determinations will only be set aside if "the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it." *Arenas*, 8 P.3d at 561 (citing *Halliburton Servs.*, 720 P.2d 571); *City of Boulder Fire Dep't v. Indus. Claim Appeals Off.*, 2018 COA 93, ¶ 35; *Hutchison v. Indus.*

Claim Appeals Off., 2017 COA 79, ¶ 30. We see no reason to depart from this reasoning.

5. The ALJ and Panel Did Not Err as a Matter of Law

¶ 39 To the extent Kiowa argues that the ALJ or the Panel erred as a matter of law, we disagree. The Panel relied on *Gates*, in which the supreme court held that a workers' compensation claimant need only prove a reasonably definite time when an injury occurred. *Gates*, 107 Colo. at 100, 108 P.2d at 883. This is consistent with the general rule in workers' compensation cases. *See* 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 50.02 (2023) (identification of the time of accident within a matter of a few days is sufficiently precise).

¶ 40 Kiowa cites *Prouse v. Industrial Commission*, 69 Colo. 382, 194 P. 625 (1920), for the proposition that a definite time, place, and cause must be established. Kiowa recognizes that this definiteness requirement has been tempered over the years, but argues that it still requires the time, place, and cause to be established through testimony or other evidence. That is what happened here. The time, place, and cause were traced through the testimony of Berends, his wife, and his surgeon. This is consistent with another

case Kiowa cited, *Uniroyal K-Mart Tire Serv. No. 235 v. Babbitt*, 481 P.2d 120 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)), in which a division of this court stated:

> Petitioners first claim that the Commission exceeded its authority in awarding compensation to claimant on the ground that Babbitt failed to sustain his burden of proof in that he failed to establish the particular time, place, or cause of his alleged injury as required by the Workmen's Compensation Act and the cases construing it, citing, among other authorities, *Prouse v. Industrial Commission*, 69 Colo. 382, 194 P. 625 . . . .
>
> However, in *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 [(1965)], the Supreme Court determined that although an injury had to be traceable to a definite cause, time, and place, "(t)his was done in the instant case by the testimony as to the causal connection between the type of work, the date the pain began, and the place of employment."
>
> Measured by this criterion, the testimony adduced in the hearing before the referee was sufficient to make a logical inference that the extensive lifting done by Babbitt while in the course of his employment on November 18, 1968, within a reasonable probability, was the proximate cause of his disability and was adequately certain as to time and place.

Id. at 121-22.

¶ 41 Given the foregoing case law, and the fact that the evidence credited by the ALJ was not overwhelmingly rebutted by "hard, certain evidence" to the contrary, *Arenas*, 8 P.3d at 561, we cannot say that the ALJ or the Panel erred as a matter of law by concluding that Berends established a reasonably definite time and place of the accident.

6. Kiowa's Evidentiary and Procedural Arguments Are Without Merit

¶ 42 Kiowa makes several arguments labeled as "impermissible evidentiary issues" with respect to Dr. Rauzzino's testimony, citing C.R.C.P. 26(a)(2). But as Berends points out, that rule regarding expert disclosures specifically states that it does not apply to expedited proceedings such as this. Further, the workers' compensation system does not require expert disclosures or distinguish between retained and non-retained experts. *See* § 8-43-207, C.R.S. 2023 (the ALJ may permit parties to engage in discovery and may rule on discovery matters); *A. Carbone & Co. v. MacGregor*, 113 Colo. 241, 246, 155 P.2d 994, 997 (1945) (the controlling question was one that must be determined from expert

medical testimony, and such testimony may be considered as substantial, credible evidence).

¶ 43 Kiowa did not object to Dr. Rauzzino being designated as an expert, and the parties specifically agreed to allow both Dr. Rauzzino and Dr. Morgenstern to testify via post-hearing depositions. While Kiowa contends that Dr. Rauzzino's testimony was "speculative," and therefore inadmissible under CRE 702, we fail to see how the testimony of Berends's treating neurosurgeon could be speculative, particularly when compared to Dr. Morgenstern's testimony, which was solely premised on a record review, that other incidents "could potentially be a cause" of the SDH. Accordingly, we reject Kiowa's evidentiary arguments.

7. Kiowa's Due Process Arguments Are Without Merit

¶ 44 Kiowa argues its due process rights were violated by (1) the Panel's "pro forma" review of the ALJ's decision and "transfer of the burden" to Kiowa; (2) the failure to consider "[o]verwhelming evidence" supporting Kiowa's position; and (3) the "procedural process" surrounding the ALJ's initial determination. To support these arguments, Kiowa repeatedly cites *Wecker*, 908 P.2d at 1188, for the proposition that "evidence is not substantial if it is

overwhelmed by other evidence or if it constitutes a mere conclusion."

¶ 45 In *Wecker*, a division of this court examined an argument that the Panel's statutory reviewing authority was constitutionally inadequate, and it concluded that argument rested on erroneous assumptions. *Id.* The division noted that the Panel had the authority to vacate grossly mistaken orders or orders supported by only a scintilla of evidence. *See id.* The division concluded that substantial evidence review requires a complete, substantive examination of the record and an explanation by the Panel of its decision. That is what occurred in this case. The Panel's order was fifteen pages long and contained a lengthy discussion of the ALJ's findings and conclusions of law. The Panel thoroughly explained its decision.

¶ 46 Additionally, there was no improper burden shifting. Under the Act, a claimant has the burden of proof to establish the occurrence of a compensable injury. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1184 (Colo. App. 1990). However, once a claimant has presented evidence sufficient to establish a prima facie case, the burden of going forward shifts to the employer and its insurer to

rebut the claimant's evidence or to establish that the claim lacks merit. *Id.*

¶ 47 The ALJ relied on substantial evidence from the only witnesses presented to conclude that Berends met his burden. Because there were no other witnesses, including any called by Kiowa, the ALJ relied on record evidence from Kiowa's own forms[2] to corroborate the witness testimony. The only witness to rebut any of the evidence or testimony was Dr. Morgenstern, who did not treat or examine Berends and erroneously concluded that the FROI was completed by Berends, instead of Kiowa's employee, Connelly. The ALJ properly allocated the burden between the parties, and there was no due process violation.

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[2] We acknowledge that Kiowa's filing of the FROI alone was insufficient to support a finding that Kiowa was liable for Berends's injury. *See Stadler v. Indus. Claim Appeals Off.*, 811 P.2d 447, 448 (Colo. App. 1991). However, considering the totality of evidence presented to the ALJ, we conclude there was substantial evidence supporting the ALJ's findings notwithstanding the ALJ's reliance on the FROI. *See State Comp. Ins. Fund v. City of Colorado Springs*, 43 Colo. App. 112, 115, 602 P.2d 881, 883–84 (1979) (affirming admission of employer's internally created document in action for recovery of workers' compensation benefits); *see also* § 8-43-210, C.R.S. 2023 (records of an employer are admissible as evidence).

8. Berends's Medical Care Was Authorized

¶ 48 Kiowa argues that Berends's medical care was not authorized, that the right to select an authorized treating provider was not transferred to Berends, and that he has yet to elect a provider from Kiowa's list of providers. According to Kiowa, therefore, Berends is not entitled to medical benefits. Kiowa reasons that because Berends's claim was not submitted until February 2021, it is not responsible for medical care before that time. We reject these arguments.

¶ 49 The ALJ found that Berends's emergency room treatment, subsequent hospitalizations, and emergency craniotomies constituted emergency care. The ALJ also found that Kiowa had knowledge of the claim on April 30, 2020 (based in part on its admissions in the non-standard form), and that Kiowa failed to appoint a physician or provide Berends with a DLP for more than eight months after his disability began on May 26, 2020. Thus, the right to select the treatment provider passed from Kiowa to Berends. The ALJ found that Kiowa was liable for care beginning on May 26, 2020, and because the record clearly supports a finding

that Kiowa had notice at least by that date and failed to provide the DLP until February 2021, we will not disturb that finding on review.

III. Disposition

¶ 50 The Panel's order is affirmed.

JUDGE FOX and JUDGE SCHUTZ concur.