

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-760-050-02

IN THE MATTER OF THE CLAIM OF

RICHARD WALLING,

Claimant,

v.

ASA ELECTRIC, INC.,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,  
Respondents.

**RECEIVED**

**DEC 11 2013**

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Cain (ALJ) dated July 3, 2013, that ordered the respondents to provide the claimant a weight loss program, (SlimGenics) and assessed penalties against the respondents for unreasonably denying SlimGenics in violation of Workers' Compensation Rule of Procedure (WCRP) 16-10(F). We affirm the ALJ's order.

A hearing was held on the issue of medical benefits, specifically SlimGenics, and a CPAP machine. The ALJ also addressed the issue of penalties against the respondents for unreasonably denying the request for prior authorization of SlimGenics in violation of WCRP 16-10(F). After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The 48 year old claimant sustained a compensable right knee injury on April 25, 2008, while working for the respondent employer as an electrician. At the time the claimant underwent arthroscopic knee surgery in May 2009, the claimant weighed over 300 pounds. The claimant went on to have three total knee arthroplasties (TKA) on the right knee, the last of which occurred in July 2011. The TKA surgeries failed for various reasons and the claimant's right knee pain is severe and continuing.

The claimant eventually began having pain in his left knee. The pain was determined to be the result of the "tricompartement arthritis" and "compensatory overuse" associated with the right knee injury. The respondents provided treatment for the claimant's left knee under the auspices of the claim for the right knee injury.

Treating physician, Dr. Erikson, evaluated the claimant and stated that the claimant met the criteria for a right knee fusion and that such a surgery could produce a stable leg that would lessen the load on the left knee to the point a TKA would no longer be necessary. Dr. Erikson expressed great concern about the outcome of a left TKA noting that a significant factor in the severity of the claimant's arthritis and failure of his joint replacements was his excessive weight. He recommended consultation with a bariatric surgeon and opined that the loss of 100 pounds would improve the claimant's situation "in a big way."

An independent medical examination was performed by Dr. Messenbaugh, who also recommended that the claimant undergo a right knee fusion, stating that if the fusion failed, the claimant would most likely be looking forward to an above-knee amputation.

On May 21, 2012, the claimant was seen by orthopedic surgeon, Dr. Hugate who previously performed a TKA on the claimant's right knee in July 2011. Dr. Hugate stated that he was hesitant to replace the left knee because the claimant is young, he is heavy and he has a history of problems with the right knee. Dr. Hugate discussed the importance of weight loss and suggested the claimant see a weight loss surgeon and stated that if the claimant does not lose 75 to 100 pounds, or more, the knee "will need to be revised and he does not do well with surgeries."

Dr. Gellrick became the authorized treating physician on June 21, 2012. Dr. Gellrick noted that the claimant was not necessarily interested in bariatric surgery but was interested in talking to a specialist in this area. Dr. Gellrick stated that the claimant needed dietary counseling and that the claimant should undergo a bariatric consultation. Dr. Gellrick also recommended a sleep apnea study because the claimant had been on opioids for a long period of time and there was a history of sleep dysfunction. Dr. Gellrick submitted the requests for authorization for the sleep study and the bariatric evaluation to the respondents. The respondents received the requests and asked Dr. Ramaswamy to review whether the requests were reasonable and necessary as related to the industrial injury that occurred on April 25, 2008. According to Dr. Ramaswamy, the need for bariatric surgery was not related to the industrial injury because the claimant was a candidate for the surgery prior to his injury and the industrial injury did not cause his weight gain. Dr. Ramaswamy also stated that it would be reasonable and necessary to conduct a sleep study to diagnose potential obstructive versus central sleep apnea. The insurance adjuster, Kari Mellin, sent a letter to Dr. Gellrick based on Dr. Ramaswamy's letter denying the bariatric surgery evaluation as not related and approving the request for a sleep study. All of this was completed within the time constraints for denying a request for prior authorization under WCRP 16.

Dr. Gellrick then requested authorization for SlimGenics. According to Dr. Gellrick, SlimGenics would be beneficial because it would expedite maximum medical improvement (MMI) and “getting on with the need for surgery and taking the weight off the knees and avoid further delays in care.” The respondent insurer again submitted Dr. Gellrick’s request to Dr. Ramaswamy who stated that it did not appear that the referral to SlimGenics was related to the industrial injury because the work-related injury did not place the claimant in a more obese classification. The insurer sent a letter to Dr. Gellrick, denying the request for SlimGenics as unrelated. The denial was accomplished within the time constraints in WCRP 16.

In the meantime, the claimant underwent a sleep study which determined that he was suffering from severe obstructive sleep apnea. Dr. Gellrick prescribed a CPAP machine to treat the sleep apnea. Dr. Ramaswamy stated that the sleep apnea is not work related diagnosis and, therefore, would not be reasonable and necessary from a work-related standpoint. The insurer then denied the request for the CPAP machine.

On October 10, 2012, Dr. Gellrick noted that the claimant had been trying to diet on his own and that he weighed 266 on this date. However, Dr. Gellrick again recommended SlimGenics.

Dr. Ramaswamy testified by deposition and reiterated his opinion that the bariatric surgery would not be reasonable necessary and related to the injury because the claimant was obese prior to the injury and there did not appear to be any change in his weight after the injury and the claimant has recently lost a substantial amount of weight on his own. Dr. Ramaswamy further testified that under these circumstances, SlimGenics is not reasonable treatment for the claimant. Dr. Ramaswamy, however, acknowledged that the claimant “needs to lose a significant amount of weight to have a chance for a successful outcome.” He also stated that every time the claimant loses weight, “he’s going to become a better surgical candidate and both knees will be better.”

The ALJ credited the opinions of Dr. Erickson, Dr. Hugate, Dr. Messenbaugh and Dr. Gellrick and concluded that those opinions established that the claimant is a candidate for a right knee replacement fusion designed to relieve his injury related pain and restore function to the right knee and that claimant may also be a candidate for a left TKA. The ALJ was also persuaded by the opinions of these doctors that the claimant’s weight is a significant factor in his ongoing knee pain and arthritis and he needs to lose 100 pounds to improve his condition and to expedite MMI and speed up the decision on surgery. The ALJ also credited the claimant’s testimony that losing weight is difficult for him and that he does not believe he can lose the additional weight necessary to obtain surgery without participating in the SlimGenics program.

Based on these findings the ALJ concluded that the evidence persuasively established that the claimant cannot obtain optimal treatment for his injury related knee condition without treating his pre-existing obesity. The ALJ, therefore, held that the SlimGenics program is reasonable, necessary and related to the industrial injury.

The ALJ went on to deny the claimant's request for a CPAP machine. On this issue, the ALJ was persuaded by Dr. Ramaswamy's testimony that the claimant's sleep apnea was caused by an obstruction of the airway that correlates with his non-industrial obesity. The ALJ determined that the claimant failed to prove that the need for a CPAP machine was proximately caused by the effects of the industrial injury.

The ALJ also determined that the insurer violated WCRP 16-10(F) by denying Dr. Gellrick's request for prior authorization of the SlimGenics program. In this regard, the ALJ found that although the insurance adjuster complied with the time constraints of WCRP 16 for denying the request for prior authorization, the insurer did not act reasonably in denying the request. The ALJ determined that the insurance adjuster was aware of case law holding that medical treatment of a non-occupational condition is compensable if such treatment is reasonable and necessary to achieve optimum treatment of a compensable injury and that despite the adjuster's awareness of this legal premise, Dr. Ramaswamy's report did not address whether the SlimGenics program might be compensable as ancillary medical care designed to achieve optimum treatment of the compensable knee injuries. Moreover, the ALJ found that the record did not contain reliable or persuasive evidence that the insurer asked Dr. Ramaswamy to address the issue even though Dr. Gellrick, Dr. Erickson and Dr. Hugate indicated the importance of weight loss in the outcome of the claimant's medical treatment.

The ALJ ruled that a reasonable insurer would not have denied prior authorization for the SlimGenics program without first obtaining the opinion of a qualified medical reviewer concerning whether or not the program was reasonably necessary to achieve optimum treatment of the compensable injury. The ALJ awarded penalties of \$50 per day commencing July 10, 2012, through the date of the hearing, February 5, 2013, for a total of 211 days resulting in a penalty of \$10,550.

On appeal the respondents contend that the ALJ erred in determining that SlimGenics is reasonable, necessary and related and in his assessment of penalties under Rule 16-10(F). We are not persuaded that the ALJ committed reversible error.

#### I.

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ...

and thereafter during the disability to cure and relieve the employee from the effects of the injury.” Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe*, 102 Colo. 515, 81 P.2d 389 (1938); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The duty has been construed to also include paying for treatment of unrelated conditions when such treatment is necessary to achieve optimum treatment of the industrial injury. *Public Service Co. v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999). In the *Public Service Co.* case, the court emphasized the factual nature of this determination. *Id.*

Here, the ALJ relied on the opinions of Dr. Erickson, Dr. Hugate, Dr. Messenger and Dr. Gellrick to conclude that SlimGenics is necessary to achieve optimum treatment of the industrial injury. This determination is amply supported by the evidence and therefore, we see no basis to disturb the ALJ’s determination on review. Section 8-43-301(8), C.R.S.

We reject the respondents’ contention that it was contradictory for the ALJ to deny the CPAP machine as unrelated to the industrial injury while finding the SlimGenics program related. Unlike the SlimGenics program, the ALJ did not find, nor did the claimant appear to allege that the CPAP machine was necessary to achieve optimal treatment for the industrial injury. Contrary to the respondents’ argument, under the principles of *Public Service Co.*, it is not necessary that there be a direct causal relationship in order for such treatment to be compensable. Rather, such treatment is compensable if it is necessary to achieve optimum treatment of the industrial injury, which the ALJ found to be the case here for the SlimGenics program.

The respondents also contend that this case is factually distinguishable from *Public Service Co.*, because the claimant here is not a surgical candidate. The respondents’ arguments notwithstanding, the ALJ found that the claimant is a candidate for surgery. This is a reasonable inference from the evidence presented. Although the claimant’s weight problem may not be causally connected to the industrial injury, such a direct causal relationship is not required in order for such treatment to be compensable under the theory espoused by *Public Service Co.*

The resolution of this case required the ALJ to determine the weight and credibility to be assigned to the expert opinions and testimony presented. This is a matter within the sole discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The opinions Dr. Erickson, Dr. Gellrick, Dr. Hugate and Dr. Messenger, provide substantial evidence and valid support for the ALJ’s conclusion

that the SlimGenics program is reasonable, necessary and related medical treatment. Therefore, we may not disturb the order on review. Section 8-43-301(8), C.R.S.

## II.

The respondents further contend that the ALJ erred in assessing penalties under the general penalty statute for violation of WCRP 16-10(F). Specifically, the respondents contend that they followed the WCRP 16-10 by timely denying the requests for prior authorization and that Dr. Ramaswamy's opinion was sufficient to comply with the requirements of the rule. We disagree that the ALJ erred.

Section 8-43-304(1), C.R.S., allows an ALJ to impose penalties of up to \$1000 per day against any party "who violates any provision of articles 40 to 47 of [Title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court ...." The failure to comply with a procedural rule has been determined to be a failure to obey an "order" and failure to perform a "duty lawfully enjoined" within the meaning of §8-43-304(1), C.R.S.; *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97, 98 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997).

The imposition of penalties under §8-43-304(1), C.R.S., is a two step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *see also Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965, 967 (Colo. App. 2003)(reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact); *but see Pioneers Hospital v. Industrial Claim Appeals Office, supra* (conduct examined to determine whether conduct was merely unreasonable without consideration of whether it was based on a rational argument).

In *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007), the court held that a violation of WCRP 16-10(F) constitutes a violation of an "order" within the meaning of §8-43-304(1), C.R.S. In *Fera*, the claimant requested prior authorization for physical therapy and steroid injections. This was denied after the insurer consulted with its medical advisor and concluded the need for treatment was related to a pre-existing condition. The claimant sought penalties for unreasonable denial of the treatment. The respondents moved for summary judgment alleging they had complied with the rules regarding prior authorization and there were no material issues of fact. The

ALJ granted the motion for summary judgment. The court of appeals set aside the ALJ's order of summary judgment. The court of appeals noted that the record contained several medical reports supporting the claimant's position that the requested treatment was related to his work injury and should have been covered and the existence of these medical reports created a question of fact as to whether the insurer acted unreasonably in denying the requests for prior authorization.

As the ALJ recognized in his order, under *Fera*, the insurer's mere act of procuring a medical opinion under WCRP 16 does not excuse the insurer from acting reasonably with respect to the opinion when deciding whether to deny or approve a request for prior authorization. Rather, the insurer must act as a reasonable insurer would act with respect to the information obtained from the medical reviewer. *See also Miller v. Industrial Claim Appeals Office*, 49 P.3d 334 (Colo. App. 2001) (Insurer penalized for unreasonable denial of medical treatment).

Under the circumstances presented here, the ALJ determined that the insurer unreasonably denied Dr. Gellrick's request for prior authorization of SlimGenics. The ALJ concluded that there was a "degree of reprehensibility" to the insurer's conduct in this case because the insurer was admittedly aware that non-industrial conditions could be treated under the Act if necessary to obtain an optimum outcome for treatment of the compensable injury but the insurer denied prior authorization by relying on a medical report that did not even address this theory of compensability. The ALJ further found that the conduct delayed the implementation of a weight loss program and the claimant's knee conditions continue to be painful and disabling and has delayed treatment necessary to relieve the claimant's condition and assist him in reaching MMI. The ALJ thus determined that the claimant suffered actual harm as a result of the insurer's conduct.

Because the issue of whether the insurer acted unreasonably is a factual question for the ALJ, we are bound to apply the substantial evidence test in determining whether the evidence supports the ALJ's findings of fact. *See Fera v. Industrial Claim Appeals Office, supra; Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). We must, therefore, uphold the ALJ's factual findings, if supported by substantial evidence and the plausible inferences drawn therefrom. Under this standard we must view the evidence as a whole and in the light most favorable to the prevailing party, and we must also defer to the ALJ's credibility determinations and resolution of conflicts in the evidence. *See Id.*

We have reviewed the record and conclude there is substantial evidence to support the ALJ's finding of unreasonable conduct by the respondents. Although the ALJ could have drawn different inferences from the medical evidence, the question to be resolved was factual in nature. We conclude that the finding of unreasonableness made by the ALJ

was supported by the opinions in evidence and in combination with the circumstances surrounding the refusal to authorize the SlimGenics.

We have considered the respondents' remaining arguments and are not persuaded that the ALJ committed any error.

III.

The claimant has filed a motion requesting sanctions for the respondents' alleged frivolous appeal. We decline to impose attorney fees pursuant to §8-43-301(14), C.R.S. Pursuant to this statute, attorney fees and costs may be awarded against an attorney who submits a petition to review or brief in support of a petition which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Although we do not agree with the respondents' arguments, we do not consider the petition to review and appellate brief to be so lacking in merit that they it may be classified as not well grounded in fact or law. Therefore, we decline to award attorney fees. See *BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997); *Brandon v. Sterling Colorado Beef Co.*, 827 P.2d 559 (Colo. App. 1991) (resort to judicial review is not considered frivolous or in bad faith as long as there is a reasonable basis for party to challenge the ALJ's order).

**IT IS THEREFORE ORDERED** that the ALJ's order dated July 3, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
David Kroll

## NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty (20) calendar days of the mailing date of this order, as shown below.
- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide five (5) copies of both the notice of appeal and the complete final order to the Colorado Court of Appeals.
- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.
- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.
- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.
- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, [www.colorado.gov/cdle/CTAPPFORM](http://www.colorado.gov/cdle/CTAPPFORM) or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**
- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

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CERTIFICATE OF MAILING

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

12/10/2013 by RP

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