

tlement to an overpayment in the first instance. See *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo.App.1992)(burden of proof rests upon the party asserting the affirmative of a proposition; therefore, consideration should be given to which party would prevail in the absence of any evidence upon the subject). Employer affirmatively relied upon the DIME physician's zero percent rating to claim such entitlement. However, because the DIME physician's opinion was insufficient and inadmissible to prove that claimant's condition improved after the reopening, the ALJ did not err in finding that employer failed to meet its initial burden of proof.

Accordingly, the burden never shifted to claimant to overcome employer's evidence. See *Johnson v. Indus. Comm'n*, 761 P.2d 1140, 1146 (Colo.1988)(burden shifted to claimant only when prima facie case of overpayment was established).

Nor are we convinced that employer is entitled to reimbursement for an overpayment based on the nine percent rating issued by the treating physician. The ALJ specifically found that there was no improvement of claimant's condition after the reopening and that the nine percent rating simply indicated a difference of opinion between physicians. This finding is within the ALJ's province, and inasmuch as it is supported by the evidence, we will not disturb it. See *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(the ALJ resolves conflicts in the evidence, makes credibility determinations, determines the weight to be accorded to expert testimony, and draws plausible inferences from the evidence).

II.

[4] Employer next contends that claimant is not entitled to medical benefits after MMI because she testified that she does not need them now and only wants the option of receiving treatment in the future. Employer asserts that this speculative evidence is insufficient to establish that the benefits are reasonably necessary. We decline to address this issue.

Employer did not raise this specific argument before the Panel. In its brief to the Panel, employer argued that claimant was not entitled to medical benefits after MMI because, as stated by the DIME physician, claimant did not sustain any injury from the automobile accident. Employer's current argument, that the need for benefits was speculative, was not encompassed in the causation argument raised before the Panel. Thus, this issue may not be raised now on appeal. See *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo.App.1997).

The order is affirmed.

Judge DAVIDSON and Judge VOGT concur.



F.T. HAVENS, Plaintiff–Appellant,

v.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF ARCHULETA,
Colorado, Defendant–Appellee.

No. 01CA1612.

Colorado Court of Appeals,
Div. I.

Oct. 10, 2002.

Taxpayer filed suit, based upon the Taxpayer's Bill of Rights (TABOR), against a county for declaratory and injunctive relief in response to passage of a ballot issue that allowed county to collect and spend or re-

serve excess revenue collected during 1999 and each subsequent year. The Judicial District Court, Archuleta County, David L. Dickinson, J., dismissed or entered judgment on pleadings in favor of county. Taxpayer appealed. The District Court of Appeal, Sternberg, J., held that language in one section of TABOR does not limit to four years voters' waiver of TABOR's revenue and spending limits.

Affirmed.

1. Municipal Corporations ⇔867(1), 957(4)

Language in section of Taxpayer's Bill of Rights (TABOR) allowing voters to "approve a delay of up to four years in voting on ballot issues" does not mean that the voters' waiver of TABOR's revenue and spending limits must be limited in duration to four years. West's C.R.S.A. Const. Art. 10, §§ 20(3)(a), (7)(b).

2. Municipal Corporations ⇔957(4)

Taxpayer's Bill of Rights (TABOR) requires voter approval for certain state and local government tax increases and restricts property, income, and other taxes. West's C.R.S.A. Const. Art. 10, § 20.

3. Municipal Corporations ⇔867(1)

Taxpayer's Bill of Rights (TABOR) requires voter approval for the collection, retention, or expenditure of revenues that exceed the dollar amounts of TABOR's revenue and spending limits. West's C.R.S.A. Const. Art. 10, § 20(7)(b).

4. Constitutional Law ⇔14

In interpreting the State Constitution, Court of Appeals first looks at the terms of the constitutional provision itself, and if possible the Court applies the provision according to its clear terms.

Abadie & Zimsky, LLC, William E. Zimsky, Durango, Colorado, for Plaintiff-Appellant.

1. Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3),

Law Office of Mary Weiss, Mary Deganhart-Weiss, Pagosa Springs, Colorado, for Defendant-Appellee.

J. Wallace Wortham, Jr., Denver City Attorney, David W. Broadwell, Assistant City Attorney, Denver, Colorado, for Amici Curiae Colorado Municipal League and City and County of Denver.

Hall & Evans, L.L.C., Thomas J. Lyons, Jennifer L. Veiga, Denver, Colorado, for Amicus Curiae Colorado Counties, Inc.

Harden, Hass, Haag & Hallberg, P.C., George H. Hass, Fort Collins, Colorado, for Amici Curiae Poudre School District R-1 and Board of County Commissioners of Larimer County.

Paul C. Rufien, P.C., Paul C. Rufien, Denver, Colorado, for Amicus Curiae Forest Hills Metropolitan District.

Opinion by Judge STERNBERG.¹

In this litigation concerning the Taxpayer's Bill of Rights (TABOR), plaintiff, F.T. Havens, appeals a judgment entered in favor of defendant, the Board of County Commissioners of Archuleta County. We affirm.

On November 2, 1999, the electors of Archuleta County approved a ballot issue allowing the County to collect and spend or reserve excess revenue collected "during 1999 and each subsequent year . . . notwithstanding any restriction contained in Article X, Section 20 of the Colorado Constitution [TABOR]." **This ballot issue allows the County to collect and spend revenues in excess of the limits set forth in a section of TABOR, Colo. Const. art. X, § 20(7)(b), concerning the maximum percentage change in a local district's annual spending. As relevant here, the ballot issue does not set the duration of the waiver of the County's revenue and spending limits.**

Plaintiff filed this lawsuit for declaratory and injunctive relief, contending that the vot-

and § 24-51-1105, C.R.S.2002.

ers are permitted to waive revenue and spending limits for a maximum period of four years. His claim is based on another section of TABOR, Colo. Const. art. X, § 20(3)(a), which states that “voters may approve a delay of up to four years in voting on ballot issues.”

The trial court either dismissed or entered judgment on the pleadings in favor of the County on all of plaintiff’s claims. The trial court interpreted § 20(3)(a) “as providing that voters can delay ballot issues for up to four years,” and declined to “read a four-year restriction for waiver of [revenue and] spending limits into the section.”

[1] On appeal, plaintiff contends that the trial court’s ruling was erroneous because the plain language of § 20(3)(a) limits to four years the maximum term of a ballot issue waiving the revenue and spending limits of § 20(7)(b). We disagree.

[2] TABOR places limits on the ability of state and local government to tax and spend. “Its provisions require voter approval for certain state and local government tax increases and restrict property, income, and other taxes.” *Havens v. Bd. of County Comm’rs*, 924 P.2d 517, 519 (Colo.1996).

[3] Section 20(7)(b) provides that revenue and spending increases by state and local governments are limited as follows: “[t]he maximum annual percentage change in each local district’s fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.” TABOR requires voter approval for the collection, retention, or expenditure of revenues that exceed the dollar amounts of § 20(7)(b) revenue and spending limits. *Cf. City of Aurora v. Acosta*, 892 P.2d 264 (Colo.1995).

[4] In interpreting the state constitution, we first look at the terms of the constitutional provision itself, and if possible we apply the provision according to its clear terms. *City of Aurora v. Acosta, supra*.

Plaintiff’s argument is based on the language in TABOR contained in § 20(3)(a), which provides, in pertinent part:

Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period. (Emphasis added.)

The plain language of § 20(3)(a) allows the voters to authorize a delay in voting on a ballot issue, but limits any such delay to a period of four years. It does not, as plaintiff asserts, limit the effective time period of any TABOR-related ballot issue approved by the voters.

We agree with the trial court that “it does not make sense for the [TABOR] drafters to use the word ‘delay’ if [they] were referring to a time limitation upon waiver of [revenue and] spending limits.” Thus, we reject plaintiff’s assertion that delay here means that voters may approve the ballot issue for up to four years, thereby delaying (or postponing) further votes on similar ballot issues for a period not to exceed four years. *See, e.g., City of Aurora v. Acosta, supra* (approving a ballot issue, challenged on different grounds, that does not contain any time limitation).

We also are not persuaded by plaintiff’s argument that this construction is inconsistent with the last sentence of § 20(3)(a), which provides, “District actions taken during such a delay shall not extend beyond that period.” Plaintiff would have us interpret this sentence to limit the circumstances in which waivers of revenue and spending limits, like the one at issue here, could be added to a district’s base. We reject this interpretation. This issue is already addressed in § 20(7)(d), which provides that voter-approved revenue changes, among other things, are dollar amounts that are exceptions to, and not part of, any district base.

Therefore, we hold that the language in § 20(3)(a) allowing voters to “approve a delay of up to four years in voting on ballot issues”

does not mean that the voters' waiver of revenue and spending limits must be limited in duration to four years.

Judgment affirmed.

Judge WEBB and Judge GRAHAM concur.



**The PEOPLE of the State of
Colorado, Complainant,**

v.

Patrick Anene EGBUNE, Respondent.

No. GC98A13.

Office of the Presiding Disciplinary Judge
of the Supreme Court of Colorado.

May 12, 1999.

Discipline proceedings were commenced against attorney, alleging multiple violations of the Rules of Professional Conduct arising out of incident in which attorney disbursed settlement proceeds less contingency fee he retained for himself after being placed on notice that prior attorney who had represented client claimed an interest in the proceeds. The Office of the Presiding Disciplinary Judge held that: (1) attorney violated rules requiring attorneys to segregate property and keep property separate; (2) attorney engaged in conduct involving dishonesty, deceit or misrepresentation; (3) attorney charged unreasonable fees; (4) attorney engaged in conduct that adversely reflected on his fit-

ness to practice law; and (5) six-month suspension was justified.

Attorney suspended.

See also 971 P.2d 1065.

1. Attorney and Client ⇄37.1

Neither county court's ruling that prior attorney who had represented client on personal injury claim failed to establish a lien on settlement funds, nor district court's affirmation of such ruling, relieved subsequent attorney of his obligation under the Rules of Professional Conduct to render an accounting of settlement funds or keep the disputed funds separate during the pendency of prior attorney's action asserting lien. Rules of Prof.Conduct, Rule 1.15(b, c).

2. Attorney and Client ⇄37.1

Attorney who received settlement funds from insurance company on personal injury claim had an affirmative obligation to respond to inquiry of attorney, who had previously represented client on such claim and had asserted an interest in the settlement funds, as to the status of the settlement and to render an accounting with regard to the funds, and by not doing so attorney violated Rule of Professional Responsibility requiring attorneys to segregate property claimed by another. Rules of Prof.Conduct, Rule 1.15(b, c).

3. Attorney and Client ⇄37.1

Attorney violated Rule of Profession Conduct requiring attorneys to keep property separate, where he received settlement funds on a personal injury claim, was on notice that prior attorney who had represented client was claiming an interest in such funds, and failed to segregate and keep such proceeds from his own funds until the dispute over the funds was resolved. Rules of Prof.Conduct, Rule 1.15(a, c).

4. Attorney and Client ⇄37.1

Attorney violated Rule of Profession Conduct prohibiting attorneys from engaging