DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City & County Building 1437 Bannock Street Denver, Colorado 80202 **Plaintiff:** TRACEY LAWLESS vs. **Defendants:** STANDARD INSURANCE COMPANY, COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION, COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION BOARD OF TRUSTEES, CAROLE WRIGHT, in her Official Capacity only, MARYANN MOTZA, in her Official Capacity only, and RICK LARSON, in his Official Capacity only.	▲ **COURT USE ONLY** ▲ Case Number: 10CV9848 Ctrm.: 215

COURT ORDER
RE: Standard's Motion to Dismiss, Plaintiff's Motion for Partial Summary Judgment, PERA's Motion for Partial Summary Judgment, and Standard's Motion for Summary Judgment

THIS MATTER is before me pursuant to Defendant Standard Insurance Company's ("Standard") Motion to Dismiss the First and Second Claims of the Third Amended Complaint ("Standard's Motion to Dismiss"), filed on May 17, 2011; Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion"), filed on August 15, 2011; Defendant Colorado Public Employees' Retirement Association's ("PERA") Motion for Partial Summary Judgment on Plaintiff's First, Second, and third Claims for Relief ("PERA's Motion"), filed on August 15, 2011; and Standard's Motion for Summary Judgment ("Standard's Motion for Summary Judgment"), filed on August 15, 2011. After reviewing the pleadings and applicable authority, I **DENY** Standard's Motion to Dismiss, **DENY** Plaintiff's Motion; **GRANT** PERA's Motion; and **GRANT in part** and **DENY in part** Standard's Motion for Summary Judgment.

I. Background

Plaintiff Tracey Lawless is a member of the Colorado Public Employees' Retirement Association ("PERA"), by virtue of her previous employment with the Widefield School District 3 as a bus driver. On August 31, 2009, Ms. Lawless filed an application with PERA for disability benefits. Standard, the designated disability program administrator ("DPA") for PERA's short term disability ("STD") insurance, denied Ms. Lawless's claim for STD benefits, based on its determination that she did not meet the requirements under the insurance policy and the rules promulgated by PERA—specifically, PERA's Rule 7.45. In denying Ms. Lawless's STD benefits, Standard concluded that Ms. Lawless was "incapacitated from performing the Essential Functions of [her] Own Job as a Bus Driver," and stated: "[a]lthough we find that Ms. Lawless is physically and medically limited in working as a bus driver, the information does not support physical limitations so severe to preclude her from full-time sedentary work." (Amend. Compl., ¶¶ 30, 32.)

Ms. Lawless asserts eight claims for relief in her Third Amended Complaint ("Complaint"). Defendant Standard moves to dismiss the first and second claims for relief as they pertain to Standard. Plaintiff moves for summary judgment on her first claim for relief. PERA moves for summary judgment on Plaintiff's first, second, and third claims. Standard moves for summary judgment on Plaintiff's first, second, fourth, fifth, seventh, and eighth claims.

Plaintiff's first and second claims are based on Plaintiff's contention that PERA promulgated rules that are inconsistent with the statutory requirements of C.R.S. §§ 24-51-702 and 703. In Plaintiff's first claim for relief, she seeks a declaration that PERA, its Board, and the individual PERA Defendants violated her due process rights under the Fourteenth Amendment, by failing to promulgate a rule and obtain insurance in compliance with the statutory requirements of C.R.S. § 24-51-702(a). As it relates to Standard, Plaintiff seeks a determination that Standard is obligated to provide STD benefits to Ms. Lawless and the class members. Her second claim requests reformation of the insurance contract, due to the same alleged failures, and her third claim asserts violation of her civil rights pursuant to 42 U.S.C. § 1983.

II. Analysis

A. Standard's Motion to Dismiss

As a practical matter, Standard's Motion to Dismiss is essentially moot, based on my findings below. Nonetheless, accepting all averments of material fact contained in the complaint as true and viewing the allegations in the light most favorable to Plaintiff, I find that Plaintiff could prove a set of facts in support of her first two claims as they relate to Standard. Accordingly, Standard's Motion to Dismiss is **DENIED**.

B. Legal standard for summary judgment motion

Summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, demonstrate that there are

no disputed issues of genuine fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56. Once the moving party establishes an absence of a genuine issue of material fact, the burden shifts to the non-movant to demonstrate the existence of a triable issue of fact. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987). Once the party moving for summary judgment has made a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest upon the mere allegations or denials in his or her pleadings, but must demonstrate by specific facts that a controversy exists. *U.S.A. Leasing, Inc. LLC v. Montelongo, M.D.*, 25 P.3d 1277, 1278 (Colo. App. 2001). Summary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004).

C. *PERA's Motion and Plaintiff's Motion*

I conclude that Rule 7.45 complies with the statutory requirements of C.R.S. § 24-51-702 *et seq.* In so concluding, I first analyze the meaning of the relevant statutes, and then determine whether PERA's interpretation as set forth in Rule 7.45 is valid.

i. Statutory Interpretation – Rule 7.45 complies with the statutory requirements of C.R.S. § 24-51-701 et seq.

The parties do not dispute the material facts of Ms. Lawless's claim. Therefore, what remains is an issue of statutory interpretation. Statutory interpretation is a question of law. *Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009). "A reviewing court begins the analysis with the plain language of the statute. If the statute is clear and unambiguous on its face, then the court need look no further." *Id.* The statutory scheme should be considered as a whole, giving "consistent, harmonious and sensible effect to all its parts." *People v. Luther*, 58 P.3d 1013, 1015 (Colo. 2002). "If the statute is ambiguous, the court looks to the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute." *Sperry* 205 P.3d at 367. "A statute is ambiguous, and [courts] may resort to other methods of statutory construction, only if it is fairly susceptible of more than one interpretation." *Miller v. Industrial Claim Appeals Office of State of Colo.*, 985 P.2d 94, 96 (Colo. App. 1999).

"Administrative regulations are presumed valid and will be set aside only when the party who challenges them establishes their invalidity beyond a reasonable doubt." *Pigg v. State Dept. of Highways*, 746 P.2d 961, 967 (Colo. 1987). Courts should accord deference to the interpretation of a statute by the agency charged with enforcing it, so long as a rule or regulation does not regulate beyond the scope of authority granted by the legislature. *Id.* "When a legislature has reenacted or amended a statute, a failure to repeal the agency's interpretation is persuasive evidence that the administrative interpretation was intended by the legislature." *Hewlett-Packard Co. v. State Dept. of Revenue*, 749 P.2d 400, 406 (Colo. 1988). Accordingly, courts should only invalidate an agency's interpretation of a statute, if it is "inconsistent with the clear language of the statute or the legislative intent." *Miller v. Industrial Claim Appeals Office of State of Colo.*, 985 P.2d 94, 96 (Colo. App. 1999).

In Title 24, article 51, part 7, the General Assembly set out a framework for a two-tiered disability program for PERA. The relevant statutes in this case are C.R.S. §§ 24-51-702 and 703. Section 702(1)(a) establishes the requirement for a short-term disability program for PERA members. It states:

> **Short-term disability.** A member who is found by the disability program administrator to be mentally or physically incapacitated from performance of the essential functions of the member's job with reasonable accommodation as required by federal law, but who is not totally and permanently incapacitated from regular and substantial gainful employment, shall be provided with reasonable income replacement, or rehabilitation or retraining services, or a combination thereof, under a program provided by the disability program administrator for a period specified in the rules adopted by the board. The cost of the program shall be funded by the association.

C.R.S. § 24-51-703 states:

> The association shall contract with a disability program administrator to determine disability, to provide short-term disability insurance coverage, and to administer the short-term disability program. A contract shall conform to rules adopted by the board, which rules shall include but not be limited to standards relating to the determination of disability; the independent review, by a qualified panel, of determinations made by the disability program administrator and challenged by the applicant; requirements for medical or psychological examinations; the adjustment or termination of payments based on the mental or physical condition of the program participant; the change of status of a program participant from short-term disability to disability retirement or from disability retirement to short-term disability based on the mental or physical condition, education, training, and experience of the program participant; and the monitoring of the disability program administrator's performance by the association.

Pursuant to these statutes, PERA promulgated rules 7.40 – 7.65. Plaintiff only disputes Rule 7.45.E. She contends that this section contradicts requirements under the statutes and therefore regulates beyond PERA's scope of authority.

Rule 7.45.E states:

> The applicant is not disabled for this purpose if the applicant is medically able to perform any job, based on the applicant's existing education, training, and experience, that earns at least 75 percent of the applicant's predisability earnings from PERA-covered employment as defined in Rule 7.50(B)(1), whether or not the applicant does so.

Plaintiff argues that this condition—*i.e.*, that even if an applicant is unable to perform the essential functions of her own job, if she is able to earn 75% of her predisability income, she is not eligible for short-term disability benefits—is inconsistent with the legislative mandate—*i.e.*,

that an applicant who is unable to perform the essential functions of her job "shall be provided with reasonable income replacement, or rehabilitation or retraining services, or a combination thereof." C.R.S. § 24-51-702(1)(a). PERA, on the other hand, contends that the rule is consistent with the statutes, because the legislature gave PERA broad discretion in formulating the details of the two-tier disability program. I agree with PERA.

First, I find that C.R.S. § 24-51-702(1)(a) is ambiguous, because the plain meaning of the statute is reasonably susceptible to more than one interpretation. In providing a framework to guide PERA in devising a short-term disability program, the statute states in part that someone who is unable to perform the essential functions of her job, "shall be provided with reasonable income replacement, or rehabilitation or retraining services, or a combination thereof, under a program provided by the disability program administrator for a period specified in the rules adopted by the board." This phrase could be read to require that a person so qualified receive some benefit for at least a brief period of time, or it could be read to give PERA broad discretion to decide when, how, and for how long—including for no time at all—someone should receive STD benefits. Therefore, it is appropriate for me to look beyond the plain meaning of the words, including the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute.

The parties provided excerpts from the legislative hearings leading up to the adoption of section 702(1)(a). Before the implementation of a short-term disability program, PERA members who were unable to perform the essential functions of their own job, were entitled to disability retirement benefits, regardless of whether they were able to find gainful employment in a different type of job. The legislature's goal, as evident in the hearings, was to create a new category of people who are unable to perform their own job but capable of returning to the workforce. Instead of paying those people retirement benefits, the intent was to assist them with a temporary bridge—*i.e.*, STD benefits—to return to the workforce. When read in conjunction with section 703, it follows that the legislature intended to give PERA broad discretion in devising an STD program. The statutes provide a basic framework, but leave the details of the STD program to PERA, including: defining disability; allowing PERA to provide income replacement, or rehabilitation services, or retraining services when someone is disabled; and determining when benefits should terminate under the short-term disability plan. C.R.S. § 24-51-703.

In section 702(1)(a), the legislators provided three methods to assist people in this new category: (1) reasonable replacement income; (2) retraining services; or (3) rehabilitation services. They used the term "or," giving PERA the option to provide one or more of these methods, but not necessarily all. Accordingly, income replacement is not an automatic benefit for anyone in this category. Whether someone in this category is automatically entitled to at least one of these benefits is less clear.

It may be a reasonable interpretation that a person in this category should receive at least one of these benefits for a specified period of time. However, because the goal is to assist PERA members in returning to the workforce, and because PERA was given broad discretion in not only determining who is disabled, but also how long benefits should last, and when they should terminate, it is also reasonable to interpret the statute the way PERA did in Rule 7.45.E. Further,

this rule has been in effect for more than ten years. In 2009, the legislature modified sections of Part 7 (section 701). It could also have modified section 702 or 703 to require something different, if it disapproved of PERA's interpretation of the statute. The legislature's decision not to modify these sections is further evidence that PERA's interpretation is reasonable and consistent with legislative intent. *See Hewlett-Packard Co. v. State Dept. of Revenue*, 749 P.2d 400, 406 (Colo. 1988). Moreover, an agency's interpretation is presumed valid and should only be invalidated, if it is inconsistent with the clear language of the statute or the legislative intent. I do not find 7.45.E to be inconsistent with the clear language of the statute or the legislative intent.

ii. The group policy issued by Standard is consistent with the rule and the statutes

Plaintiff argues that the insurance policy issued by Standard, which uses the language of Rule 7.45.E, also violates the statutory requirements and should be reformed. Because I find that Rule 7.45 complies with C.R.S. §§ 24-51-702 and 703, I also find that the policy language, tracking Rule 7.45, is consistent with the statutes. Accordingly, the policy need not be reformed to reflect otherwise.

Plaintiff also argues that the program, as actually implemented, violates C.R.S. §§ 24-51-702 and 703, because it requires someone to first qualify for income replacement and once an applicant actually has received income replacement, only then does he or she become eligible for retraining or rehabilitation services. This does not change the fact that, on its face, Rule 7.45 is valid, and therefore, the policy is also valid on its face.

Accordingly, PERA's Motion is **granted** as it relates to Plaintiff's first and second claims for relief. Plaintiff's Motion is likewise **denied**.

iii. Plaintiff's third claim for relief

PERA also moves for summary judgment on Plaintiff's third claim for relief, which asserts a violation of her civil rights, pursuant to 42 U.S.C. § 1983. The parties do not specifically argue about this claim. However, to the extent Plaintiff's third claim is contingent on a finding that PERA acted *ultra vires* in promulgating Rule 7.45.E, the third claim also cannot survive summary judgment. Accordingly, PERA's Motion is **granted** as it relates to Plaintiff's third claim for relief.

D. Standard's Motion for Summary Judgment

Standard moves for summary judgment on all of Plaintiff's claims asserted against Standard, which, in addition to the first two claims discussed above, include claims for: breach of contract, bad faith breach of insurance contract, violation of the Colorado Consumer Protection Act, and statutory bad faith under C.R.S. § 10-3-1116. Standard argues that if I find Rule 7.45 and the group policy valid, pursuant to C.R.S. § 24-51-702, then all of Plaintiff's other claims against Standard must fail. Plaintiff, however, contends that even if the contract and rule are found to be valid, Plaintiff is still claiming that Standard breached the current contract as

written. More specifically, Plaintiff alleges that Standard breached the contract and acted in bad faith when it denied Ms. Lawless STD benefits.

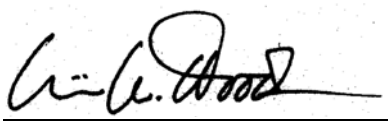
I find there are genuine issues of material fact as to whether Standard properly denied Ms. Lawless STD benefits, notwithstanding my conclusion that the rule and the group policy are facially valid. Based on my findings and conclusions above, Standard's Motion is **granted** as it relates to Plaintiff's first two claims for relief and her claim that the group policy, on its face, is invalid. Standard's Motion is **denied** as it relates to claims four, five, seven, and eight.

III. Conclusion

In sum, Standard's Motion to Dismiss Plaintiff's first and second claims is denied. Summary judgment enters in favor of PERA and against Plaintiff on Plaintiff's first, second, and third claims for relief. Summary judgment enters in favor of Standard and against Plaintiff on Plaintiff's first and second claims for relief. Summary judgment enters on Plaintiff's third claim for relief, based on my understanding that the claim is contingent on the invalidity of Rule 7.45. Standard's Motion for summary judgment is denied as it relates to Plaintiff's fourth, fifth, seventh, and eighth claims.

SO ORDERED this 4th day of January, 2012.

BY THE COURT:



William W. Hood III
District Court Judge