COLORADO
Department of Labor and Employment

Division of Workers' Compensation
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July Case Law Update

Presented by Judge David Gallivan and Judge Elsa Martinez Tenreiro

This update covers COA and ICAO decisions issued from
June 12, 2020, to July 10, 2020

Court of Appeals

Industrial Claim Appeals Office

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COLORADO COURT OF APPEALS

DATE FILED: July 9, 2020
CASE NUMBER: 2019CA1795

Court of Appeals No. 19CA1795
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-073-295

City of Colorado Springs, Colorado,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Theodore E. Martinez,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE TERRY
Freyre and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 9, 2020

Ruegsegger Simons & Stern, LLC, Lori Miskell, Michele Carey, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Franklin D. Azar & Associates, P.C., Royce Mueller, Greenwood Village, Colorado, for Respondent Theodore E. Martinez

¶ 1 In this workers' compensation action, employer, the City of Colorado Springs (the City), seeks review of a final order of the Industrial Claim Appeals Office (Panel) upholding an award of benefits to claimant, Theodore E. Martinez. An administrative law judge (ALJ) determined that claimant's spinal infection and resulting paralysis were related to his work injury and consequently compensable. The City contends that insufficient evidence exists in the record to support this determination; that the ALJ's factual findings instead established that an unrelated intervening cause led to claimant's spinal infection and paraplegia; and that the ALJ misapplied the law governing the chain of causation. Because we conclude that the ALJ did not misapply the law and agree with the Panel that substantial evidence supports the ALJ's determination, we affirm.

I. Background

¶ 2 Claimant worked as a senior instrument and control electrical specialist for the City. He was in charge of maintaining all the instrumentation in telemetry for the City's wastewater management system, ensuring that the City could communicate with valves and operate them remotely from the operations department. His job

duties included maintaining and testing the equipment using a fifteen-to-twenty-pound device called a Druck Pressure Calibrator.

¶ 3 On March 20, 2018, claimant experienced a "pop" in his back after returning to the calibration lab from his maintenance rounds. Claimant testified that upon returning to "the shop," he got out of his truck, walked to the passenger side, and reached into the truck to grab the Druck calibrator with his left hand and his laptop with his right hand. With the equipment in hand, he turned and nudged the passenger side door closed with his left hip. As he "went to put the equipment on the ground . . . [he] felt a pop in [his] back."

¶ 4 Soon thereafter, claimant's back began to hurt, and he reported the injury to his supervisor. Later that evening, his back pain became "excruciating."

¶ 5 On March 26, 2018, Dr. Jay Neubauer, an authorized treating physician, examined claimant. Dr. Neubauer diagnosed muscle and tendon strain of the thorax. He recommended treating the injury with ibuprofen and physical therapy. Although Dr. Neubauer released claimant to modified duty work, claimant took "several days off" work because of his back pain.

¶ 6 A few weeks later, on April 11, 2018, claimant was admitted to the hospital for an upper gastrointestinal bleed likely caused by his ingestion of non-steroidal anti-inflammatory medication for his back pain. While hospitalized, he was examined for leg swelling, but no evidence of acute deep venous thrombosis was found. His morbid obesity and alcoholism were noted, however.

¶ 7 Claimant was readmitted to the hospital on May 8, 2018, due to severe back pain and lower extremity swelling. Examination revealed lower extremity edema, a compression fracture in the thoracic spine, and "severe destruction in the T9-T10 vertebra with possible discitis versus neoplastic process." Discitis is an infection of the disk in between the vertebrae. A blood culture later confirmed the presence of the bacteria staphylococcus lugdunensis. Dr. Peter Brookmeyer, an infectious disease specialist, examined claimant on May 9, 2018. He started claimant on aggressive antibiotics and noted that claimant had "strength in his lower extremities." Hospital physicians concluded that the likely source of the infection was claimant's "bilateral lower extremity venostasis ulcerations," or open sores on his legs. He had experienced such leg and ankle swelling since at least 2016.

¶ 8 Claimant was discharged to a rehabilitation facility on May 22, 2018. However, his condition did not improve. He continued to suffer from severe back pain despite several weeks of antibiotics. By June 5, 2018, he was losing function in his lower extremities and exhibiting significant weakness in his legs; he was consequently again admitted to the hospital for treatment. On June 7, 2018, claimant underwent decompression back surgery at T9-T10 and L3-L4, which also showed signs of discitis. Two days later, on June 9, 2018, Dr. Brookmeyer noted that claimant had lost the ability to move his legs.

¶ 9 Despite undergoing a subsequent surgery and rehabilitation, claimant has not regained the use of his legs. He now suffers from paraplegia and is wheelchair-bound.

¶ 10 In November 2018, claimant filed an application for hearing seeking medical and temporary total disability (TTD) benefits for the treatment of his infection and resulting paraplegia. The City contested the application on the grounds that the infection and paraplegia were not causally related to the March 20, 2018, work injury but were instead caused by an intervening event. It argued that, because the bacteria likely entered claimant's body through

the ulcers on his legs and ankles, the infection could not be tied to his March 2018 back injury.

¶ 11 The City offered the opinion of Dr. Daniel Mogyoros, an infectious disease specialist, in support of its position. Dr. Mogyoros opined that claimant's "thoracic and lumbar discitis diagnosed on May 8, 2018, is not related in any [] way to the work injury of March 20, 2018." Instead, Dr. Mogyoros suggested, claimant's infection likely pre-existed the work injury and his back injury merely "unmasked" the already-present bacterial infection.

¶ 12 Alternatively, Dr. Mogyoros theorized, the bacteria could have entered claimant's body through the edema-caused sores on his lower extremities and coincidentally settled in the spine, independent of claimant's back injury.

¶ 13 Claimant's treating infectious disease specialist, Dr. Brookmeyer, testified that the second scenario Dr. Mogyoros described was the more likely chain of events leading to the infection. Rejecting Dr. Mogyoros's theory of a pre-existing infection becoming "unmasked" after the work injury, Dr. Brookmeyer noted that "[t]his tends to be an aggressive, rapidly progressing infection. I would have a hard time believing he had a spine infection or

muscle infection that was not symptomatic at that point." Instead, Dr. Brookmeyer stated:

> I think he probably did not have an infection, in my opinion, before the work injury. I think it happened afterwards. I think he most likely developed a transient blood infection, from whatever source, that I think likely landed in an area of inflamed tissue, which was hypervascular, that makes it more likely to set up.
>
> If he did not have the work [injury], I think the odds of him developing this infection would have been substantially less likely.

Dr. Brookmeyer further testified:

> It is my opinion, one, that he probably did not have a pre-existing infection that was activated by the injury. It is possible, but probably less likely, in my opinion. I think he probably seeded the spine later.
>
> I think that the injury . . . probably made the area more likely to be have been seeded.
>
> . . . .
>
> I think that the skin was the source, likely. He developed a transient blood infection, and it landed in his back. I think that the injury made it more likely that that area was seeded.
>
> . . . .
>
> I think that it is just an area that maybe is slightly — hypervascular maybe is not the right term. Inflamed. For whatever reason, it

> makes it more likely for bacteria to set up shop.

¶ 14 Dr. Mogyoros rejected Dr. Brookmeyer's explanation that claimant's injured and inflamed back made it more prone to infection. Dr. Mogyoros observed that (1) no literature supports this theory; (2) muscle strain like that suffered by claimant does not cause the extent of tissue damage — such as occurs in surgery — necessary to predispose tissue to infection; (3) infections tend to take root in tissues suffering from a lack of oxygen, the opposite of hypervascularity; and (4) hypervascularity should increase the presence of white blood cells in those tissues which should then, in turn, increase the body's capacity to fight the infection.

¶ 15 After considering all the presented evidence, the ALJ found that claimant suffered a compensable injury on March 20, 2018, when he bent over to set down his Druck calibrator and laptop. Turning to the compensability of claimant's infection and resulting paraplegia, the ALJ first reviewed and summarized Drs. Mogyoros's and Brookmeyer's differing opinions in detail. The ALJ rejected Dr. Mogyoros's first scenario — that claimant suffered from a pre-existing bacterial infection — as unpersuasive, expressly noting that

"there is no evidence that [c]laimant had any sort of spine infection prior to the date of injury on March 20, 2018. Claimant had no back pain, no fever and no chills." The ALJ further noted that Dr. Brookmeyer described this type of bacterial infection as both aggressive and painful, which, the ALJ surmised, suggested that had claimant's infection preceded the March 20, 2018, work injury, he likely would have exhibited some symptoms of the infection. Moreover, the ALJ observed, a spinal X-ray taken on April 25, 2018,

> showed only "diffuse degenerative changes . . . ." It was 14 days later, on May 8, 2018, that the CT at Penrose revealed the "destructive process within the thoracic spine, epicentered at the T9-T10 disc level . . . ." The timing supports Dr. Brookmeyer's explanation that Staph lugdunensis is "an aggressive bacteria that typically becomes symptomatic very early" and that claimant did not have an infection on the date of his work injury.

¶ 16 The ALJ found Dr. Mogyoros's alternative theory — that the infection entered claimant's body through the ulcers on his lower extremities sometime after the work-related injury — "at least partially persuasive." The ALJ agreed that the bacterial infection "likely did indeed occur somewhere between April 11 (when it was not noted), and May 8 (when it was noted)."

¶ 17 However, the ALJ expressly rejected as unpersuasive Dr. Mogyoros's conclusion "that there is *no connection* between the work injury and the infection in [c]laimant's spine." Crediting Dr. Brookmeyer's anecdotal observation of the phenomena occurring "in his own practice," the ALJ found that claimant's "disc and vertebra, inflamed as they were by the work injury, were more receptive to allow the spread of the pathogens." In sum, the ALJ found that claimant's "injury created conditions conducive to the seeding of the inflamed areas by Staph lugdunensis, which then aggressively colonized these areas, causing the lasting damage to his spine." Based on these conclusions, the ALJ awarded claimant his related medical benefits — explicitly excluding treatment associated with claimant's unrelated upper gastrointestinal bleed — and TTD benefits.

¶ 18 On review, the Panel affirmed the ALJ's decision, holding that because substantial evidence supported the ALJ's causality determination, it could not set it aside.

II. Analysis

¶ 19 The City contends that the ALJ misapplied the law in awarding claimant medical and TTD benefits. The City argues that, based on

the ALJ's finding that claimant contracted the bacterial infection between April 11 and May 8, 2018, — i.e. after straining his back at work in March 2018 — the infection and its consequences are only compensable if they are the natural result of claimant's work-related back injury. Because, the City argues, "nothing about the mechanism of injury . . . caused or contributed to the entry of the staph bacteria into claimant's blood," the staph infection was a non-compensable, unrelated, intervening event. Disregarding this break in the causation chain, the City contends, misapplies the law. We are not persuaded that the ALJ or the Panel erred.

A. Governing Law

¶ 20 A claimant bears the burden of establishing that a claim is compensable by a preponderance of the evidence. § 8-43-201, C.R.S. 2019; *see Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded.") "Proof 'by a preponderance of the evidence' demands only that the evidence must 'preponderate over, or outweigh, evidence to the contrary.' Without imputing any technical or

mathematical meaning to the term 'probable,' the widely accepted formula for expressing this burden of persuasion is 'more probable than not.'" *City of Littleton v. Indus. Claim Appeals Office*, 2016 CO 25, ¶ 38 (quoting *Mile High Cab, Inc. v. Colo. Pub. Utils. Comm'n*, 2013 CO 26, ¶ 14.) Thus, "[t]he preponderance standard is met when 'the existence of a contested fact is "more probable than its nonexistence."'" *Indus. Comm'n v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984) (quoting *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980)).

¶ 21 The "claimant must show . . . that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). In other words, to be compensable, a claimant must have sustained injuries that are "proximately caused by" an incident that both [arose] out of and in the course of the employee's employment." § 8-41-301(1)(c), C.R.S. 2019. "In the course of employment" generally refers to "the time, place and circumstances under which the injury occurred." "The 'course of employment' requirement is satisfied when it is shown that the injury occurred within the time

and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991).

¶ 22 "The term 'arises out of' refers to the origin or cause of an injury. There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment." *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). If no causal connection can be established, a claim is not compensable. There is no necessary presumption that an injury arises out of or in the course of the employment simply because it occurs at the place of employment. "On the contrary, the burden of proof in these cases is on the claimant who must show a direct causal relationship between his employment and his injury." *Finn v. Indus. Comm'n*, 165 Colo. 106, 109, 437 P.2d 542, 544 (1968).

¶ 23 And symptoms that develop later may also be compensable. Under the chain of causation doctrine, an injury flowing from a compensable, work-related injury may also be compensable. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 515, 474 P.2d 622, 625 (1970). "[T]he 'chain of causation analysis' . . . is reserved for cases in which the industrial injury leaves the body in a weakened

condition and the weakened condition plays a causative role in the subsequent injury." *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082, 1086 (Colo. App. 2002). Thus, in this case claimant had to demonstrate that it was more probably true than not that his infection flowed from his work injury.

¶ 24 Whether claimant established the requisite causal connection or chain of causality between his injury and his employment is a question of fact for resolution by the ALJ. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Neither the Panel nor we may disturb the ALJ's factual resolutions concerning compensability if supported by substantial evidence in the record. § 8-43-301(8), C.R.S. 2019; *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

¶ 25 However, we are not bound by an ALJ's factual findings if the ALJ "misconstrue[d] or misapplie[d] the law." *Hertz Corp. v. Indus. Claim Appeals Office*, 2012 COA 155, ¶ 12. We review an ALJ's application of the law to the facts de novo. *Id.*

B. The ALJ Did Not Misapply the Law

¶ 26 The City argues that the ALJ misapplied these standards when he awarded claimant medical and TTD benefits. It contends that

"[i]f the contraction of the infection though the unrelated cellulitis was the cause of the disability and the work injury did not contribute to the contraction of the infection, then the staph infection was not a natural result of the work injury and, as a matter of law, that causal chain is broken." The City insists that it cannot be liable for any disability flowing from the infection unless it is shown "that the conditions of employment contributed to claimant *contracting the infection*." Because the ALJ did not find that claimant's work activities caused or contributed to the genesis of the staph infection, it reasons, the ALJ erred in awarding claimant benefits for injuries stemming from the infection.

¶ 27 But the City's contention ignores a key principle of the chain of causation. The chain of causation analysis is applicable to "cases in which the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in the subsequent injury." *Jarosinski*, 62 P.3d at 1086. Under this analysis, it is not necessary for the work conditions to have directly caused claimant's infection. Rather, it is sufficient if claimant's weakened back condition played "a causative role" in his resulting disability.

¶ 28 The ALJ concluded that a "connection" existed between claimant's work-related spinal strain and the fact that the infection seeded at that very locus. The ALJ was persuaded by Dr. Brookmeyer's theory that claimant's strained back became "hypervascularized," thereby drawing the infection to claimant's spine and providing fertile tissue in which the bacteria could seed. The ALJ expressly rejected Dr. Mogyoros's countertheory suggesting that hypervascularized tissue should be more able to fight an infection because increased blood flow would necessarily also bring additional infection-fighting white blood cells. In other words, according to the ALJ's reasoning, claimant's weakened spinal condition contributed to the infection taking root in claimant's spine. The ALJ thus applied the principle articulated in *Jarosinski* in finding that claimant's weakened condition was a contributing cause of his infection. *Id.* Contrary to the City's contention, then, the ALJ did not misapply the law.

C. Substantial Evidence Supports the ALJ's Findings

¶ 29 The ALJ's decision rested upon his acceptance of Dr. Brookmeyer's explanation tying the situs of claimant's infection to his admitted, work-related back injury, and his rejection of Dr.

Mogyoros's conflicting views. Dr. Brookmeyer persuaded the ALJ that it was more probable than not — and not a mere coincidence, as the City argues — that the infection seeded itself in claimant's spine because that tissue had been damaged by claimant's work injury. Claimant thus met his burden of proof. *City of Littleton*, ¶ 38.

¶ 30 The City may dispute Dr. Brookmeyer's causation analysis, but "the weight to be accorded to [expert] testimony is a matter exclusively within the discretion of the [ALJ] as fact-finder." *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). Such credibility determinations may not be set aside or disregarded unless the witness's credibility is "overwhelmingly rebutted by hard, certain evidence" to the contrary. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000); *see also Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 46 ("Nor may we set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence."). Moreover, "we may not substitute our judgment for that of the ALJ in assessing the weight and sufficiency of the medical evidence." *Postlewait v. Midwest Barricade*, 905 P.2d 21, 24 (Colo. App. 1995).

¶ 31 Dr. Brookmeyer's opinion, even if disputed or controversial, provides substantial evidence supporting the ALJ's determination that claimant's infection and resulting paraplegia were related to his March 2018 work injury. Because substantial evidence supports the ALJ's causation finding, we may not disturb it. *See Dover Elevator*, 961 P.2d at 1143; *Snyder*, 942 P.2d at 1339.

¶ 32 Accordingly, we conclude that the Panel properly upheld the ALJ's decision. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

III. Conclusion

¶ 33 The order is affirmed.

JUDGE FREYRE and JUDGE LIPINSKY concur.

SUMMARY
July 9, 2020

2020COA103

No. 18CA2358, *Warembourg v. Excel Elec., Inc.* — Evidence — Spoliation — Sanctions — Adverse Inference Instruction

A division of the court of appeals analyzes whether a trial court abused its discretion in giving an adverse inference jury instruction containing an irrebuttable presumption of causation and liability as a sanction after finding that the defendant engaged in spoliation by destroying a critical piece of evidence, in breach of its duty to preserve that evidence. The division holds that Colorado law authorizes the imposition of such an instruction for the pre-litigation destruction of evidence and that the trial court did not abuse its discretion in imposing the instruction as a sanction for spoliation.

The division additionally holds that the trial court did not err in classifying the plaintiff as an invitee under the Premises Liability

Act, § 13-21-115, C.R.S. 2019; in its evidentiary rulings; in declining to instruct the jury on the plaintiff's alleged assumption of risk; and in ruling that the cap on noneconomic damages in the Construction Defect Action Reform Act, § 13-20-806(4)(a), C.R.S. 2019, does not limit the plaintiff's damages.

COLORADO COURT OF APPEALS **2020COA103**

Court of Appeals No. 18CA2358
Boulder County District Court No. 17CV30891
Honorable Nancy W. Salomone, Judge

Brian Warembourg,

Plaintiff-Appellee,

v.

Excel Electric, Inc.,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE LIPINSKY
Freyre and Graham*, JJ., concur

Announced July 9, 2020

Zaner Harden Law, LLP, Kurt Zaner, Sara McEahern, Denver, Colorado; Levin Sitcoff, PC, Nelson A. Waneka, Denver, Colorado, for Plaintiff-Appellee

Walberg Law, PLLC, Wendelyn K. Walberg, Morrison, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 Spoliation — a party's failure to preserve evidence — jeopardizes adverse parties' ability to obtain justice. The truth-seeking function of our legal system is thwarted if a party is deprived of material evidence during discovery or if the finder of fact is denied that evidence at trial. Thus, upon learning that he or she is likely to be involved in litigation, a person has a legal duty to preserve all potentially relevant evidence within his or her possession.

¶ 2 Courts possess the inherent authority to impose sanctions for spoliation. Judges have the power to enter a broad range of penalties against spoliators, depending on whether the destruction of the evidence was intentional, the prejudice to the other party, how spoliation affects the judicial process, and whether lesser sanctions would be effective. These penalties can range from monetary sanctions to the most drastic sanction of all — the entry of a default judgment. Adverse inference jury instructions fall in the middle of the spectrum of sanctions.

¶ 3 In this case, we consider whether a trial court abused its discretion in giving an adverse inference jury instruction containing an irrebuttable presumption of causation and liability (the subject

instruction) as a sanction after finding that the defendant destroyed a critical piece of evidence, in breach of its duty to preserve that evidence.

¶ 4 Because we discern no abuse of discretion, and disagree with the defendant's other arguments, we affirm.

I. Background Facts and Procedural History

A. Warembourg's Injury

¶ 5 Brian Warembourg, an employee of Schmidt Custom Floors, Inc., provided flooring for a new home being constructed by Feller Homes, Inc. Excel Electric, Inc., performed the electrical work at the construction site. It installed a temporary electrical box (the box) to supply power to the subcontractors.

¶ 6 While working at the site on September 9, 2015, Warembourg was unable to power his equipment using the home's interior outlets. He plugged a tool into the box, which was located outside the home, but discovered that the exterior outlets on the box also were not working. To troubleshoot the problem, he removed the box's front cover and began toggling the circuit breakers inside the box. While toggling one of the breakers, the box "exploded," shooting an "intense release" of electricity into Warembourg's hand.

Warembourg suffered permanent and disabling injuries as a result of the electrocution.

¶ 7 Warembourg's coworker photographed the damaged box shortly after the accident. The pictures depict a weathered electrical box lacking legible warning stickers. Although the box's cover had been removed, the photographs show that none of the box's internal wiring had been disconnected.

B. Excel's Pretrial Conduct and the Spoliation Sanction

¶ 8 On the day of the incident, Excel learned that someone had been injured at the job site. Excel retrieved the damaged box and took it to its warehouse. The next morning, Shane and Corey Heil, Excel's owners, inspected the box. (For clarity, and without intending any disrespect, we refer to the members of the Heil family by their first names.) Neither Shane nor Corey wrote any notes about or photographed the box. Excel discarded the box sometime during the next eight months.

¶ 9 An investigator for Warembourg's worker's compensation carrier, Pinnacol Assurance, called Shane on October 27, 2015, "in regards to an injury that one of [its] . . . injured workers had . . . ." The investigator explained, "There was a temporary power pole that

was set up. And we're just trying to figure out if there w[ere] any circumstances that contributed to his injury." Shane told the investigator that his "shop guy" "probably" threw the box away because it was unrepairable. Shane later added, "And when I heard [Warembourg] got hurt, it's like, he probably shouldn't have been in [the box] in the first place."

¶ 10 On April 29, 2016, Warembourg's counsel sent Excel a letter introducing himself, referencing his client's injury claim, and putting Excel on notice of its duty to preserve evidence. The letter specifically mentioned the need to preserve "the temporary electrical box" and other "evidence relating to this incident."

¶ 11 Excel tendered a claim to its liability insurance carrier on May 13, 2016. Shane sent the insurance carrier a letter discussing the cause of Warembourg's injuries. In the letter, Shane speculated that Warembourg had been using a power cord lacking an industry standard end and attempted to overcome his lack of proper equipment by hooking the deficient cord directly to a breaker in the box. Shane claimed that Warembourg removed the cover to the box, reached into the electrified box, and unhooked live wires.

¶ 12 Warembourg filed suit against Excel. In its answer, Excel pleaded contributory negligence and assumption of risk as affirmative defenses, and designated Schmidt Floors as a nonparty at fault. It "admit[ted] that approximately six months after the [box] . . . was returned, the [box] was thrown away."

¶ 13 In interrogatory responses, Excel claimed that "[t]he exact date the box was disposed of is not known, but it was approximately six months after the date of the incident when [Excel's] storage unit underwent its customary six month cleanout. Shane Heil would have been the individual responsible for authorizing the disposal of the box." Excel added, "[a]fter the date of the incident, Excel did not hear anything about the accident or about [Warembourg] until it received a phone call from an attorney over a year later."

¶ 14 Warembourg deposed several of Excel's employees, including Shane, Matthew O'Connell, Corey, and Chris Heil. (O'Connell was a longtime employee of Excel. Chris is Corey's son and Shane's nephew.)

¶ 15 Shane testified during his deposition that Excel retained the box for approximately six months "[b]ecause we cleaned out our warehouse sometime in May after the accident." He reiterated, "We

threw it out six months after we brought it back to the shop." When Warembourg questioned Shane's timeline, Shane said the box was destroyed in March or April 2016. Shane admitted, however, that he was guessing the date because Excel did not have any records concerning the cleaning. Shane further testified that he ordered Chris to throw away the box because it was taking up space.

¶ 16 During his deposition on March 28, 2018, O'Connell testified that Excel currently displayed a damaged electrical panel (the panel) on a wall at its warehouse as a warning to Excel's employees about the dangers of electricity. Someone had written "IGNORANT FLOORING GUY" next to the panel. O'Connell explained that the panel had been there for years.

¶ 17 During Corey's deposition, he stated that Excel threw away the box between six to eight months after Warembourg's accident. He said he was present when the box was thrown away and probably made the decision to do so. However, Corey conceded that the last time he remembered seeing the box was September or October 2015, and that he could not "even say that it was [in Excel's warehouse] in December [2015] to be honest."

¶ 18 Corey further testified that Excel held the box in the "job room," which was not subject to periodic cleanings and would not have been cleaned until three months after Excel's work with Feller Homes concluded in late 2016 or early 2017. Finally, Corey admitted that he knew Warembourg suffered a "major injury" based on the information Shane received from Pinnacol Assurance in the October 27, 2015, call.

¶ 19 Following these depositions, Warembourg served a request to inspect the panel at Excel's warehouse. Excel objected, claiming that it destroyed the panel in late March 2018 — apparently within hours of O'Connell's revelation about the existence of the "IGNORANT FLOORING GUY" label and the panel.

¶ 20 Warembourg next deposed Chris. Chris testified that he threw away the panel after Shane told him to remove it from the warehouse wall and Corey told him to dispose of it. Chris also said he did not remember seeing the box.

¶ 21 Excel moved for a ruling that the Premises Liabilities Act (PLA), § 13-21-115, C.R.S. 2019, provided Warembourg's sole remedy and for a determination of Warembourg's status under the PLA. Excel asserted that Warembourg was a trespasser because he

had lacked its permission to "break into" its box and had engaged in criminal activity under sections 18-4-506.5 or 18-2-101, C.R.S. 2019, by removing the box's cover. The court agreed that the PLA provided Warembourg's exclusive remedy, but classified Warembourg as an invitee at the time of the accident because both parties presented evidence that he had the authority to access the breakers within the box.

¶ 22 In addition, Warembourg moved for entry of a default judgment against Excel as a sanction for its destruction of the box and the panel and lack of candor regarding these items. The district court found that Excel provided inconsistent accounts of the date it destroyed the box and, consequently, found that Excel engaged in spoliation when it destroyed the box in bad faith. The court further found that Excel's spoliation prejudiced Warembourg because an exemplar panel and photographs of the box were inadequate substitutes for the box itself. The court also determined that Excel's destruction of the panel during litigation adversely impacted its credibility concerning its destruction of the box.

¶ 23 After determining that it could not impose "the ultimate sanction of default in absence of a rule or court order," the district

court announced it would give an adverse inference jury instruction as a sanction for Excel's spoliation. The court asked the parties to tender proposed language for the instruction and submit briefs on the times during the trial when the court should read the instruction to the jury.

¶ 24 At the trial management conference, the district court ruled that Excel could not present evidence that Warembourg had engaged in criminal conduct.

¶ 25 Shortly before trial, the district court conducted a hearing to determine the language of the subject instruction. Based on its previous findings that Excel destroyed the box intentionally and in bad faith, the court concluded that the appropriate sanction was an instruction that the jury must presume Excel failed to use reasonable care to protect Warembourg against the danger the box presented and, therefore, was *a* cause of the accident. The instruction stated,

> [d]ue to the Defendant's destruction of the electrical box, the Court has previously made a legal finding that the electrical box is presumed to have been a danger on the property about which [Excel] knew or, as an entity using reasonable care, should have known; that [Excel] failed to use reasonable

> care to protect against the danger of the electrical box on the property, and [Excel's] failure was a cause of [Warembourg's] injuries, if any. You must regard those facts as proven.
>
> Therefore, you need only consider whether plaintiff has proven by a preponderance of the evidence that he had injuries.

¶ 26 In addition, the court specifically barred Excel from presenting evidence that it acted with due care and announced it would read the subject instruction each time Excel defied its order by introducing evidence of its due care.

¶ 27 The court did not strike Excel's contributory negligence defense, however. For this reason, the court declined to give Warembourg's proposed instruction that the box was "*the* cause" of his injuries. (Emphasis added.) The court also rejected Warembourg's request for a standalone instruction. Finally, the court determined that evidence of the condition of the box was admissible because it was relevant to the credibility of Excel's employees and to its contributory negligence defense.

C. The Trial and Excel's Motion to Cap Warembourg's Damages

¶ 28 The district court enforced the spoliation sanction against Excel by reading the subject instruction to the jury after Excel's

expert opined that Warembourg had engaged in dangerous actions when he removed the box's cover. The court also read the subject instruction to the jury during voir dire — upon Excel's request — and after the completion of the evidentiary portion of the trial. Consistent with its pretrial rulings, the court allowed Warembourg to present testimony about the panel and the likely condition of the box before the accident.

¶ 29 Further, the court rejected Excel's tendered assumption of risk instruction because the evidence showed that Warembourg lacked knowledge of the specific danger associated with toggling the breaker and, thus, did not consent to the risk of injury. The court also struck Excel's assumption of risk defense because it was inconsistent with its contributory negligence defense and designation of a nonparty at fault.

¶ 30 The jury returned a verdict in favor of Warembourg. It concluded that neither Warembourg nor Schmidt Floors acted negligently or caused Warembourg's injuries. Rather, it found Excel to be 100% at fault. The jury awarded Warembourg damages totaling approximately $16 million, of which approximately $5.3 million was for his noneconomic injuries.

¶ 31 Excel moved to cap the jury's award of noneconomic damages under the Construction Defect Action Reform Act (CDARA), §§ 13-20-801 to -808, C.R.S. 2019, arguing that CDARA's statutory cap applied to construction professionals such as itself. The district court disagreed, ruling that CDARA's cap did not limit Warembourg's damages because this was not a construction defects case. Instead, the court applied the general cap on noneconomic damages found in section 13-21-102.5(3)(a), C.R.S. 2019, which was nearly twice as high as CDARA's cap. The court then doubled the general cap due to Warembourg's "profound, severe, and life-altering" injuries. *See* § 13-21-102.5(3)(a).

¶ 32 Excel also filed a motion for new trial, which the district court denied.

II. Discussion

¶ 33 Excel advances five primary contentions of error:

(1) The district court improperly classified Warembourg as an invitee under the PLA.

(2) The district court erred in giving the subject instruction as a sanction for Excel's spoliation.

(3) The district court abused its discretion by barring Excel's evidence that it had acted with due care and that Warembourg had violated the criminal code, and by allowing Warembourg to testify about the condition of the box, which Excel claimed amounted to improper advocacy by the court.

(4) The district court erred in declining to instruct the jury on Excel's assumption of risk defense.

(5) The district court should have capped Warembourg's noneconomic damages under CDARA.

A. Warembourg's Status Under the PLA

¶ 34 Excel contends that the district court erred by ruling that Warembourg was an invitee for purposes of the PLA. Excel specifically asserts that, because he was not authorized to "break into" its box, Warembourg was a trespasser or, at best, a licensee. And, because Warembourg failed to present evidence that Excel knew of any dangers created by the box, Excel argues that he is not entitled to recover any damages. We discern no error in the court's classification of Warembourg as an invitee under the PLA, however.

1. Standard of Review

¶ 35 We review a trial court's ruling on whether a plaintiff was an invitee, licensee, or trespasser at the time of injury as a mixed question of fact and law. *Legro v. Robinson*, 2015 COA 183, ¶ 15, 369 P.3d 785, 789; *see* § 13-21-115(4). "We defer to the court's credibility determinations, and will disturb its findings of historical fact only if they are clearly erroneous and not supported by the record." *Legro*, ¶ 15, 369 P.3d at 789. But we review de novo the court's application of the facts to the governing legal standards. *Id.*

2. Legal Authority

¶ 36 The General Assembly enacted the PLA to "establish a comprehensive and exclusive specification of the duties landowners owe to those injured on their property." *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004); *see* § 13-21-115(2) ("In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in" section 13-21-115(3).) The statute "preempts prior common law theories of liability, and [is] the sole codification of

landowner duties in tort." *Vigil*, 103 P.3d at 328; *see Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1265 (Colo. App. 2010) ("The [PLA] provides the sole remedy against landowners for injuries on their property.").

¶ 37 A "'landowner' includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." § 13-21-115(1). "Thus, a 'person need not hold title to the property to be considered a "landowner."'" *Wycoff*, 251 P.3d at 1266 (quoting *Burbach v. Canwest Invs., LLC*, 224 P.3d 437, 441 (Colo. App. 2009)).

> We read the statute as intending to define and limit the liability of property owners. Such protection is, in our view, available to authorized agents or parties in possession of the property *and also to parties legally responsible for the condition of the property or activities conducted on it*. Since the protections of the statute are broad-reaching, its responsibilities must be coextensive. Therefore, an independent contractor . . . is a "landowner" for purposes both of the protections and the responsibilities of the statute.

Pierson v. Black Canyon Aggregates, Inc., 48 P.3d 1215, 1216 (Colo. 2002) (emphasis added).

¶ 38 Section 13-21-115(3) "outlines the respective duties that a landowner owes to trespassers, invitees, and licensees and provides that a breach of those duties may result in liability for damages caused." *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 574 (Colo. 2008); *see Legro*, ¶ 19, 369 P.3d at 789 ("[T]he ability of an injured party to recover is correlated with his status as a trespasser, licensee, or invitee." (quoting § 13-21-115(1.5)(a))).

¶ 39 A landowner owes the greatest duty of care to an invitee, a lesser duty to a licensee, and the least duty to a trespasser. *Wycoff*, 251 P.3d at 1265; *see* § 13-21-115(3). The PLA defines invitee, licensee, and trespasser as follows:

> (a) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.
>
> (b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's

> permission or consent. "Licensee" includes a social guest.
>
> (c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

§ 13-21-115(5).

¶ 40 A plaintiff's status may change if he or she exceeds the scope of the landowner's invitation to access the property. *Chapman v. Willey*, 134 P.3d 568, 569-70 (Colo. App. 2006).

3. Analysis

a. Warembourg's Status Under the PLA Is Not a Moot Issue

¶ 41 As an initial matter, Warembourg claims that his status under the PLA is moot because this determination concerns only the standard of care Excel owed to him, which the district court conclusively resolved through the subject instruction. We reject this argument, however, because it assumes that the court would have imposed an identical sanction regardless of its ruling on Warembourg's status under the PLA.

¶ 42 The subject instruction specifically said that Excel "knew, or as an entity using reasonable care, should have known" that the box presented a danger of injury. The "knew or should have known" language mirrors the standard to which landowners must

adhere to protect invitees under the PLA. *See* § 13-21-115(3)(c)(I). Thus, it appears the district court fashioned the sanction based on its previous ruling that, pursuant to the PLA, Warembourg was an invitee. Had the court's PLA ruling differed, the sanction likely would have differed too. Thus, because the court's PLA ruling informed its sanction, which impacted the later proceedings in the case, we conclude that Warembourg's status under the PLA is not moot.

b. Warembourg Was an Invitee at the Time of His Injury

¶ 43 Because the record shows that Warembourg and Excel were mutually interested in providing construction services for Feller Homes and supports the district court's finding that Excel did not tell Warembourg he could not toggle the box's internal breakers, we hold that Warembourg was an invitee under the PLA at the time of his injury. *See* § 13-21-115(5)(a) (An "[i]nvitee" is a person "who enters or remains on the land of another to transact business in which the parties are mutually interested.").

¶ 44 The parties do not dispute that Excel owned the box and was responsible for its condition and providing electrical access to subcontractors at the construction site. Thus, we conclude that

Excel was a property owner for purposes of the PLA because it was legally responsible for the condition of the box. *See Pierson*, 48 P.3d at 1216.

¶ 45 Nor do the parties dispute that Feller Homes hired Schmidt Floors and Excel to provide construction services for the new home and that Warembourg was Schmidt Floors' employee. Further, the record supports the district court's finding that "each party require[d] the existence of the other in order to perform a service for which it [could] be compensated: [Warembourg] require[d] electricity in order to install floors; and [Excel] need[ed] subcontractors, such as [Schmidt Floors], for whom construction site electricity is a commodity." For this reason, given that the parties were "mutually interested" in "transacting business," Warembourg was Excel's invitee under the PLA for purposes of accessing power from the box. § 13-21-115(5)(a).

¶ 46 The parties' agreement on the facts ends here, however. Excel concedes that Warembourg was initially its invitee but contends that Warembourg lost that status when he "broke into" the box. In response, Warembourg asserts that Excel's briefs addressing the PLA failed to provide any evidence that he had lacked the authority

to toggle the box's internal breakers. (Warembourg argues that our review is limited to the arguments presented in the parties' briefs on Warembourg's status under the PLA and, thus, we may not consider evidence Excel introduced at trial regarding Warembourg's authority to access the interior of the box).

¶ 47 Neither party apparently contends that the district court misapplied the law. Rather, Excel claims that the court erred in finding that Warembourg had the authority to access the interior of the box. Thus, the resolution of this issue turns on whether Warembourg had such authority: if he did, he was an invitee; if not, he was either a licensee or a trespasser. *See* § 13-21-115(5).

¶ 48 We need not resolve Warembourg's contention that Excel waived the right to present evidence regarding Warembourg's status under the PLA because, regardless of whether we consider the evidence introduced at trial, the record supports the district court's finding that Warembourg had the authority to troubleshoot power problems by removing the box's cover and toggling its internal breakers. Although Excel's employees testified that they had not given Warembourg permission to "break into" and "mess with" the box, there is no evidence that any of these employees — or anyone

else — told Warembourg he could not troubleshoot the malfunctioning box in the exact manner he did.

¶ 49 Indeed, the deposition and trial testimony show that Warembourg operated within the scope of his authority:

- Warembourg testified that he thought he had permission to use the box and troubleshoot the power problem, that he had toggled breakers "well over a thousand" times in his fourteen years as a subcontractor, and that nobody had ever told him he lacked such permission.
- Shane testified that Excel installed the box to provide power to subcontractors working at the construction site; subcontractors commonly troubleshoot power problems by removing the panel on temporary boxes to toggle the internal breakers; and Excel did nothing to stop other subcontractors from troubleshooting in this manner.
- O'Connell testified similarly, explaining that subcontractors have access to temporary boxes, commonly remove the boxes' covers to troubleshoot problems, and have not been told they are not authorized to do so.

- Corey testified that Excel does not tell subcontractors that they may not access the interior of its temporary boxes.
- The Inspection Supervisor for the City of Westminster opined that subcontractors commonly remove the panel on boxes and toggle the internal breakers to troubleshoot power issues.

Moreover, contrary to Excel's assertions, the photographs of the damaged box in the record prove it lacked legible warning stickers. Based on this evidence, we conclude that Excel did not limit Warembourg's authority to access the box.

¶ 50 Because Warembourg possessed the authority to troubleshoot the power problem by removing the box's cover and toggling its internal breakers, the district court did not err in classifying him as an invitee under the PLA.

B. The Spoliation Sanction

¶ 51 Excel contends that the district court erred in instructing the jury on an irrebuttable presumption of causation and liability as a sanction for Excel's destruction of the box. We disagree.

1. Standard of Review

¶ 52 Because "trial courts enjoy broad discretion to impose sanctions for spoliation of evidence, even if the evidence was not subject to a discovery order permitting sanctions under C.R.C.P. 37[,] . . . we will not overturn the trial court's determination unless it is manifestly arbitrary, unreasonable, or unfair." *Castillo v. Chief Alt., LLC*, 140 P.3d 234, 236 (Colo. App. 2006); *see Pfantz v. Kmart Corp.*, 85 P.3d 564, 567 (Colo. App. 2003). If a court imposes an adverse inference instruction as a sanction for spoliation, "the form and style of the instruction [are] within the trial court's discretion." *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 909 (Colo. 2001).

2. Legal Authority

¶ 53 "The ability to provide the jury with an adverse inference instruction as a sanction for spoliation of evidence derives from the trial court's inherent powers." *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006) (citing *Pena v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984)). Although courts' inherent powers to sanction spoliation may differ between jurisdictions, *see Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001), "we are persuaded by Colorado cases involving discovery violations, as well

as by more recent federal precedent," for guidance on whether a court abuses its discretion by imposing a particular sanction, *Pfantz*, 85 P.3d at 568.

¶ 54 "In determining whether the trial court abused its discretion, we must examine whether the rationales underlying the adverse inference supported giving the instruction as a sanction for spoliation." *Aloi*, 129 P.3d at 1002.

> [A]dverse inference instructions serve both a punitive and a remedial purpose. The punitive function serves to deter parties from destroying evidence in order to prevent its introduction at trial. The remedial function serves to restore the putative prejudiced party to the position it would have held had there been no spoliation.

Id. (citations omitted).

¶ 55 To effectuate these purposes, the supreme court adopted the Fourth Circuit's rationale that a court need not find bad faith or that the content of the destroyed evidence would have been unfavorable to the spoliator before imposing a sanction in the form of an adverse instruction. *See id.* at 1003-04 ("To draw an adverse inference from the absence, loss[,] or destruction of evidence, it would have to appear that the evidence would have been relevant to

an issue at trial and otherwise would naturally have been introduced into evidence." (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995))).

¶ 56 Thus, "[t]he trial court need not find that the evidence was destroyed in bad faith; it may sanction a party who willfully destroys evidence relevant to a contested issue" if "the party knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation." *Castillo*, 140 P.3d at 236 (citing *Aloi*, 129 P.3d at 1003); *Pfantz*, 85 P.3d at 568-69; *Rodriguez v. Schutt*, 896 P.2d 881, 884-85 (Colo. App. 1994), *aff'd in part and rev'd in part on other grounds*, 914 P.2d 921 (Colo. 1996).

¶ 57 Further, the spoliator's state of mind is an important consideration when determining the appropriate severity of the adverse inference sanction. *See Pfantz*, 85 P.3d at 568 ("The sanction should be 'commensurate with the seriousness of the disobedient party's conduct.'" (quoting *Newell v. Engel*, 899 P.2d 273, 276 (Colo. App. 1994))).

> [A]n adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction

> should be determined based on the nature of the spoliating party's conduct — the more egregious the conduct, the more harsh the instruction. In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable. The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party.

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., 685 F. Supp. 2d 456, 470 (S.D.N.Y. 2010) (footnotes omitted), *abrogated on other grounds by Chin v. Port Auth.*, 685 F.3d 135 (2d Cir. 2012).

3. The District Court Did Not Abuse Its Discretion in Imposing the Subject Instruction as a Sanction for Excel's Spoliation

¶ 58 As explained above, the district court imposed the subject instruction as a sanction for Excel's intentional destruction of the box in bad faith. The court noted that this sanction served the punitive purpose of deterring misconduct and the remedial purpose of reducing the "profound[] prejudice" to Warembourg.

¶ 59 Excel concedes that it discarded the box and that the box would have be relevant to the litigation. However, Excel claims that its actions were benign: its employees were not "litigation-savvy" and did not understand the importance of retaining a damaged piece of equipment for months when Warembourg had not divulged the extent of his injuries or the significance of the box to those injuries. It further asserts that its employees' inconsistent and contradictory statements concerning the box's destruction resulted from their "possible incomplete memor[ies]" and Warembourg's engagement in "semantics."

¶ 60 In the alternative, Excel contends that, even if the record supports the court's finding, the court abused its discretion because Colorado law does not authorize the sanction it imposed. Excel further asserts that the subject instruction impermissibly took the issues of credibility, causation, and liability away from the jury, thereby wrongfully precluding the jury from deciding the case on the merits. We consider and reject each argument.

a. The District Court Did Not Err in Finding that Excel Intentionally Destroyed the Box in Bad Faith

¶ 61 Excel had a legal duty to preserve the box upon learning that litigation arising from Warembourg's accident was likely. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) ("In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely."); *Scott v. IBM Corp.*, 196 F.R.D. 233, 249 (D.N.J. 2000) ("While a litigant is under no duty keep or retain every document in its possession, even in advance of litigation it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.").

¶ 62 The analysis of when litigation was "reasonably foreseeable" is "a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). That analysis was stymied here due to Excel's conflicting accounts of the box's destruction.

¶ 63 The district court meticulously reviewed the record in determining that Excel had destroyed the box while under a duty to preserve it. In support of its conclusion, the district court made the following findings of fact:

- "[Excel] knew within days of September 9, 2015 that [Warembourg] had sustained an injury related to the electrical box in question";
- "[Excel] was on notice as of October 27, 2015, that the box had relevance to an investigation of this injury"; and
- "[s]ometime between May 1 and 17, 2016, [Excel acquired] actual knowledge that litigation was imminent."

¶ 64 Based on these findings, the court concluded that Excel "disposed of the electrical box sometime after it had actual knowledge that the box had potential evidentiary value . . . . Conflicting evidence and testimony provided by [Excel], however, make[] it impossible to definitely establish the date of destruction." Due to the Excel employees' conflicting testimony regarding when the box was discarded, who destroyed it, and where it was kept before its destruction, the court inferred that "at the time [Excel] destroyed the electrical box involved in [Warembourg's] injury, it

knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably for[e]seeable litigation."

¶ 65 The record supports the district court's findings of fact and inferences from those facts. *See People in Interest of L.M.*, 2018 COA 57M, ¶ 17, 433 P.3d 114, 118 ("[T]he inferences and conclusions to be drawn from [the facts] are within the [trial] court's discretion."). First, Corey testified that Excel knew somebody had been injured "a couple days after" the accident. Corey's testimony is consistent with the evidence that an Excel employee retrieved the damaged box the day of the accident and Excel inspected the box the next day.

¶ 66 Second, following Shane's call with Pinnacol Assurance, Excel was on notice that the box was relevant to Warembourg's injuries. The investigator explained who he was, for whom he worked, and why he was calling. Their conversation focused on the condition of the box, its whereabouts, and Warembourg's alleged actions preceding the accident. Further, Shane said he knew Warembourg had been injured.

¶ 67 If there was any doubt that Excel knew the box was relevant, Shane later testified that he knew it was prudent to retain injury-causing equipment for potential worker's compensation claims. Moreover, Corey conceded that, at the time of the Pinnacol Assurance call, Excel knew that a "major injury" had occurred and that a worker's compensation carrier was investigating the cause of Warembourg's injuries and the condition of the box.

¶ 68 Third, the record evidence establishes that Excel had actual knowledge that litigation was imminent when it received the letter from Warembourg's counsel in early May 2016. The letter specifically referenced Warembourg's claim against Excel and included an express request that Excel preserve "any . . . evidence relating to this incident." Further, the record shows that Excel tendered a claim for Warembourg's injuries to its insurance carrier on May 13, 2016.

¶ 69 Thus, the record supports the district court's finding that Excel intentionally "disposed of the electrical box sometime after it had actual knowledge that the box had potential evidentiary value."

¶ 70 The record also supports the district court's inference that Excel destroyed the box in bad faith. Excel inconsistently described

when it disposed of the box. Shane first told the investigator for Pinnacol Assurance on October 27, 2015, that Excel had "probably" already thrown away the box. He initially testified in his deposition that Excel retained the box for approximately six months, but later testified that Excel kept the box until March or April 2016. Shane also testified that Excel discarded the box during a routine cleaning of its warehouse, which occurred sometime in May 2016. Yet Excel represented in interrogatory responses that it disposed of the box approximately six months after Warembourg's accident. And Corey testified that Excel retained the box for six to eight months after the accident.

¶ 71 As the district court correctly noted, "[a]t least one of these statements [wa]s necessarily false . . . [and] prevented an interested party from inspecting the box for physical evidence regarding the circumstances of [Warembourg's] injury."

¶ 72 Excel also inconsistently described *who* destroyed the box. During the call with Pinnacol Assurance, Shane stated that his "shop guy" discarded the box. Shane later testified that he was responsible for discarding the box and that either he or Chris did so. However, Chris testified that he did not remember seeing the

box. Meanwhile, Corey testified that he was present when the box was thrown away and probably made the decision to do so. Further, in interrogatory responses, Excel certified that "Shane Heil would have been the individual responsible for authorizing the disposal of the box." Thus, at least one of Excel's sworn statements concerning who destroyed the box must also have been false.

¶ 73 Finally, Excel inconsistently described *where* it kept the box after Warembourg's injury. Shane initially told Pinnacol Assurance that Excel did not have the box and later testified that he directed its destruction during a routine cleaning. Corey gave a different account, however, testifying that Excel held the box in the "job room," which was not subject to periodic cleanings.

¶ 74 The district court found that Excel intentionally destroyed the box in bad faith in anticipation of litigation, based on Excel's numerous inconsistent statements, its destruction of the "IGNORANT FLOORING GUY" label and the panel within hours following O'Connell's deposition testimony about this potentially damaging evidence, and its demonstrably false representations throughout the litigation, including its statement that "[a]fter the date of the incident, Excel did not hear anything about the accident

or about [Warembourg] until it received a phone call from an attorney over a year later."

¶ 75 We cannot assume the district court's role to find facts and determine credibility. *Legro*, ¶ 15, 369 P.3d at 789 ("We defer to the court's credibility determinations, and will disturb its findings of historical fact only if they are clearly erroneous and not supported by the record."). The district court was free to believe or disbelieve the witnesses. We conclude that it did not err in disbelieving Excel's representations and finding that Excel intentionally destroyed the box in bad faith.

b. The District Court Did Not Abuse Its Discretion in Giving the Subject Instruction

¶ 76 As an initial matter, we reject Excel's assertion that Colorado law does not authorize a court to give an adverse inference jury instruction containing an irrebuttable presumption as a sanction for a party's pre-litigation destruction of evidence. Excel provides no authority, and we can find none, that circumscribes a court's power in this manner. To the contrary, Colorado and federal case law overwhelmingly indicates that courts possess broad discretion in fashioning the appropriate sanction for spoliation. *See Aloi*, 129

P.3d at 1002; *see also Vodusek*, 71 F.3d at 156; *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996) (Because the imposition of sanctions is essentially a judgment call, courts' rulings "cannot be tied down to a fixed rule or formula. If such were the case, courts would lose their flexibility in the sanctions process, and discretion would lose its meaning.").

¶ 77 A court has the option to fashion an adverse inference jury instruction against the spoliator. *See Rodriguez*, 896 P.2d at 884 ("Where a party intentionally destroys evidence to prevent its introduction at trial, the trial court clearly has the power to employ an adverse inference as a sanction."); *see also Pension Comm.*, 685 F. Supp. 2d at 470. The adverse inference instruction can take different forms; "[i]n its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true." *Pension Comm.*, 685 F. Supp. 2d at 470; *see Pfantz*, 85 P.3d at 568-69 (affirming the trial court's rulings, including its decision to give an adverse inference jury instruction containing an irrebuttable presumption as a sanction for spoliation).

¶ 78 For these reasons, we hold that Colorado trial courts have the authority to give an adverse inference jury instruction containing an irrebuttable presumption as a sanction for a party's pre-litigation spoliation of evidence. *See Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 204 (Colo. App. 1998) ("We note that the opposite result — denying the court the inherent power to award sanctions . . . — would only encourage unscrupulous parties to destroy damaging evidence before a court order has been issued.").

¶ 79 We decline to address Warembourg's contention that the district court also had the authority to enter a default judgment as a sanction for Excel's pre-litigation spoliation. Such a determination "would have no practical legal effect upon the existing controversy" — whether the district court abused its discretion in imposing a jury instruction containing an irrebuttable presumption. *Am. Drug Store, Inc. v. City & Cty. of Denver*, 831 P.2d 465, 469 (Colo. 1992) (quoting *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426-27 (Colo. 1990)).

¶ 80 Having concluded that the spoliation sanction was within the district court's authority, we now turn to whether the court abused its discretion in imposing it. We hold that the court did not abuse

its discretion because the sanction served the punitive function of deterring Excel's bad faith misconduct and the remedial function of restoring Warembourg to the position in which he would have been had Excel not discarded the box. *See Aloi*, 129 P.3d at 1002.

¶ 81 The court's finding that Excel intentionally destroyed the box in bad faith alone provides a sufficient punitive purpose for imposition of the subject instruction. *See Pension Comm.*, 685 F. Supp. 2d at 470; *Pfantz*, 85 P.3d at 568-69. Moreover, the district court's findings regarding Excel's destruction of the panel during litigation underscore the appropriateness of the sanction. The court needed to "deter [Excel] from destroying evidence" that would naturally have been "introduc[ed] at trial." *Aloi*, 129 P.3d at 1002.

¶ 82 The subject instruction also properly served as a remedial measure to limit prejudice to Warembourg. *See id.* The district court found that the box was "the key item of physical evidence," that it "would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence," and that Warembourg was "profoundly prejudiced" by its destruction. *Id.* at 1004 (quoting *Vodusek*, 71 F.3d at 156). The court noted that an

exemplar panel and photographs of the box were inadequate substitutes for the box itself because the "proffered substitutes cannot resolve the disputed question of the condition of [the box], and all its constituent parts, when [Warembourg] came upon it."

¶ 83 The record supports the district court's finding of prejudice and need for remedial measures. Excel destroyed the box without recording any notes or taking any photographs of it, thereby precluding Warembourg and Pinnacol Assurance from examining it. Excel subsequently misrepresented the condition of the box, stating that it found no issues during its inspection, and speculated that Warembourg's attempt to compensate for his own lack of proper equipment caused his injuries. However, Excel failed to introduce any evidence supporting its contention that Warembourg either lacked the proper equipment or injured himself while trying to hook an improper cord to the breaker. Thus, without access to the box, Warembourg could not defend himself against Excel's accusations that he, and not the box, caused his injuries. For this reason, we conclude that a lesser sanction would not have adequately remedied the prejudice to Warembourg. An adverse inference jury instruction articulating a rebuttable presumption of causation and

liability, for which Excel advocates, would have carried little weight given that Excel had the opportunity to examine the box and Warembourg did not. Under this hypothetical scenario, Warembourg would have had no way to refute Excel's statements that the box was functioning properly and did not cause the accident.

¶ 84 Because the district court had the authority to impose the subject instruction as a sanction for Excel's spoliation of the box, and because the sanction served punitive and remedial functions, we hold that the court did not abuse its discretion in giving the adverse inference jury instruction.

c. The District Court Did Not Preclude the Jury from Deciding the Case on the Merits

¶ 85 Finally, we reject Excel's contention that the sanction impermissibly precluded the jury from deciding the case on the merits. As we perceive it, Excel has recloaked its previous abuse of discretion argument in the guise of a right to a jury trial argument. But Excel's contention misses the mark because courts are empowered to enforce their lawful rulings. *See Pena*, 681 P.2d at 956 ("The inherent powers which courts possess consist of: '[A]ll

powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and *to make its lawful actions effective*.'" (quoting Jim R. Carrigan, *Inherent Powers and Finance*, Trial, Nov.-Dec. 1971, at 22)) (emphasis added). Thus, because we held above that the court did not abuse its discretion in imposing an adverse inference jury instruction containing an irrebuttable presumption, we conclude that its enforcement of the sanction did not *impermissibly* take the factfinding role from the jury. Indeed, the federal and Colorado courts have affirmed trial courts' instructions that certain facts are deemed admitted and must be accepted as true. *See Smith v. Kmart Corp.*, 177 F.3d 19, 28-29 (1st Cir. 1999); *Pfantz*, 85 P.3d at 567.

¶ 86 Moreover, the district court allowed Excel to present its contributory negligence defense and nonparty at fault argument. These arguments required the jury, and not the court, to determine whether Warembourg or Schmidt Floors were partly at fault for the accident. Thus, we disagree that the subject instruction precluded the jury from deciding the case on the merits.

C. The District Court's Evidentiary Rulings

¶ 87 Excel argues that the district court abused its discretion by barring Excel's experts from testifying about, and Excel's counsel from discussing, the cause of Warembourg's injuries; by allowing Warembourg's allegedly speculative testimony about the condition of the box; and by precluding Excel from introducing evidence that Warembourg violated the criminal code when he accessed the box. Excel claims that the court's evidentiary rulings, in conjunction with the subject instruction, sanctioned Excel multiple times for the same act, which amounted to improper advocacy by the court. We disagree.

1. Standard of Review

¶ 88 We review a trial court's evidentiary rulings for an abuse of discretion. *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 7, 276 P.3d 562, 564. "A trial court has considerable discretion in ruling upon the admissibility of evidence, and we will find an abuse of discretion only if its ruling is manifestly arbitrary, unreasonable, or unfair." *Leaf v. Beihoffer*, 2014 COA 117, ¶ 9, 338 P.3d 1136, 1138 (quoting *Wark v. McClellan*, 68 P.3d 574, 578 (Colo. App. 2003)). "In weighing those dangers and considerations, the

proffered evidence 'should be given its maximal probative weight and its minimal prejudicial effect.'" *Alhilo v. Kliem*, 2016 COA 142, ¶ 9, 412 P.3d 902, 906 (quoting *Murray v. Just In Case Bus. Lighthouse, LLC*, 2016 CO 47M, ¶ 19, 374 P.3d 443, 451).

2. The District Court Did Not Abuse Its Discretion in Preventing Excel's Witnesses from Opining About the Safety of the Box

¶ 89 Excel specifically asserts that the district court erred by reading the subject instruction to the jury after Excel's expert opined that Warembourg had engaged in dangerous actions. Excel also contends that the court's rulings improperly precluded its witnesses from testifying that

- other contractors had safely used the box the previous year;
- "[t]he box was assembled, installed[,] and maintained according to the applicable standards of care";
- "[t]he accident's cause was not an unreasonable failure of Excel to protect against a danger of which it knew or should have known";

- "[r]easonable protection was provided by Excel against dangers which were known or should have been known"; and
- "[n]o unreasonable failure to protect caused the injury in this case."

¶ 90 We reject Excel's assertions. The district court read the subject instruction after Excel's expert testified that, because "[Warembourg] was hurt," "the work was dangerous." The court's action was consistent with its decision — and obligation — to enforce the subject instruction. At the pretrial hearing, the court informed the parties,

> now that the Court has made this determination about the conclusive presumption, it is no longer relevant to assert or argue that [Excel] exercised due care. The Court has taken that question from the jury. And so a circumstance where the Court might give this instruction would be an event that [Excel] argued or one of the witnesses, perhaps an expert, attempted to offer testimony about [Excel] having exercised due care. The Court would give the instruction in the event that that was – that testimony would lead the jury to infer that there was due care exercised.

Given our holding that the court did not abuse its discretion in imposing the subject instruction, *supra* Part II.B.3.b, we conclude

that the court's reading of the instruction, just as it warned Excel it would do, was not "manifestly arbitrary, unreasonable, or unfair." *Leaf*, ¶ 9, 338 P.3d at 1138 (quoting *Wark*, 68 P.3d at 578); *see Pena*, 681 P.2d at 956 (explaining that courts have the inherent power "to make [their] lawful actions effective"); *see also Pfantz*, 85 P.3d at 568 (explaining that a party that destroys evidence in bad faith is precluded from presenting secondary evidence concerning the characteristics of the evidence (citing CRE 1004(1))).

¶ 91 Further, although the district court said that "it [wa]s no longer relevant to assert or argue that [Excel] exercised due care," the record indicates that the instruction did not preclude Excel from introducing evidence of its alleged exercise of due care regarding the condition of the box. For example, Excel presented evidence that

- Shane inspected and tested the box before installing it at the construction site;
- the box passed inspection; and
- more than a dozen other subcontractors had used the box without reporting any issues.

¶ 92 For this reason, we disagree with Excel's blanket statement that the court precluded it from presenting evidence of its alleged exercise of due care. Accordingly, we hold that the court did not abuse its discretion when it precluded Excel's expert from testifying that Excel exercised due care concerning the condition of the box.

3. The District Court Did Not Abuse Its Discretion in Permitting Warembourg's Witnesses from Opining About the Box's Condition and Destruction

¶ 93 Excel next asserts that the district court erred in permitting Warembourg to present speculative evidence about the condition of the box, Excel's destruction of the panel, and Excel's alleged knowledge concerning its destruction of the box, which was irrelevant as a consequence of the court's imposition of the subject instruction. The court addressed Excel's contention in denying Excel's motion for new trial, explaining that Excel's comparative fault defense and nonparty at fault argument made this evidence relevant. The court also noted that it had permitted both parties to present evidence concerning Excel's destruction of the box, and that Excel chose to do so.

¶ 94 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence." CRE 401. Relevant evidence is generally admissible. CRE 402.

¶ 95 In advancing its assertion that the condition of the box was irrelevant after the court imposed the subject instruction, Excel focuses on Warembourg's PLA claim and ignores its own defenses. Evidence of the condition of the box would have been irrelevant had the subject instruction stated that Excel was *the sole cause* of Warembourg's injuries and had Excel not argued comparative fault and that Schmidt Floors was a nonparty at fault. But, by stating that Excel was "a cause" of the accident, the subject instruction left the door open for Excel's presentation of evidence that Warembourg's and Schmidt Floors' actions contributed to the accident. Thus, the condition of the box was relevant to Excel's own defenses at trial.

¶ 96 Excel's destruction of the panel and knowledge of when it destroyed the box were also relevant to Excel's theory of the case. As the district court correctly noted, the jury "had to determine [Excel's] degree of liability in comparison to [Warembourg's] and [Schmidt Floors'] alleged liability." *See* § 13-21-111(1), (2)(b), C.R.S.

2019 (providing that, in actions where the plaintiff's negligence contributed to his or her injuries, "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made," which is determined "by the degree of negligence of each party, expressed as a percentage"); § 13-21-111.5(1), C.R.S. 2019 (stating that, in applying the nonparty designation statute, "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant . . . ."). Evidence concerning Excel's destruction of the panel during the pendency of the litigation and its knowledge of when it discarded the box were relevant to its credibility on all other issues, including its representations about the condition of the box and its percentage of fault for the accident.

¶ 97 Accordingly, we hold that the district court did not abuse its discretion in permitting Warembourg to present evidence concerning the condition of the box, Excel's destruction of the panel, and Excel's alleged knowledge when it discarded the box.

4. We Do Not Address Excel's Remaining Contentions of Error Concerning the District Court's Evidentiary Rulings

¶ 98 Excel contends that the district court abused its discretion by precluding Excel from introducing evidence that Warembourg allegedly violated the criminal code and by barring Excel's counsel from arguing in closing that the box was safe. But Excel devotes a mere conclusory sentence to each of these issues. We decline to address these arguments because they are "unsupported by any substantial argument" and, thus, are insufficiently developed for appellate review. *Taylor v. Taylor*, 2016 COA 100, ¶ 13, 381 P.3d 428, 431.

5. The District Court Did Not Improperly Act as an Advocate

¶ 99 Excel argues that the district court's evidentiary rulings improperly sanctioned Excel multiple times for the same act and, thus, amounted to improper advocacy by the court. Because we held above that the court correctly applied the subject instruction, we reject Excel's argument.

¶ 100 Moreover, despite the severity of Excel's conduct that led to Warembourg's inability to prove that the box caused his injuries, the district court went out of its way to ensure that the sanction

would not preclude the jury from deciding the case on the merits. *See Aloi*, 129 P.3d at 1006 ("The test which must be applied here is whether the trial judge's conduct so departed from the required impartiality as to deny the [party] a fair trial." (quoting *People v. Adler*, 629 P.2d 569, 573 (Colo. 1981))). The court

- denied Warembourg's request for language in the instruction stating that the box was "the cause" of the accident;
- denied Warembourg's request for a standalone instruction highlighting Excel's spoliation;
- permitted Excel to present evidence that the "destruction [of the box] was due to a good faith accidental loss";
- never informed the jury of its finding that Excel destroyed the box in bad faith;
- permitted Excel to raise its contributory negligence defense and argue that Schmidt Floors was a nonparty at fault;
- read the adverse inference jury instruction to the jury only three times over an eight-day trial, one time at Excel's request;

- did not read the instruction in many instances where Excel presented evidence of its alleged exercise of due care concerning the condition of the box; and
- expressly invited Excel to object to Warembourg's presentation of evidence about the box if such evidence became cumulative, which Excel did not do.

Thus, we agree with the court's assessment that "the spoliation instruction was not unduly highlighted" and did not deprive Excel of a fair trial. *See Aloi*, 129 P.3d at 1006.

¶ 101 Moreover, in each of the its actions listed above, the district court addressed Excel's objections and articulated the reasoning behind its decision. *See id.* Accordingly, when we view the totality of the court's actions, we conclude that it did not act as an advocate because its actions were "motivated by a desire to remedy prejudice caused by spoliation of evidence rather than by partiality." *Id.*

D. The Rejected Assumption of Risk Instruction

¶ 102 Excel contends that the district court erred in failing to instruct the jury on Excel's assumption of risk defense, given that Warembourg presented evidence that he was qualified to troubleshoot the problems with the box; Excel introduced evidence

that Warembourg ignored a warning sticker on the box; and the parties agreed he voluntarily removed the box's cover and accessed the breaker. Excel further asserts that the court erroneously concluded that the tendered instruction was inconsistent with Excel's contributory negligence defense and argument that Schmidt Floors was a nonparty at fault. We discern no error.

1. Standard of Review

¶ 103 Trial courts must correctly instruct the jury on all matters of law. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). We review de novo whether the "instructions as a whole accurately informed the jury of the governing law." *Id.* However, because trial courts have broad discretion to fashion the form and style of instructions, "we review a trial court's decision to give a particular jury instruction for an abuse of discretion." *Id.* "A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable, or unfair, or the instruction is unsupported by competent evidence in the record." *Vititoe v. Rocky Mountain Pavement Maint., Inc.*, 2015 COA 82, ¶ 78, 412 P.3d 767, 782.

2. Legal Authority

¶ 104 A party may plead an assumption of risk defense in PLA cases. *See Tucker v. Volunteers of Am. Colo. Branch*, 211 P.3d 708, 711 (Colo. App. 2008) ("The PLA . . . does not exclusively limit defenses and does not abrogate statutorily created defenses . . . ."), *aff'd and remanded sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010). "[A] person assumes the risk of injury or damage if he voluntarily or unreasonably exposes himself to injury or damage with knowledge or appreciation of the danger and risk involved." § 13-21-111.7, C.R.S. 2019; *see Carter v. Lovelace*, 844 P.2d 1288, 1289 (Colo. App. 1992).

3. The District Court Did Not Abuse Its Discretion in Declining to Instruct the Jury on Excel's Assumption of Risk Defense

¶ 105 We conclude that the district court did not abuse its discretion in rejecting Excel's tendered assumption of risk instruction because the evidence at trial showed that Warembourg lacked knowledge that toggling a breaker in the box presented a danger of injury and, thus, did not consent to that danger. *See Wark*, 68 P.3d at 581 (explaining that a court may instruct the jury on the assumption of risk defense if the facts of the case support giving the instruction).

¶ 106 Contrary to Excel's contention, the record evidence does not indicate that Warembourg knew of the danger or consented to it. Rather, Warembourg testified that he was not aware of the danger of being electrocuted by toggling the breaker. There is a difference between generally appreciating the danger of electricity and knowing that a particular electrical component presents a danger of electrocution. *See Carter*, 844 P.2d at 1290 (holding that the trial court erred in instructing the jury on assumption of the risk when the plaintiff did not assume the specific risk that caused his injuries). A finding that Warembourg's testimony was credible alone would have been sufficient for the court to reject Excel's tendered assumption of risk instruction. *See Wark*, 68 P.3d at 581 (explaining that a party's subjective knowledge of the danger is necessary for an assumption of risk instruction); *see also Legro*, ¶ 15, 369 P.3d at 789 ("We defer to the court's credibility determinations . . . .").

¶ 107 Moreover, additional evidence supported Warembourg's subjective belief that his actions were not dangerous. Shane and Corey conceded that toggling a breaker in a properly functioning box would not be a dangerous act. Warembourg's flooring expert,

his coworker, and the Inspection Supervisor for the City of Westminster confirmed this point. Further, Shane and O'Connell testified during their depositions and the Inspection Supervisor opined in his expert report that subcontractors commonly remove the panel on boxes and toggle the internal breakers to troubleshoot issues with power.

¶ 108 Excel's arguments conflate the assumption of risk and contributory negligence defenses. The distinction between these defenses reinforces our conclusion that the district court did not abuse its discretion in rejecting Excel's tendered instruction. *See Appelhans v. Kirkwood*, 148 Colo. 92, 99, 365 P.2d 233, 237 (1961) ("[A]ssumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct . . . ." (quoting Prosser on Torts § 305 (2d ed. 1955))); *Carter*, 844 P.2d at 1289 ("[A]ssumption of risk requires *knowledge* of the danger and *consent* to it. Contributory negligence does not."). Each of Excel's assertions rests on the subjective belief of one of *its* employees — not Warembourg's belief — that Warembourg assumed the risk of electrocution by opening the box. These

arguments potentially support the conclusion that Warembourg acted negligently, but do not support the conclusion that Warembourg assumed the risk of injury.

¶ 109 Moreover, as noted above, the photographs of the box in the record establish that it lacked legible, if any, warning stickers. We therefore reject Excel's contention that Warembourg assumed the risk of injury by ignoring the warning stickers on the box. And given our holding that the court did not abuse its discretion in rejecting Excel's tendered assumption of risk instruction because Warembourg lacked knowledge of, and did not consent to, the box's danger, we need not address the court's alternate rationale that the proposed assumption of risk instruction was inconsistent with Excel's other defenses.

E. Caps on Noneconomic Damages

¶ 110 Excel contends that the district court erred by not applying the cap on noneconomic damages set forth in CDARA. Excel asserts that the CDARA cap applies because it "was a construction professional whom the statute was intended to protect." We disagree.

1. Standard of Review

¶ 111 Statutory interpretation is a question of law that we review de novo. *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 19, 433 P.3d 22, 28. "In doing so, we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." *Id.*

2. Legal Authority

¶ 112 The General Assembly has proscribed a general cap on noneconomic damages:

> In any civil action other than medical malpractice actions in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of noneconomic loss or injury damages exceed five hundred thousand dollars.

§ 13-21-102.5(3)(a). This cap is adjusted for inflation. § 13-21-102.5(3)(c).

¶ 113 The General Assembly has also capped noneconomic damages in construction defect cases: "In an action asserting personal injury

or bodily injury as a result of a construction defect in which damages for noneconomic loss or injury or derivative noneconomic loss or injury may be awarded, such damages shall not exceed the sum of two hundred fifty thousand dollars." § 13-20-806(4)(a), C.R.S. 2019. The CDARA cap is also adjusted for inflation. § 13-20-806(4)(b).

3. The General Cap on Noneconomic Damages — Not the Cap in CDARA — Applies to Warembourg's Damage Award

¶ 114 Based on the plain language of CDARA, we hold that its cap on noneconomic damages does not apply to Warembourg's judgment because this is not a construction defects case. *See* § 13-20-802.5, C.R.S. 2019. Rather, this case represents the quintessential premises liability action: Warembourg alleged that Excel was legally responsible for the condition of the property or activities conducted on it and failed to use reasonable care to protect him against a dangerous condition that caused his injury. Indeed, Warembourg could not have presented any other theory of liability after the district court ruled that the PLA provided his sole means of recovery. And this was the exact relief Excel sought in its

pretrial motion for a declaration that the PLA applied to Warembourg's claims.

¶ 115 Moreover, regardless of the district court's ruling on the appropriate legal theory, the facts demonstrate that CDARA does not apply. The General Assembly enacted CDARA to proscribe the rights and remedies of property owners who allege that professionals in the construction industry are responsible for construction defects on their property. § 13-20-802, C.R.S. 2019. As the district court found, Warembourg was not a property owner and his claims did not arise from a defect impacting his property.

¶ 116 Further, Excel did not intend for its injury-causing property — the box — to be an "improvement to real property." *See* § 13-20-802.5(1) (providing that CDARA applies to actions "against a construction professional . . . caused by a defect in the design or construction of an improvement to real property"). The General Assembly "intended [CDARA] to apply only to negligence in planning, design, construction, supervision, or inspection that results in a defect *in an improvement to real property* that causes an injury, and to limit actions against building professionals only for claims of injury arising from defects in the improvement they

create." *Two Denver Highlands Ltd. P'ship v. Dillingham Constr. N.A., Inc.*, 932 P.2d 827, 829 (Colo. App. 1996) (emphasis added). Given that the term "improvement to real property" is not defined in CDARA, "[t]he principal factor to be considered in making a determination of whether an activity constitutes an improvement to real property is the intention of the owner." *Id.*; *see Enright v. City of Colorado Springs*, 716 P.2d 148, 150 (Colo. App. 1985) ("[A] permanent fixture . . . must be construed as an improvement to real property."). Here, the record indicates that Excel intended to remove the box at the end of construction. Because the box was temporary, it was not an "improvement to real property."

¶ 117 Thus, CDARA's cap on noneconomic damages does not limit Warembourg's recovery. Accordingly, the general cap on noneconomic damages, which can be doubled due to Warembourg's "profound, severe, and life-altering" injuries, applies to this case. *See* § 13-21-102.5(3)(a).

III. Conclusion

¶ 118 The district court's judgment is affirmed.

JUDGE FREYRE and JUDGE GRAHAM concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-915-969

IN THE MATTER OF THE CLAIM OF:

NINA KAZAZIAN,

Claimant,

v.

FINAL ORDER

VAIL RESORTS,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated February 3, 2020, that denied the claimant's request to overcome the Division sponsored Independent Medical Examiner's (DIME) finding the claimant was at maximum medical improvement (MMI), denied the claimant's request for temporary total disability benefits, and denied her request to convert the scheduled permanent impairment rating to one for the whole person. We affirm the decision of the ALJ.

The claimant worked for the employer as a ski instructor. On April 1, 2013, she fell on stairs leading to the instructor locker room and hit her head. Following the fall the claimant suffered headaches, high frequency hearing loss in both ears and tinnitus, or ringing, in her ears. The claimant was diagnosed by Dr. Strahan as having sustained a cochlear concussion. He believed many of the claimant's symptoms would resolve over time. A CT scan and an MRI did not reveal significant injury to the skull. The claimant was placed at MMI by Dr. Lan on August 22, 2013. Although the claimant complained of persisting high frequency hearing loss, tinnitus ringing and some decreased cognition, the MMI report noted no permanent impairment.

The claimant underwent a DIME review performed by Dr. McLaughlin on May 29, 2019. Dr. McLaughlin noted ongoing hearing loss at high frequencies and tinnitus. Observing that the claimant's symptoms had varied little since the date of MMI and treatment had been limited to the provision of hearing aids, Dr. McLaughlin agreed with

the August 22, 2013, date of MMI. His measurements of hearing loss did not qualify the claimant for an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 3d Edition (revised). However, Chapter 4 of the Guides describes how tinnitus in the presence of hearing loss justifies adding 3-5% to the hearing loss rating. Dr. McLaughlin determined the claimant qualified for a 5% rating based on the duration of the ringing symptoms. The doctor also recommended post MMI maintenance care in the form of a neuropsychological battery of tests to determine if the claimant's complaints of cognitive issues are related to the work injury and any treatment appropriate to a related traumatic brain injury. In addition, he endorsed the need for ongoing audiology and hearing aid treatment.

The respondent filed a Final Admission of Liability (FAL) denying an award of temporary benefits but admitting for the 5% loss of hearing in one ear from the schedule of disabilities, § 8-42-107(2)(ii) C.R.S. The FAL attached the DIME report of Dr. McLaughlin in support of the award. Pertinent to maintenance medical care after MMI the FAL incongruously checked both boxes provided, indicating 'yes' and 'no', but noted the issue was addressed in Dr. McLaughlin's attached report of May 29, 2019.

The claimant applied for a hearing requesting the ALJ find she was not at MMI on August 22, 2013, that she be awarded temporary total disability benefits between the date of injury on April 1, 2013, and August 22 of 2013, and that the 5% impairment rating for loss of hearing be converted to a 2% whole person impairment rating. A hearing was convened on December 12, 2019. The parties submitted exhibits but no testimony was taken. Both parties presented argument through their respective counsel.

The ALJ found that the claimant did not produce clear and convincing evidence to establish that the DIME physician was mistaken regarding the date of MMI. The fact that Dr. McLaughlin prescribed post MMI treatment aimed at diagnosing and possibly treating cognitive symptoms was not seen as inconsistent with the finding of MMI. The recommendation was characterized as speculation as to what might happen in the future, but did not represent a finding by the DIME physician that presently there actually was any medical treatment that offered improvement in the claimant's condition. Otherwise, the ALJ determined the medical records supported the conclusion MMI was achieved on August 22, 2013.

Insofar as the claimant contended she was entitled to temporary disability benefits from April 1, 2013, through August 22, 2013, the ALJ acknowledged that the claimant had established some medical incapacity but that she had failed to demonstrate the second element of temporary indemnity eligibility that required impairment of wage

earing capacity as demonstrated by the claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The ALJ pointed to records from Physician Assistant Landon that recommended on April 5, 2013, that the claimant stay off work for the next few days and then return to limited work on April 16. Dr. Strahan provided a full duty return to work release on May 22, 2013. The ALJ decided that without any testimony as to the loss of earning capacity by the claimant and the reason for that loss of earning capacity, any award of temporary benefits would be speculative.

The ALJ resolved the claimant did not prove by a preponderance of the evidence that her permanent injury was not located on the schedule of disabilities and was instead, described as a percentage of deafness in one ear as provided by § 8-42-108(2)(ii) of the schedule. The ALJ was not convinced the situs of the injury was elsewhere on the body. He relied on the AMA Guides, Chapter 4, Section 4.1c (VIII), pg. 110. That reference provides: "… tinnitus in the presence of a unilateral hearing loss may impair speech discrimination, and 3% to 5% should be added to the rating for the hearing loss." In order to convert the 5% rating to a whole person 2% rating to allow the application of § 8-42-107(8)(c), it must be shown the injury is not set forth on the subsection (2) schedule. The ALJ construed the evidence at the hearing as inadequate to show the permanent disability was located on a part of the body not on the schedule, i.e. loss of hearing of an ear.

While the claimant was represented by counsel at the hearing, she pursues her appeal to us in a pro se capacity.

The claimant points out that the transcript of the hearing contains 84 'inaudibles' indicating that a word or words at those junctures were unintelligible. The claimant argues her appeal is frustrated when such a large portion of the hearing proceedings are unavailable for our review. The claimant's concern notwithstanding, there was no testimony presented at the hearing. Based on the transcript that does exist, as well as proposed findings presented to the ALJ, both after the hearing and after a request for specific findings were submitted, and the briefs in support and in opposition to the Petition to Review, we are sufficiently conversant with the legal arguments the parties are pursuing on appeal.

The claimant asserts her claims for temporary and permanent disability benefits were compromised by her attorney who she contends was unprepared, did not offer relevant exhibits and did not offer her testimony concerning her case. She seeks to have the ALJ's order set aside and the matter remanded for a new hearing. We, however, have no authority to disturb the ALJ's order on this basis. Our authority to review the ALJ's

order is defined in § 8-43-301(8), C.R.S. That statute precludes us from disturbing the ALJ's order unless the ALJ's findings of fact are insufficient to permit appellate review, the ALJ has not resolved conflicts in the evidence, the record does not support the ALJ's findings, the findings do not support the order, or the order is not supported by the applicable law. *See, Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992) (the review provisions of the Act are "definitive and organic," and do not need supplementation by other legislative acts or procedural remedies). Because issues pertinent to the conduct of counsel were not raised before the ALJ, the ALJ had no opportunity to take and evaluate the evidence. Accordingly, since there is no record or findings, there is nothing for us to review. *McGinley v. Mariner Post Acute Network*, W.C. No. 4-565-097 (April 7, 2003), *aff'd*, *McGinley v. Industrial Claim Appeals Office,* No. 03CA0814 (February 26, 2014)(NSOP); *Gonzalez v. Custom Concrete Services*, W.C. No. 5-004-869-02 (March 8, 2017). We are unable to order a new hearing on this basis. Accordingly, insofar as the claimant argues that she was not successful on her claim because of ineffective counsel, we cannot alter the ALJ's order on this basis. Disputes between a client and her attorney involving the sufficiency of the representation are properly addressed to another forum.[1]

The claimant contends the ALJ committed error by failing to make a finding that her claim was still open for post MMI medical maintenance benefits. The respondent replies that issue was not endorsed for hearing. We find the matter to be moot. The statute specifies that "In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician," § 8-42-107(8)(f). In her MMI report of August 22, 2013, Dr. Lan recommended post MMI Grover medicals in the form of periodic audiology exams and hearing aids. Dr. Strahan made similar suggestions. The respondent does not identify any contrary medical reports nor were any submitted at hearing. The statute therefore, requires liability for maintenance medical benefits in this case.

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[1] Our capacity to address issues involving mistakes attributed to attorney representation is limited to appellate review of the ALJ's determinations in regard to those assertions. While the claim that mistakes of counsel justify judicial relief may possibly be addressed by an ALJ through the extraordinary authority described in § 8-42-303 involving reopening for mistake, *Weis v. Litton Data Systems*, W.C. No. 4-248-731 (August 8, 2001), or § 8-43-103(2) involving a 'reasonable excuse' for the tardy filing of a claim for benefits, *State Compensation Fund v. Foulds*, 445 P.2d 716 (Colo. 1968); *Aceves v. Genesis Fixtures*, W.C. No. 4-844-271-02 (November 13, 2014), the claim is most often denied on the basis that the actions of a parties' attorney are attributed to the party themselves since the attorney is the agent of the party, *Ray v. New World Van Lines*, W.C. No. 4-520-251 (October 12, 2004; *Weis v. Litton Data Systems*, W.C. No. 4-248-731 (February 10, 2004).

In addition, the FAL has "yes" checked next to the respondent's position on post MMI treatment, and the mistaken "no" is belied by the medical report attached to the FAL (that of Dr. McLaughlin). The attached medical report is required by Rule, 5-5(A)(1), and is part of the FAL. *Paint Connection Plus v. Industrial Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). The respondent's attorney admitted on the record the FAL allowed for post MMI medical treatment, Tr. at 32, and reiterated that statement in the Brief in Opposition to Petition to Review, at 5. A finding in the ALJ's order would serve no additional purpose. *Kokins v. City of Westminster*, W.C. No. 4-629-985-01 (June 10, 2013).

The claimant asserts the record demonstrates the claimant was unable to perform her regular work between April 1 and August 22, 2013. The ALJ acknowledged Physician's Assistant London did make recommendations in April that the claimant should not work for the "next few days" and then should only work limited shifts on April 16. However, the ALJ also noted the absence of evidence that showed the claimant actually heeded the recommendations and did not, in fact, work. The pay records submitted by the respondent contains information for a pay period ending as late as April 10 that indicated the claimant was paid some wages in that pay period. No later wage information appears in the exhibits. We cannot conclude the ALJ committed error by declining to speculate as to which days, if any, the claimant might have been kept from working by her injuries.

The claimant's assertions as to what she would have testified to concerning days she missed from work do not help. We are limited to considering the evidence presented to the ALJ at the hearing. The respondent has no opportunity to cross examine the claimant's information in her brief and they have no ability to present rebuttal evidence to those statements. Consequently, we cannot consider the claimant's evidence for the first time on appeal. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995).

In respect to the request to convert the scheduled impairment rating to one for the whole person, the claimant argues additional testing as recommended by Dr. Treihaft would have established cognitive impairments or brain injury. She also explains she has sustained several functional limitations due to her hearing loss and possible cognitive deficits. As noted above, the possibility of additional medical evidence is not a basis in this case for setting aside the order of the ALJ. The loss of hearing was documented and the DIME physician performed the necessary hearing tests to measure its extent. That information does not suggest disability located at parts of the body other than the ear. The

statute, § 8-42-101(3.7), limits physical impairment ratings to those derived from the AMA Guides. The Guides instruct that ratings are to be compiled from specified measurements of diagnosis and symptoms. They eschew most considerations of functional limitations. The ALJ appropriately reviewed the medical evidence and concluded the impairment rating provided by the DIME physician was not challenged by the claimant and was supported by a preponderance of the evidence, § 8-42-107(7)(b). He also reasonably read the record evidence to resolve that the location of the permanent disability was located in the ear and involved loss of hearing. Because this location was listed on the schedule of disabilities, his finding that a preponderance of the evidence required an award be calculated pursuant to 8-42-107(6)(b) C.R.S. is not in error.

Section 8-42-107(8)(b)(III), C.R.S. provides that the DIME physician's finding of MMI is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The ALJ resolved the claimant had not overcome Dr. McLaughlins's DIME findings of MMI by clear and convincing evidence. The ALJ's decision was supported by substantial evidence in the record. We may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990). Given the nature of the record and the medical dispute involved, we cannot say the ALJ committed error in adopting the DIME date of MMI provided by Dr. McLaughlin.

The question of whether the claimant sustained a loss of hearing in the ear within the meaning of § 8-42-107(2)(ii), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8), C.R.S. is one of fact for determination by the ALJ considering a preponderance of the evidence. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment". *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Here the ALJ relied on the opinion of Dr. McLaughlin that the claimant's tinnitus represented a functional impairment of her hearing. This determination is supported by the directions specified in the AMA Guides.

It is the prerogative of the ALJ to resolve conflicts in the evidence and determine the probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). So long as such determination is supported by substantial evidence in the record, it is binding on review. *See May D & F v. Industrial*

Claim Appeals Office, 752 P.2d 589 (Colo. App. 1988). Substantial evidence is probative evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory or contrary inferences. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). *Ackerman v. Hilton's Mech. Men*, 914 P.2d 524, 527-28 (Colo. App. 1996). We may not interfere with the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). The claimant's arguments notwithstanding, we perceive no extreme circumstances here.

IT IS THEREFORE ORDERED that the ALJ's order issued February 3, 2020, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

7/6/2020 by TT .

NINA KAZAZIAN, PO BOX 1952, VAIL, CO, 81657 (Claimant)
RITSEMA & LYON, P.C., Attn: PAUL KRUEGER, ESQ, 999 - 18TH STREET, SUITE 3100, DENVER, CO, 80202 (For Respondents)

NOTE: For clarification, the following entities have not been served with this Order. However, if you appeal a Final Order, you **MUST** include a copy of your appeal to the parties at the addresses listed above **AND** to the following parties:

COLORADO COURT OF APPEALS
2 EAST 14TH AVENUE
DENVER, CO 80203

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY 6TH FLOOR
DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE
P.O. BOX 18291
DENVER, CO 80218-0291

INDUSTRIAL CLAIM APPEALS OFFICE

IN THE MATTER OF:

PARKER MOVERS LLC

DBA GENTLE HANDS MOVING AND STORAGE

Respondent.

FEIN: TP-FN05043

FINAL ORDER

The respondent seeks review of an order of the Director of the Division of Workers' Compensation (Director) dated March 25, 2020, which dismissed its untimely petition to review pursuant to §8-43-301(2), C.R.S. We affirm.

On February 21, 2020, the Director entered an order which assessed and ordered the respondent to pay fines under §8-43-409, C.R.S. for failing to meet its statutory obligation to maintain workers' compensation insurance. The Director's February 21, 2020, order stated that the respondent may appeal the order imposing the fines by filing a petition to review within 20 days of the order. The Director's February 21, 2020, order also stated that it was final and not subject to appeal unless the respondent filed a petition to review pursuant to §8-43-301(2), C.R.S. within 20 days after the date the order is mailed.

Thereafter, on March 18, 2020, the respondent submitted email correspondence to the Director regarding the February 21, 2020, order. The respondent contended that it had no employees or contractors; that the order was sent to incorrect addresses; that its first knowledge of the fine was on February 25, 2020; and that its business never has taken off. The Director considered the email correspondence as a petition to review.

On March 25, 2020, the Director entered an order dismissing the respondent's petition to review as untimely under §8-43-301(2), C.R.S. The Director held that the order was sent to the respondent's registered agent, and that the respondent conceded it had received the Director's February 21, 2020, order on February 25, 2020, and, therefore, the respondent had actual notice of the order sixteen days prior to the appeal deadline. The Director further held that the respondent emailed its petition to review on March 18, 2020, and, therefore, it was not mailed within 20 days of the Director's order. The Director concluded that the respondent did not comply with the provisions of 8-43-301(2), C.R.S.

On April 5, 2020, the respondent again submitted email correspondence to the Director. The Director considered the correspondence as a petition to review of his March 25, 2020, order. In the email correspondence, the respondent states that it is appealing the decision to enforce fines and fees. The respondent argues that it does not have any employees other than the owner, that the company "has not even left the ground," and that its google listing was given to it by the previous owner which had preexisting reviews of that company. The respondent states that as soon as it is "ready to launch" it will be in compliance with all state and federal guidelines.

Section 8-43-301(2), C.R.S. provides that an order is final unless a petition to review the order is filed "within twenty days after the date of the certificate of mailing of the order." The statute also allows the petition to review to be filed by mail and states that the petition shall be deemed filed upon the date of mailing. Further, Workers' Compensation Rules of Procedure 1-1(J), 7 CCR 1101-3, provides that "[s]ervice" means delivery via United States mail, hand delivery, facsimile or, with consent of the party upon whom the documents are being served, electronic mail." Additionally, Workers' Compensation Rules of Procedure 1-2(A), 7 CCR 1101-3, provides that "[u]nless a specific rule or statute states to the contrary, the date a document or pleading is filed is the date it is mailed or hand delivered to the Division of Workers' Compensation or the Office of Administrative Courts."

The requirement to file a timely petition to review is jurisdictional, and must be strictly enforced. *Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991). Moreover, jurisdiction may not be conferred by waiver, consent, or estoppel. *Hasbrouck v. Industrial Commission*, 685 P.2d 780 (Colo. App. 1984). Consequently, the court lacks jurisdiction to review an order unless the record demonstrates a timely petition to review was filed. *Buschmann v. Gallegos Masonry, Inc., supra.*

Here, the respondent's petition to review essentially appeals the merits of Director's order to enforce fines and fees, which is the Director's February 21, 2020, order. However, our review is of the Director's March 25, 2020, order, which dismissed the respondent's untimely petition to review pursuant to §8-43-301(2), C.R.S. We perceive no reversible error in the Director's March 25, 2020, order. As found by the Director, his February 21, 2020, order contains a certificate of mailing stating that it was mailed to the respondent on that same date or on February 21, 2020, and the respondent conceded it had received the order on February 25, 2020. Further, as detailed above, the Director's February 21, 2020, order advised the respondent that it would become final unless it filed a petition to review pursuant to §8-43-301(2), C.R.S. within 20 days after the date the order is mailed. Consequently, pursuant to §8-43-301(2), C.R.S., the

respondent's petition to review had to be filed no later than March 12, 2020.[1] However, as the Director found, the respondent's petition to review the Director's February 21, 2020, order was emailed to the Director on March 18, 2020. Pursuant to §8-43-301(2), C.R.S., the respondent's petition to review the Director's February 21, 2020, order was untimely. As such, the Director's February 21, 2020, order became final and not subject to appeal. Consequently, the Director's March 25, 2020, order properly dismissed the respondent's petition to review pursuant to §8-43-301(2), C.R.S. for lack of jurisdiction.

IT IS THEREFORE ORDERED that the Director's Order dated March 25, 2020, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

[1] The Director's March 25, 2020, order states that the respondent had to file its petition to review on or before March 11, 2020. We consider this a typographical error. Section 8-43-301(2), C.R.S. ("petition shall be filed within twenty days after the date of the certificate of mailing of the order…."). Nevertheless, since the respondent's petition to review was not filed with the Director until March 18, 2020, any error in this regard is harmless. Section 8-43-310, C.R.S. (harmless error to be disregarded).

CERTIFICATE OF MAILING

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

7/10/2020 by TT .

PARKER MOVERS LLC, Attn: REGISTERED AGENT AMY RODRIGUEZ, C/O: d/b/a GENTLE HANDS, 6425 BALSAM STREET, ARVADA, CO, 80004 (Employer)
DIVISION OF WORKERS COMPENSATION, Attn: JOEL CUMMINGS, 633 17TH STREET SUITE 400, DENVER, CO, 80202 (Other Party)

NOTE: For clarification, the following entities have not been served with this Order. However, if you appeal a Final Order, you **MUST** include a copy of your appeal to the parties at the addresses listed above **AND** to the following parties:

COLORADO COURT OF APPEALS
2 EAST 14TH AVENUE
DENVER, CO 80203

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY 6TH FLOOR
DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE
P.O. BOX 18291
DENVER, CO 80218-0291

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

SENATE BILL 20-026

BY SENATOR(S) Fields and Cooke, Rodriguez, Bridges, Danielson, Ginal, Hansen, Lee, Moreno, Story, Tate, Todd, Williams A., Winter, Zenzinger, Garcia;
also REPRESENTATIVE(S) Singer and Exum, Arndt, Bird, Bockenfeld, Buckner, Buentello, Cutter, Duran, Esgar, Froelich, Gonzales-Gutierrez, Gray, Herod, Jackson, Jaquez Lewis, Lontine, Michaelson Jenet, Mullica, Roberts, Sirota, Titone, Valdez A., Valdez D., Weissman, Young.

CONCERNING ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS FOR WORKERS WHO ARE EXPOSED TO PSYCHOLOGICALLY TRAUMATIC EVENTS, AND, IN CONNECTION THEREWITH, ESTABLISHING THAT A WORKER'S VISUAL OR AUDIBLE EXPOSURE TO THE SERIOUS BODILY INJURY OR DEATH, OR THE IMMEDIATE AFTERMATH OF THE SERIOUS BODILY INJURY OR DEATH, OF ONE OR MORE PEOPLE AS THE RESULT OF A VIOLENT EVENT, THE INTENTIONAL ACT OF ANOTHER PERSON, OR AN ACCIDENT IS A PSYCHOLOGICALLY TRAUMATIC EVENT FOR THE PURPOSES OF DETERMINING THE WORKER'S ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 8-41-301, **amend**

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

(3)(b)(II)(B) and (3)(b)(II)(C) as follows:

8-41-301. Conditions of recovery - definitions. (3) For the purposes of this section:

(b) (II) "Psychologically traumatic event" also includes an event that is within a worker's usual experience only when the worker is diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist after the worker experienced exposure to one or more of the following events:

(B) The worker visually OR AUDIBLY, OR BOTH VISUALLY AND AUDIBLY, witnesses a death, or the immediate aftermath of the death, of one or more people as the result of a violent event; or

(C) The worker repeatedly AND EITHER visually OR AUDIBLY, OR BOTH VISUALLY AND AUDIBLY, witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident.

SECTION 2. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless

approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Leroy M. Garcia PRESIDENT OF THE SENATE	KC Becker SPEAKER OF THE HOUSE OF REPRESENTATIVES
Cindi L. Markwell SECRETARY OF THE SENATE	Robin Jones CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

APPROVED_____
(Date and Time)

_____
Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Workers' Compensation

7 CCR 1101-3

WORKERS' COMPENSATION RULES OF PROCEDURE

Emergency Rules

Section 1 – Authority

This emergency regulation is promulgated and adopted by the Director of the Division of Workers' Compensation pursuant to §8-47-107.

Section 2 – Scope and Purpose

The purpose of this emergency regulation is to establish the procedures for Workers' Compensation applicable during the state of emergency declared by the Governor due to COVID-19.

The Division finds, pursuant to § 24-4-103(6)(a), C.R.S., that immediate adoption of this regulation is imperatively necessary for the preservation of public health, safety, or welfare as ensuring operation of the workers' compensation system is imperative to preserve the health of the citizens of Colorado. Therefore, compliance with the requirements of § 24-4-103, C.R.S., would be contrary to the public interest.

As reported cases of COVID-19 increase, they place a significant strain upon medical resources. These emergency rules are being promulgated to increase access to telehealth services in order to assure injured workers maintain access to reasonable and necessary medical care while complying with physical distancing guidelines and mandates.

COVID-19-related actions to promote physical distancing have disrupted workers' ability to receive in-person care for their job-related injuries and illnesses. Continuity of care is essential to monitor the progress of recovery. Treatment delays impede recovery and may increase claims costs. Increasing reimbursement for remote services to levels equivalent to in-person care should promote use of these alternatives to in-office care.

This rule supersedes and replaces the emergency rules adopted on March 24 and March 31, 2020. The rules adopted on those dates are revoked.

Section 3 – Applicability

While in effect, this emergency rule applies to all entities subject to the Workers' Compensation Rules of Procedure. The emergency procedures specified in this rule supersede the applicable rules of procedure; however, the Workers' Compensation Rules of Procedure remain in full force and effect where not in conflict with this emergency rule.

Section 4 – Electronic Communications

All information submitted to the Division of Workers' Compensation must be submitted via electronic mail. Only ONE document per email message is permitted (ie one FA with

attachments or one GA with Support for Return to Work). Multiple attachments will not be accepted.

The subject line must include (in this order): WC#, Claimant first and last name, and type of document (FA, GA, Petition, LS Request, MTC, MTN). The document included with the email must be named in the same format as the subject line.

The Certificate of Service should reflect the date it was emailed to the Division of Workers' Compensation.

I. Admissions

General Admissions, Final Admissions, Petitions to Modify, Terminate, or Suspend (WC54), Request for Lump Sum Payment (WC62) must be addressed to: cdle_dowc_filings@state.co.us

II. Motions to Close

Motions to close must be filed via electronic mail and include an electronic mail address for all parties (including represented claimants). Motions to close not accompanied by the required email addresses will be rejected. Motions to close must be sent to: cdle_dowc_filings@state.co.us.

III. All other motions

Motions (other than motions to close) and submissions for the Prehearing and Settlement Unit must be addressed to: cdle_dowc_prehearings@state.co.us. Motions must be accompanied by a proposed order in either .doc or .docx format.

IV. Disfigurement

Requests for determination of additional compensation for disfigurement based upon submission of photographs must be filed via email to: cdle_dowc_prehearings@state.co.us

Electronically submitted requests must be accompanied by the Division form and include in the body of the email the date the photographs were taken.

V. Rejections of Coverage

Rejections of coverage must be submitted by email to cdle_dowc_coverage@state.co.us. A paper copy of the form must be sent via certified mail within ninety (90) days of the electronic submission.

VI. All Other Communication

All other communications not specifically addressed in this rule, including but not limited to objections to final admissions, entries of appearance and workers' claims for compensation must be addressed to: cdle_workers_compensation@state.co.us

First Reports of Injury and Notices of Contest must be submitted via EDI.

Electronic submission via mechanisms other than those set forth herein requires advanced approval of the Division.

Section 5 – Utilization Procedures

The seven (7) day requirement for denial of a request for prior authorization in Rule 16-7(B) is extended to thirty-five days for requests relating to a procedure or treatment which is unavailable at the time of the request due to emergency restrictions on medical treatment enacted by the Governor and/or Colorado Department of Public Health and Environment in executive order D2020 009.

Section 6 – Telehealth

Parties are encouraged to utilize telehealth wherever medically appropriate. Place of service 02 – Telehealth is removed from place of service codes used with the RBRVS facility RVUs.

Maximum allowance is the non-facility RBRVS unit value for the CPT® code times the appropriate conversion factor. A 95 modifier must be appended to the appropriate CPT® code(s). An additional $5.00 transmission fee is not payable.

Section 7 – Duration

This emergency rule shall be in effect until October 13, 2020 unless continued, superseded or rescinded.

Colorado Principles of Professionalism

Preamble

The hallmark of a civilized society is its ability to maintain a legal system that is fair, effective and efficient. As lawyers, we have a predominant role in assuring that the legal system fulfills these goals. Toward that end, starting in 2009, the CBA-DBA Professionalism Coordinating Council undertook a project to meld existing principles of professionalism into a single unified document to create a guide for statewide use. This product of that consolidation of principles is not intended to supersede local Bar association rules of professionalism.

The wisdom and practicality of these combined Principles of Professionalism lie in two key features. First, highly experienced attorneys from many different practice areas and numerous judicial officers who are members of the Professionalism Coordinating Council reviewed, discussed, and developed the combined practice principles as "real-world" attainable goals for professional behavior to which the profession should aspire to apply every day in practice. Second, the principles have no coercive enforcement mechanism except those that have existed in our profession since the days of the quill pen and powdered wig: the fundamental commitment of attorneys to conduct themselves and their practices professionally and with integrity. Adherence to these principles brings its own rewards through the admiration of one's colleagues, and falling short of these high standards brings the opprobrium and condemnation of those same colleagues. The mark of a professional calling is that it aspires first and foremost to police itself.

For the achievement of integrity throughout the legal profession, each lawyer should aspire to adopt the following Principles of Professionalism and to perform in accordance with the Practical Considerations:

Colorado Principles of Professionalism

I. Principle: As licensed professionals, we understand that the law is more than a business; it is also a calling. We will keep our Lawyer's Oath in mind in our daily practice. We understand and accept our role in the American justice system, and freely accept our responsibility to support and defend the Constitutions of the United States of America and the State of Colorado.[1]

II. Principle: Professionalism is fundamental to the effective and efficient representation of clients in the legal system and the even-handed administration of justice. It is also indispensable to building respect for the rule of law and to preserving the integrity of the legal system.[2]

III. Principle: Integrity, honesty, candor, diligence, fairness, trust, respect, dignity, courtesy, cooperation, and competence are guiding principles of our conduct generally and in our dealings with judges, clients, opposing counsel, co-counsel, partners, associates, employees, and the public.[3]

Practical Considerations:

3.1 We will work together toward resolution of our cases by being reasonable.[4]

3.2 We will be cooperative to the extent it does not prejudice our clients' legitimate interests.[5]

3.3 We will treat others, but especially our clients, opponents, fellow attorneys, the courts and other legal professionals, with courtesy and respect. We will always endeavor to retain

our objectivity and will try not to take personally disagreements that arise in the proper representation of our clients.[6]

3.4 We will refrain from unseemly or discourteous references to opposing parties, counsel, courts, legal systems or other civil and criminal justice professionals. [7]

3.5 We will respond to all communications in a timely manner and allow for reasonable time for opposing counsel to respond.[8]

3.6 We will communicate promptly with opposing counsel to discuss any disputes, ambiguities or other issues that arise in client representations. We recognize that, in most instances, genuine, personal interaction serves our clients better than perfunctory communication. Although electronic means are appropriate methods to communicate, we will not use electronic communication, including but not limited to facsimile transmission, email, text messaging, or telephone contact, as a means of gaining unfair advantage or as a substitute for effective interpersonal dialogue.[9]

3.7 We will allow ourselves and each other sufficient time to resolve any dispute or disagreement by communicating with one another in a timely and professional manner and by agreeing to reasonable deadlines in light of the nature and status of the matter.[10]

3.8 We will work to reduce the level of anger or animosity among or between parties to a conflict or transaction wherever and whenever we can, and we will strive whenever possible not to add to, or manipulate, the emotional burden of any dispute or transaction by our conduct, words, or attitudes.

3.9 When scheduling, we will keep in mind that a reasonable balance between life and work helps promote the efficient and fair administration of justice and effective delivery of legal services. We will not make unreasonable demands on off-hours time when dealing with parties, witnesses, opposing counsel, co-counsel, associates, partners, or employees

IV. <u>Principle:</u> In serving the client, a lawyer must be ever conscious of the broader duty to the judicial system of which both attorney and client are a part.

Practical Considerations:

4.1 We are committed to the loyal and ardent representation of our clients, using our skills and training to seek their legitimate ends. We are equally committed to preventing the use of the legal system to cause unjust harm or to gain unjust advantage. We recognize that, just as legal action pursued for legitimate ends can accomplish great good, legal action pursued for improper purposes or by unjust means can cause great harm. An unjust process can never lead to a just result, and a successful result cannot remedy the harm of an unjust process.[11]

4.2 We will scrupulously refrain from making misleading statements of law or fact, whether by omission, inference, or implication.[12]

4.3 We will abide by our promises and agreements, whether written or oral. Our word is our bond. In the event of a conflict, we will attempt in good faith to resolve the conflict before seeking court intervention.[13]

4.4 When exchanging drafts of agreements, we will call to the attention of other parties and their counsel any changes or suggestions for new language and issues that have not been agreed upon or discussed beforehand.[14]

4.5 We must accept fully the responsibility that comes with the privilege and licensure of practicing law. This requires that we respect the legal rights of others, that we act reasonably and with candor toward others, and that we not seek to advance our personal interests at the expense of the legitimate interests of others.[15]

4.6 Justice is not achieved where short-term victory plants the seed of future conflict. The satisfactory completion of a transaction or the settlement of an adversarial dispute through mutual agreement creates a foundation for future cooperation. The just resolution of a dispute begins a process of reconciliation for the parties.

4.7 Neither we nor our clients are the sole possessors of truth or righteousness in any circumstance. While we may strive zealously for our clients' rights, our zeal also must be directed to achieving justice in the process. Zealous representation is not a justification for failure to act with professionalism.[16]

V. Principle: A lawyer owes to the profession a duty to counsel, mentor, advise, educate, and guide less experienced lawyers. Mentoring should encompass not only the practical and substantive aspects of the practice of law but also the fundamental role of professionalism. As a mentor, a lawyer should encourage those lawyers to whom guidance is provided to engage in activities that enhance the image of lawyers in the eyes of the public, including becoming involved in volunteer service to the community, educating the public about the American legal system, and fostering respect and trust among lawyers. An experienced lawyer should demonstrably impart the intangible qualities of the profession of honor, duty, and pride.

Practical Considerations:

5.1 We will emphasize through mentoring, practice, and guidance the importance of collegiality and of the exercise of ethical and civil behavior.

5.2 We will emphasize through mentoring, practice, and guidance the importance of participation and inclusion in the professional associations of the Colorado bar.

5.3 We will emphasize through mentoring, practice, and guidance the mandate of providing clients a high standard of representation through competency and the exercise of sound and reasoned judgment.

5.4 We will emphasize through mentoring, practice and guidance the imperative of maintaining best practices for client representation, including following legal principles learned from practical experience and maintaining sound law office management practices.

5.5 We will promote through mentoring, practice, and guidance the role of our profession as a public service.

5.6 We will elevate the quality of legal services provided by the profession through mentoring and guiding other lawyers.

5.7 We will welcome requests from other lawyers seeking our guidance and advice on legal professionalism issues.

VI. Principle:A client has no right to demand that counsel abuse any participant in the judicial system or indulge in offensive conduct. Effective advocacy requires neither.[17]

VII. Principle:A lawyer should not use any form of discovery, the scheduling of discovery, or any other part of the dispute resolution process as a means of harassing opposing counsel or opposing counsel's client or as a means of impeding the timely, efficient, and cost-effective resolution of a dispute.[18]

Practical Considerations:

7.1 Discovery Generally

7.1.1 We will not use any form of discovery or discovery scheduling as a means of harassing anyone or for the purpose of obstructing the prosecution or defense of the case. [19]
7.1.2 We will only use definitions and instructions in written discovery that are pertinent, clear, and concise. [20]
7.1.3 We will object to disclosure or discovery only when we have a good faith belief in the merit of the objection. [21]
7.1.4 We will provide disclosures and respond to written discovery requests reasonably. We will not strain to interpret requests or disclosure requirements in the rules of procedure in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information. We will not produce documents in a manner designed to hide or obscure the existence of particular documents. [22]

7.2 Conduct During Depositions

7.2.1 We will conduct ourselves in depositions with the same courtesy and respect as is expected in court. [23]
7.2.2 We will not conduct examinations or engage in other behavior that is purposely offensive, demeaning, harassing or intimidating, or that unnecessarily invades the privacy of anyone.[24]
7.2.3 If sensitive or controversial matters are to be inquired into in a deposition, counsel should consider discussing those matters with opposing counsel in advance. When appropriate, we will attempt to engage in meaningful dialogue with opposing counsel for the purpose of exploring agreements regarding the scope of the examination and the use of the information after the deposition. [25]
7.2.5 We will refrain from coaching deponents by objecting, commenting, or acting in any other manner that suggests a particular answer to a question. [26]
7.2.6 We will not object for the purpose of disrupting or distracting the questioner or the witness. We will object only in the manner provided by the rules. [27]
7.2.7 We will not interrupt the examination for an off-the-record conference with the deponent when the purpose is solely to obstruct the deposition or to coach the witness. [28]
7.2.8 We will not intentionally misstate facts or mischaracterize prior statements or testimony. [29]

7.3 Motions And Conduct In Court

7.3.1 We will scrupulously avoid misleading the court in our presentation of the law, facts, case history, or procedure. [30]
7.3.3 We will only make objections that are concise, specific, and supported by applicable law. [31]
7.3.4 We will demonstrate courtesy and respect for the court and its staff at all times. When in court, we will stand when the judge and jury enter, when addressing the judge, and when the judge and jury leave, unless the custom and practice of a particular court is different.

7.3.7 We will not transmit correspondence or copies of correspondence to the court unless requested or encouraged by the court, authorized by the applicable law or rules and/or by all other parties or their counsel or necessitated by extraordinary circumstances. [32]
7.3.8 We will not engage the court staff in *ex parte* communications concerning the merits of a pending case, ask the court staff for an indication of how the judge may rule, or ask the court staff for legal advice. [33]

7.3.9 We will respectfully seek permission before continuing to argue after the court has ruled.

7.3.10 We will not take positions on litigated or contested matters that are legally or factually unsupportable, and we will not use motions or procedural issues to delay the prompt and fair resolution of a matter, or to harass, intimidate, or wear down an opponent. [34]

7.3.11 We will not lightly seek court sanctions. [35]

7.3.12 We will cooperate in presenting evidence by providing the court and counsel with the names of witnesses to be called and estimates of time for examination and by sharing equipment (such as audio-visual equipment) in the courtroom. [36]

VIII. <u>Principle:</u> A lawyer will be punctual in communications with others and in honoring scheduled appearances and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system. [37]

Practical Considerations:

8.1 We will cooperate by agreeing upon and keeping reasonable deadlines for exchanging drafts, scheduling and completing transactions and providing required documentation.

8.2 We will seek agreements on preliminary, procedural and factual matters, and we will enter into appropriate written stipulations or agreements that will make more effective use of everyone's time. [38]

8.3 We will respond promptly to requests for agreements, even when our response is that agreement on a certain issue is not possible.[39]

8.4 When discussing final stipulations or agreements, we will act promptly to submit proposals for agreement both as to form and content, and we will cooperate in assuring that the final documents fairly and accurately reflect the parties' agreements. [40]

8.5We will act promptly to advise the courts and other interested parties of all stipulations and agreements. [41]

8.6 We will follow through to assure that all details involved in concluding any agreement or transaction are quickly and efficiently addressed and finalized. [42]

8.7 While always keeping our client's interests paramount, we will also keep in mind that our goal should be the prompt, efficient, and fair resolution of disputes, and the prompt, efficient, and fair completion of transactions on which we are engaged. [43]

IX. <u>Principle:</u> A lawyer providing representation in a transactional matter owes to the legal system, opposing counsel, and all parties duties of candor and transparency, subject to the protection of client confidences.

Practical Considerations:

9.1 When dealing with unrepresented persons, we will encourage them to engage counsel, we will inform them that we do not and cannot represent their interests, and we will avoid any appearance or impression that we are providing any unrepresented persons advice as to the transaction or matter. [44]

9.2 When exchanging electronically drafted documents subject to form and content negotiation, where appropriate, we will furnish to opposing counsel and *pro se* parties "redline" versions or otherwise call specific attention to all changes we have made. We will also take steps to assure that the final document executed by the parties is the document to which all parties have agreed. [45]

9.3 When representing a party in a transactional matter, we will not ask for an opinion-of-counsel from opposing counsel that we, in a similar situation, would be unable (or unwilling) to give.

9.4 We will honor reasonable requests to re-transmit materials or to provide hard copies of documents or drafts.

X. Principle: If a fellow member of the bar makes a just request for cooperation or seeks scheduling accommodations, a lawyer will not arbitrarily or unreasonably withhold consent. [46]

Practical Considerations:

10.1 We will endeavor to schedule hearings, depositions, or other matters by agreement with opposing counsel. [47]

10.2 We will give opposing counsel notice of cancellation of hearings, depositions, and other matters at the earliest possible time. [48]

10.3 We will not seek extensions or postponements for the purpose of harassment or to prolong, delay, or increase the cost or complexity of any matter. [49]

10.4 In scheduling matters, including requests for reasonable extensions of time, we will act in a spirit of cooperation and accommodation. We will act with consideration of the need for expediting the litigation or transaction and the professional and personal schedules of others involved. We will raise scheduling conflicts only when they actually exist. [50]

XI. Principle: A lawyer owes to the public a devotion to the public good and to public service; a commitment to the improvement of the administration of justice; a duty to abide by and, subject to a good-faith reservation as to existence of a violation, to report violations by others of any disciplinary rules; and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance. [51]

Practical Considerations:

11.1 We will endeavor to make legal services available to people who have legal needs, but cannot afford to pay customary charges, and we will strive to provide advisory or other assistance to non-profit community service organizations. [52]

XII. Principle: A lawyer will not attack, demean, or otherwise degrade opposing counsel. The public cannot be expected to hold the profession in high esteem if we do not ourselves respect one another. [53]

Practical Considerations:

12.1 We will not impute improper motives to other lawyers or make any statements that impugn their character unless clearly justified by the facts and essential to the resolution of an issue.

12.2 We will commit to treat the representation of the client as the client's transaction, dispute or controversy, and not as a personal dispute with opposing counsel. [54]

XIII. Principle: Above all, a lawyer owes to all with whom the lawyer comes in contact, civility, professional integrity, and personal dignity. [55]

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[1] (Rules of Professional Conduct, Preamble, nn. 1,7; hereafter "R.P.C.")
[2] (R.P.C. Preamble, 1.1, 1.3, 3.2, 3.3, 3.4, 3.5, 4.1, 4.4)
[3] (R.P.C. 3.3, 3.4, 3.5, 4.1, 4.3)
[4] (R.P.C. 3.2)
[5] (R.P.C. 1.6)
[6] (R.P.C. Preamble, n. 5; 4.1-4.5, 8.2)
[7] (R.P.C. Preamble, n. 5; 4.4(a), 8.2).
[8] (R.P.C. 1.3 cmt. 3; 1.4 cmt. 4; 3.2)
[9] (C.R.C.P. 1(a), 16(b)(3), 121, § 1-15(8)); R.P.C. 3.4).
[10] (R.P.C. 1.3)
[11] (C.R.C.P. 1(a); R.P.C. 1.2(d), 3.1, 3.2, 3.3, 3.4, 4.1, 4.5)
[12] (C.R.C.P. 11(a); R.P.C. 3.1, 3.3, 4.1)
[13] (C.R.C.P. 121, §§ 1-12(5), 1-15(8), 26(c))
[14] (R.P.C. 4.1, cmt. 1, 2)
[15] (R.P.C. 3.3, 3.4, 4.4)
[16] (R.P.C. Preamble, nn. 1, 2, and 8; 3.1, cmt. 1)
[17] (R.P.C., 3.4)
[18] (R.P.C. Preamble nn 5, 3.1, 3.4 and 4.4)
[19] (C.R.C.P. 26(b)(2), (c), (g)(2); R.P.C. 3.2, cmt.1, 3.4 and 4.4)
[20] (C.R.C.P. 26(g), 33(b), 34(b), 36(a))
[21] (C.R.C.P. 11(a); 30(c), (d)(1); 33(b)(1), (4); 34(b); 36(a))
[22] (C.R.C.P. 16.1(k)(1), 16.2(e), 26(a))
[23] (C.R.C.P. 30(d)(3))
[24] (C.R.C.P. 30(d)(3))
[25] (C.R.C.P. 26(c), 121, § 1-12(1), (2))
[26] (C.R.C.P. 30(d)(1)-(3))
[27] (C.R.C.P. 30(c), (d)(1))
[28] (C.R.C.P. 30(d)(1)-(3))
[29] (R.P.C. 3.3, 3.4)
[30] (C.R.C.P. 11(a); R.P.C. 3.3, 3.5, 4.1)
[31] (C.R.C.P. 11(a))
[32] (R.P.C. 3.5)
[33] (R.P.C. 3.5)
[34] (C.R.C.P. 11(a) and R.P.C. 3.1)
[35] (C.R.C.P. 26(c); 37(a)(2), (d); 121, §§ 1-12(5), 1-15(8))
[36] (C.R.C.P. 16(f), 16.1(k), 16.2(h), 121, § 1-6))
[37] (R.P.C. 1.3)
[38] (C.R.C.P. 1(a); R.P.C. 1.3)
[39] (C.R.C.P. 121, § 1-15(8); R.P.C. 3.1, cmt. 1)
[40] (C.R.C.P. 121, § 1-16)
[41] (R.P.C. 1.3)
[42] (R.P.C. 1.3)
[43] (C.R.C.P. 1(a); R.P.C. 1.3)
[44] (R.P.C. 4.1, 4.3, 4.4)
[45] (R.P.C. 3.4, 4.1)

[46] (R.P.C. 3.2)
[47] (C.R.C.P. 121, § 1-12(1))
[48] (C.R.C.P. 121, §§ 1-12, 1-15)
[49] (C.R.C.P. 11(a); R.P.C. 3.2, 3.4)
[50] (C.R.C.P. 1(a), 121, §§ 1-12, 1-15)
[51] (R.P.C. Preamble, n. 6; 6.1, 8.3, 8.4)
[52] (R.P.C. 6.1)
[53] (R.P.C. 3.4, 4.1, 4.4)
[54] (R.P.C. 3.4, 4.1)
[55] (R.P.C. Preamble, 1.3, 1.4, 1.6, 1.7, 3.2, 3.3, 3.4, 4.1, 4.2, 4.3, 4.4, 5.1, 7.1, 7.3, 8.3, 8.4)