COLORADO
Department of Labor and Employment

Division of Workers' Compensation
633 17th Street, Suite 400
Denver, CO 80202-3660
303-318-8700

June Case Law Update

Presented by Judge Laura Broniak and Judge David Gallivan

This update covers Supreme Court, COA, and ICAO decisions issued from May 16, 2019 to June 17, 2019

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DATE FILED: June 17, 2019
CASE NUMBER: 2017SC200

ADVANCE SHEET HEADNOTE
June 3, 2019
AS MODIFIED [JUNE 17, 2019]

2019 CO 47M

No. 17SC200, *Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*—Eighth Amendment—Corporations—Excessive Fines—Workers' Compensation Noncompliance.

The supreme court considers whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations. Concluding that this Eighth Amendment protection does apply to corporations, the supreme court holds that the proper test to assess the constitutionality of government-imposed fines requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed, as articulated in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The court of appeals' ruling is thus reversed and the case is remanded to that court for return to the Division of Workers' Compensation to determine whether the per diem fines at issue are proportional to the harm or risk of harm caused by each day of the employer's failure to comply with the statutory requirement to carry workers' compensation insurance.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2019 CO 47M

Supreme Court Case No. 17SC200
Certiorari to the Colorado Court of Appeals
Colorado Court of Appeals Case No. 16CA249

Petitioner:

Colorado Department of Labor and Employment, Division of Workers' Compensation,

v.

Respondents:

Dami Hospitality, LLC; and Industrial Claim Appeals Office.

Judgment Reversed
en banc
June 3, 2019

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

June 17, 2019

Attorneys for Petitioner:
Philip J. Weiser, Attorney General
John T. Lee, Senior Assistant Attorney General
Emmy A. Langley, Assistant Solicitor General
Denver, Colorado

Attorneys for Respondent Dami Hospitality, LLC:
Law Offices of Daniel T. Goodwin
Daniel T. Goodwin
Paige Orgel
Broomfield, Colorado

Attorney for Amici Curiae Cato Institute and Independence Institute:
David B. Kopel
Denver, Colorado

No appearance on behalf of Industrial Claim Appeals Office.

JUSTICE HART delivered the Opinion of the Court.
JUSTICE SAMOUR concurs in part and dissents in part.
JUSTICE HOOD does not participate.

¶1 This case requires us to consider whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations.[1] We conclude that the purpose of the Excessive Fines Clause is to prevent the government from abusing its power to punish by imposing fines, and nothing in that purpose or in the text of the Eighth Amendment limits its reach to fines imposed on individuals. We further conclude that the proper test to assess the constitutionality of government fines under the Eighth Amendment is that set forth by the United States Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), which requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed. We thus reverse the court of appeals' ruling and remand to that court for return to the Division of Workers' Compensation with instructions to, as appropriate and necessary, develop an evidentiary record sufficient to determine whether the $250–$500 fine that a business was required to pay for each day that it was out of compliance with Colorado's

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[1] We granted certiorari to review the following issues:

1. Whether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations;
2. Whether the court of appeals applied the correct test to determine the constitutionality of a civil fine; and
3. Whether the court of appeals reasonably concluded that the fine at issue violated the Eighth Amendment.

workers' compensation law is proportional to the harm or risk of harm caused by each day of noncompliance.

I. Facts and Procedural History

¶2 Dami Hospitality, LLC ("Dami") is the owner-operator of a Denver motel located on Peoria Street. Dami employs between four and ten people at any given time. As an employer, Dami is required by statute to maintain workers' compensation insurance. *See* § 8-43-409, C.R.S. (2018).

¶3 Dami allowed its workers' compensation coverage to lapse on or about July 1, 2005. Upon receiving notification of the lapse from the Division of Workers' Compensation ("DWC"), Dami conceded the violation and paid a corresponding settlement in June 2006.

¶4 Approximately two months later, Dami again allowed its workers' compensation coverage to lapse. This time, Dami went without coverage from August 10, 2006, through June 8, 2007.

¶5 From June 9, 2007, to September 11, 2010, Dami carried the proper insurance, but the company's workers' compensation coverage again lapsed on September 12, 2010. Dami was without such insurance from that time until July 9, 2014.

¶6 On February 19, 2014, the DWC discovered that Dami had allowed its workers' compensation insurance to lapse for these periods of time and issued a notice to Dami regarding this. That written correspondence was dispatched to Dami's Peoria Street address, which was the address on file with the Colorado Secretary of State for both the limited liability company and its registered agent, Soon Pak. The DWC notice advised

Dami that it had twenty days to return an enclosed compliance questionnaire and to submit documents either establishing that it had maintained coverage during the relevant periods or demonstrating an exemption from the coverage requirement. It also specified that Dami could "request a prehearing conference on the issue of default."

¶7 After Dami failed to respond to the notice of subsequent violation, the DWC mailed a second notice to Dami on June 25, 2014, this time sending it to an East Dartmouth Place address.[2] For the second time, Dami was given twenty days to return the same compliance questionnaire and to submit documents either establishing coverage during the relevant periods or demonstrating an exemption from the coverage requirement. The DWC also specified, again, that Dami could request a prehearing conference on the issue of default.

¶8 On July 11, 2014, the DWC received a faxed certificate of workers' compensation insurance for Dami effective from July 10, 2014, through July 10, 2015. Dami did not offer any other documentation or any explanation for the extended periods of noncompliance.

¶9 Having received no claim of exemption or proof of coverage for the second and third periods of noncompliance, and no request for a prehearing conference, the DWC

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[2] It is not clear from the record why the DWC mailed an additional subsequent violation notice to the East Dartmouth Place address. However, the record includes documentation from the Colorado Secretary of State's website indicating that the East Dartmouth Place address appears in Dami's May 11, 2000 Articles of Incorporation for both the "principal place of business" and its organizer, Soon Pak. Elsewhere, Pak identifies the East Dartmouth Place address as her personal residence.

concluded its legally mandated investigation into Dami's noncompliance on October 29, 2014. The applicable statutory framework provides that the DWC shall:

> For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage: impose a fine of: (I) Not more than two hundred fifty dollars for an initial violation; or (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and subsequent violation.

§ 8-43-409(1)(b), C.R.S. (2018). In implementing this provision, the DWC promulgated Rule 3-6(D), 7 CCR 1101-3, which provides that:

> For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from $250/day up to $500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or until further order of the Director:
>
> Class VII 1-20 Days $250/Day
>
> Class VIII 21-25 Days $260/Day
>
> Class IX 26-30 Days $280/Day
>
> Class X 31-35 Days $300/Day
>
> Class XI 36-40 Days $400/Day
>
> Class XII 41 Days $500/Day

¶10 The DWC applied this statutory and regulatory regime in calculating the fine for Dami's second and third periods of noncompliance with the Workers' Compensation Act. On October 30, 2014, the DWC sent its "Specific Findings of Fact, Conclusions and Order to Pay Fine–Subsequent Violation" (the "Order") to Dami. This document categorized the fine amounts owed by Dami by the six classes of violation defined in DWC Rule

3-6(D), noting the per diem amount owed for each of the corresponding date ranges. The final paragraph of the order explained that the total amount Dami owed as a result of the 1,698 per diem fines was $841,200.

¶11 On November 18, 2014, the DWC received correspondence from Soon Pak, Dami's registered agent. In a letter written on Dami's behalf, Pak conceded that the business had failed to maintain workers' compensation insurance during the noticed periods. Pak explained that Dami's failure to consistently maintain coverage was a result of her reliance on others to maintain "business coverage." Pak stated that Dami's annual payroll is less than $50,000, and that the aggregate fine proposed by the DWC exceeded the business's gross annual income. Pak informed the DWC that Dami was thus unable to pay the aggregated per diem fines and requested leniency in the form of a penalty "that is more reasonable to the size of [the] business." Pak also asserted that there had never been a worker-related accident or injury at the motel, either when coverage was in place or during any period of Dami's noncompliance. Pak did not request a hearing on the issue of Dami's default on its workers' compensation insurance obligation.

¶12 The DWC construed Pak's correspondence as a petition to review the Order. The DWC then made settlement overtures, offering to decrease the fine by nearly half, to $425,000 (the aggregated minimum per diem fines permissible under section 8-43-409(1)(b)(II)). Dami did not accept the settlement, and instead submitted a brief in furtherance of the petition to review. Dami argued that (1) it had "reasonably believed that it was in compliance with the statute" at all relevant times; (2) the DWC failed to provide adequate and timely notice of Dami's noncompliance; (3) because Dami

promptly cured its default upon receiving notice, it should be assessed no penalty or at least a much smaller penalty; and (4) the assessed per diem fines were constitutionally excessive in violation of the Excessive Fines Clause of the Eighth Amendment.

¶13 The DWC issued an order upholding the fines. The DWC began by noting that the per diem fines were "not discretionary" and were properly calculated pursuant to section 8-43-409 and Rule 3-6(D)'s assessment classification schedule. Next, the DWC observed that the law places the responsibility for knowing whether workers' compensation coverage is consistently maintained on the employer and not on the DWC. Further, the order explained that Dami's policy was cancelled in 2006 due to nonpayment of required premiums and "its 2010 policy was cancelled for failure to comply with terms & conditions or audit failure." The DWC determined that both of those reasons for cancellation were within Dami's control. The DWC stated that Dami's procurement of coverage after receiving actual notice of its subsequent violation did not relieve it of responsibility to pay the statutory fines imposed for the prior 1,698 days of noncompliance. Finally, the DWC declined to address Dami's constitutional arguments, concluding that administrative agencies are not authorized to "pass on the constitutionality of statutes."

¶14 Dami appealed to the Industrial Claim Appeals Office ("ICAO"). The ICAO rejected all but Dami's excessive fines argument. The ICAO remanded the matter to the DWC, directing it to review the constitutionality of the aggregated per diem fines assessed in accordance with the test established by the court of appeals in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). That

test, borrowed from United States Supreme Court Fourteenth Amendment jurisprudence, requires consideration of "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." *Id.* at 326 (citing *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001)).

¶15 Without holding a hearing, the DWC ultimately issued a supplemental order concluding that "Rule 3-6(D) incorporates and addresses all of the elements of the *Associated Business Products* test, and thus that the fine of $841,200.00 assessed against [Dami] according to that Rule is appropriate." The DWC explained that the graduated nature of the daily fines, increasing as the length of the period of noncompliance increases, accounted for the degree of reprehensibility of the conduct. The potential harm caused by noncompliance, according to the DWC, was in line with the fines because each day of noncompliance presents a risk that an employee will be injured and insurance will not be in place to cover that injury. And because the penalties are statutorily imposed and apply to all violators equally, Rule 3-6(D) ensures that there is no disparity between the fines imposed on Dami and fines imposed on any other noncompliant employer.

¶16 Dami again appealed to the ICAO, which affirmed the DWC's supplemental order.

¶17 Dami then appealed to the court of appeals. The division set aside the assessment of aggregated per diem fines. *Dami Hosp., LLC v. Indus. Claim Appeals Office*, 2017 COA 21, ¶ 110, __ P.3d __. It assumed without deciding that the Excessive Fines Clause could be applied to challenge regulatory fees imposed on a corporation. *Id.* at ¶ 57. It

determined that the *Associated Business Products* test was the correct test to apply in assessing the constitutionality of the fee and that consideration of Dami's ability to pay the fine was a relevant factor in that assessment. *Id.* at ¶¶ 71–81. And it concluded that DWC abused its discretion by failing "to apply the *Associated Business Products* factors . . . to Dami's specific circumstances." *Id.* at ¶ 110. The division remanded the Order to the DWC for recalculation in accordance with its opinion. *Id.* The DWC petitioned for certiorari, and we granted the petition.

II. Analysis

¶18 We first consider whether the Excessive Fines Clause affords corporations protection against constitutionally excessive fines. We conclude that it does. Next, we hold that the proper test for determining whether a fine is unconstitutionally excessive is whether it is grossly disproportional to the gravity of the subject offense. *See Bajakajian*, 524 U.S. at 334. We explain that the evaluation of disproportionality should include consideration of the company's ability to pay the fine. We then consider whether the gross disproportionality analysis should be applied to each per diem fine or to the aggregate amount imposed for 1,698 days of noncompliance. We hold that where, as here, a statute expressly states that each day a party fails to comply with a legal obligation "shall constitute a separate and distinct violation" of the law, the Eighth Amendment analysis must focus on each per diem fine imposed by statute. § 8-43-305, C.R.S. (2018). We then remand the case to the court of appeals with instructions to return it to the DWC for the development, as appropriate and necessary, of an evidentiary record to facilitate application of the proportionality analysis.

A. Applicability of the Excessive Fines Clause to Corporations

¶19 Whether a particular constitutional guarantee applies to both natural persons and corporations "depends on the nature, history, and purpose" of the provision. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).[3]

¶20 Guarantees that are "purely personal" or "limited to the protection of individuals" will not apply to corporations. *Id.* The established personal guarantees include the Fifth Amendment privilege against self-incrimination and the right to privacy. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."); *United States v. White*, 322 U.S. 694, 698–701 (1944) (Fifth Amendment); *NW Nat. Life Ins. v. Riggs*, 203 U.S. 243, 255 (1906) (noting that the "liberty" referred to in the Fourteenth Amendment is the liberty of natural persons).

¶21 On the other hand, when a guarantee is against certain government overreach, and is a "constitutional immunit[y] appropriate to [a corporate] body," this constitutional limitation on government power can apply to protect a corporation just as it may protect a natural person. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Thus, corporations have been recognized to have First Amendment rights to free speech and Fourteenth Amendment rights to due process and equal protection of the law. *See Metro. Life Ins. v. Ward*, 470 U.S.

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[3] After oral argument in this case, the United States Supreme Court held that the Excessive Fines Clause is incorporated against the States by the Due Process Clause in *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687 (2019). The prohibition against imposing excessive fines thus does apply to Colorado's DWC.

869, 880 (1985) (equal protection); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984) (due process); *First Nat'l Bank*, 435 U.S. at 783–84 (free speech). Similarly, corporations are protected from unreasonable searches and seizures, cannot have their property taken without just compensation, and cannot be tried twice for the same offense. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (takings); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–13 (1978) (unreasonable searches and seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568–69 (1977) (double jeopardy).

¶22 With these cases as guideposts, in considering whether the Excessive Fines Clause applies to corporations we must evaluate both the purpose of the clause and the appropriateness of applying it to corporations.[4]

¶23 The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. On its face, the text of the Excessive Fines Clause does not suggest that its protections are limited to natural persons. The clause is a directive to the government not to impose excessive fines. It does not include any limitation on who merits protection from the imposition of excessive fines.

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[4] Contrary to the court of appeals' suggestion that there has been a "tidal shift" toward favoring the application of constitutional guarantees to corporations, *Dami*, ¶ 58, this nature and purpose-based approach to evaluating the question has been applied by the United States Supreme Court since at least 1906, *see Hale*, 201 U.S. at 76.

¶24 The DWC argues that the other clauses of the Eighth Amendment offer an important textual clue to the meaning of the Excessive Fines Clause. Wielding the maxim of *noscitur a sociis*, which provides that the meaning of a phrase should be informed "by the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008), it asserts that (1) the prohibitions of excessive bail and cruel and unusual punishment can only be applied to protect natural persons, and, therefore (2) the Excessive Fines Clause must be limited in application to natural persons.

¶25 Unfortunately for the DWC, the United States Supreme Court has already abandoned *noscitur a sociis* in interpreting the Eighth Amendment. In *Austin v. United States*, 509 U.S. 602, 610 (1993), the Court concluded that the Excessive Fines Clause applied to prohibit excessive *civil* fines as well as excessive *criminal* fines when the purpose of the civil fine was, at least in part, to impose punishment. The Court reached that conclusion despite the fact that it had previously held that the Cruel and Unusual Punishment Clause applied only to criminal punishment. *See Ingraham v. Wright*, 430 U.S. 651, 666–68 (1977). In so holding, the *Austin* Court moved away from its earlier suggestion that the three clauses of the Eighth Amendment must all be interpreted to have the same reach. *See id.* at 664; *see also Austin*, 509 U.S. at 608–09 & n.5. Instead, the Court focused on the purpose of the Excessive Fines Clause itself—which is to prevent the government from abusing its power to punish through the imposition of fines, whether those fines are part of a criminal scheme or a civil one. *Austin*, 509 U.S. at 610–11.

¶26 The question we face, then, is whether there is justification to conclude that the purpose of the Excessive Fines Clause supports its application to protect corporations even if the other clauses in the Eighth Amendment do not. We conclude that there is. The bail clause is necessarily limited to natural persons because corporations cannot be jailed, and therefore cannot be subject to bail. Similarly, cruel and unusual punishment cannot be imposed upon a corporation. In short, these two guarantees are not "appropriate to [a corporate] body." *Hale*, 201 U.S. at 76. By contrast, "[t]he payment of monetary penalties . . . is something that a corporation can do as an entity." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989) (O'Connor, J., concurring in part and dissenting in part). Moreover, the government regularly imposes a wide array of monetary penalties, both civil and criminal, on corporations for the purposes of punishing corporate misconduct and regulatory violations. And when the government imposes these punitive sanctions, we hold that it must do so in compliance with the Excessive Fines Clause.

B. The Proportionality Standard for Determining Whether a Fine is Constitutionally Excessive

¶27 Having determined that corporations are entitled to assert claims that fines imposed by the government for punitive purposes are excessive in violation of the Eighth Amendment, we next consider what standard a corporation must meet to succeed in such a claim. The United States Supreme Court articulated that standard in *Bajakajian*, where it explained that "[i]f the amount of the [fine] is grossly disproportional to the gravity of the . . . offense, it is unconstitutional." 524 U.S. at 337.

¶28 In adopting this proportionality standard, the Court in *Bajakajian* relied on two "particularly relevant" considerations. *Id.* at 336. The first is that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983), and *Gore v. United States*, 357 U.S. 386, 393 (1958)). The second is that judicial determinations as to the gravity of an offense are inherently imprecise. *Id.* These considerations, explained the Court, "counsel against requiring strict proportionality" between the amount of a punitive fine and the gravity of the underlying offense, and for adopting the test previously articulated in cases interpreting the Cruel and Unusual Punishment Clause. *Id.* (citing *Solem*, 463 U.S. at 288 and *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). Under that test, courts evaluating proportionality must consider whether the defendant was treated more harshly (1) than others within the same jurisdiction and (2) than he would have been in any other jurisdiction. *Solem*, 463 U.S. at 303.

¶29 Neither the court of appeals nor the ICAO hearing panel in this case applied the United States Supreme Court's "gross disproportionality" test to evaluate the fines imposed on Dami for its protracted failure to maintain workers' compensation insurance. Instead, both relied on the test articulated by the court of appeals in *Associated Business Products.* This test is inconsistent with *Bajakajian.* Today, we bring Colorado law into conformity with federal law and hold that the proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly disproportional to the gravity of the underlying offense.

¶30 The United States Supreme Court has not addressed whether the Eighth Amendment proportionality assessment can or should include consideration of the ability of the person being fined to pay that fine. The only reference to the issue in *Bajakajian* itself was a footnote observing that: "respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." 524 U.S. at 340 n.15. The Court has, however, in a number of cases observed that the historical precursor to the Eighth Amendment, the English Magna Carta, limited the power of government to impose punitive fines by, among other things, requiring that a penalty "not be so large as to deprive [a person] of his livelihood." *Browning-Ferris*, 492 U.S. at 271; *see also Bajakajian*, 524 U.S. at 335 (same). And the Court's most recent Excessive Fines Clause decision cited with approval a statement from Blackstone's Commentaries on the Laws of England that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Timbs*, ___ U.S. ___, 139 S. Ct. at 688 (citing 4 W. Blackstone, Commentaries on the Laws of England 372 (1769)). We see in the Court's citation to these historical predecessors of the Excessive Fines Clause, and their consideration of ability to pay, persuasive evidence that a fine that is more than a person can pay may be "excessive" within the meaning of the Eighth Amendment.

¶31 The concept of "proportionality" itself also persuades us that ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis. A fine that would bankrupt a person or put a company out of business would be a

substantially more onerous fine than one that did not. For some types of criminal or regulatory infractions, a penalty that would have that kind of grave consequence might be warranted, whereas for others the severity of that outcome may be out of proportion to the gravity of the offense for which the fine is imposed. We thus conclude that courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.

C. The Proportionality Analysis Must Consider Each Individual Per Diem Fine

¶32 Dami argues that the proportionality analysis should be applied to the aggregate $841,200 that the company was assessed, and not to each of the $250-$500 daily fines. We disagree. The workers' compensation statutory regime explicitly states that "[e]very day during which an employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." § 8-43-305. Moreover, the statute directs the DWC to impose a daily fine of $250–$500 for each day of noncompliance. The statute thus puts every employer on notice that it will be fined between $250 and $500 per day for each day that it is out of compliance with its legal obligations. While the assessment for the 1,698 per diem fines may have reflected a lump sum total owed by Dami, the fines were clearly imposed at a daily rate as a result of many daily violations.

¶33 In the criminal context, we have refused to aggregate sentences that were assessed individually for purposes of evaluating the proportionality of the sentences. In *People v. Lucero*, 2017 CO 49, ¶ 23, 394 P.3d 1128, 1133–34, we rejected the defendant's argument

that his four consecutive sentences totaling eighty-four years for four separate crimes amounted in the aggregate to a sentence of life without the possibility of parole. We concluded instead that "[t]he question of whether Lucero's consecutive term-of-years sentences meet the dictates of the Eighth Amendment's proportionality principle requires consideration of each individual crime and each sentence imposed." *Id.* at 1134; *see also Close v. People*, 48 P.3d 528, 538–40 (Colo. 2002) (holding that, because each sentence is a separate punishment for a separate offense, the proper question is whether each sentence is appropriate for its related offense and not whether the aggregate of the sentences is disproportional in the abstract). We see no principled justification for taking a different approach in the context of the regulatory fines at issue here.

¶34 We recognize that, under the circumstances, the fact that Dami did not receive notice of noncompliance regarding its subsequent violations from the DWC for several years resulted in a staggeringly high-dollar aggregate total of per diem fines.[5] However, responsibility for that unfortunate circumstance rests squarely on the shoulders of Dami, and perhaps its business advisors. Dami was in fact well aware that it had an obligation to carry workers' compensation insurance and that it would be subject to daily fines for noncompliance; at the very moment that the company allowed its insurance to lapse in

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[5] Indeed, this case featured prominently in the legislature's decision to amend section 8-43-409 in 2017 to limit the maximum period for which fines can be imposed to "three years prior to the date an employer is notified by the division of a potential violation." § 8-43-409(c). *See* David Gallivan, *HB 17-1119 Brings Reform to Workers' Compensation*, 46 Colo. Law., Nov. 2017, at 58, 59.

2006 it was in the process of settling with the DWC for a year-long period of noncompliance during 2005 and 2006. Moreover, under the workers' compensation statutes, it is the employer who is responsible for ensuring that it is in compliance with the obligation to carry insurance. The statute makes plain—by excluding any mens rea element and imposing a daily fine for each day that an employer fails to have insurance or allows its insurance to lapse—that the legislature intended that a violation of section 8-43-409(1)(b)(II) be a strict-liability offense.

¶35 There are good and practical reasons for putting the burden on the employer, and not on the DWC, to ensure compliance. First, workers' compensation insurance is not paid to or by the DWC. Instead, it is private insurance coverage that an employer purchases from an insurance company. *See* Division of Workers' Compensation, *Employer's Guide* 2 (Dec. 2015).[6] The employer is therefore in a better position than the DWC to know whether it has obtained the required coverage. Second, the lack of a mens rea element in the requirement to maintain coverage discourages both negligent noncompliance (where an employer should have known that coverage was lacking) on the one hand, and gamesmanship (where an employer knew coverage was lacking but willfully failed to procure or maintain a compliant policy) on the other. Adopting a rule

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[6] We take judicial notice of this official publication, as it appears on the Colorado Department of Labor and Employment's website. *See* https://www.colorado.gov/pacific/sites/default/files/Employers_Guide_2015.pdf [https://perma.cc/6TVT-DS7J].

that focuses on the proportionality of the aggregate of daily fines, rather than the proportionality of each daily fine, would actually incentivize employers to forego workers' compensation coverage for as long as possible, hoping that the DWC would not notice until the fines had accrued for an extended period of time so that they could then argue that the fine for noncompliance was excessive.

¶36 We thus cannot allow the size of aggregated per diem fines in this case to distort our Eighth Amendment jurisprudence more generally.[7] When a fine is imposed on a per diem basis, with each day constituting an independent violation, the evaluation of whether a fine is excessive must be done with reference to each individual daily fine.

III. Remand

¶37 There is scant evidence in the record before us, particularly about Dami's ability to pay the daily fines. Dami asserted in a letter to the DWC that it could not pay without going out of business. Dami did not request the evidentiary hearing to which it was entitled in order to develop a record supporting that claim. Moreover, because the test we announce today is a new one in Colorado, we remand to the court of appeals so that it can return the case to the DWC. Assuming it is appropriate or necessary to conduct an evidentiary hearing at this stage, the DWC should permit the parties to develop a record

[7] Dami's arguments about lack of notice and the consequent length of the period of noncompliance are more properly understood as supporting a due process claim that is outside the scope of the issues upon which we granted certiorari. The fact that the DWC did not catch Dami's noncompliance for a number of years is not relevant to the Eighth Amendment argument.

that permits a complete evaluation of whether the $250-$500 fine imposed on Dami each day that it violated the workers' compensation laws was constitutionally excessive in accordance with this opinion.

III. Conclusion

¶38 In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

¶39 We therefore reverse the ruling of the court of appeals and remand this case for return to the DWC so that the DWC can, as necessary and appropriate, permit the development of an evidentiary record sufficient to allow the application of this Excessive Fines Clause analysis.

JUSTICE SAMOUR concurs in part and dissents in part.
JUSTICE HOOD does not participate.

JUSTICE SAMOUR, concurring in part and dissenting in part.

¶40 My colleagues in the majority and I are generally on the same page in this case. I write separately because I disagree that the proportionality analysis must be conducted with regard to each individual per diem fine, as opposed to the total fine of $841,200. Like the court of appeals, I would focus on the aggregate fine that the Director imposed, which is what triggered Dami's appeal. Dami has never argued that the daily fine of $250 to $500 is unconstitutionally excessive; rather, Dami has contended all along that the $841,200 fine is.

¶41 I agree that section 8-43-409(1), C.R.S. (2018), required the Director to impose a penalty on Dami, and that once Dami obtained insurance coverage (after receiving the notice from the Director), the only available penalty was a fine of between $250 and $500 for every day Dami was noncompliant.[1] But the penalty imposed in October 2014—the state action Dami complains about—was the $841,200 fine, not the per diem rate of $250 to $500. As the majority acknowledges, the Director did not send Dami a notice at the beginning of the violation period to inform it that he intended to impose a prospective fine of $250 to $500 every day until it obtained the required insurance. Maj. op. ¶ 34. Had

[1] The statute also contemplates a cease-and-desist order and an order for injunctive relief as potential penalties. *See* § 8-43-409(4) ("The issuance of an order to cease and desist, the imposition of a fine . . . , or the issuance of an order for injunctive relief . . . shall be the penalty . . . ."). However, issuing such an order after Dami had come into compliance with the insurance mandate wouldn't have made sense.

he done so, I might accept looking at the daily fine to determine constitutional proportionality. Instead, he waited *more than seven years* to contact Dami about a purported violation and then imposed a *retroactive* fine of almost a million dollars.[2] To be sure, Dami, as an employer, was responsible for complying with section 8-43-409(1). *Id.* But I nevertheless find it troubling that, under today's decision, if the Director retroactively imposes a "staggeringly high-dollar aggregate" fine, *id.*, simply because he delayed taking action to correct a potential violation, the employer's only recourse is to argue that the daily fine amount is excessive.

¶42 The majority today holds that the Eighth Amendment offers Dami protection against excessive fines. *Id.* at ¶¶ 18, 26, 38. I wholeheartedly agree. Unfortunately, the majority opinion, at least in this context, has no teeth because it says that Dami is restricted to challenging the daily fine amount. That's where the majority and I part company. I would conclude that, to be meaningful, the proportionality analysis has to focus on the total fine the Director required Dami to pay ($841,200), not the daily fine amount ($250 to $500) used to calculate the total fine. In my view, to focus on the daily fine amount instead of the total fine Dami must pay renders the entire constitutional analysis an exercise in futility.

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[2] Dami went without coverage between August 10, 2006 and June 8, 2007, and again between September 12, 2010 and July 9, 2014. The Director did not attempt to notify Dami about a potential violation until February 19, 2014. He then waited until June 25, 2014, to mail a second notice to a different address.

¶43 Notably, under the majority's analytical framework, if the Director had waited twelve years to contact Dami and then imposed a retroactive fine of over two million dollars ($500 × 4,380 days), the outcome would be identical: Dami would still be limited to challenging whether the daily fine amount of $250 to $500 is excessive. The same would be true if the Director had contacted Dami within a month of a potential violation and imposed a total fine of only $15,000 ($500 × 30 days). Stated differently, whether a fine of over two million dollars is excessive and whether a fine of $15,000 is excessive both depend on whether the daily fine amount of $250 to $500 is excessive. Hence, in evaluating the constitutionality of a section 8-43-409 fine under the Eighth Amendment's Excessive Fines Clause, the majority renders the total amount of the fine imposed completely inconsequential. To my mind, that greatly risks immunizing the Director and the statute from constitutional attack under the Eighth Amendment.[3] So long as the daily fine amount is not excessive, it matters not whether the Director imposes a $1,000 fine or a $10,000,000 fine.

¶44 The reality here is that the Director imposed a one-time, aggregate fine retroactively when he advised Dami in October 2014 that it was required to pay $841,200. He did not impose a fine in the amount of $250 to $500 1,698 times (a fine each day Dami

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[3] In some circumstances, such as when a fine is the only feasible penalty, the Director is required by the statute to impose a retroactive fine, the total amount of which is calculated by multiplying the number of days an employer was noncompliant times $250 to $500.

was in violation of section 8-43-409(1)).[4] Given that the Eighth Amendment's Excessive Fines Clause applies, Dami should be allowed to challenge the constitutionality of the Director's action—i.e., the one-time, aggregate fine imposed after the fact in October 2014.

¶45 Accordingly, like the majority, I would reverse the judgment of the court of appeals and remand the case with instructions to have it returned to the Division of Workers' Compensation. However, I would do so on slightly different grounds. For this reason, I respectfully concur in part and dissent in part.

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[4] I understand that section 8-43-305, C.R.S. (2018), provides that "[e]very day during which any employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." But the fact remains that the Director imposed a one-time, aggregate, retroactive fine in the amount of $841,200.

ADVANCE SHEET HEADNOTE
June 3, 2019
AS MODIFIED [JUNE 14, 2019]
2019 CO 47M

No. 17SC200, *Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*—Eighth Amendment—Corporations—Excessive Fines—Workers' Compensation Noncompliance.

The supreme court considers whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations. Concluding that this Eighth Amendment protection does apply to corporations, the supreme court holds that the proper test to assess the constitutionality of government-imposed fines requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed, as articulated in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The court of appeals' ruling is thus reversed and the case is remanded to that court for return to the Division of Workers' Compensation to determine whether the per diem fines at issue are proportional to the harm or risk of harm caused by each day of the employer's failure to comply with the statutory requirement to carry workers' compensation insurance.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2019 CO 47M

Supreme Court Case No. 17SC200
Certiorari to the Colorado Court of Appeals
Colorado Court of Appeals Case No. 16CA249

Petitioner:

Colorado Department of Labor and Employment, Division of Workers' Compensation,

v.

Respondents:

Dami Hospitality, LLC; and Industrial Claim Appeals Office.

Judgment Reversed
en banc
June 3, 2019

Modified Opinion. Marked revisions shown.

Attorneys for Petitioner:
Philip J. Weiser, Attorney General
John T. Lee, Senior Assistant Attorney General
Emmy A. Langley, Assistant Solicitor General
Denver, Colorado

Attorneys for Respondent Dami Hospitality, LLC:
Law Offices of Daniel T. Goodwin
Daniel T. Goodwin
Paige Orgel
Broomfield, Colorado

Attorney for Amici Curiae Cato Institute and Independence Institute:
David B. Kopel
Denver, Colorado

No appearance on behalf of Industrial Claim Appeals Office.

JUSTICE HART delivered the Opinion of the Court.
JUSTICE SAMOUR concurs in part and dissents in part.
JUSTICE HOOD does not participate.

¶1 This case requires us to consider whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations.[1] We conclude that the purpose of the Excessive Fines Clause is to prevent the government from abusing its power to punish by imposing fines, and nothing in that purpose or in the text of the Eighth Amendment limits its reach to fines imposed on individuals. We further conclude that the proper test to assess the constitutionality of government fines under the Eighth Amendment is that set forth by the United States Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), which requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed. We thus reverse the court of appeals' ruling and remand to that court for return to the Division of Workers' Compensation with instructions to, as appropriate and necessary, develop an evidentiary record sufficient to determine whether the $250–$500 fine that a business was required to pay for each day that it was out of compliance with Colorado's

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[1] We granted certiorari to review the following issues:

4. Whether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations;
5. Whether the court of appeals applied the correct test to determine the constitutionality of a civil fine; and
6. Whether the court of appeals reasonably concluded that the fine at issue violated the Eighth Amendment.

workers' compensation law is proportional to the harm or risk of harm caused by each day of noncompliance.

I. Facts and Procedural History

¶2 Dami Hospitality, LLC ("Dami") is the owner-operator of a Denver motel located on Peoria Street. Dami employs between four and ten people at any given time. As an employer ~~of three or more persons~~, Dami is required by statute to maintain workers' compensation insurance. *See* § 8-43-409, C.R.S. (2018).

¶3 Dami allowed its workers' compensation coverage to lapse on or about July 1, 2005. Upon receiving notification of the lapse from the Division of Workers' Compensation ("DWC"), Dami conceded the violation and paid a corresponding settlement in June 2006.

¶4 Approximately two months later, Dami again allowed its workers' compensation coverage to lapse. This time, Dami went without coverage from August 10, 2006, through June 8, 2007.

¶5 From June 9, 2007, to September 11, 2010, Dami carried the proper insurance, but the company's workers' compensation coverage again lapsed on September 12, 2010. Dami was without such insurance from that time until July 9, 2014.

¶6 On February 19, 2014, the DWC discovered that Dami had allowed its workers' compensation insurance to lapse for these periods of time and issued a notice to Dami regarding this. That written correspondence was dispatched to Dami's Peoria Street address, which was the address on file with the Colorado Secretary of State for both the limited liability company and its registered agent, Soon Pak. The DWC notice advised

Dami that it had twenty days to return an enclosed compliance questionnaire and to submit documents either establishing that it had maintained coverage during the relevant periods or demonstrating an exemption from the coverage requirement. It also specified that Dami could "request a prehearing conference on the issue of default."

¶7 After Dami failed to respond to the notice of subsequent violation, the DWC mailed a second notice to Dami on June 25, 2014, this time sending it to an East Dartmouth Place address.[2] For the second time, Dami was given twenty days to return the same compliance questionnaire and to submit documents either establishing coverage during the relevant periods or demonstrating an exemption from the coverage requirement. The DWC also specified, again, that Dami could request a prehearing conference on the issue of default.

¶8 On July 11, 2014, the DWC received a faxed certificate of workers' compensation insurance for Dami effective from July 10, 2014, through July 10, 2015. Dami did not offer any other documentation or any explanation for the extended periods of noncompliance.

¶9 Having received no claim of exemption or proof of coverage for the second and third periods of noncompliance, and no request for a prehearing conference, the DWC

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[2] It is not clear from the record why the DWC mailed an additional subsequent violation notice to the East Dartmouth Place address. However, the record includes documentation from the Colorado Secretary of State's website indicating that the East Dartmouth Place address appears in Dami's May 11, 2000 Articles of Incorporation for both the "principal place of business" and its organizer, Soon Pak. Elsewhere, Pak identifies the East Dartmouth Place address as her personal residence.

concluded its legally mandated investigation into Dami's noncompliance on October 29, 2014. The applicable statutory framework provides that the DWC shall:

> For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage: impose a fine of: (I) Not more than two hundred fifty dollars for an initial violation; or (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and subsequent violation.

§ 8-43-409(1)(b), C.R.S. (2018). In implementing this provision, the DWC promulgated Rule 3-6(D), 7 CCR 1101-3, which provides that:

> For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from $250/day up to $500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or until further order of the Director:
>
> Class VII 1-20 Days $250/Day
>
> Class VIII 21-25 Days $260/Day
>
> Class IX 26-30 Days $280/Day
>
> Class X 31-35 Days $300/Day
>
> Class XI 36-40 Days $400/Day
>
> Class XII 41 Days $500/Day

¶10 The DWC applied this statutory and regulatory regime in calculating the fine for Dami's second and third periods of noncompliance with the Workers' Compensation Act. On October 30, 2014, the DWC sent its "Specific Findings of Fact, Conclusions and Order to Pay Fine–Subsequent Violation" (the "Order") to Dami. This document categorized the fine amounts owed by Dami by the six classes of violation defined in DWC Rule

3-6(D), noting the per diem amount owed for each of the corresponding date ranges. The final paragraph of the order explained that the total amount Dami owed as a result of the 1,698 per diem fines was $841,200.

¶11 On November 18, 2014, the DWC received correspondence from Soon Pak, Dami's registered agent. In a letter written on Dami's behalf, Pak conceded that the business had failed to maintain workers' compensation insurance during the noticed periods. Pak explained that Dami's failure to consistently maintain coverage was a result of her reliance on others to maintain "business coverage." Pak stated that Dami's annual payroll is less than $50,000, and that the aggregate fine proposed by the DWC exceeded the business's gross annual income. Pak informed the DWC that Dami was thus unable to pay the aggregated per diem fines and requested leniency in the form of a penalty "that is more reasonable to the size of [the] business." Pak also asserted that there had never been a worker-related accident or injury at the motel, either when coverage was in place or during any period of Dami's noncompliance. Pak did not request a hearing on the issue of Dami's default on its workers' compensation insurance obligation.

¶12 The DWC construed Pak's correspondence as a petition to review the Order. The DWC then made settlement overtures, offering to decrease the fine by nearly half, to $425,000 (the aggregated minimum per diem fines permissible under section 8-43-409(1)(b)(II)). Dami did not accept the settlement, and instead submitted a brief in furtherance of the petition to review. Dami argued that (1) it had "reasonably believed that it was in compliance with the statute" at all relevant times; (2) the DWC failed to provide adequate and timely notice of Dami's noncompliance; (3) because Dami

promptly cured its default upon receiving notice, it should be assessed no penalty or at least a much smaller penalty; and (4) the assessed per diem fines were constitutionally excessive in violation of the Excessive Fines Clause of the Eighth Amendment.

¶13 The DWC issued an order upholding the fines. The DWC began by noting that the per diem fines were "not discretionary" and were properly calculated pursuant to section 8-43-409 and Rule 3-6(D)'s assessment classification schedule. Next, the DWC observed that the law places the responsibility for knowing whether workers' compensation coverage is consistently maintained on the employer and not on the DWC. Further, the order explained that Dami's policy was cancelled in 2006 due to nonpayment of required premiums and "its 2010 policy was cancelled for failure to comply with terms & conditions or audit failure." The DWC determined that both of those reasons for cancellation were within Dami's control. The DWC stated that Dami's procurement of coverage after receiving actual notice of its subsequent violation did not relieve it of responsibility to pay the statutory fines imposed for the prior 1,698 days of noncompliance. Finally, the DWC declined to address Dami's constitutional arguments, concluding that administrative agencies are not authorized to "pass on the constitutionality of statutes."

¶14 Dami appealed to the Industrial Claim Appeals Office ("ICAO"). The ICAO rejected all but Dami's excessive fines argument. The ICAO remanded the matter to the DWC, directing it to review the constitutionality of the aggregated per diem fines assessed in accordance with the test established by the court of appeals in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). That

test, borrowed from United States Supreme Court Fourteenth Amendment jurisprudence, requires consideration of "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." *Id.* at 326 (citing *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001)).

¶15 Without holding a hearing, the DWC ultimately issued a supplemental order concluding that "Rule 3-6(D) incorporates and addresses all of the elements of the *Associated Business Products* test, and thus that the fine of $841,200.00 assessed against [Dami] according to that Rule is appropriate." The DWC explained that the graduated nature of the daily fines, increasing as the length of the period of noncompliance increases, accounted for the degree of reprehensibility of the conduct. The potential harm caused by noncompliance, according to the DWC, was in line with the fines because each day of noncompliance presents a risk that an employee will be injured and insurance will not be in place to cover that injury. And because the penalties are statutorily imposed and apply to all violators equally, Rule 3-6(D) ensures that there is no disparity between the fines imposed on Dami and fines imposed on any other noncompliant employer.

¶16 Dami again appealed to the ICAO, which affirmed the DWC's supplemental order.

¶17 Dami then appealed to the court of appeals. The division set aside the assessment of aggregated per diem fines. *Dami Hosp., LLC v. Indus. Claim Appeals Office*, 2017 COA 21, ¶ 110, __ P.3d __. It assumed without deciding that the Excessive Fines Clause could be applied to challenge regulatory fees imposed on a corporation. *Id.* at ¶ 57. It

determined that the *Associated Business Products* test was the correct test to apply in assessing the constitutionality of the fee and that consideration of Dami's ability to pay the fine was a relevant factor in that assessment. *Id.* at ¶¶ 71–81. And it concluded that DWC abused its discretion by failing "to apply the *Associated Business Products* factors . . . to Dami's specific circumstances." *Id.* at ¶ 110. The division remanded the Order to the DWC for recalculation in accordance with its opinion. *Id.* The DWC petitioned for certiorari, and we granted the petition.

II. Analysis

¶18 We first consider whether the Excessive Fines Clause affords corporations protection against constitutionally excessive fines. We conclude that it does. Next, we hold that the proper test for determining whether a fine is unconstitutionally excessive is whether it is grossly disproportional to the gravity of the subject offense. *See Bajakajian*, 524 U.S. at 334. We explain that the evaluation of disproportionality should include consideration of the company's ability to pay the fine. We then consider whether the gross disproportionality analysis should be applied to each per diem fine or to the aggregate amount imposed for 1,698 days of noncompliance. We hold that where, as here, a statute expressly states that each day a party fails to comply with a legal obligation "shall constitute a separate and distinct violation" of the law, the Eighth Amendment analysis must focus on each per diem fine imposed by statute. § 8-43-305, C.R.S. (2018). We then remand the case to the court of appeals with instructions to return it to the DWC for the development, as appropriate and necessary, of an evidentiary record to facilitate application of the proportionality analysis.

D. Applicability of the Excessive Fines Clause to Corporations

¶19 Whether a particular constitutional guarantee applies to both natural persons and corporations "depends on the nature, history, and purpose" of the provision. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).[3]

¶20 Guarantees that are "purely personal" or "limited to the protection of individuals" will not apply to corporations. *Id.* The established personal guarantees include the Fifth Amendment privilege against self-incrimination and the right to privacy. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."); *United States v. White*, 322 U.S. 694, 698–701 (1944) (Fifth Amendment); *NW Nat. Life Ins. v. Riggs*, 203 U.S. 243, 255 (1906) (noting that the "liberty" referred to in the Fourteenth Amendment is the liberty of natural persons).

¶21 On the other hand, when a guarantee is against certain government overreach, and is a "constitutional immunit[y] appropriate to [a corporate] body," this constitutional limitation on government power can apply to protect a corporation just as it may protect a natural person. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Thus, corporations have been recognized to have First Amendment rights to free speech and Fourteenth Amendment rights to due process and equal protection of the law. *See Metro. Life Ins. v. Ward*, 470 U.S.

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[3] After oral argument in this case, the United States Supreme Court held that the Excessive Fines Clause is incorporated against the States by the Due Process Clause in *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687 (2019). The prohibition against imposing excessive fines thus does apply to Colorado's DWC.

869, 880 (1985) (equal protection); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984) (due process); *First Nat'l Bank*, 435 U.S. at 783–84 (free speech). Similarly, corporations are protected from unreasonable searches and seizures, cannot have their property taken without just compensation, and cannot be tried twice for the same offense. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (takings); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–13 (1978) (unreasonable searches and seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568–69 (1977) (double jeopardy).

¶22 With these cases as guideposts, in considering whether the Excessive Fines Clause applies to corporations we must evaluate both the purpose of the clause and the appropriateness of applying it to corporations.[4]

¶23 The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. On its face, the text of the Excessive Fines Clause does not suggest that its protections are limited to natural persons. The clause is a directive to the government not to impose excessive fines. It does not include any limitation on who merits protection from the imposition of excessive fines.

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[4] Contrary to the court of appeals' suggestion that there has been a "tidal shift" toward favoring the application of constitutional guarantees to corporations, *Dami*, ¶ 58, this nature and purpose-based approach to evaluating the question has been applied by the United States Supreme Court since at least 1906, *see Hale*, 201 U.S. at 76.

¶24 The DWC argues that the other clauses of the Eighth Amendment offer an important textual clue to the meaning of the Excessive Fines Clause. Wielding the maxim of *noscitur a sociis*, which provides that the meaning of a phrase should be informed "by the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008), it asserts that (1) the prohibitions of excessive bail and cruel and unusual punishment can only be applied to protect natural persons, and, therefore (2) the Excessive Fines Clause must be limited in application to natural persons.

¶25 Unfortunately for the DWC, the United States Supreme Court has already abandoned *noscitur a sociis* in interpreting the Eighth Amendment. In *Austin v. United States*, 509 U.S. 602, 610 (1993), the Court concluded that the Excessive Fines Clause applied to prohibit excessive *civil* fines as well as excessive *criminal* fines when the purpose of the civil fine was, at least in part, to impose punishment. The Court reached that conclusion despite the fact that it had previously held that the Cruel and Unusual Punishment Clause applied only to criminal punishment. *See Ingraham v. Wright*, 430 U.S. 651, 666–68 (1977). In so holding, the *Austin* Court moved away from its earlier suggestion that the three clauses of the Eighth Amendment must all be interpreted to have the same reach. *See id.* at 664; *see also Austin*, 509 U.S. at 608–09 & n.5. Instead, the Court focused on the purpose of the Excessive Fines Clause itself—which is to prevent the government from abusing its power to punish through the imposition of fines, whether those fines are part of a criminal scheme or a civil one. *Austin*, 509 U.S. at 610–11.

¶26 The question we face, then, is whether there is justification to conclude that the purpose of the Excessive Fines Clause supports its application to protect corporations even if the other clauses in the Eighth Amendment do not. We conclude that there is. The bail clause is necessarily limited to natural persons because corporations cannot be jailed, and therefore cannot be subject to bail. Similarly, cruel and unusual punishment cannot be imposed upon a corporation. In short, these two guarantees are not "appropriate to [a corporate] body." *Hale*, 201 U.S. at 76. By contrast, "[t]he payment of monetary penalties . . . is something that a corporation can do as an entity." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989) (O'Connor, J., concurring in part and dissenting in part). Moreover, the government regularly imposes a wide array of monetary penalties, both civil and criminal, on corporations for the purposes of punishing corporate misconduct and regulatory violations. And when the government imposes these punitive sanctions, we hold that it must do so in compliance with the Excessive Fines Clause.

E. The Proportionality Standard for Determining Whether a Fine is Constitutionally Excessive

¶27 Having determined that corporations are entitled to assert claims that fines imposed by the government for punitive purposes are excessive in violation of the Eighth Amendment, we next consider what standard a corporation must meet to succeed in such a claim. The United States Supreme Court articulated that standard in *Bajakajian*, where it explained that "[i]f the amount of the [fine] is grossly disproportional to the gravity of the . . . offense, it is unconstitutional." 524 U.S. at 337.

¶28 In adopting this proportionality standard, the Court in *Bajakajian* relied on two "particularly relevant" considerations. *Id.* at 336. The first is that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983), and *Gore v. United States*, 357 U.S. 386, 393 (1958)). The second is that judicial determinations as to the gravity of an offense are inherently imprecise. *Id.* These considerations, explained the Court, "counsel against requiring strict proportionality" between the amount of a punitive fine and the gravity of the underlying offense, and for adopting the test previously articulated in cases interpreting the Cruel and Unusual Punishment Clause. *Id.* (citing *Solem*, 463 U.S. at 288 and *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). Under that test, courts evaluating proportionality must consider whether the defendant was treated more harshly (1) than others within the same jurisdiction and (2) than he would have been in any other jurisdiction. *Solem*, 463 U.S. at 303.

¶29 Neither the court of appeals nor the ICAO hearing panel in this case applied the United States Supreme Court's "gross disproportionality" test to evaluate the fines imposed on Dami for its protracted failure to maintain workers' compensation insurance. Instead, both relied on the test articulated by the court of appeals in *Associated Business Products.* This test is inconsistent with *Bajakajian.* Today, we bring Colorado law into conformity with federal law and hold that the proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly disproportional to the gravity of the underlying offense.

¶30 The United States Supreme Court has not addressed whether the Eighth Amendment proportionality assessment can or should include consideration of the ability of the person being fined to pay that fine. The only reference to the issue in *Bajakajian* itself was a footnote observing that: "respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." 524 U.S. at 340 n.15. The Court has, however, in a number of cases observed that the historical precursor to the Eighth Amendment, the English Magna Carta, limited the power of government to impose punitive fines by, among other things, requiring that a penalty "not be so large as to deprive [a person] of his livelihood." *Browning-Ferris*, 492 U.S. at 271; *see also Bajakajian*, 524 U.S. at 335 (same). And the Court's most recent Excessive Fines Clause decision cited with approval a statement from Blackstone's Commentaries on the Laws of England that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Timbs*, ___ U.S. ___, 139 S. Ct. at 688 (citing 4 W. Blackstone, Commentaries on the Laws of England 372 (1769)). We see in the Court's citation to these historical predecessors of the Excessive Fines Clause, and their consideration of ability to pay, persuasive evidence that a fine that is more than a person can pay may be "excessive" within the meaning of the Eighth Amendment.

¶31 The concept of "proportionality" itself also persuades us that ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis. A fine that would bankrupt a person or put a company out of business would be a

substantially more onerous fine than one that did not. For some types of criminal or regulatory infractions, a penalty that would have that kind of grave consequence might be warranted, whereas for others the severity of that outcome may be out of proportion to the gravity of the offense for which the fine is imposed. We thus conclude that courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.

F. The Proportionality Analysis Must Consider Each Individual Per Diem Fine

¶32 Dami argues that the proportionality analysis should be applied to the aggregate $841,200 that the company was assessed, and not to each of the $250-$500 daily fines. We disagree. The workers' compensation statutory regime explicitly states that "[e]very day during which an employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." § 8-43-305. Moreover, the statute directs the DWC to impose a daily fine of $250–$500 for each day of noncompliance. The statute thus puts every employer on notice that it will be fined between $250 and $500 per day for each day that it is out of compliance with its legal obligations. While the assessment for the 1,698 per diem fines may have reflected a lump sum total owed by Dami, the fines were clearly imposed at a daily rate as a result of many daily violations.

¶33 In the criminal context, we have refused to aggregate sentences that were assessed individually for purposes of evaluating the proportionality of the sentences. In *People v. Lucero*, 2017 CO 49, ¶ 23, 394 P.3d 1128, 1133–34, we rejected the defendant's argument

that his four consecutive sentences totaling eighty-four years for four separate crimes amounted in the aggregate to a sentence of life without the possibility of parole. We concluded instead that "[t]he question of whether Lucero's consecutive term-of-years sentences meet the dictates of the Eighth Amendment's proportionality principle requires consideration of each individual crime and each sentence imposed." *Id.* at 1134; *see also Close v. People*, 48 P.3d 528, 538–40 (Colo. 2002) (holding that, because each sentence is a separate punishment for a separate offense, the proper question is whether each sentence is appropriate for its related offense and not whether the aggregate of the sentences is disproportional in the abstract). We see no principled justification for taking a different approach in the context of the regulatory fines at issue here.

¶34 We recognize that, under the circumstances, the fact that Dami did not receive notice of noncompliance regarding its subsequent violations from the DWC for several years resulted in a staggeringly high-dollar aggregate total of per diem fines.[5] However, responsibility for that unfortunate circumstance rests squarely on the shoulders of Dami, and perhaps its business advisors. Dami was in fact well aware that it had an obligation to carry workers' compensation insurance and that it would be subject to daily fines for noncompliance; at the very moment that the company allowed its insurance to lapse in

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[5] Indeed, this case featured prominently in the legislature's decision to amend section 8-43-409 in 2017 to limit the maximum period for which fines can be imposed to "three years prior to the date an employer is notified by the division of a potential violation." § 8-43-409(c). *See* David Gallivan, *HB 17-1119 Brings Reform to Workers' Compensation*, 46 Colo. Law., Nov. 2017, at 58, 59.

2006 it was in the process of settling with the DWC for a year-long period of noncompliance during 2005 and 2006. Moreover, under the workers' compensation statutes, it is the employer who is responsible for ensuring that it is in compliance with the obligation to carry insurance. The statute makes plain—by excluding any mens rea element and imposing a daily fine for each day that an employer fails to have insurance or allows its insurance to lapse—that the legislature intended that a violation of section 8-43-409(1)(b)(II) be a strict-liability offense.

¶35 There are good and practical reasons for putting the burden on the employer, and not on the DWC, to ensure compliance. First, workers' compensation insurance is not paid to or by the DWC. Instead, it is private insurance coverage that an employer purchases from an insurance company. *See* Division of Workers' Compensation, *Employer's Guide* 2 (Dec. 2015).[6] The employer is therefore in a better position than the DWC to know whether it has obtained the required coverage. Second, the lack of a mens rea element in the requirement to maintain coverage discourages both negligent noncompliance (where an employer should have known that coverage was lacking) on the one hand, and gamesmanship (where an employer knew coverage was lacking but willfully failed to procure or maintain a compliant policy) on the other. Adopting a rule

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[6] We take judicial notice of this official publication, as it appears on the Colorado Department of Labor and Employment's website. *See* https://www.colorado.gov/pacific/sites/default/files/Employers_Guide_2015.pdf [https://perma.cc/6TVT-DS7J].

that focuses on the proportionality of the aggregate of daily fines, rather than the proportionality of each daily fine, would actually incentivize employers to forego workers' compensation coverage for as long as possible, hoping that the DWC would not notice until the fines had accrued for an extended period of time so that they could then argue that the fine for noncompliance was excessive.

¶36 We thus cannot allow the size of aggregated per diem fines in this case to distort our Eighth Amendment jurisprudence more generally.[7] When a fine is imposed on a per diem basis, with each day constituting an independent violation, the evaluation of whether a fine is excessive must be done with reference to each individual daily fine.

III. Remand

¶37 There is scant evidence in the record before us, particularly about Dami's ability to pay the daily fines. Dami asserted in a letter to the DWC that it could not pay without going out of business. Dami did not request the evidentiary hearing to which it was entitled in order to develop a record supporting that claim. Moreover, because the test we announce today is a new one in Colorado, we remand to the court of appeals so that it can return the case to the DWC. Assuming it is appropriate or necessary to conduct an evidentiary hearing at this stage, the DWC should permit the parties to develop a record

[7] Dami's arguments about lack of notice and the consequent length of the period of noncompliance are more properly understood as supporting a due process claim that is outside the scope of the issues upon which we granted certiorari. The fact that the DWC did not catch Dami's noncompliance for a number of years is not relevant to the Eighth Amendment argument.

that permits a complete evaluation of whether the $250-$500 fine imposed on Dami each day that it violated the workers' compensation laws was constitutionally excessive in accordance with this opinion.

III. Conclusion

¶38 In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

¶39 We therefore reverse the ruling of the court of appeals and remand this case for return to the DWC so that the DWC can, as necessary and appropriate, permit the development of an evidentiary record sufficient to allow the application of this Excessive Fines Clause analysis.

JUSTICE SAMOUR concurs in part and dissents in part.
JUSTICE HOOD does not participate.

JUSTICE SAMOUR, concurring in part and dissenting in part.

¶40 My colleagues in the majority and I are generally on the same page in this case. I write separately because I disagree that the proportionality analysis must be conducted with regard to each individual per diem fine, as opposed to the total fine of $841,200. Like the court of appeals, I would focus on the aggregate fine that the Director imposed, which is what triggered Dami's appeal. Dami has never argued that the daily fine of $250 to $500 is unconstitutionally excessive; rather, Dami has contended all along that the $841,200 fine is.

¶41 I agree that section 8-43-409(1), C.R.S. (2018), required the Director to impose a penalty on Dami, and that once Dami obtained insurance coverage (after receiving the notice from the Director), the only available penalty was a fine of between $250 and $500 for every day Dami was noncompliant.[1] But the penalty imposed in October 2014—the state action Dami complains about—was the $841,200 fine, not the per diem rate of $250 to $500. As the majority acknowledges, the Director did not send Dami a notice at the beginning of the violation period to inform it that he intended to impose a prospective fine of $250 to $500 every day until it obtained the required insurance. Maj. op. ¶ 34. Had

[1] The statute also contemplates a cease-and-desist order and an order for injunctive relief as potential penalties. *See* § 8-43-409(4) ("The issuance of an order to cease and desist, the imposition of a fine . . . , or the issuance of an order for injunctive relief . . . shall be the penalty . . . ."). However, issuing such an order after Dami had come into compliance with the insurance mandate wouldn't have made sense.

he done so, I might accept looking at the daily fine to determine constitutional proportionality. Instead, he waited *more than seven years* to contact Dami about a purported violation and then imposed a *retroactive* fine of almost a million dollars.[2] To be sure, Dami, as an employer, was responsible for complying with section 8-43-409(1). *Id.* But I nevertheless find it troubling that, under today's decision, if the Director retroactively imposes a "staggeringly high-dollar aggregate" fine, *id.*, simply because he delayed taking action to correct a potential violation, the employer's only recourse is to argue that the daily fine amount is excessive.

¶42 The majority today holds that the Eighth Amendment offers Dami protection against excessive fines. *Id.* at ¶¶ 18, 26, 38. I wholeheartedly agree. Unfortunately, the majority opinion, at least in this context, has no teeth because it says that Dami is restricted to challenging the daily fine amount. That's where the majority and I part company. I would conclude that, to be meaningful, the proportionality analysis has to focus on the total fine the Director required Dami to pay ($841,200), not the daily fine amount ($250 to $500) used to calculate the total fine. In my view, to focus on the daily fine amount instead of the total fine Dami must pay renders the entire constitutional analysis an exercise in futility.

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[2] Dami went without coverage between August 10, 2006 and June 8, 2007, and again between September 12, 2010 and July 9, 2014. The Director did not attempt to notify Dami about a potential violation until February 19, 2014. He then waited until June 25, 2014, to mail a second notice to a different address.

¶43 Notably, under the majority's analytical framework, if the Director had waited twelve years to contact Dami and then imposed a retroactive fine of over two million dollars ($500 × 4,380 days), the outcome would be identical: Dami would still be limited to challenging whether the daily fine amount of $250 to $500 is excessive. The same would be true if the Director had contacted Dami within a month of a potential violation and imposed a total fine of only $15,000 ($500 × 30 days). Stated differently, whether a fine of over two million dollars is excessive and whether a fine of $15,000 is excessive both depend on whether the daily fine amount of $250 to $500 is excessive. Hence, in evaluating the constitutionality of a section 8-43-409 fine under the Eighth Amendment's Excessive Fines Clause, the majority renders the total amount of the fine imposed completely inconsequential. To my mind, that greatly risks immunizing the Director and the statute from constitutional attack under the Eighth Amendment.[3] So long as the daily fine amount is not excessive, it matters not whether the Director imposes a $1,000 fine or a $10,000,000 fine.

¶44 The reality here is that the Director imposed a one-time, aggregate fine retroactively when he advised Dami in October 2014 that it was required to pay $841,200. He did not impose a fine in the amount of $250 to $500 1,698 times (a fine each day Dami

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[3] In some circumstances, such as when a fine is the only feasible penalty, the Director is required by the statute to impose a retroactive fine, the total amount of which is calculated by multiplying the number of days an employer was noncompliant times $250 to $500.

was in violation of section 8-43-409(1)).[4] Given that the Eighth Amendment's Excessive Fines Clause applies, Dami should be allowed to challenge the constitutionality of the Director's action—i.e., the one-time, aggregate fine imposed after the fact in October 2014.

¶45 Accordingly, like the majority, I would reverse the judgment of the court of appeals and remand the case with instructions to have it returned to the Division of Workers' Compensation. However, I would do so on slightly different grounds. For this reason, I respectfully concur in part and dissent in part.

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[4] I understand that section 8-43-305, C.R.S. (2018), provides that "[e]very day during which any employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." But the fact remains that the Director imposed a one-time, aggregate, retroactive fine in the amount of $841,200.

COLORADO COURT OF APPEALS

DATE FILED: May 16, 2019
CASE NUMBER: 2018CA1599

Court of Appeals No. 18CA1599
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-044-870

Cyrus Rajabi,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Arvada Fire Protection District; and Colorado Special Districts Property and Liability Pool, c/o TRISTAR Risk Management,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE WEBB
Román and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced May 16, 2019

The Elliot Law Offices, P.C., Mark D. Elliott, Alonit Katzman, Arvada, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, PC, David R. Bennett, Eliot J. Wiener, Denver, Colorado, for Respondents Colorado Special Districts Property and Liability Pool

¶ 1 In this workers' compensation action, claimant, Cyrus Rajabi, seeks review of a final order of the Industrial Claim Appeals Office (Panel) upholding the denial and dismissal of his request for in-home housekeeping and yard services. We affirm.

I. Background

¶ 2 Claimant sustained admitted injuries to his right hand in April 2017 while serving as a volunteer firefighter for employer, Arvada Fire Protection District. Eventually, several physicians diagnosed claimant with complex regional pain syndrome (CRPS) in his upper right extremity. He received stellate ganglion blocks to alleviate his pain and, several months later, Bier blocks that relieved his pain.

¶ 3 Claimant complained to some of his treating physicians that he had difficulty performing household chores. Two physicians, Dr. Tomm Vanderhorst and Dr. Kyros Ipaktchi, reported in July 2017 that despite feeling stressed, prone to anger, and forgetful, claimant "adamantly opposed" psychological consultation and counseling. Instead, claimant "state[d] that what he needs is more help with activities around the house." His authorized treating physician, Dr. Craig Davis, prescribed "home assistance" "3 days/wk" for four weeks starting on June 5, 2017. In mid-July 2017, Dr. Davis

increased the prescription for in-home assistance to "5 hours daily" "4 days/week" for "6-8 weeks as needed."

¶ 4 Still, no medical report contained in the record expressly restricted claimant's use of his hand. Emblematic of this disconnect is a note from a clinical neuropsychologist, Dr. Timothy Shea, who reported that claimant's "physical activity level appears minimal and he is unsure how much he can/should use his right hand and arm, which is problematic because it is reinforcing his belief that exercise and activity can lead to more pain and possible re-injury." Claimant admitted that because he is able to bathe, dress, and feed himself — the basic activities of daily living (ADLs) — he is "not disabled." Even so, he told Dr. Ipaktchi in late July 2017 that "Dr. Davis provided him with a prescription for home assistance 3 times a week for ADLs as he has been having difficulty handling heavier duties, particularly with upcoming plans for [a] wedding within the next month."

¶ 5 In mid-August 2017, a month after home assistance had been prescribed, claimant spoke with Dr. Davis "for about 45 minutes" to discuss "numerous concerns . . . that he wanted to share with" Dr. Davis. In his report summarizing this conversation, Dr. Davis wrote

that claimant "spoke extensively about reasons why he needs help at home. He says that any use of his hand significantly exacerbates the CRPS causing significant worsening of his overall fatigue and affecting his ability to do his regular job as an attorney. He says he has a large property and there is a lot of work to be done and that he really needs help on this." Two days after this conversation, Dr. Davis wrote to employer's counsel advising that claimant

> requires assistance with general home services and activities, including yard services, as a result of significant injury to his right hand at the fire department as well as the CRPS/nerve damage complications. . . .
>
> The prescribed assistance is intended to allow the patient to receive relief from symptoms of his injury and the resulting nerve damage (CRPS) complications. The CRPS/nerve damage complications are exacerbated to the patient's detriment when he is required to use his injured right hand to perform the tasks for which assistance is sought. In short, by avoiding the activities encompassed by the prescribed assistance, the patient is provided with relief from symptoms of the work injury, including the increased and severe pain caused when he uses his injured hand to perform these activities. Additionally, the patient's performance of these activities results in CRPS "flare-ups" that prevent the patient from meaningfully participating in and performing the physical therapy which is

> critical to his recovery and puts the patient in tears. . . .
>
> [T]he patient should not use his right hand, with the understanding it exacerbates the CRPS symptoms and impedes the patient's recovery.

Then he prescribed "home assistance with these and other related tasks for 5 hours/day, 5 days/week for additional 6 to 8 weeks, as needed."

¶ 6 Later, employer sent claimant to see Dr. Nicholas Olsen for an independent medical examination (IME). Dr. Olsen prepared a post-IME report, but it was not disclosed to claimant until twelve days before the hearing. Although claimant objected to the late disclosure, the presiding administrative law judge (ALJ) still admitted it and permitted Dr. Olsen to testify.

¶ 7 At the hearing, Dr. Olsen agreed that testing indicated claimant suffered from CRPS "in his right upper extremity." Despite claimant's diagnosed CRPS, Dr. Olsen testified that claimant did not need assistance with his activities of daily living (ADLs), which Dr. Olsen defined as "the basic functions that a person needs to get through their day, which includes waking up in the morning, transferring out of bed, getting dressed, . . . toileting, . . . hygiene,

washing one's face, shaving, brushing one's teeth. . . . And then feeding oneself." But, Dr. Olsen noted, claimant told him that "he needed help in his yard with, you know, cleaning up, taking care of the yard, the things he had done to care for his lawn in the past, as well as his house. The cleaning of the house, putting things away, and, you know, household chores."

¶ 8 The ALJ found that requested services for "home assistance and yard service as reasonable and necessary benefits . . . would not cure and relieve the symptoms and effects of [c]laimant's work injury." Citing to *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997), the ALJ noted that to be compensable, services had to be "medical in nature or incidental to obtaining such medical or nursing treatment." The ALJ concluded

> that [c]laimant's request for in home services and yard services is not reasonably necessary to cure and relieve [c]laimant of the effects of the April 23, 2017, injury nor is it incidental to obtaining medical treatment. Claimant's testimony at hearing, and the medical records reflect, that [c]laimant aggressively acquired workers' compensation benefits. Dr. Davis's evolving prescription for in home services and yard services leaves question about the credibility and persuasiveness of Dr. Davis's opinion. Particularly, in light of the credible testimony and independent medical

> examination report of Dr. Ols[e]n who opined that [c]laimant's request for in home services and yard services was not a reasonably necessary medical benefit. Dr. Ols[e]n further credibly opined that [c]laimant did not require in home services to aide him with his activities of daily living.
>
> It is concluded that the request for yard services and in home services would relieve [c]laimant of the rigors of yard work and larger projects in the home but these services are not prescribed to cure and relieve [c]laimant of the effect of the work injury nor are these services incidental to obtaining such medical treatment.

Based on these findings and conclusions, the ALJ denied and dismissed claimant's request for housekeeping and yard services.

¶ 9 On review, the Panel affirmed, holding that the ALJ's decision was based on her credibility determinations, which the Panel could not disturb. It also held that the ALJ did not misapply the standard set out in *Bellone*. Claimant asserted that the ALJ abused her discretion by admitting Dr. Olsen's report and by permitting him to testify. The Panel, however, noted that claimant had never moved to compel production of Dr. Olsen's report and had cross-examined Dr. Olsen during the hearing. It rejected his abuse of discretion assertion.

II. Yard and Home Services as Medical Benefits

¶ 10 Claimant first contends the ALJ followed an "outdated legal standard" in assessing whether he was entitled to compensation for home and yard services. Claimant interprets *Bellone* as expanding covered essential services to include services that benefit an injured worker even when the worker did not require assistance with his or her ADLs. He argues that the ALJ disregarded this expansion when she denied his request for home and yard services, instead relying entirely on his ability to perform his ADLs despite his injury. We decline to set aside the Panel's decision.

A. Standard of Review

¶ 11 Whether the ALJ and the Panel applied the proper legal standard is a question of law subject to review de novo. *See Indus. Claim Appeals Office v. Softrock Geological Servs., Inc.*, 2014 CO 30, ¶ 9.

B. Law Governing Compensation for Medical Services

¶ 12 Section 8-42-101(1)(a), C.R.S. 2018, requires

> [e]very employer . . . [to] furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the

> injury . . . and thereafter during the disability to cure and relieve the employee from the effects of the injury.

This provision has been applied to compensate injured workers for services such as childcare, *Bellone*, 940 P.2d at 1118; home health care services, *Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854, 856 (Colo. App. 1995); as well as attendant care and housekeeping services, *Atencio v. Quality Care, Inc.*, 791 P.2d 7, 9 (Colo. App. 1990).

¶ 13 When assessing any requested service, though, the following general test applies: "to be compensable, expenses must be for medical or nursing treatment, or incidental to obtaining such medical or nursing treatment." *Country Squire Kennels v. Tarshis*, 899 P.2d 362, 363 (Colo. App. 1995). "In other words, to be considered a medical benefit under the statute, the service must be a medical service that is reasonably necessary for treating the injury or that provides therapeutic relief from the injury's effects." *Nanez v. Indus. Claim Appeals Office*, 2018 COA 162, ¶ 24. *See also Bellone*, 940 P.2d at 1117 ("The service must be reasonably needed to cure and relieve the effects of the injury and be related to a claimant's physical needs.").

¶ 14 Simply put, the service must be medical in nature in that it directly relieves the symptoms or effects of the injury or is associated with the claimant's physical needs. *Kuziel v. Pet Fair, Inc.*, 931 P.2d 521, 522 (Colo. App. 1996). Still, "the mere fact that the housecleaning services are prescribed by a physician does not make them medically necessary." *Country Squire Kennels*, 899 P.2d at 363.

¶ 15 Whether services "are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment" is a question of fact to be determined by the ALJ. *Atencio*, 791 P.2d at 8. "And, if the findings of fact entered by the ALJ are supported by substantial evidence, they are not to be altered by the Panel." *Id.*

C. ALJ Did Not Misapply the Test

¶ 16 The ALJ determined that the requested services did not meet the applicable test. As described above, the ALJ found that the requested services "would not cure and relieve the symptoms and effects of [c]laimant's work injury." Further, the ALJ expressly found that the services were "not incidental to medical treatment because they are not part of a home healthcare program designed to

treat [c[laimant's condition." The ALJ also credited Dr. Olsen's testimony "that [c]laimant did not require in home services to aide him with his activities of daily living."

¶ 17 Claimant contends the ALJ improperly relied on his ability to perform ADLs in denying his request for services. He insists that *Bellone* moved away from this standard and that the ability to complete ADLs should not bar a claimant from receiving compensation for services. We agree that *Bellone* viewed more broadly the conditions that may necessitate essential medical services. But a closer look shows that *Bellone* neither mandates such services nor alters the applicable compensability test for the services, as discussed above.

¶ 18 In *Bellone*, an injured worker who "suffer[ed] from seizures, extreme fatigue, depression, mental confusion, and a sleep disorder" as a result of a "compensable closed head injury," was prescribed and awarded child care services "to allow her to attend medical appointments and to allow her time to rest during the week." 940 P.2d at 1117-18. True, as claimant points out, the injured worker seemingly was able to perform her ADLs. Still, an ALJ found that the child care services were nonetheless "medically

necessary to cure and relieve the claimant from the effects of her work-related head injury and resulting seizure disorder" because without the care, the claimant, a single parent, would not get the prescribed rest she needed. *Id.* at 1118. With rest, claimant could "pace herself," thereby not becoming overwhelmed, overly fatigued or depressed, which, in turn, reduced her susceptibility to seizures and depression. *Id.*

¶ 19 Contrary to claimant's assertion, *Bellone* did not turn on whether claimant could perform ADLs. Rather, *Bellone* held that the requested child care services were compensable because they relieved the symptoms of the claimant's injury and were "incidental" to her medical treatment "because the services were provided as part of an overall home healthcare program designed to treat the claimant's condition." *Id.* Thus, *Bellone*'s holding tracks the rule articulated in earlier cases. *See Country Squire Kennels*, 899 P.2d at 363; *Hillen v. Tool King*, 851 P.2d 289, 290 (Colo. App. 1993) ("Employers have been required to provide services which are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment.").

¶ 20 Likewise, here, although the ALJ noted claimant could perform his ADLs, we do not read the decision as turning on this finding. Instead, the ALJ found that claimant had established neither that the requested services would relieve him of the symptoms and effects of his injury nor that they were "incidental to [his] medical treatment because they [were] not part of a home healthcare program designed to treat [his] condition." These findings mirror the language in *Bellone*, which tracked earlier caselaw. So, the ALJ did not apply "outdated" law.

¶ 21 Moreover, the ALJ's finding that home and lawn services were "not prescribed to cure and relieve [c]laimant of the effect of the work injury," follows the outcomes of precedential caselaw on this issue. While housekeeping services have been awarded where those services were found to be medically necessary — *see Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286, 1289 (Colo. App. 1992) (wife compensated for nursing care including time spent housekeeping); *Atencio*, 791 P.2d at 9 — where housekeeping services would not relieve or treat a worker's injuries, those services were denied. *See Country Squire Kennels*, 899 P.2d at 365; *Valdez v. Gas Stop*, 857 P.2d 544, 546 (Colo. App. 1993) (upholding Panel

decision setting aside ALJ's award of housekeeping services on the ground that claimant did not require them for a medical purpose; evidence showed claimant was able to engage in work activities but could not mop floors, clean bathtub, or move furniture).

¶ 22 As well, no case that we have found, and claimant has not pointed us to any, has ever compensated an injured worker for lawn or yard services. To the contrary, the only published case in Colorado that has addressed lawn care services upheld a Panel decision *setting aside* an ALJ's award of these services on the ground that lawn care services could not "be equated with the type of household services approved in *Atencio*." *Hillen*, 851 P.2d at 290. This was so because lawn services provided no "direct relation to a person's physical needs," did not fall under the statute's scope for medical treatment, and had not been prescribed to cure or relieve the claimant's injuries. *Id.* Instead, the requested lawn services were intended "simply to relieve claimant of the rigors of yardwork." *Id.* Unlike yard work, the "household services approved in *Atencio*, . . . such as cooking, . . . bear[] a direct relation to a person's physical needs." *Id.* And despite claimant's undisputed testimony that avoiding yardwork will diminish his flare-ups, yardwork cannot

be equated with the childcare awarded in *Bellone*. Childcare is a necessity that ensures an injured worker's child is not neglected. In contrast, claimant has offered no evidence explaining what harm could befall him or his family if the yard work and lawn care for which he seeks assistance are simply deferred.

¶ 23 Finally, and perhaps most importantly, the ALJ's findings in *Bellone* were upheld by a division of this court because substantial evidence supported them. *Bellone*, 940 P.2d at 1118. Ultimately, *Bellone* did not rest on application of a new test — or any test, for that matter — but rather on the conclusion that the evidence supported the ALJ's finding that child care services would relieve the symptoms and effects of the worker's brain injury. *Id.* And, because "[t]he determination whether services qualify under this test is one of fact," findings that are supported by substantial evidence cannot be set aside. *Atencio*, 791 P.2d at 8.

¶ 24 For these reasons, we conclude that neither the ALJ nor the Panel misapplied the law governing compensation for services in denying claimant's request for household and yard care.

III. Evidence Supporting ALJ's Finding

¶ 25 Alternatively, claimant contends evidence supporting the ALJ's findings — in particular, Dr. Olsen's report and testimony — should have been excluded and that, without this evidence, the record does not support the ALJ's findings. Further, claimant argues, even if Dr. Olsen's report and testimony are not excluded, the record lacks the requisite substantial evidence to support the ALJ's findings because, according to claimant, Dr. Olsen never expressly said that household and yard services were *not* medically necessary. We conclude that these arguments do not provide a basis for setting aside the Panel's decision.

A. ALJ Did Not Abuse Her Discretion by Admitting Dr. Olsen's Report or Testimony

¶ 26 Claimant contends, and employer does not dispute, that employer mailed Dr. Olsen's report to claimant twelve days before the hearing and claimant received it only eight days before the hearing. Thus, employer violated the applicable Workers' Compensation Rule of Procedure mandating that "[d]iscovery, other than depositions, shall be completed no later than 20 days prior to the hearing date." Dep't of Labor & Emp't Rule 9-1(E), 7 Code Colo.

Regs. 1101-3. *See also* § 8-43-210, C.R.S. 2018 (requiring "expert witness reports" to be exchanged "at least twenty days prior to the hearing.").

¶ 27 At the hearing, claimant objected to the report's admission on the ground that it had not been timely disclosed. He also objected to Dr. Olsen's testimony on this basis and on the ground that the report did not express Dr. Olsen's opinion concerning the necessity for the services claimant sought.

¶ 28 But claimant was aware of Dr. Olsen's role well before the hearing. Employer listed Dr. Olsen as a witness on its response to claimant's application for hearing, and, as claimant read to the ALJ at the hearing, explained in its interrogatory responses that Dr. Olsen would be testifying "as to his determination of what medical treatment, including the provision of essential services, is reasonable and necessary in this case. Dr. Olsen will testify consistent with the contents of his report." After noting these objections, the ALJ permitted Dr. Olsen to testify and admitted his report into evidence.

¶ 29 Section 8-43-207(1)(c), C.R.S. 2018, empowers an ALJ to "make evidentiary rulings." This statute vests in the ALJ "wide

discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009). An ALJ's evidentiary ruling will be set aside only for an abuse of discretion. *See Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 47 (refusing to set aside ALJ's ruling that documents were inadmissible where no abuse of discretion was shown). And an ALJ commits an abuse of discretion only if the evidentiary ruling "exceeds the bounds of reason." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993) (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985)).

¶ 30 The record shows that claimant knew Dr. Olsen would be a witness three months before the hearing; claimant attended the independent medical examination in October 2017, which typically would be followed by a report; and the ALJ afforded claimant ample opportunity at the hearing to cross-examine Dr. Olsen.

¶ 31 True, employer never sought to excuse its untimely disclosure. But even if employer's untimely disclosure violation lacked

> substantial justification, the sanction of evidence or witness preclusion is inappropriate if the lateness of the disclosure is harmless to the other party. In evaluating whether a failure to disclose evidence is harmless under

> Rule 37(c), the inquiry is not whether the new evidence is potentially harmful to the opposing side's case. Instead, the question is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence.

Todd v. Bear Valley Vill. Apartments, 980 P.2d 973, 979 (Colo. 1999).

¶ 32 Claimant does not explain what more he would have done to prepare for Dr. Olsen's testimony. Nor did he either seek a continuance or request a post hearing deposition of Dr. Olsen to supplement the hearing record. Under these circumstances, we conclude claimant was given an "adequate opportunity to defend against" Dr. Olsen's opinions. *Id.*

¶ 33 In the end, we cannot say that the ALJ's actions "exceeded the bounds of reason." *Coates, Reid & Waldron*, 856 P.2d at 856.

B. Substantial Evidence Supports the ALJ's Findings

¶ 34 Having concluded that the ALJ applied the correct legal standard and did not abuse her discretion by admitting Dr. Olsen's report and testimony, we next address whether substantial evidence supported the ALJ's finding that the housekeeping and lawn services claimant requested neither relieved claimant of the

symptoms and effects of his injuries nor were incidental to his receipt of medical treatment for his injuries. We conclude that the record amply supports the ALJ's factual findings.

¶ 35 Here, the evidence established that claimant could perform all of his ADLs. He testified that he is

> not disabled in terms of being able to not do something. What happens is once I flare up my nerves it overwhelms my body and I cannot get out of bed, I cannot function, I cannot think.
>
> So if you take me out of context and have me honestly answer hey, can I pick something up one time or two times or can I bathe myself if I take time to avoid a flare-up and it takes five times as long, I can answer that question yes, because I answer it honestly.

Claimant testified that other activities which require "any extensive use of [his] hand," such as "taking care of the house; laundry, cleaning . . . or clean[ing] up outside the house," can cause his CRPS to "flare up." Dr. Olsen corroborated claimant's assessment, noting that claimant is "able to do the basic ADLs, . . . but . . . needed help in his yard with, you know, cleaning up, taking care of the yard . . . as well as his house."

¶ 36 Similarly, in his letter to employer's counsel, Dr. Davis wrote that avoiding these tasks may diminish claimant's "flare-ups." However, his opinion was ambiguous as to how these services would ease claimant's symptoms or provide him therapeutic relief. Moreover, as the ALJ noted, Dr. Davis' letter was written immediately after claimant's lengthy telephone call with Dr. Davis in which he reportedly "spoke extensively about reasons why he needs help at home" and emphasized to Dr. Davis that "he really needs help on this." Claimant also asked Drs. Vanderhorst and Ipaktchi for at-home assistance.

¶ 37 Absent from the record, however, is any medical report detailing how the requested services were necessitated by claimant's condition or would help in his recovery. Thus, the evidence does not unequivocally establish that the services claimant sought were "reasonably necessary for treating the injury or . . . provide[] therapeutic relief from the injury's effects." *Nanez*, ¶ 24. And while Dr. Davis prescribed the services, a prescription alone is not enough to establish that a service is medically mandated. *See Country Squire Kennels*, 899 P.2d at 363.

¶ 38 Importantly, the ALJ found Dr. Olsen's opinion more credible and persuasive than that of Dr. Davis, particularly in light of, as the ALJ put it, Dr. Davis' "evolving prescription for in home services and yard services." This finding is supported by the record which establishes that Dr. Davis repeatedly extended the prescription for "in-home assistance" and issued a request for assistance to employer's counsel after claimant's lengthy telephonic plea for help.

¶ 39 As claimant points out, though, the ALJ misapprehended Dr. Olsen's opinion. Her conclusion of law relies on Dr. Olsen's purported opinion that "in home services and yard services was not a reasonably necessary medical benefit." We have thoroughly reviewed the record but could not find such a statement from Dr. Olsen. Thus, the ALJ's reliance is misplaced.

¶ 40 Claimant argues that this error is so egregious the Panel should have set aside the ALJ's decision on this basis alone. We disagree. While the ALJ's conclusions are clearly based on her erroneous assumption about Dr. Olsen's opinion, other evidence in the record supports the ALJ's findings and conclusions.

¶ 41 In particular, the ALJ found that Dr. Davis' opinion concerning claimant's need for in-home services expanded and

"evolved" in response to claimant's complaints that he was unable to perform certain tasks and his demands for help to several doctors. The record also bears out the ALJ's observation that claimant "aggressively acquired workers' compensation benefits." He told multiple doctors that he needed help with home services; told at least one physician that Dr. Davis prescribed "home assistance" for ADLs even though Dr. Olsen reported that claimant told him he only needed help with "bigger projects around his home [and] taking care of his property and lawn"; and was found by a clinical neuropsychologist to self-limit his activities because he was confused about his ability and restrictions. Thus, even disregarding the ALJ's misstatement about Dr. Olsen's testimony, other evidence in the record supports the ALJ's conclusion that claimant had not established that the requested yard and home services would relieve or cure the symptoms of his work-related injury. *See Nanez*, ¶ 24; *Bellone*, 940 P.2d at 1117.

¶ 42 Moreover, the weight to be given expert medical testimony is within the ALJ's sound discretion. *See Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). Therefore, we cannot disturb the ALJ's credibility determination finding Dr. Olsen more

credible than Dr. Davis unless the evidence 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*, ¶ 46 ("Nor may we set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence.").

¶ 43 We cannot say that Dr. Davis "overwhelmingly rebutted" Dr. Olsen's opinion, and claimant has not pointed us to any additional evidence supporting his position and rebutting Dr. Olsen's testimony. Therefore, like the Panel, we are bound by the ALJ's determination crediting Dr. Olsen's opinion over Dr. Davis'. *See Arenas*, 8 P.3d at 561.

¶ 44 In sum, we conclude that substantial evidence in the record supports the ALJ's factual findings that the housekeeping and lawn services claimant requested would not relieve the symptoms and effects of claimant's injuries. Like the Panel, we are therefore bound by these findings and cannot set aside them aside. *See Bellone*, 940 P.2d 1117-18; *Atencio*, 791 P.2d at 8. So, the Panel did not err in upholding the ALJ's decision.

IV.. Household and Yard Services Were Not Incidental to Medical Treatment

¶ 45 Last, claimant challenges the ALJ's ruling for allegedly "failing to analyze whether [claimant's] prescribed home services were incidental to medical treatment." He argues that the ALJ's findings "required" a finding that the services were incidental to his medical treatment because the services cost a fraction of claimant's medical bills. We disagree.

¶ 46 To be compensable as "incidental" to medical treatment,

> such services must enable the claimant to obtain medical care or treatment or, alternatively, must be relatively minor in comparison to the medical care and treatment.
>
> In contrast, if housekeeping services do not enable a claimant to obtain medical or nursing treatment or are not relatively minor in comparison to medical care and treatment, then other divisions of this court have held that such services are not compensable.

Country Squire Kennels, 899 P.2d at 364. This test, too, is a question of fact for the ALJ's determination that cannot be set aside if supported by substantial evidence in the record. *Bellone*, 940 P.2d 1117-18.

¶ 47 First, we note that contrary to claimant's assertion, the ALJ addressed and analyzed this factor. Quoting *Bellone*, *id.* at 1118, the ALJ said that services in that case "were 'incidental' to medical treatment because the services were provided as part of an overall home health care program designed to treat the claimant's condition." Applying this standard, the ALJ expressly found that the services claimant sought were "not incidental to medical treatment because they are not part of a home healthcare program designed to treat [c]laimant's condition." Finally, the ALJ concluded the services claimant requested were not "incidental to obtaining such medical treatment."

¶ 48 To be sure, the ALJ could have expounded on these findings or analyzed the factors more thoroughly, but she was not required to do so. An ALJ need not address every issue raised or all the evidence offered, and "is not held to a crystalline standard in articulating h[er] findings of fact." *Sanchez v. Indus. Claim Appeals Office*, 2017 COA 71, ¶ 61 (quoting *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 388-89 (Colo. App. 2000)). Given that the ALJ addressed both the standard and the evidence

pertaining to incidental services, we disagree that the ALJ "failed to analyze" the issue.

¶ 49 Turning to whether the services sought were "incidental" as a matter of law, here, too, we perceive no basis for setting aside the ALJ's determination. No evidence suggested, and claimant does not appear to contend, that the services "enabled [him] to obtain medical care or treatment." Rather, claimant only argues that the services cost only $253 for one day's work, significantly less than the $41,589.48 spent on his medical care. While we agree that $253 is a fraction of $41,589.48, no evidence was offered — and claimant has not pointed to any in the record — verifying what the requested services would cost in the future. Claimant was seeking services several days per week for many weeks. And as employer points out, that figure could quickly multiply.

¶ 50 In sum, we cannot say that the ALJ erred as a matter of law in finding that the lawn and housekeeping services claimant sought were not "incidental" to his medical treatment. *Country Squire Kennels*, 899 P.2d at 364. To the contrary, because substantial evidence supports the ALJ's finding that the services were not

incidental to his medical treatment, we cannot set it aside. *See Bellone*, 940 P.2d at 1117-18.

V. Conclusion

¶ 51 The order is affirmed.

JUDGE ROMÁN and JUDGE FREYRE concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-052-934

IN THE MATTER OF THE CLAIM OF:

CINDY MCROBBIE,

Claimant,

v.

FINAL ORDER

ESTATE OF MARY E WALES-DECEASED,

Employer,

and

NON-INSURED,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Sidanycz (ALJ) dated November 9, 2018, that found Carolyn Cargile and Mary Wales were joint employers; that the claimant suffered a compensable injury; that the respondents are liable for specified medical treatment; that the claimant is entitled to temporary disability benefits; that established the average weekly wage (AWW); that the respondents are liable for a 25% penalty due to the absence of workers' compensation insurance; and that denied several penalty claims. We correct the order in regard to the identification of the employer, the duration of temporary disability benefits and the amount of medical benefits to be reimbursed. We otherwise affirm the decision of the ALJ.

The claimant was employed to work as an in-home assistant and care-giver to Mary Wales. Ms. Wales was in her 90's and had physical difficulties involving ambulation, food preparation, bathing, dressing, taking medications and attending medical appointments. The claimant began providing part-time assistance for Ms. Wales concerning these tasks in 2016. In May 2016, an agreement was reached for the claimant to provide 24 hour assistance in Ms. Wales' home for 23 days each month.

On July 7, 2017, the claimant was physically seating Ms. Wales on a shower bench. In the process, the claimant described a shooting pain going through her left arm into her fingers. Following the shower, the claimant indicated she incurred further pain in her left arm when she acted to keep Ms. Wales from falling to the floor instead of

taking a seat in her wheel chair. The claimant notified Ms. Cargile, Ms. Wale's daughter, of her injury. Ms. Cargile advised the claimant to seek medical attention. The claimant attended an appointment on July 11 at St. Mary's Occupational Medicine. She was treated by Nurse Practitioner Harkreader who obtained an X-ray of her neck, referred her to two physician specialists, arranged for physical therapy and recommended lifting no more than 20 pounds. An MRI on August 8 revealed a cervical disc herniation at the C4-5 level impinging on the claimant's spinal cord. Dr. Stagg at St. Mary's referred the claimant to neurosurgeon Dr. Replogle. Dr. Replogle performed a C4-5 cervical discectomy and fusion on September 22.

The claimant's symptoms improved following the surgery. Dr. Stagg placed the claimant at maximum medical improvement (MMI) on May 14, 2018, and assigned a 19% permanent impairment rating. The doctor also recommended permanent restrictions including no lifting, pushing or pulling over 30 pounds. The respondents requested a review by a Division sponsored Independent Medical Examiner (DIME). The DIME review had not been completed as of the time of the August 2 and 20, 2018, hearing before the ALJ.

The claimant returned to work following her initial appointment with NP Harkreader. The claimant reported in subsequent medical appointments she was having difficulty observing her work restrictions while at work and her duties were causing persistent pain. On August 14, 2017, Mr. Harkreader recommended the claimant remain completely off work. The claimant informed Ms. Cargile on August 15 she could no longer perform her job with Ms. Wales. Shortly thereafter, Ms. Cargile moved her mother to a nursing facility. Ms. Wales passed away on December 23, 2017.

The respondents arranged for the claimant to be examined by Dr. Paz on January 13, 2018. Dr. Paz found the claimant exhibited preexisting multilevel degenerative disc disease. However, the doctor concluded the C4-5 disc herniation "developed as a result of the July 7, 2017, incident" at work. That lifting event was said to represent an aggravation and acceleration of the progression of the herniated disc.

The claimant filed a Worker's Claim for Compensation with the Division on July 24, 2017. The respondents filed a General Admission of Liability on August 8, 2017, for medical benefits only. The Admission indicated there was no insurance carrier.

On April 19, 2018, the claimant filed an application for hearing concerning medical benefits, AWW, temporary disability benefits, and penalties. Also endorsed for determination was the identity of the respondent parties including possibly the estate of

Mary Wales, the Mary E. Wales Revocable Trust, and Carolyn Cargile personally. The respondents added the issue of the claimant's responsibility for the termination of employment.

In the order of November 9, 2018, the ALJ determined the claimant's activity assisting Ms. Wales in the shower and her transfer to the wheel chair on July 7, 2017, combined with the claimant's preexisting degenerative condition to accelerate and aggravate that condition so as to cause the need for her cervical surgery. The ALJ also concluded the July 7 work accident led to the claimant's loss of her job and the resulting wage loss. The ALJ found the claimant entitled to temporary disability benefits beginning August 16, 2017, and ongoing in the amount of $817.92 per week for a total of $40,896 through the date of the hearing on August 2, 2018. The claimant's medical care, including the surgery, was deemed reasonable, necessary and related to the work injury. The ALJ ruled Ms. Cargile and Mary Wales were joint employers. The personal representative appointed by the District Court to administer the estate of Mary Wales was noted to have been informed of the August 2 hearing and actually appeared and gave testimony. Ms. Cargile also appeared as the designated trustee of the Mary E. Wales Revocable Trust. The ALJ denied the claim that the claimant was responsible for the loss of her employment. The claims for penalties argued by both the claimant and the respondents were denied. The ALJ assessed a 25% penalty required by § 8-43-408(5) due to a lack of compliance with that section's requirement for workers' compensation insurance.

I.

The respondents contend that the ALJ erred in determining that Ms. Cargile and Ms. Wales were co-employers. For the reasons set for below, we agree that the ALJ erred in determining that Ms. Cargile is personally liable as a joint employer and correct the November 9, 2018, order to reflect the appropriate employer.

A.

The ALJ referred the appeal to us on April 8, 2019. Following that referral the parties continued to file written arguments and motions with the ALJ. Those were duly passed along. On April 12, Ms. Cargile submitted a motion to reopen the record. The motion requested the substitution of a signed and executed Medical Durable Power of Attorney and General Durable Power of Attorney form be made for the specimen copies of these same documents admitted into evidence at the hearing as exhibits 'O' and 'P'. The signed and executed Powers of Attorney were attached to the motion. Ms. Cargile

asserts this is required due to the findings by the ALJ in her order that because the copies of the Power of Attorney documents did not include the final signatures, "the ALJ finds no persuasive evidence on the record that Ms. Cargile was acting as Ms. Wales' agent under a power of attorney." Finding of Fact, ¶ 36. This finding was then cited as a basis for the ALJ's conclusion of law that Ms. Cargile and Mary Wales were joint employers. Ms. Cargile asserts she was provided no notice the veracity of her power of attorney was a disputed issue. The motion cites as authority our recent decision in *Madera v. GCA Services Group, Inc*. W.C. No. 5-048-431-001 (March 8, 2019).

We decline to grant the motion of Ms. Cargile as we find it unnecessary. At the outset of the August 2 hearing, the attorney for the claimant set forth the claimant's position in regard to this issue: " – who actually was the employer? It's my position that the evidence will show that that was most likely Cookie Cargile acting under a power of attorney and responsible for all of the financial and business matters of her mother, who we – who she was operating under a power of attorney for." Aug. 2 Tr. at 12.

We construe this statement as a judicial admission of the claimant that there was no dispute concerning the presence of a power of attorney for the ALJ to address. A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute. *Wang v. August Moon Asian Grill*, W.C. No. 4-885-554-07 (January 17, 2017). In *Kempter v. Hurd*, 713 P. 2d 1274 (Colo. 1986), the Court noted the position taken by a party in a post-trial brief that they are not pursuing a claim may be characterized as a judicial admission:

> They assert in their briefs that their claims against the remaining defendants have been abandoned, and at oral argument their attorney stated that they would so stipulate. … We hold that the statement made by the petitioners' at oral argument constitutes a judicial admission. 713 P. 2d at 1279-80.

We have also held that the post hearing advisement by a parties' attorney that "the claimant was not challenging the treating physician's determination of MMI … amounted to a judicial admission that the claimant was not seeking additional treatment to improve her condition...." *Dimitt v. Prime Cut Meat Market*, W.C. No. 4-426-344 (January 18, 2002). We have noted that parties may not advocate one position before the ALJ and assert a new position on appeal. *Kresl v. Poudre Valley Healthcare*, W.C. No. 4-359-681 (April 4, 2000)(relying on S*chlage Lock v. Lohr*, 870 P.2d 615 (Colo. App. 1993)).

Ms. Cargile was not put on notice the issue of her status as a power of attorney for her mother was being disputed. Particularly in this case where completion of the hearing was continued for three weeks, notice of this particular dispute would have allowed her to submit additional relevant evidence. Accordingly, the determination by the ALJ that Ms. Cargile was not acting through a power of attorney is set aside as a factual and legal issue not submitted for determination.

B.

The ALJ found in her conclusions of law that a basis for concluding Ms. Cargile was an employer was derived from the identification of Ms. Cargile as the employer when she filed a General Admission of Liability (GAL) on August 8, 2017. Substantial evidence, however, does not support the ALJ's finding this GAL could serve as an admission Ms. Cargile was the employer.

The claimant filed a Worker's Claim for Compensation form with the Division on July 24, 2017, that stated the employer's name to be "Carolyn Cargile". Claimant's Exhibit 1. The claimant then authored a letter dated July 31, 2017, introduced into evidence by the claimant as "Claimant's written report of injury dated July 31, 2017." Exhibit 2, Aug. 2 Tr. at 91-92. Ms. Cargile stated she was sent the form for a GAL by the Division for her to complete. Aug. 20 Tr. at 173. On the completed GAL, Ms. Cargile used the information from the claimant's Claim for Compensation form, including the assigned W.C. number and the name of the employer, which was herself. Exhibit 3. However, Ms. Cargile also wrote on the GAL "see attached letter and email." The attached letter was the July 31 letter written by the claimant. The letter stated:

> I, Cindy McRobbie, am the full-time caregiver for Mary Wales of 1761 Palisade Street, Grand Junction, CO 81503: I am Mary's employee and am paid wages & given a W2 showing such for tax purposes.
>
> As Mary is no longer physically able to take care of her own financial affairs, her daughter Cookie Cargile of 1374 North 2900 West, Vernal, Utah 84078 is her Durable Power of Attorney and oversees her affairs as well as pays her bills.
>
> * * *
>
> On July 7, 2017 I had a work place injury while caring for Mary. I am now suffering numbness in my arm and

> recurring/constant headaches – all indicating a nerve impingement.
>
> * * *
>
> I have every intention of continuing to care for Mary as long as my services are needed. I also have no expectation of any legal ramifications resulting form [sic] this injury as long as Cookie, as Mary's POA, does pay for the medical treatment of this injury and for my time as I undergo said treatment **…**

The specific reference on the GAL to the attached statement from the claimant that Ms. Cargile is indeed not the employer, but is instead the agent for the employer Mary Wales, through a power of attorney, explicitly takes the position Ms. Cargile is not the employer, but is the agent of the employer. Accordingly, the ALJ's conclusion to the contrary is not supported by a reasonable reading of the GAL.

C.

The statutory provisions providing for Medical Durable Powers of Attorney preclude the finding here that Ms. Cargile, acting under a power of attorney, is personally liable.

Colorado has enacted statutory provisions pertinent to Medical Durable Powers of Attorney, § 15-14-500 C.R.S., Power of Attorney, § 15-14-602, and the Uniform Power of Attorney Act, § 15-14-701. The intent of these enactments is set forth in § 15-14-500.3 (1): "The general assembly hereby recognizes that each adult individual has the right as a principal to appoint an agent to deal with property or make personal decisions for the individual, but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal's lifetime, including during periods of disability, and be sure that any third party will honor the agent's authority at all times."

The power of attorney allows the agent "to make health care decisions…", § 15-14-500.5(a), "assert or maintain before a court or administrative agency a … defense …", § 15-14-735(a), "provide normal domestic help …", § 15-14-736(1)(d), "withdraw by check money or property of the principal deposited with … a financial institution;" § 15-14-731(1)(d), "determine … the mode of engaging, compensating, and dealing with its employees …" § 15-14-732(1)(g)(II)(E). An agent is not personally liable for the principal's contractual obligations incurred through the exercise of a power of attorney. An agent who acts in good faith in making medical treatment decisions "shall not be

subject to civil or criminal liability therefor …, § 15-14-508(1). An agent "that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.", § 15-14-714(4). An agent acting within the Act and within the authority granted will not be liable for damages, § 15-14-714 (statutory form)(Liability of agent). A third party is directed to either accept an acknowledged power of attorney or request certification no later than seven business days. A person that refuses to accept an acknowledged power of attorney is subject to liability for attorney's fees and costs incurred through an action to confirm the validity of the power of attorney, §15-14-720(1)(a) and (3). This is consistent with the statement in the statutory Prefatory Note that the Act was to, "(11) include remedies and sanctions for refusal of other persons to honor a power of attorney."

The claimant asserted at hearing that Ms. Cargile should be determined as personally liable as the claimant's employer based on a theory of an alter ego. The claimant argues Ms. Cargile was the individual that negotiated the terms of employment with the claimant. When the claimant encountered difficulties caring for Ms. Wales she found it necessary to contact Ms. Cargile to achieve a resolution. While checks to pay the claimant were written from a bank account bearing the name of Mary Wales, the claimant points out it was Ms. Cargile that signed all the checks. Many of the documents addressed to Mary Wales were delivered to Ms. Cargile's address in Vernal, Utah. The ALJ noted these circumstances and found they supported a determination that Ms. Cargile was personally liable as an employer of the claimant. Conclusion of Law ¶ 9.

The findings by the ALJ, however, do not indicate personal liability on the part of Ms. Cargile. The ALJ found that Ms. Cargile arranged for documents to be drafted identifying her mother as an employer, communicated with the claimant regarding the terms and conditions of the claimant's employment, could sign checks for her mother, paid the claimant's wages with those checks, and also reimbursed the claimant for medical expenses from her mother's checking account. Those are all duties statutorily designated as functions to be performed by an agent with a power of attorney. They were all specified in the General Power of Attorney granted by Mary Wales (Grant of Specific Authority) parts (vi), (ix), and (x). Exhibit P. The record does not demonstrate activities of Ms. Cargile inconsistent with her authority as an agent with a power of attorney.

In *Water, Waste & Land v. Lanham*, 955 P.2d 997 (Colo. 1998), the court reiterated the long standing rule that, "If both the existence and identity of the agent's principal are fully disclosed to the other party, the agent does not become a party to any contract which he negotiates …" 955 P.2d at 1001. In *Masinton v. Dean*, 659 P2d 50

(Colo. App. 1982), a supplier to a restaurant sought to apply the alter ego doctrine to render corporate officers liable for unpaid deliveries made to the restaurant. The Court noted that the supplier plaintiff had always been paid previously with checks bearing the name "Dean-King Corporation d/b/a Harry's Steak House, Inc." The Court stated, "As an individual acting within the scope of her authority for the corporation, Olive could be held liable only if she was acting for an undisclosed principal. We conclude that a consistent practice of paying for goods with checks that bear the name of the corporation was sufficient to identify the principal." 659 P.2d at 52. The alter ego doctrine was held not to apply in such circumstances. The *Masinton* decision referenced the same point of agency law recognized in *Lanham* and in *Fink v. Montgomery Elevator Co*., 161 Colo. 342, 421 P.2d 735, 737 (1966):

> The generally accepted rule is that a party is not liable upon a contract signed by him on behalf of another, assuming proper authorization to act, when he has given notice to the third party that there is a principal for whom he acts and also notice of the name or identity of the principal.

Here, the claimant acknowledged, not only in her July 31, 2017, letter, exhibit 2, but also in her testimony, Aug. 2 Tr. at 95-96, Aug. 20 Tr. at 96, 223, that she was aware at the time she was hired in 2016, that Ms. Cargile was acting through a power of attorney for Ms. Wales. The checks she was provided to pay her wages all bore the name of Mary Wales and were signed by Ms. Cargile. Exhibit II. Ms. Cargile initially and consistently disclosed to the claimant that she was acting on behalf of Mary Wales as the principal to her power of attorney. As a consequence, Ms. Cargile is not personally liable upon the contract of employment with the claimant in this matter. The alter ego doctrine does not apply. The ALJ's ruling that Ms. Cargile is a joint employer, therefore, is in error and we set aside the ALJ's determination on this matter.

D.

We further correct the ALJ's November 9, 2018, order to reflect the proper employer parties. The respondents in the claim are the Estate of Mary E. Wales as represented by Mr. Reams and the Mary E. Wales Revocable Trust as represented by Ms. Cargile as its trustee, but not Carolyn Cargile individually.

In *Knight v. Estate of Lorene Wherry*, W.C. No. 4-746-724 (October 7, 2009), the employer died before the disputed claim went to hearing. The claimant did not properly join the employer's estate as a substituted party since no representative had yet been

appointed by the District Court. The Panel held that until such a representative was installed and noticed as a party, the claimant's claim was non-justiciable. Here, the record reflects and the ALJ found that a probate case was opened in the District Court on April 17, 2018. The Public Administrator, Charles F. Reams, was appointed as the special administrator of the Estate of Mary A. Wales. A special administrator performs the duties and functions of a personal representative under the statute. Section 15-12-616, C.R.S. He is tasked with managing the assets of the estate, to preserve them and to account for them. Section 15-12-620. He may act as a representative of the estate in an action brought by a creditor or claimant against the estate in the event the claimant makes arrangements to pay the reasonable fees and cost of the administrator involved in the litigation against the estate. Section 15-12-621(9). Mr. Reams appeared at the August 2, 2018, hearing and testified as to his role in the estate. He did not participate in the August 20 hearing, nor has he entered an appearance in the appeal proceedings. The ALJ ruled Mary Wales was an employer of the claimant and the Estate of Mary E. Wales is liable for the payment of the claimant's benefits. That determination has not been appealed by the estate.

Here, Ms. Cargile testified she is the trustee designated to administer the Mary E. Wales Revocable Trust. Her attorney has also entered her appearance as the attorney for the Trust. The Trust Agreement, Exhibit D, provides the Trustee, as the administrator of the Trust, upon the settlor's (Mary Wales) death, among other duties, is to pay legally enforceable claims against the Settlor or the Settlor's estate. (Article 4)(a)(ii). The ALJ found Ms. Cargile did represent the Trust as the trustee. F of F ¶ 35. It appears the ALJ referred to both the Trust and to the actual Estate when the ALJ ruled the estate was liable for Workers' Compensation benefits to the claimant. Accordingly, the correct respondents in this matter are the Estate of Mary E. Wales as represented by Mr. Reams and the Mary E. Wales Revocable Trust as represented by Ms. Cargile as its trustee.

II.

The respondent Trust contends that the need for cervical surgery was not justified by the medical evidence in the record. The respondent argues Dr. Paz concluded the claimant had accumulated considerable degenerative disease in her spine prior to July 7, 2017. We are not persuaded the ALJ erred in her determination.

In order to impose liability for medical treatment, the ALJ must find the need for treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1) (b), C.R.S. The determination of whether the claimant proved causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*,

12 P.3d 844 (Colo. App. 2000). To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). Thus, if the industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In this regard, it was the prerogative of the ALJ to assess the weight and credibility of the medical records and testimony offered on the issue of causation. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

Here, although the respondents argue that Dr. Paz concluded the claimant had accumulated considerable degenerative disease in her spine prior to July 7, 2017, the ALJ correctly noted that Dr. Paz also reported the lifting incident of July 7 did serve to aggravate and accelerate the claimant's preexisting condition. Dr. Paz stated the July 7 accident made the cervical surgery necessary. In addition, Dr. Replogle and Dr. Stagg were of the opinion the surgery was caused by the July 7 lifting incident.

The weight and credibility to be assigned expert medical opinion is a matter within the fact-finding authority of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). We cannot say the ALJ here has made a decision not reasonably supported by the record. In addition, the ALJ's plausible inferences may not be disturbed if drawn from substantial evidence in the record.

The ALJ's citation of the evidence in the record relied upon to support her conclusion can be characterized as substantial evidence which supports her findings. Section 8-43-301(8), C.R.S. The ALJ relied on Dr. Paz's opinion that the mechanism of the injury was consistent with the ensuing symptoms of pain and disability. He also observed the onset of symptoms coincided with the July 7 accident. The claimant

testified to her sudden onset of left arm pain while seating Ms. Wales in the shower on July 7. The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). We therefore find no error in the ALJ's decision finding the work accident caused the claimant's need for cervical surgery.

III.

A.

The respondent Trust asserts that the claimant is responsible for her own termination from employment and not entitled to temporary disability benefits pursuant to §8-42-105(4), C.R.S. The respondent argues the claimant injured Ms. Wales on July 7 while lifting her incorrectly in the shower and into her wheel chair. The medical records are said to then show Ms. Wales became depressed and died a few months later. The respondent maintains that because the claimant negligently lifted Ms. Wales, she injured her and was therefore discharged. This misfeasance, it is claimed, also led to the placement of Ms. Wales in a nursing home and rendered the claimant's in-home caregiving job superfluous. We perceive no error.

The ALJ found that the respondents failed to demonstrate by a preponderance of the evidence that the claimant was responsible for the termination of her employment. The ALJ found no persuasive evidence in the record that the claimant was responsible for the termination of her employment. The ALJ's findings are supported by plausible inferences from the record**.** Ms. Cargile testified that on August 1, 2017, the claimant informed her she could no longer work as Ms. Wales care giver. Ms. Cargile indicated she was aware the claimant could no longer take care of Ms. Wales. After the claimant stated she could no longer do the job, Ms. Cargile stated she let her go. Aug. 20 Tr. at 141. She explained that: "Mom's condition worsened. And it was taking two people to help Mom at that point. And Cindy was just not capable of doing that anymore." Tr. at 154. The claimant testified she could no longer perform the job because the amount of lifting involved aggravated the pain in her arm. This testimony by both witnesses supports the ALJ's finding the claimant's wage loss was due to the disabling effects of the July 7 work accident.

The respondent also contends the claimant was terminated due to the "injury-producing activity." The Court of Appeals pointed out in *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P.3d 1061, 1064 (Colo. App. 2002), "… the word 'responsible' does not refer to an employee's injury or injury-producing activity." In that

case a claimant fired for causing an accident with his truck, that also resulted in his injury, was not responsible for the loss of his job. Similarly, in *Vigil v. Pueblo School District #60*, W.C. No. 4-875-633-02 (August 28, 2010), a paraprofessional assistant injured in a physical altercation with a student was not responsible for her job loss due to also improperly restraining the student during the altercation. The respondent's assertion here that the claimant's injury-producing activity, i.e. the incompetent lifting of Ms. Wales, was the cause for her termination presents a similar argument. The claimant cannot be seen as responsible for the termination when she is discharged due to the claimant's injury-producing conduct.

The ALJ was not required to conclude the claimant was responsible for her wage loss. There is substantial evidence that justifies the ALJ's finding the claimant is entitled to temporary disability benefits beginning August 16, 2017.

B.

However, the ALJ did find that an authorized treating physician (ATP), Dr. Stagg, determined the claimant was at MMI on May 14, 2018. As a result, the ALJ did commit error in ordering temporary total disability (TTD) benefits subsequent to that date as prohibited by § 8-42-105(3)(a) (TTD to cease when the employee reaches MMI). The ALJ could not make a decision as to whether the claimant was actually at MMI. She noted only that an authorized treating physician (ATP) had expressed an opinion the claimant had achieved MMI. As a consequence, until that MMI finding is reviewed by a Division Independent Medical Examiner (DIME), the ALJ lacks authority to disregard the claimant's status as being at MMI. The ALJ then, would necessarily be required to terminate TTD benefits as of the MMI date assigned by the ATP. We have held on several occasions that once an ATP has designated a date of MMI, an ALJ lacks any further authority to award temporary benefits until a DIME review of the MMI determination occurs. *Ayala v. Conagra Beef Co*., W.C. No. 4-579-880 (July 22, 2004); *Chapman v. American Medical Response*, W.C. No. 4-600-029 (September 15, 2006); *Heckler v. Wern Air, Inc*. W.C. No. 4-877-223 (December 16, 2014), *Haakinson v. Loomis Fargo & Co*.,W.C. No. 4-544-827 (April 13, 2005). We therefore correct the decision of the ALJ to indicate TTD payments are to run from August 16, 2017, until May 14, 2018. This represents a total of 39 weeks and $31,899 in TTD benefits.

IV.

The respondent Trust also contends the assessment of a 25% penalty, pursuant to § 8-43-408(1), is an excessive fine in violation of the Eighth Amendment to the U.S.

Constitution and Article II, Section 20 of the Colorado Constitution. The respondent is referring to the version of § 8-43-408 as it existed prior to July 1, 2017. Accordingly, the ALJ correctly determined the subsequent amended language added on that date applied to the injury in this matter occurring on July 7, 2017. It appears then, that the respondent is complaining about the penalty the ALJ imposed pursuant to § 8-43-408(5), payable to the Colorado uninsured employer fund, due to "an employer who is not in compliance with the insurance provisions" of article 40 to 47 of title 8 at the time an employee suffers a compensable injury. The penalty is to be "an amount equal to 25% of the compensation or benefits to which the employee is entitled…" The respondent cites as authority the decision in *Dami Hospitality v. Industrial Claim Appeals Office*, _ P.3d. _ , 2017 COA 21 (Colo. App. 2017).

However, the decision in *Dami Hospitality* construed a penalty assessed pursuant to § 8-43-409(1)(b). That section describes penalties assessed for the failure of an employer to maintain insurance regardless of the presence of any injury claims. The section also allows by its terms for the Director to exercise discretion in the amount of the penalty as long as the penalty falls within the minimum and maximum limits specified. Here, the statute, § 8-43-408(5), does not call for any application of discretion. If the conditions for a penalty are found present, the penalty is simply 25%. As a consequence, the respondent is asking us on appeal to find the statute itself is unconstitutional insofar as it does not allow for judicial discretion. We lack jurisdiction to find the statute is unconstitutional on its face. *Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971); *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). We therefore decline to address this argument of the respondent.

V.

The respondent Trust asserts the ALJ is in error to the extent she ordered the respondents to reimburse claimant's health insurance carriers in the amount of $64,580. The ALJ's findings identify this figure as the amount billed to the carrier. The respondent contends it is not liable to pay a reimbursement in an amount higher than is allowed by the medical fee schedule. Section 8-42-101(6)(a) provides the respondent as an employer is to repay the claimant in full for her out of pocket medical payments. Part (b) specifies that any amount for which that reimbursement exceeds the fee schedule the employer is required to retrieve from the medical provider. However, § 8-42-101(6)(a) and (b) is silent on the application of the fee schedule to reimbursements owed to other health insurance providers as opposed to payments to health care providers. Similarly, W.C. Rule 16-11(F) speaks solely of reimbursement to the injured worker. In *Martin v. Hyams*, W.C. No. 4-781-144 (May 11, 2010), citing to § 8-42-101(3)(a)(I), it was held

that in such a situation "the employer may only be ordered to pay the health insurer and the outstanding medical bills the amounts that could be billed pursuant to the medical fee schedule." Applying the *Martin* decision in this matter, the ALJ's order is corrected to require the respondents to reimburse the claimant's health insurance carrier in the amounts the medical providers are allowed to charge in compliance with the medical fee schedule.

VI.

The respondent Trust maintains the AWW should be $570.58 instead of $1,220.77 as determined by the ALJ. The respondent's calculation is premised on the claimant's W-2 wage statement indicating she was paid $29,670 total salary in 2017. The respondent divides this figure by 52 weeks to derive an AWW of $570.58. However, the claimant did not work 52 weeks in 2017 due to her injury. The claimant did not work at all after August 15. She testified she also was off work for a month in June, 2017, as a result of the illness and death of the claimant's mother. Instead, the ALJ found credible the claimant's testimony her agreement was to work for Ms. Wales at the rate of $230 per day for 23 days each month. This testimony represents substantial evidence to support the ALJ's finding for an AWW of $1,220.77 and a weekly temporary total benefit rate of $817.92 per week.

VII.

Finally, we see no error in the ALJ's determination that the Dead Man's Statute did not limit all or part of the claimant's testimony.

Section 13-90-102, C.R.S., limits the admissibility of statements made by persons who are incapable of testifying and thereby seeks "to guard against perjury by living interested witnesses when deceased persons cannot refute the testimony, thus protecting estates against unjust claims." *In re Estate of Crenshaw*, 100 P.3d 568, 569 (Colo. App. 2004).

Section 13-90-102(1)(c), permits testimony concerning an oral statement by decedent if the statement is corroborated by material evidence of an independent and trustworthy nature. Section 13-90-102(3) (a), C.R.S. provides:

> 'Corroborated by material evidence' means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the

> witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or other admissible source, including trustworthy documentary evidence, and such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.

The Dead Man's Statute requires that the corroborating evidence be material to the underlying issue and tend to confirm, strengthen and show the probable truthfulness of the party's testimony

Here, the respondent contends that the claimant was a financially interested witness seeking to reenact alleged conversations that she claim occurred between her and the now deceased Ms. Wales regarding the circumstances of the claimant's business relationship. The respondent, however, does not dispute that Ms. Cargile was allowed to testify concerning her understanding of the employer/employee relationship between the parties. Ms. Cargile's testimony, along with other evidence, is corroborating testimony which can confirm the existence of the business relationship. Therefore, the claimant's testimony was admissible. We agree with the ALJ's determination that the disputed testimony in this case was not barred by the Dead Man's Statute.

IT IS THEREFORE ORDERED that the ALJ's order dated November 9, 2018, is corrected to designate the employer to be the Mary E. Wales revocable trust, represented by its trustee, and the estate of Mary E. Wales, represented by the Public Administrator, and not Carolyn Cargile personally. The order is further corrected to indicate temporary disability benefits are not payable after the date of MMI, which is currently May 14, 2018, and that the respondents' obligation to reimburse the claimant's health care insurer is limited by the medical fee schedule. In all other respects the November 9, 2018, decision of the ALJ 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

5/22/19 by TT .

WITHERS SEIDMAN RICE MUELLER GOODBODY PC, Attn: DAVID B MUELLER ESQ, 101 SOUTH THIRD ST SUITE 265, GRAND JUNCTION, CO, 81502 (For Claimant)
LAW OFFICE OF MIGUEL MARTINEZ, Attn: WILLOW ARNOLD ESQ, 1776 VINE ST, DENVER, CO, 80206 (For Respondents)
CHARLES F REAMS, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY E WALES, 222 NORTH 7TH STREET, GRAND JUNCTION, CO, 81501 (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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-019-619-001

IN THE MATTER OF THE CLAIM OF:

SYLVIA GIL DE PRIETO,

Claimant,

v.

SPIRIT HOSPITALITY II LLC,

Employer,

and

FARMERS INSURANCE EXCHANGE,

Insurer,
Respondents.

ORDER OF REMAND

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated November 7, 2018 that denied the claimant's request for a left shoulder MRI arthrogram and arthroscopy without allowing the claimant to present post-hearing rebuttal evidence pursuant to procedural orders dated October 3, 2018 and October 16, 2018. We set aside the ALJ's order and remand for further findings.

This matter went to hearing on the issue of medical benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an injury to her left shoulder on June 13, 2016, while she was working as a housekeeper for the employer. The claimant was diagnosed with multi-directional instability of the left shoulder by Dr. Young. Dr. Young recommended additional physical therapy concentrated on left shoulder stabilization. Although taping her left shoulder decreased the claimant's symptoms, physical therapy did not provide significant improvement. Dr. Young subsequently recommended a left shoulder "arthroscopy with capsuloraphy."

The claimant underwent an independent medical examination with Dr. Ciccone at the respondents' request. In Dr. Ciccone's opinion, shoulder instability is usually related to genetics with shoulder capsular laxity and it was not likely that the claimant suffered a dislocation or subluxation of her left shoulder because of the work incident. Dr. Ciccone

concluded that the claimant's condition did not warrant the proposed left shoulder surgery.

A pre-hearing conference in this matter was conducted on April 23, 2018, before PALJ DeMarino on the respondents' oral motion to do a post-hearing deposition of Dr. Ciccone. The claimant objected to this motion on the basis that there would be no opportunity for the claimant to present rebuttal evidence if needed. In an order dated April 26, 2018, the PALJ granted the respondents' motion under the condition that the deposition shall be taken on May 30, 2018, and the claimant shall have 15 days thereafter for the exercise of rebuttal in the form of either a deposition of a doctor, or submission of a medical report, or if agreed, a joint Samms conference with Dr. Ciccone or any other doctor.

The case proceeded to hearing on May 18, 2018, before ALJ Cannici. During the preliminary discussions the ALJ and the parties discussed the need to change the timing of the deposition. Tr. at 13-15. At the conclusion of the hearing, the ALJ noted that the time period for the deposition and the possible rebuttal may change and that the parties could reasonably work out the details. Tr. at 36.

The deposition of Dr. Ciccone began on May 30, 2018, but was not completed that day. A second session to complete the deposition occurred on August 8, 2018. The claimant counsel asserts on appeal that she needed to confer with her client after she received the deposition transcript. The claimant's attorney also states that she wanted to confer with Dr. Young to see if he still thought the claimant needed the recommended care. The claimant states she was not able to get into see Dr. Young until September 13, 2018. On appeal, the claimant states that the purpose of the September appointment was not for purposes of trying to introduce new evidence in to the case but to determine if the procedures were no longer needed.

On September 20, 2018 the claimant filed an Opposed Motion to Submit Rebuttal Evidence via a Deposition of Dr. Young. The motion explained that the claimant was trying to obtain a copy of a report to review with the claimant to make a decision whether to take the deposition of Dr. Young and was requesting until September 28, 2018 to be able to obtain the report and consult with the claimant and then advise the court if the claimant wanted to provide rebuttal testimony via the deposition of Dr. Young.

On September 27, 2018, the claimant filed a Status Update which advised the court of the claimant's opposed motion to submit rebuttal evidence and advised the court that a report had been obtained from Dr. Young and provided to opposing counsel. The

status update further advised the court that the claimant wanted to take the deposition of Dr. Young and had obtained three possible dates from the doctor's office, October 24, 2018, October 31, 2018 and November 14, 2018.

The respondents filed a Response to Claimant's Motion to Submit Late Evidence and Depose Dr. Young. The respondents indicated to the court that the claimant was going to try to introduce Dr. Young's report from September 13, 2018. In an order dated October 3, 2018, the ALJ denied the claimant's request to submit additional evidence and the deposition of Dr. Young, simply stating that the report and Dr. Young's testimony do not constitute rebuttal.

The claimant filed an Opposed Motion to Reconsider the October 3, 2018, order of the ALJ stating that she was not seeking to submit additional evidence and instead was only seeking to take the deposition of Dr. Young as directed by the PALJ. The claimant specifically stated that she did not intend to introduce the September 13, 2018, report.

On October 16, 2016, ALJ Cannici summarily denied the claimant's motion.

The ALJ issued his Specific Findings of Fact and Conclusion of Law on November 7, 2018. Relying on opinions from Dr. Ciccone, Dr. Davis and Dr. Rafferty the ALJ concluded that the claimant did not suffer shoulder instability, dislocation or a labral tear that warranted arthroscopy of an MRI arthrogram. The ALJ denied and dismissed the claimant's request for these procedures.

On appeal the claimant contends that the ALJ abused his discretion in permitting the taking and submission of a post-hearing deposition and then in denying the claimant's the opportunity to present a rebuttal deposition. Because the ALJ's findings are insufficient to permit appellate review, we set aside the ALJ's order and remand the matter for further findings.

Section 8-43-301(8), C.R.S. provides that we may set aside an order where "the findings of fact are not sufficient to permit appellate review" or when "the findings of fact do not support the order." Although the ALJ is not held to a "crystalline standard" in expressing his findings, the findings must be sufficient to indicate the basis of the order. *Riddle v. Ampex Corp*., 839 P.2d 489 (Colo. App. 1992); *FlaHavhan v. Hewlett Packard Co.*, 675 P.2d 19 (Colo. App. 1983).

As a general rule the ALJ has considerable discretion in matters involving the timing and conduct of administrative hearings. *Ortega v. Industrial Claim Appeals*

Office, 207 P.3d 895 (Colo. App. 2009); *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). For good cause shown, the ALJ may grant continuances or extend the date of the hearing for the taking of additional evidence. Section 8-43-207(i) and (j), C.R.S.; *see* § 8-43-209(3), C.R.S. (once hearing commences, ALJ "may, for good cause shown, continue the hearing … to take additional testimony . . . [or] to file the transcript of a deposition. . . ."). Because the ALJ's decisions take additional evidence are discretionary, we may not interfere with them unless they are an abuse of discretion. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). "An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008).

In determining whether to grant a continuance or permit the taking of post-hearing evidence, an ALJ may consider various factors including whether a party has exercised due diligence to obtain the evidence prior to the hearing, whether the evidence might be outcome determinative, and the potential inconvenience and expense to the opposing party if additional proceedings are permitted. *See Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171, 173 (Colo. App. 1988)(in ruling on request for continuance, hearing officer must weigh nature of proceedings, timeliness of request, reasons justifying continuance, and prejudicial or disruptive effect which might be caused by requested continuance); *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). The ALJ's decision must also consider the parties' due process rights, including the right to present evidence and confront adverse evidence. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990).

Here, we conclude that there are insufficient findings on the issue of the claimant's request to take the rebuttal deposition of Dr. Young. In the order dated October 3, 2018, the ALJ concluded, without explanation, that the report and testimony were not rebuttal evidence. The ALJ also summarily denied the request for reconsideration. Based on the ALJ's summary denial of the claimant's request, we are unable to ascertain the basis of or the reasoning behind his order, or understand what factors the ALJ considered when making his determination.

We, therefore, set aside the ALJ's order and remand the matter for entry of new findings of fact and conclusions of law concerning whether the claimant showed good cause for introducing the post-hearing deposition testimony of Dr. Young. In reaching this result, we should not be understood as expressing any opinion on the resolution of this issue.

IT IS THEREFORE ORDERED that the ALJ's orders dated November 7, 2018, October 16, 2018 and October 3, 2018, are set aside and the matter is remanded for further findings.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

5/24/19 by TT .

LAW OFFICES OF RICHARD K BLUNDELL, Attn: SHELLEY P DODGE ESQ, C/O: RICHARD K BLUNDELL ESQ, 3535 W 12TH AVENUE SUITE D, GREELEY, CO, 80631 (For Claimant)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, PO BOX 258829, OKLAHOMA CITY, OK, 73125-8829 (For Respondents)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, 7535 E HAMPDEN AVE SUITE 210, DENVER, CO, 80231 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-066-416-001

IN THE MATTER OF THE CLAIM OF:

NOE LOPEZ,

Claimant,

v.

FINAL ORDER

HOLSINGER DRYWALL INC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated September 12, 2018, that denied and dismissed the claim for benefits. We reverse the ALJ's order, order the claim compensable, and award the claimant medical benefits, including hospital expenses following his December 18, 2017, accident and the resulting pelvic surgery.

The claimant was injured on December 19, 2017, when he fell 12 feet to the ground while working for Holsinger Drywall (Holsinger) on an apartment construction project. The claimant sustained several injuries including fractures of his pelvis and vertebrae in his back. He underwent a surgical open reduction and internal fixation of the pelvis fracture on December 21. Following the surgery he was assigned lifting restrictions by his physician.

Holsinger denied liability for the claim on the basis the claimant was not an employee of Holsinger but, instead, was an independent contractor. The claimant sought a hearing concerning compensability and medical benefits. Following a hearing on May 18, 2018, the ALJ agreed with the respondents and ruled "Claimant's Workers' Compensation claim is thus denied and dismissed."

Pursuant to § 8-40-202 (2) (a), C.R.S., any individual who performs services for pay for another shall be deemed to be an employee unless the person is free from control

and direction in the performance of the service, both under the contract for performance of service and in fact; and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of the nine criteria set forth in § 8-40-202(2)(b)(II), C.R.S. *See also Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998).

Under § 8-40-202(2)(b)(II), to prove independence it must be shown that the person for whom services are performed does not: (A) require the individual to work exclusively for a single person or company, (B) does not establish a quality standard for the individual's work, (C) does not pay a salary or hourly rate instead of a fixed contract rate, (D) is not able to terminate the individual's employment without liability during the contract period, (E) provides no more than minimal training to the individual, (F) does not provide tools or benefits, other than materials; (G) does not dictate the time of performance other than a completion schedule, (H) does not pay individually rather than under a trade or business name, and (I) does not combine its business with the business of the individual.

If the parties use a written document specifying the existence of the nine factors referenced in § 8-40-202 (2) (b) (II), the document can create a rebuttable presumption of an independent contractor relationship between the parties. Such a document must also advise in larger or bold type that the individual is not entitled to workers' compensation benefits and must pay the individual's own federal and state income tax on any moneys earned. The ALJ did not rule the presumption applied and maintained the burden of proof on the respondents.

When facts are undisputed and reasonable minds could draw but one inference from them, their application is a question of law. *Smith v. State Compensation Insurance Fund*, 749 P.2d 462 (Colo. App. 1987); *Schrieber v Brown & Root*, 888 P.2d 274 (Colo. App. 1993).

I.

The ALJ made findings and conclusions that the claimant was an independent contractor and not an employee of Holsinger Drywall. This conclusion was based on several findings. The ALJ noted the claimant signed a Subcontractor Agreement and a Declaration of Independent Contractor Status when he began work for Holsinger. The ALJ pointed out that these forms provided that the claimant was responsible for all state

and federal taxes, that he would furnish workers' compensation insurance for his workers, and that the claimant would provide labor and materials to install drywall at the rate of $9.00 per drywall sheet. The ALJ found Holsinger paid the claimant through a Federal 1099 form and that the claimant made at least $30,000 ($900 per week) from one other entity in 2017. The ALJ reasoned the work expenses the claimant listed on his Federal tax form Schedule C, including auto and truck expenses, work tool expenses, business insurance expenses of $2,500, and phone expenses, were all used to earn $900 per week as an independent contractor for another entity. Findings of Fact ¶ 15-17.

The ALJ determined the claimant was free from the direction and control of Holsinger because Holsinger employees had specific start and end times every day, and submitted timecards. Mr. Mulnix, a Holsinger foreman, only inspected the claimant's work upon completion without applying a quality standard. Holsinger did not provide tools to the claimant with the exception of ladders and scaffolding. The ALJ therefore resolved the claimant was an independent contractor while performing work for Holsinger and dismissed his claim for benefits.

Few of the facts in the claim are disputed. The claimant testified he had worked for more than ten years framing and hanging drywall. In September, 2017, he contacted the respondent Holsinger Drywall, Inc. seeking work. At a meeting on September 20, 2017, the claimant met with Douglas Kirby, a supervisor with Holsinger. Mr. Kirby presented the claimant with a document titled "Subcontractor Agreement." Both Patrick Hess, Holsinger president, and the claimant signed the Agreement. That same day, the claimant submitted an on-line application for a federal Taxpayer Identification Number. Also on that day the claimant contacted an insurance agent, Travis Lease, at Security Insurance Group, recommended by Holsinger as a company it worked with routinely. Mr. Lease sold the claimant a general liability policy designating Holsinger as the policy certificate holder. Mr. Lease transmitted the policy directly to Holsinger. The liability policy excluded coverage for any worker's compensation risk. Two days later, on September 22, Mr. Kirby presented the claimant with a document titled Declaration of Independent Contractor Status Form. The Declaration featured nine paragraphs setting forth criteria describing the relationship between Holsinger and the claimant using his new trade name of Noe Lopez Construction with his new Taxpayer Identification Number. Both the claimant and Mr. Kirby signed the Declaration.

The claimant commenced working for Holsinger Drywall on September 22 at a nursing home remodeling project in Greeley. He was assigned to work on a Holsinger apartment construction job in Ft. Collins where the claimant injured himself on

December 19, 2017. It was determined by the ALJ the claimant worked exclusively for Holsinger for the 90 days between September 21 and December 19.

II.

We conclude the ALJ misapplied the legal standard to determine whether the claimant is an independent contractor rather than an employee. The ALJ places undue reliance on the statements included in the September 20 and 22, 2017, written documents of the parties that the agreement calls for the claimant to be an independent contractor. Premised primarily on the written statements, the ALJ determined the claimant was engaged in an independent business.

Permitting the label rather than the actual nature of the relationship to control would be contrary to the policy of the Act by allowing easy evasion of workers' compensation liability. 1C A. Larson Workmen's Compensation Law, §§ 44.32(a) and (b) and 46.00 through 46.30 (1991); *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992). The ALJ reasons that because the claimant was allowed by the documents executed by the parties in September, 2017, to operate an independent business, he therefore was engaged in an independent business. This finding is belied by the absence of evidence in the record that the claimant ever took any steps to do so.

The record reveals few disputes in regard to material facts. However, it does indicate a working relationship significantly different from that described in the written documents relied upon by the ALJ.

Departures from the terms of the written documents:

- The respondents' witness, Patrick Hess, the president of Holsinger Drywall, testified he met with the claimant on September 20, 2017, and reviewed the Subcontractor Agreement with him. The Subcontractor Agreement and Independent Contractor Declaration stated the claimant was to perform the work of drywall hanger and framer, was to supply all materials and labor and was to be paid at the rate of $9.00 per sheet of drywall.

- However, Mr. Hess stated he could actually not hire the claimant to perform the work of hanging drywall because the claimant had no helper. Instead, he was hired to perform a variety of other tasks. These included inserting thermal screws in firewalls, piece work inserts into the drywall, soffits, finishing, texture, pre-rock installations and back-out work. Hess Depo. at 8, Mulnix Depo at 7.

- The claimant was not paid by the drywall sheet, but by the hour. Hess Depo. at 8. Holsinger provided all the materials. Tr. at 26.

- The Agreement indicated the claimant was to meet completion dates and set his own hours. Instead, the claimant met every morning with Blaine Mulnix, the Holsinger foreman, who gave him his assignments for the day. Mr. Mulnix saw the claimant at the job site every morning, at lunch time and then normally on two other occasions each day. Mulnix Depo. at 9, Tr. at 25-26. Mr. Mulnix inspected the claimant's work at the end of every day. Mulnix Depo. at 8-9.

- The Agreement prohibited the claimant from working on the job site should he not have workers' compensation insurance coverage. Without coverage, the Agreement provided it would be cancelled immediately. The claimant did not have that coverage. Mr. Hess was aware he did not have that insurance and knew the claimant could not get it due to his lack of employees. Depo. at 12.

- The claimant and Holsinger agreed the claimant brought his own personal set of tools to the job. These consisted of a measuring tape, pencils, hammer and an electric drill. Tr. at 27. Holsinger provided all the necessary scaffolding and ladders. Mulnix Depo. at 15. The claimant stated Holsinger also provided some drills, a router, extension cords, a lamp, and a stool and all the materials. Tr. at 57, Lopez Depo at 12-13. Neither Mr. Hess nor Mr. Mulnix disputed the use or source of those tools.

- Mr. Hess indicated he preferred to have an employee rather than an independent contractor. This was because he could fire an employee for poor work. Hess Depo. at 14 – 15. However, if an independent contractor worked on a job Mr. Hess felt could have been accomplished in a shorter time, he would similarly terminate the agreement with the contractor and "off he goes." Hess Depo. at 16.

- The Declaration of Independent Contractor specified Holsinger could not terminate the claimant's service during the contract period unless the claimant produced work in violation of the contract. However, the contract actually had no contract period, and no date for termination or conclusion.

The claimant's history as an independent contractor:

- The ALJ determined the claimant was an independent contractor because he had worked for another entity in 2017. The claimant was found to have earned $900 per week from that company.

- The claimant testified he had never worked as an independent contractor. Tr. at 20, 36. He had worked for the three years prior to his service with Holsinger for a company named Yolkins Drywall. Tr. at 19. Prior to his work for Yolkins he worked for Midwest Partitions for seven years. In both of these companies he was engaged as an employee. Tr. at 19-20.

- In 2017 he worked for Yolkins but was paid in cash and was never provided any tax documents reporting his wages. Tr. at 56. He estimated he was paid $30,000 in 2017, and it could have been as much as $40,000. This amount included the $12,252 he was paid by Holsinger. Lopez depo. at 5. Accordingly, the claimant would have only earned $17,748 from Yolkins in 2017. At $900 per week he would have worked there 19 weeks.

- The claimant indicated the name "Noe Lopez Construction" on the Declaration form on the suggestion of Douglas Kirby, a Holsinger supervisor. Depo. at 36. The claimant said he never used that name, had no business cards or any other document bearing the name. Depo. at 36.

- The claimant stated he had never had insurance previously. Tr. at 45. He only obtained a business liability policy on September 20, 2017, when Holsinger required the policy in order for him to get work from them. Tr. at 28-29, 38, 44, 63.

- The claimant was also informed by a Holsinger employee on September 20 that he would need a Federal Tax ID number. Tr. at 37-38. The tax ID number was assigned automatically upon the submission of his on-line application. Lopez Depo. at 23-25.

The claimant's 2017 Federal income tax return:

- The ALJ found the claimant identified himself as self-employed on his income tax return. The claimant indicated in the tax return he incurred $3,082 in deductible expenses for his truck representing 5760 miles commuting to work, $2,250 for business insurance, $2,500 for work tool expenses and $360 for work phone expenses. The ALJ concluded these expenses reflected the claimant's use of his truck, tools and phone to earn $900 each week as an independent contractor for another entity.

- The claimant stated he had never previously filed a tax return. He employed "Amalia's Taxes" for the tax preparation. Lopez Depo at 6. The tax return, exhibit O, featured a Schedule C, "Profit or Loss from Business".

- The Schedule C did not reference "Noe Lopez Construction." Instead, it stated it was related to "Holsinger Drywall, Inc." The income reported, $12,252, was the amount listed on the Federal 1099 Miscellaneous Income form sent to the claimant by Holsinger Drywall.

- The claimant testified the deductions for expenses were related to the three months he worked for Holsinger with the exception of the mileage involved in his commute to work.

- The claimant described how the tax preparer made a mistake when she listed the business insurance figure as $2,250 and when she misstated the claimant's birth date. The insurance amount was $750, the premium for the claimant's business liability policy required by Holsinger. Lopez Depo. 8-9.

- The equipment deduction specified as $2,500 was comprised of the claimant's cost to buy two hand drills, screw drivers, laser measuring devices, tool bags, tool belts, work clothes, work shoes and the cost of equipment Holsinger rented to him. Lopez Depo. at 10-11.

- The claimant listed a $360 expense for his cell phone, which is the only phone he has. Lopez Depo. at 13.

- The claimant left to the tax preparer the choice of the tax form selected. Lopez Depo. at 16, 19. The form does not include a Social Security number or a Federal Tax ID number.

Holsinger stated it was legally impossible to hire the claimant as an employee:

- The ALJ found the claimant refused to work for Holsinger as an employee instead of as an independent contractor in order to earn more money.

- Holsinger paid an employee drywall hanger between $18 to $26 per hour. Hess Depo. at 23. Mr. Hess agreed to pay the claimant $24 per hour. Depo. at 8.

- Mr. Hess then noted it is difficult to secure employees because almost all of the available workers in the state are independent contractors. That, he explained, is because they cannot legally be hired due to their immigration status. Hess Depo. at 14.

- But if he negotiated with such a worker as an independent contractor, the Federal I-9 requirement for legal identification is dispensed with and it is not necessary to send the worker's name through E-Verify. Hess Depo. at 14, 22.

- Mr. Hess was aware the claimant had provided a false Social Security number. Depo. at 14. The Holsinger foreman, Blaine Mulnix, testified he had met the claimant in the past when the claimant was then working under the fictitious name of Sergio Macias. Mulnix Depo. at 7. Mr. Hess was aware that regardless of whether the claimant felt he could earn more money as a contractor, Holsinger could not, in fact, hire the claimant as an employee due to his immigration status. Hess Depo. at 14-15, 22.

III.

The determination of whether a claimant works as an independent contractor requires analysis beyond the facial assertions of a written document produced prior to any actual work. In that regard the claimant contends that while the ALJ did reference the direction in *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2015), to evaluate the totality of the circumstances, the ALJ did not so evaluate.

The *Softrock* decision addressed the issue of what evidence is necessary to establish that a worker is customarily engaged in an independent trade or business. The decision reviewed a claim the putative employer was liable for unemployment insurance benefits to a claimant. The Court observed the nine factors, listed both in § 8-70-115(1)(c) and (2)(involving unemployment benefits) and § 8-40-202(2)(a) and (b) (pertaining to workers' compensation), were relevant to the assessment of the maintenance of an independent business, as was the fact that a claimant had no customers other than the respondent employer. However, the Court determined none of those criteria, by themselves, were exhaustive of the inquiry. "We find that other factors may also be relevant." The Court indicated the status of the claimant must include consideration of the totality of the circumstances and examination of "the nature of the working relationship." *Id*. at 565. The decision pointed to indicia that would normally accompany the performance of an ongoing separate business in the field; whether, for example, the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project;

used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance.

Statutes relating to the same subject matter and seeking a similar objective and purpose can often be referenced to discern the legislative intent of an enactment. *Nelson v. Industrial Claim Appeals office*, 981 P.2d 210 (Colo. App. 1998); *Giametto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). In *Nelson*, the opinion cited to unemployment compensation decisions when construing the independent contractor provisions of the workers' compensation statute. *See also Allen v. America's Best Carpet Cleaning Service*, W.C. No. 4-776-542 (December 1, 2009). The decision in *Softrock* serves that same function in this case.

The Supreme Court in *Softrock* obligated the fact finder to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-40-202(2)(b), but also any other relevant factors. The Court pointed as an example to the decision in *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008). In *Long View*, the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" avoided the problem presented by the single-factor test asking only if the claimant had other customers besides the employer. Should the employee decide not to seek other business, the employer would not be subjected to "an unpredictable hindsight review" of the matter which could impose unwitting benefit liability on the employer. 325 P.3d at 565.

However, in this matter the working relationship of the parties does not correspond to this situation featured in *Softrock*. The working relationship is also not reflected in the written documents obtained by Holsinger at the outset of the work arrangement. In *Softrock*, the claimant operated a geology business in the oil and gas field. The claimant never actually worked for other employers during this period. The hearing officer noted the claimant intended to provide his services to other employers had he become aware of their existence in the area. Despite the claimant's absence of other customers, the Court indicated the circumstances could be seen to show the claimant was engaged in operating an independent business. Here, the Subcontractor Agreement and the Declaration of Independent Contractor Status state the claimant is an independent contractor and describe numerous terms of the relationship. The documents

notwithstanding, the record shows they do not accurately describe the actual 'working relationship' of the parties. In this matter, the undisputed record shows the claimant spent years working in the drywall construction business but always as an employee, and never as an independent business. The claimant had no business address, no business cards, no internet web site, no business phone number, conducted no advertising, had no employees and only had the tools sufficient to allow one individual to perform work for another business that could provide the necessary scaffolding and ladders. Prior to being required by Holsinger, the claimant had no liability insurance, no business name and no Federal Tax ID number. He obtained these items solely to allow him to work for Holsinger. After obtaining them, the claimant worked for Holsinger more than 40 hours per week ($12,252 ÷ $24 hour = 510.5 hours; 510.5 hours ÷ 12.5 weeks = 40.8 hours per week). He neither worked nor sought work from another employer during this period. The work expenses he claimed on his Federal income tax form are identical to deductions from income allowed for employees as well as for the self-employed. With the exception of some miles spent commuting, all of the expenses in the claimant's tax return were incurred while working for Holsinger, and none were used to promote work for another entity, company or employer.

The claimant testified he executed the documents presented to him by Holsinger solely to obtain work for that company. Tr. at 38. Due to his limited English language skills, he did not read the contents of the documents. Tr. at 40-42. Even if he had, he would not have been accurately informed of the work circumstances. The Subcontractor Agreement stated the claimant was to hang drywall and be paid at the rate of $9 per sheet. However, because the claimant did not have any helper employees, Holsinger could not use him to hang drywall. To do so he would need to work with other employees or workers. Accordingly the claimant was tasked with performing a variety of non-drywall hanging jobs with other workers and was paid hourly at the rate of $24. The Subcontractor Agreement specified the claimant must have workers compensation insurance coverage to do any work. However, Holsinger knew he did not have that insurance, knew he could not obtain it and never asked for verification of the insurance coverage. The Declaration of Independent Contractor states the employer does not establish a quality standard. Nonetheless, the claimant's work was inspected at the conclusion of each work shift by the Holsinger supervisor. The Declaration asserts the claimant would 'not' be paid at an hourly rate. He was paid at an hourly rate. The Declaration recites Holsinger will 'not' terminate the claimant's service during the contract period. However, the Declaration has no contract period. Contractors will not be invited back the next day if they are too slow on the job, similar to at-will employment. Hess Depo. at 16. The Declaration asserts no tools will be provided by Holsinger. However, this term only applies to smaller personal tools and not to larger

items such as scaffolding and ladders necessary for the work. The Declaration requires that Holsinger will not combine its business operations with the contractors business operations. Nonetheless, the business of Holsinger is drywall construction and that was the task the claimant was being employed to perform.

Holsinger here intended to hire the claimant as an employee but was dissuaded by his apparent immigration status. A worker is eligible for workers' compensation coverage as an employee, including aliens, whether lawfully or unlawfully employed, § 8-40-202(1)(b). Instead, the claimant was employed nominally as an independent contractor while the terms and conditions of his service were, in fact, identical to that of an employee.

The Supreme Court in *Softrock* warned against the use of "a rigid check-box type inspection." Instead, the analysis is to focus on "the nature of the working relationship". The ALJ focused too intently on the former at the expense of the latter. The *Softrock* Court noted "…under the single factor test, the determinative issue is whether the putative employee chose to work for another in the field, regardless of, among other things, the intent of the parties, the number of weekly hours the putative employee actually worked for the employer, or whether the putative employee even sought other work in the field." 325 P.3d at 565. The record here shows that Holsinger used the claimant as a member of its work force similar to an individual employee. The claimant was interested only in regular drywall construction work. The claimant worked the number of hours for the respondent characteristic of a full time job. The claimant never sought work other than from Holsinger. Whereas the answer to these three inquiries in *Softrock* may have suggested an independent contractor relationship, in this case they prove the opposite.

Applying the tests pertinent to discerning whether the claimant was either free from control and direction in the performance of the service 'and' "in fact such individual is customarily engaged in an independent trade occupation or business related to the service performed", as required by § 8-40-202(2)(a), we conclude the ALJ did not apply the correct test to determine the claimant's status as an independent contractor as opposed to an employee. The ALJ did not analyze the working relationship of the parties. Rather, the ALJ noted primarily the terms of the written documents without requiring that those terms correspond to the reality of the working relationship. We therefore set aside the order of the ALJ for the reason the denial of benefits is not supported by the applicable law or the record.

IV.

The respondents contend the statute pertinent to workers' compensation benefits departs from that dealing with unemployment compensation benefits insofar as the former is controlled by a statement of intent in § 8-40-102(2). That section provides:

> … to provide an easily ascertainable standard for determining whether an individual is an employee. In order to further this objective, the test for determining whether an individual is an employee for the purposes of the "Workers' Compensation Act of Colorado" shall be based on the nine criteria found in section 8-40-202(2)(b)(II) which shall supersede the common law.

The respondents argue that by using the word "shall", the direction is mandatory. The implication being that if any circumstance is not specifically referenced in the nine factors, it should be disregarded.

However, the respondents conflate the term "is based on" with a definition of exclusive reliance. It is not intended to mean the entirety of the matter. That, in fact, is the manner in which the *Softrock* opinion used the nine factors. They were held to be significant and relevant but not conclusive. *See, Pierce v. Pella Windows & Doors, Inc*., W.C. No. 4-850-181-02 (September 24, 2018).

The respondents assert that the determination as to whether a claimant is working as an independent contractor or as an employee is exclusively one of fact for the ALJ. However, as noted above, the determination of the employment status of the claimant is not solely one of fact finding. The ultimate determination is an issue of law.

In *Varsity Tutors LLC. V. Industrial Claim Appeals Office*, 2017 COA 104 (Colo. App. 2017), the court reviewed a determination by a hearing officer, and affirmed by the Panel, that the respondent company was the employer of 22 individuals working as scholastic tutors and that they were not independent contractors. The Court reversed the decisions of the hearing office and the Panel premised on its review of the evidence in the record. The court observed that while it is indeed required to afford deference to the fact finding role of the hearing officer, such deference concerning the issue of independent contractors does not automatically lead to the approval of the fact finder's interpretation of the record.

> If, as in this case, "there [was] no material conflict in the evidence before" the [panel], we "may reach [our] own conclusions, and [we are] not bound by [the panel's] findings of fact." *Denver Post Corp. v. Indus. Comm'n*, 677 P.2d 436, 438 (Colo. App. 1984). In other words, "since the facts are undisputed, we are not bound by the [panel's] legal conclusions." *Irwin v. Indus. Comm'n*, 695 P.2d 763, 766 (Colo. App. 1984).
>
> The question of whether an administrative agency "applied the correct legal standard or legal test raises a question of law that we review de novo." *Visible Voices, Inc. v. Industrial Claim Appeals Office*, 328 P.3d 307 (Colo. App. 2014), ¶ *11*; *see also* § 8-74-107(6)(d)("The industrial claim appeals panel's decision may be set aside only [if] . . . the decision is erroneous as a matter of law."). *Id.* at 6.

Similarly, in this matter there are few material conflicts in the evidence. Based on the record and the findings of fact, the question of whether the ALJ applied the correct legal standard or legal test raises a question of law. In that regard, as found, we conclude the ALJ misapplied the applicable law.

Accordingly, we set aside the determination of the ALJ that the claim is not compensable and set aside the ALJ's denial of the claimant's request for his hospital expenses following his December 18, 2017, accident and the resulting pelvic surgery.

IT IS THEREFORE ORDERED that the ALJ's order dated September 12, 2018, is reversed, the claim is ordered compensable, and the respondents are liable for the consequential hospital and surgical expenses.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

5/16/19 by TT .

PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
THE LAW FIRM OF JESS M PEREZ PC, Attn: JESS M PEREZ ESQ, 1717 MADISON AVENUE SUITE 2, LOVELAND, CO, 80538 (For Claimant)
RUEGSEGGER SIMONS & STERN LLC, Attn: DREW RZEPIENNIK ESQ, 1700 LINCOLN STREET SUITE 4500, 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

W.C. No. 5-055-251-002

IN THE MATTER OF THE CLAIM OF:

JORGE MARTINEZ,

Claimant,

v.

FINAL ORDER

ENERGY SAVING CREW LLC,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated December 17, 2018, that denied the claimant's motion for summary judgment and granted the respondents' cross-motion for summary judgment. We affirm.

The facts are uncontroverted. The claimant sustained an admitted cervical spine injury on August 25, 2017. On June 22, 2018, respondents filed a Final Admission of Liability (FAL). The FAL admitted liability for medical benefits prior to the date of maximum medical improvement (MMI) only; and denied liability for other benefits including temporary disability, permanent medical impairment, and post-MMI medical benefits. Consistent with an authorized treating physician's (ATP) medical report, the MMI date was stated to be June 7, 2018. The FAL contained the notice to claimant required by § 8-43-203(2)(b)(II)(A) that, among other things, he had 30 days to object to the FAL and the right to request a division sponsored independent medical examination (DIME) pursuant to § 8-42-107.2, C.R.S.

On September 5, 2018—75 days after the FAL was filed and 45 days after the 30-day objection period expired—claimant objected to the FAL and filed a notice and proposal to select a DIME.

Respondents moved to strike the claimant's notice and proposal for a DIME as untimely. A prehearing conference was conducted on the respondents' motion on

September 24, 2018, before Prehearing Administrative Law Judge (PALJ) Sisk. In an order issued October 2, 2018, PALJ Sisk held that claimant's failure to timely file a notice and proposal to select a DIME rendered the DIME procedure "jurisdictionally deficient." Citing to *Williams v. Devereux Cleo Wallace*, W.C. No. 4-620-507 (ICAO, August 10, 2006) and *Gibson v. Atlantic Relocation System*, W.C. No. 5-020-939 (ICAO, September 5, 2018), the PALJ granted respondents' motion and struck the claimant's notice and proposal.

Claimant filed an application for hearing with the Office of Administrative Courts (OAC) to appeal Judge Sisk's order. Prior to a hearing at OAC, claimant filed a motion for summary judgment. Respondents filed a cross-motion for summary judgment. On December 17, 2018, ALJ Felter issued full findings of fact, conclusions of law, and order granting summary judgment in favor of respondents.

The ALJ first determined that resolution via summary judgment was appropriate as the material facts were not disputed. We agree.[1] In the context of summary judgment, we review the ALJ's legal conclusions de novo. *See A.C. Excavating v. Yacht Club II Homeowners Assoc.*, 114 P.3d 862 (Colo. 2005).

The ALJ correctly stated that "this case concerns the correct interpretation of the holding in *Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014)." Claimant contended that the decision in *Loofbourrow* eliminates the obligation for a claimant to file a timely notice and proposal to begin the DIME process following the filing of a FAL. The ALJ rejected the claimant's contention.

The ALJ recognized that *Loofbourrow* involved a "uniquely unusual set of circumstances." The ALJ distinguished *Loofbourrow* from the present case. In *Loofbourrow*, the claimant had not suffered wage loss and had not originally filed a claim. As a "non-lost time" claim, the respondents did not report the claim to the division and no position admitting or denying the claim was filed. No FAL was filed by the Respondents. The insurance carrier paid medical expenses without admitting or denying liability. In contrast to the facts in *Loofbourrow*, a FAL was filed here.

It was undisputed, and the ALJ so found, that the respondents' FAL met the requirements of § 8-43-203(2)(b)(II)(A), C.R.S., which states (in pertinent part):

[1] Neither party objects that the ALJ's summary judgment order was the appropriate vehicle for resolution of the issues. Lacking any appeal regarding the same, we need not address it further.

> An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to § 8-42-107.2 if an independent medical examination has not already been conducted.

The ALJ also referenced § 8-42-107.2(2)(a)(II)(b), C.R.S., which reads:

> If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request … *Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability* … the authorized treating physician's findings and determinations shall be binding on all parties and on the division. (Emphasis supplied by the ALJ.)

The claimant argued that decisions of the Panel, after *Loofbourrow*, support the conclusion that a claimant who has not received temporary benefits and no admitted permanent impairment is free from the jurisdictional obligations of filing an objection and a notice and proposal for a DIME in order to challenge a FAL and proceed with a DIME. The ALJ rejected claimant's argument. The ALJ reiterated that the *Loofbourrow* court was addressing a narrow issue. That eliminating a claimant's jurisdictional obligations was not included. That there was no FAL, and claimant's responsibilities in light of a FAL were not considered. The narrow issue before the Court in that case was only whether the claimant's claim for TTD was barred by not having first proceeded through the DIME process, considering that the respondents had not filed a FAL.

The ALJ also relied on the Panel's decision in *Gibson, supra.* The ALJ quoted the *Gibson* language, "…if a party wishes to challenge the authorized treating physician's MMI determination the impairment, or both, the party must request a DIME in accordance with the procedures established in § 8-42-107.2, C.R.S." The ALJ interpreted *Gibson* as a caution "against taking the language of *Loofbourrow* out of context and reading it too broadly." The ALJ concluded that *Gibson* held that "a claimant placed at MMI with a zero percent impairment rating and no wage loss or lost time is entitled to the DIME process, but that claimant is bound by the jurisdictional requirements of that DIME process."

Ultimately, the ALJ concluded that the decision in *Loofbourrow* cannot be expanded to eliminate statutory jurisdictional time requirements. The ALJ entered summary judgment in favor of the respondents; effectively striking the claimant's request for a DIME as jurisdictionally time barred.

The claimant appeals the ALJ's order to the Panel. The claimant asserts that the ALJ's decision either conflicts with or misapplies post-*Loofbourrow* ICAO decisions and that med-only FALs cannot limit the time an injured worker may request a DIME. Under claimant's interpretation of the Panel's post-*Loofbourrow* decisions, he contends that they fit into two categories. According to the claimant, the first category is whether a med-only FAL can close a claim. The second category is whether an injured workers' right to request a DIME begins with a med-only FAL. The claimant further alleges that only the first category applies to the facts of this claim and contends the ALJ erroneously applied the rulings in the second category to this claim. We disagree with the claimant's categorization of these cases and adhere to the reasoning in *Gibson* that a non-lost time claim is subject to the DIME process.

The ICAO decisions that are purportedly in the first category are:

- *Kazazian v. Vail Resorts*, W.C. No. 4-915-969-03 (ICAO April 24, 2017).
- *Trujillo v. Elwood Staffing*, W.C. No. 4-957-118 (ICAO June 22, 2017).

The ICAO decisions that are purportedly in the second category are:

- *Ramirez-Chavez v. In-Out Field Services*, W.C. No. 5-019-466-01 (ICAO April 12, 2018).
- *Gibson v. Atlantic Relocation Systems*, W.C. No. 5-020-939-01 (ICAO September 5, 2018).

Before considering the ICAO decisions that were issued in its aftermath, we must first address the *Loofbourrow* decision.

Harman-Bergstedt, Inc. v. Loofbourrow

Loofbourrow was a manager of a fast food restaurant and sustained a lower back injury in November, 2008. She reported the injury to her employer and was afforded medical treatment from the employer's worker's compensation carrier. Her employer was able to accommodate medical restrictions without wage loss to the claimant and accordingly did not report the injury to the Division or admit or deny liability. After providing a period of medical treatment, the treating physician placed her at MMI. Several months later, she experienced worsened back pain and sought treatment from her private physician. When her private physician recommended various work restrictions that her employer was unable to accommodate, she sought temporary disability and other workers' compensation benefits.

The ALJ found Loofbourrow's injury to be compensable and awarded TTD benefits. The ALJ concluded that claimant suffered a worsening of her low back condition as a natural progression of the initial injury. Loofbourrow's employer appealed the award to the ICAO.

ICAO concluded that because temporary disability benefits must, by statute, cease when a claimant reaches maximum medical improvement and "may not be paid so long as the claimant continues at MMI," temporary benefits could not be awarded for any period after the determination of MMI. The panel noted that the claimant's case did not appear to be one involving reopening as contemplated by the statutory scheme, referring expressly to the facts that the case was not even found to compensable until the entry of the ALJ's order; that no admission of liability had ever been filed; and that the ALJ failed to address reopening in his statement of issues.

On appeal, the court of appeals set aside the ICAO order and remanded the case with directions to reinstate the ALJ's award of TTD benefits. The court of appeals conceded that an authorized treating physician's (ATP) determination would typically be binding in the absence of a challenge according to the statutory procedures for a DIME and that temporary benefits must terminate once MMI is reached. It concluded, however, that Loofbourrow was alleging a worsening condition as distinguished from contesting the finding of MMI; where she had not been given a chance to request a DIME; and where substantial evidence supported the ALJ's determination that she had proven a worsening of her original condition, the statute requiring TTD to cease upon reaching MMI was inapplicable, and the statutory scheme did not preclude the assertion of a post-MMI worsening of condition in an open claim. The court of appeals decision was

accepted for review by the Supreme Court on a petition for a writ of certiorari.

The Supreme Court affirmed the court of appeal. The Court summarized:

> Because a determination of maximum medical improvement has no statutory significance with regard to injuries resulting in the loss of no more than three days or shifts of work time, Loofbourrow's award of temporary total disability benefits was not barred by her failure to first seek a division-sponsored independent medical examination.
> 320 P.3d at 328.

The Court commenced its review by stating:

> 'Maximum medical improvement' is a concept statutorily designed to identify a point in time beyond which further treatment is unlikely to improve the injured employee's condition. A determination of maximum medical improvement is statutorily called for only in section 8-42-107(8), as the initial step in a procedure assessing whether permanent medical impairment has resulted from the injury; if so, the extent of that permanent medical impairment; and ultimately, the amount of permanent disability benefit to which the injured employee will be entitled. 'Maximum medical improvement' therefore has statutory significance only in a determination of the amount, if any, of a permanent disability benefit and in marking the point in time at which temporary disability benefits terminate and permanent disability benefits begin. (Internal citations Omitted.)
> *Id.* at 330.

The Court apparently found inconsequential that a finding of MMI has dramatic statutory significance in the termination of medical care; a right that may not be denied without procedural due process per *Whiteside v. Smith,* 67 P.3d 1240, 1246 (Colo. 2003).

The Court in *Loofbourrow* continued:

> 'Maximum medical improvement,' as a statutory term of art, therefore has no applicability or significance for injuries

> insufficiently serious to entail disability indemnity compensation in the first place. While the concept is defined in terms of the ineffectiveness of further medical treatment and may therefore be useful in assessing the extent to which an employer is obligated to continue furnishing medical services to an injured employee, as a statutory term of art with consequences for *(1)* contesting a final admission of liability, *(2)* reopening a closed claim, or, *(3) as in this case*, filing a new claim for an injury that has become compensable for the first time, it can logically have applicability only for injuries for which disability indemnity is payable. (Enumeration added for explanatory purposes in the paragraph following this quote.) (Emphasis added.)
>
> * * *
>
> The statutory consequences of a finding of 'maximum medical improvement' can apply only in injuries as to which disability indemnity is payable. (Internal citations omitted.) *Id.* at 331.

The case which the *Loofbourrow* Court conceded was actually before it, was the case enumerated as number three in the quote immediately above. The first and second enumerated situations did not exist in the claim and were not before the Court. Thus, the Court's application of the "MMI-term of art" beyond the case before it was unnecessary. Being unnecessary for the Court's determination, we view the Court's application of the "MMI-term of art" to the other situations as *obiter dicta* (dicta). The dicta is easily recognizable by the Court's raising a "logical[]" or, in other words, an analogical or hypothetical analysis. Consequently, we are not bound to the dicta under the doctrine of *stare decisis* in our consideration of the instant claim.

Later in its opinion, the Court compounded the dicta by again raising the two scenarios that were not before it when it stated:

> As will ever be the case with a worsening injury that initially required treatment but did not result in excess of three days' lost work time, no award of temporary disability benefits *or admission of final liability was possible and no claim that could be subject to reopening* was ever opened or closed. (Emphasis added.)

Id. at 331.

Put succinctly, the *Loofbourrow* case addressed the sole issue of whether Ms. Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a DIME, the initial treating physician's assessment that she had reached maximum medical improvement. The Court held the claim was not barred for lack of the DIME process. It did not state that claimant was barred from pursuing the DIME process when a FAL was filed. It did not state that respondents are barred from filing a FAL when indemnity benefits are actively contested.

Throughout the hearing process and the appeals process herein, both parties refer to the FAL as a "med-only" or "medical-only" admission. This shorthand description has become a widely used expression in the workers' compensation vocabulary. It has unfortunately taken on a meaning that overlooks the fact that such an admission addresses significantly more than just admitting to medical benefits already provided. It also contains the respondents' final denial of temporary total or partial disability, permanent total or partial disability, disfigurement, vocational rehabilitation services, and post-MMI medical maintenance benefits. The less-than-precise phrase has also seemingly obscured many legal questions. Such as the *Loofbourrow* Court's overlooking the reality that an MMI determination has significantly greater application than just to injuries for which disability indemnity is payable.

A "med-only FAL" serves multiple purposes. It is at once an opening of a claim (admission of liability) and a closure of the claim (denial of particular benefits). It provides a claimant with benefits and at the same time provides a respondent with potential closure.

In our view, a FAL that denies indemnity benefits should have the same legal effectiveness as a FAL that admits for indemnity benefits. To hold that a respondent cannot deny benefits by a FAL leads to an absurd result. Without a MMI determination, the respondent would be required to continue medical treatment indefinitely as there would be no trigger to stop the treatment. A FAL that follows a MMI determination is notification and statutory compliance that medical benefits are henceforth terminated. If a respondent does not so serve a FAL, it is obligated to continue to pay for medical benefits indefinitely.

Kazazian v. Vail Resorts

The ramification of the Court's dicta first arose in the case of *Kazazian v. Vail Resorts, supra*. In *Kazazian*, the claimant fell while working and sustained a concussion in April 2013. The claimant experienced hearing loss as a result but was able to continue working. After a finding of MMI, respondents filed a FAL in September 2013, admitting to medical benefits but denying temporary disability and permanent impairment. In August 2015, claimant revisited her audiologist who diagnosed deteriorating hearing loss and prescribed hearing aids. When the claimant contacted the WC claims administrator she was told the claim had been closed by the September 2013 FAL. The administrator forwarded a copy of the FAL to the claimant. The claimant objected and requested a DIME review. At hearing, claimant denied that she ever received the original FAL, but the ALJ determined that the FAL had been properly served and effectively closed the claim. The ALJ concluded that the claimant's request for a DIME was not timely pursuant to the applicability of § 8-43-203(2)(b)(II)(case closed unless objection and request for DIME filed within 30 days).

On appeal, a panel of the ICAO, relying on the *Loofbourrow* dicta, concluded that the FAL had not closed the claim because the FAL had not admitted for any temporary disability benefits or permanent medical impairment benefits. The Panel expanded the *Loofbourrow* dicta in its interpretation of the Court's holding:

> Claims which do not feature liability for temporary or permanent indemnity benefits cannot be closed through any procedure which applies a finding of MMI. This would include a FAL filed pursuant to W.C. Rule of Procedure 5-5. *Kazazian* at pg. 3.
>
> * * *
>
> Without an applicable determination of MMI, no DIME review of the MMI determination may be requested, § 8-42-107(8)(b)(II), no permanent impairment rating may be calculated *nor DIME review initiated*, § 8-42-107(8)(c), and the provisions of Section 8-43-203(2)(b)(II) cannot control because one of the options provided by that section includes the ability to request a DIME. The subsidiary factual dispute presented by the parties, i.e. the date by which the claimant needed to object to the FAL and to request a DIME, does not have any bearing on the rights of the parties according to § 8-34-203(2)(b)(II) as that section does not yet apply in this claim. (Emphasis added.)

Kazazian at pg. 4.

The Panel set aside the ALJ's order and determined that claimant's objection to the FAL and request for the DIME could not have been untimely, since the FAL was essentially a nullity and thus no time period ever began to run.

The *Kazazian* panel effectively barred a DIME when a medical-only FAL is filed. We view the *Kazazian* holding as unfortunate and, as applied, an unconstitutional deprivation of a property right without procedural due process of law.

A segment of the WC Bar, relying on the unfortunate, broad language in *Kazazian,* has argued that a "med-only FAL" is a nullity on its face when no indemnity benefits are claimed, admitted, or denied. Accordingly, they argue, a claimant with no lost time and zero permanent medical impairment can never request a DIME because without an applicable FAL, the DIME cannot be triggered. Similarly, in the instant claim, the claimant argues that because the FAL is a nullity, deadlines for objecting to the FAL and requesting a DIME do not exist. Illogically, and if the argument is taken to its logical effect, the claimant herein would not only be free of any deadline to file for a DIME but would also be barred from requesting a DIME.

This interpretation could result in an unconstitutional deprivation of a property right without procedural due process. *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003) (any statute that precludes full recourse to the DIME process violates the due process rights granted by the Fourteenth Amendment to the U.S. Constitution)

Trujillo v. Elwood Staffing

The *Trujillo, supra.,* case was decided in the wake of *Kazazian.* The claimant in *Trujillo* sustained an admitted injury to the right wrist. After conservative treatment, the claimant was placed at MMI in July 2014. Respondents filed a medical-only FAL. The claimant objected and requested a DIME. The DIME physician concluded that the claimant was not at MMI. Respondents filed a general admission of liability, reopening the claim for further treatment. After additional treatment, the claimant was again placed at MMI by the DIME as of October 2015 with no impairment. Respondents filed another medical-only FAL in February 2016 consistent with the DIME report. In June 2016, the claimant revisited his physician, reporting his symptoms had worsened. In November 2016, the ATP opined that the claimant was not at MMI and recommended surgery.

At hearing, the claimant attempted to overcome the DIME's opinion that he had reached MMI in October 2015. The ALJ determined that the claimant had not overcome

the DIME that he was at MMI on October 2, 2015. The ALJ concluded that the claimant had a change of condition after MMI, and found that the claim had been closed by the February 2016 FAL and the claimant needed to proceed under a reopening procedure.

The Panel set aside the ALJ's order relying on the *Loofbourrow* dicta and ICAO's prior *Kazazian* decision, concluding that a determination of MMI has no statutory significance for non-indemnity claims. As a result, the Panel held that the claim could not have been closed by the February 2016 FAL and thus a reopening was not required. The claimant only needed to prove that the recommended medical treatment was reasonable, necessary, and related to the work injury.

For the reasons set forth above in our *Kazazian* discussion, we view *Trujillo* as an incorrect, overly broad application of *Loofbourrow* and we choose not to follow it here.

Ramirez-Chavez

The claimant in *Ramirez-Chavez* had an injury at work in April 2015. She received conservative medical treatment until placed at MMI in August 2015. Claimant continued to work for the employer until January 2016. Respondents filed a med-only FAL in July 2016, and admitted to maintenance medical benefits after MMI. Claimant requested a DIME review. The DIME agreed with the August 2015 MMI date and assigned a 10% whole person impairment but found no need for continuing medical treatment. Respondents filed a second FAL in December 2016, admitting for 10% whole person impairment and denying medical maintenance care.

At hearing, the claimant sought to overcome the DIME only as to the date of MMI, and requested additional medical treatment. The ALJ determined that the claimant had overcome the DIME as to MMI, and awarded additional medical benefits. Respondents appealed the decision to the Panel.

The Panel first noted that the claimant had requested the DIME after the July 2016 med-only FAL (a FAL that the Panel reasoned couldn't be validly filed—because of the *Loofbourrow* dicta). However, the Panel modified its reasoning from that found in *Kazazian* and *Trujillo.* After quoting *Loofbourrow* and *Kazazian,* the Panel stated:

> While this prohibition concerning the respondents' inability to file a FAL (in July 2016) affects the validity of that FAL to close the claim or to limit the time within which the claimant

> is required to request a DIME, it does not serve to restrict the claimant's ability to initiate the DIME process."

The Panel explained further that a valid FAL is not always required as a prerequisite to requesting a DIME, making the invalidity of the July 2016 FAL a moot point. In a footnote, the Panel stated:

> In *Kazazian* … featuring a FAL similar to the July 201[6] FAL filed in this case, we held the FAL to be ineffective to close the claim or to close the period within which the claimant may request a DIME review. However, to the extent we also noted in that opinion the claimant would be unable to initiate the DIME process, we now modify that language as stated in the text above to interpret the statute to allow the claimant to request a DIME. This is not because of the respondents' FAL (which was invalid to close the claim or to limit the period to request a DIME), but because the statute allows a DIME review despite the absence of a FAL in those circumstances.
> (W.C. No. 5-019-466-01, footnote 3, pg. 6)

A second panel examiner concurred in the result, but issued a concurring opinion disagreeing with the application of *Loofbourrow* to invalidate the July 2016 FAL. The concurring examiner stated: "… the principles announced in *Loofbourrow* are limited to the particular facts of that case and should not be read to invalidate an otherwise [valid] final admission of liability that follows both the statute and the WC rules of procedure."

Although tucked into a footnote, the Panel essentially conceded that the *Loofbourrow* dicta had been too broadly applied in *Kazazian* and *Trujillo.* The Panel seemingly recognized the deleterious effect of the dicta on claimants who desire to challenge a med-only FAL through the DIME process. We view the dicta as equally pernicious if it precludes respondents from validly filing a med-only FAL on a non-indemnity claim.

Gibson v. Atlantic Relocation Systems

In *Gibson, supra,* the claimant sustained an admitted injury in November 2014. The ATP provided work restrictions that varied between modified duty work and no work at all. The claimant was salaried and was paid full wages. The ATP placed the

claimant at MMI in April 2016. The ATP concluded the claimant's complaints were related to pre-existing issues and opined that the work injury resulted in no permanent impairment. Claimant filed a worker's claim for compensation on his own behalf in July 2016. Thereafter the respondents filed a FAL admitting for medical benefits, but no temporary or permanent disability. Claimant timely objected and requested a DIME.

The DIME was held in August 2017. The DIME physician agreed with an April 2016 MMI date, but provided a 19% whole person impairment rating. Relying on *Loofbourrow*, respondents filed a motion to strike the claimant's DIME (after the fact). A prehearing ALJ denied the motion and the matter proceeded to hearing. The merits ALJ ultimately rejected the respondents' argument that the holding in *Loofbourrow* barred the claimant from pursuing a DIME. He found that while the claimant did not suffer a wage loss, he did suffer a disability. In addition, the ALJ held that the respondents' FAL triggered the claimant's time period for applying for a DIME to address MMI and permanent medical impairment. The ALJ upheld the DIME's 19% whole person impairment.

On appeal, respondents' contended that, "the DIME should have been stricken as a matter of law based on the holding in *Loofbourrow*." They argued that the concept of MMI does not apply since the claimant did not suffer a loss of earnings and, therefore, the right to apply for a DIME was not triggered under § 8-42-107(8)(c), in the first place. The Panel rejected respondents' contentions. The Panel initially concluded that the claimant had a "disability" (lost time from work) but acknowledged there was no compensable wage loss. Because of the "disability," the Panel held the ATP was required to make a determination on MMI and impairment. Sections 8-40-201(11.5), 8-42-103, 8-42-105, and 8-42-106, C.R.S. The Panel stated, "If we were to hold that the employer's payment of … full salary prevented a finding of 'disability,' then this would allow employers to defeat the DIME process merely by having wage continuation plans."

The Panel again reviewed the dicta in *Loofbourrow* and stated:

> By taking this language out of context and reading it so broadly as to prevent a DIME here, then this would leave injured workers who have not suffered wage loss or lost time and are place at MMI with a zero percent impairment rating without any remedy for challenging MMI or the zero percent impairment rating. This certainly was not the intent of the General Assembly when it enacted the DIME process … nor could it have been the intent of the *Loofbourrow* Court.

The Panel concluded that a claimant, who has not suffered wage loss or lost time and is placed at MMI with a zero percent impairment, is entitled to request a DIME to challenge MMI and the rating. *See* § 8-42-107(8)(c), C.R.S. The Panel also concluded that the "med-only" FAL was sufficient to trigger the claimant's right to request a DIME under § 8-42-107.2, C.R.S. The Panel affirmed the ALJ's order to the extent it denied the request to strike the DIME.[2]

The Panel discussed its divergent orders which followed in the aftermath of the *Loofbourrow* decision, specifically those that are addressed above. The Panel stated, "To the extent prior orders of the Panel conflict with this interpretation of *Loofbourrow*, we choose not to follow them." We echo that choice here.

Conclusion

Over time, the *Loofbourrow* dicta has been extensively analyzed and examined and the Panel's decisions have evolved. In retrospect, the dicta appear to us to be facile, i.e. appearing neat and comprehensive only by ignoring the true complexities of the issues. The application of the principles announced in *Loofbourrow* is limited to a very specific factual scenario and concerns the sole issue of the claimant's entitlement to TTD in a case where a claimant had not filed a claim, suffered no wage loss, the injury was not reported to the Division and there was no admission filed. While we agree that MMI is a statutory term of art, it nevertheless has great applicability and significance for all injuries, including those insufficiently serious to entail disability indemnity compensation.

We conclude that the ALJ's order correctly gives effect to the legislative purpose and intent of § 8-43-203(2)(b)(II)(A) and § 8-42-107.2(2)(b). Claimant's argument that because he has not received temporary disability benefits and has no permanent medical impairment he should be free from the statutory jurisdictional requirements of filing a timely objection and for requesting a DIME, is directly opposed in all respects to the plain meaning of these statutes. Claimant's assertion that he can utilize § 8-42-107.2 to request a DIME but not be subject to its jurisdictional time limitations would lead to absurd results contrary to legislative intent and we reject the assertion. *See Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 264 (Colo. App. 2004) (stating that "no provision states or implies that issues admitted in an FAL may remain open indefinitely until the claimant identifies a disputed issue and requests a hearing.")

[2] The Panel remanded the case to the ALJ because he had not addressed whether the DIME opinion had been overcome by clear and convincing evidence.

IT IS THEREFORE ORDERED that the ALJ's order issued December 17, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

5/31/19 by TT .

PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
KAPLAN MORRELL LLC, Attn: BRITTON MORRELL ESQ, 6801 WEST 20TH ST STE 201, GREELEY, CO, 80634 (For Claimant)
RUEGSEGGER SIMONS & STERN LLC, Attn: KATHERINE HR MACKEY ESQ, 1700 LINCOLN STREET SUITE 4500, DENVER, CO, 80203 (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

W.C. No. 4-911-782-001

IN THE MATTER OF THE CLAIM OF:

BRANDON HUMPHREY,

Claimant,

v.

ORDER

FED EX FREIGHT INC,

Employer,

and

INDEMNITY INSURANCE CO OF NORTH AMERICA,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated December 3, 2018, that denied the claimant's Motion to Strike the Respondents' Final Admission of Liability. We set aside the order of the ALJ and remand the matter for further findings and a new order.

The claimant was injured on February 18, 2013, when the forklift he was driving was hit by another forklift driven by a second employee. The claimant complained of injuries to his shoulders and to his cervical, thoracic and lumbar spine. The claimant was paid temporary partial disability benefits until July 26, 2013. On that date his authorized treating physician (ATP), Dr. Hawke, provided a return to regular work release based on a normal reading of an EMG nerve conduction study. Dr. Hawke concluded the claimant was at maximum medical improvement (MMI) on August 23, 2013. The MMI report noted the claimant continued to complain of intermittent pain across the middle and upper back. The doctor believed the claimant was experiencing myofascial pain. It was determined the claimant had sustained no permanent impairment.

The respondents filed a Final Admission of Liability (FAL) on August 28, 2013. The FAL stated it was based upon an attached report of August 23, 2013, from Dr. Hawke which indicated no permanent impairment but did admit for maintenance medical benefits described in the report. The claimant did not object to the FAL.

In September and October of 2016, the claimant returned to the clinic complaining of resurgent pain in the lumbar spine and in the left arm. The claimant asserted the pain represented a worsening of his February 18, 2013, work injury. The claimant requested his claim be reopened and that additional chiropractic treatment be authorized. A hearing regarding reopening and medical treatment was conducted before the ALJ on September 27, 2018.

Before the ALJ issued an order pertinent to the hearing, the claimant submitted a motion on October 10, 2018, requesting the ALJ strike the August 28, 2013, FAL due to its failure to attach a medical report stating the claimant was at MMI. The claimant contended the August 23 MMI report was not attached. Instead, he argues the respondents attached the July 26 report releasing the claimant to regular work and stating the date of MMI was unknown at that time. In a summary order dated December 3, 2018, the ALJ entered an order stating in its entirety: "ORDERED that this motion shall be and hereby is DENIED."

In the interim, following the motion but before denying it, the ALJ submitted an order with full findings on November 27, 2018, that denied the claimant's request to reopen his claim. The ALJ found the claimant's current complaints were not shown to be related to the February 18, 2013, work accident.

The claimant initially appealed both orders. He subsequently withdrew his appeal of the November 27 order and now seeks review solely of the December 3 order denying his request to strike the FAL.

The claimant essentially is pursuing a collateral attack on the November 27 decision of the ALJ. The withdrawal of the appeal of the November 27 decision has made that decision final, including its finding of an absence of a causal link between the work injury and the claimant's current symptoms. A striking of the preceding FAL would allow the claimant to request a Division sponsored Independent Medical Examination (DIME). The use of the DIME procedure to functionally reverse a prior decision of an ALJ is not a novel tactic. *See*, *Goff v. Schwan's Home Services, Inc.*, W.C. No. 4-947-521-03 (August 9, 2017), *aff'd Schwans's Home Services, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 17CA1546, July 26, 2018)(not selected for publication), *Holcombe v. Fedex Corp*., W.C. No. 4-824-259 (March 24, 2017); *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (November 29, 2016); *Jackson v. Select Comfort Corp*. W.C. No. 4-914-418-03 (November 16, 2016); *Madrid v. Trinet Group, Inc*., W.C. No. 4-851-315-03 (April 1, 2014); *Ortega v. JBS, USA, LLC*, W.C. No. 4-804-825 (June 27, 2013); *Braun v. Vista Mesa*, W.C. No. 4-637-254 (April

15, 2010). Similarly, the passage of additional time coupled with further changes in the claimant's condition may also lead to a subsequent reversal of outcome concerning the claimant's request for medical treatment. *See Penny v. Trinity Packaging*, W.C. No. 4-899-523-06 (May 22, 2017); *Goff, supra*; *Zolman v Horizon Home Care LLC*, 4-626-044 (November 3, 2010).

The respondents oppose the motion to strike the FAL arguing the denial of the motion by the ALJ is not an order subject to review pursuant to § 8-43-301(2). The respondents contend the claimant has waived any right he has to complain of defects in the FAL. They also contend the issue of whether a proper medical report was attached to the FAL and whether the respondents substantially complied with § 8-43-203(2)(b)(II) is a question of fact not subject to resolution without a hearing.[1]

The denial of a motion to strike an FAL has been determined a reviewable order. Section 8-43-301(2) allows an appeal of an order only when the order requires "any party to pay a penalty or benefits or denies a claimant any benefit or penalty." In *Maloney v. Ampex Corp*., W.C. No 3-952-034 (February 27, 2001), the Panel held such an order satisfied the § 8-43-301(2) prerequisites:

> Initially, we reject the respondents' contention the ALJ's order is interlocutory and not subject to review. … Because it is undisputed the claimant failed timely to object to the December 1999 final admission, the ALJ's order effectively closed the claim, and precluded the claimant from recovering any further benefits without presenting the proof required by § 8-43-303 C.R.S. 2000 to reopen the claim. *See Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991). Consequently, the ALJ's order denied the claimant benefits and is reviewable.

[1] The FAL was admitted into evidence without objection as claimant's exhibit 1 at the September 27, 2018, hearing. "… when a party fails to object to the admission of a document or offers it into evidence himself, as plaintiff did in this case, he is held to have waived the need for any evidence authenticating its genuineness, …", *Fink v. Montgomery Elevator Co*., 161 Colo. 342, 424 P.2d 735, 349 (1966).

Similar determinations were featured in *Valenzuela v. Best Car Buys*, W.C. No. 4-664-544 (January 23, 2007) and in *Coxen v. Laidlaw Transit*, W.C. No. 4-674-208 (April 10, 2012). Accordingly, the ALJ's December 3, 2018, denial of the Motion to Strike the FAL is an order subject to review.

In *Paint Connection Plus v. Industrial Claims Appeals Office*, 240 P.3d 429 (Colo. App. 2010), the court ruled an FAL accompanied by a medical report stating the claimant was not at MMI was an invalid admission which did not serve to close the claim. *See also* Director's Rule 5-5(A), and (E), 7 Code Colo. Reg. 1101-3.

Further, in *McCotter v. U.S. West Communications*, W.C. No. 4-430-792 (March 25, 2002) the FAL submitted by the respondents was found insufficient when it failed to include the DIME report on which it was based. The invalidity of the FAL prevented the claim from being closed. The presence of a valid FAL was deemed a jurisdictional prerequisite to a claim's closure. Due to its jurisdictional nature, an objection to an invalid FAL could be raised at any point during the proceedings. In *Avila v. Universal Forest Products*, W.C. No. 4-477-247 (August 25, 2004), the claimant complained of the invalidity of the respondents' FAL approximately two years after it was filed. The ALJ agreed the FAL was insufficient in its reference to the supporting medical report. However, the ALJ determined the claimant failed to preserve his objection when he did not challenge the FAL within the statutory 30 day time period. The Panel however, ruled the requirements in § 8-43-203(2) are:

> … jurisdictional in scope, and if an issue remains open because of the respondents' failure to close the issue under subsection 2, [8-43-203(2)(b)(II)] the ALJ may consider the issue. … the FAL was legally insufficient to close the claim regardless of whether the claimant filed a timely objection. Consequently, the claimant was not required to object to the FAL to "preserve" his contention that the FAL was invalid and the claim remained open. Under these circumstances, the ALJ erred in requiring the claimant to prove a worsened condition to establish his entitlement to additional medical benefits.

The determination that valid FALs are jurisdictional requirements, and their inadequacy may be raised at any time has been repeatedly stated. *Reed v. Demetre Painting*, W.C. No 3-069-138 (January 15, 1993); *Bargas v. Special Transit*, W.C. No. 4-534-551 (June 4, 2004); *Roddam v. Rocky Mountain Recycling*, W.C. No. 4-367-003

(January 24, 2005). The Court of Appeals noted in *Cramer v. Industrial Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994), "[t]he procedural requirements for review in the Workers' Compensation Act constitute limitations on administrative jurisdiction, and these jurisdictional limitations cannot be waived or eliminated by consent and cannot be avoided by estoppel." 885 P.2d at 319.

We are not however, advised as to the reason the ALJ was led to deny the motion to strike the FAL in this case. While not characterized as a motion for summary judgment, the requirement in OAC Rule 17 that an order addressing such a motion include findings of fact, conclusions of law and an order would be reasonably appropriate in the resolution of the claimant's motion. We therefore remand the matter to the ALJ to make those findings and conclusions.

IT IS THEREFORE ORDERED that the ALJ's order issued December 3, 2018, is set aside and the matter is remanded to the ALJ for further findings as discussed above.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

6/3/19 by TT .

THE FRICKEY LAW FIRM, Attn: ADAM MCCLURE ESQ, 940 WADSWORTH BLVD 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)
POLLART MILLER LLC, Attn: BRAD MILLER ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-058-044-001

IN THE MATTER OF THE CLAIM OF:

QUINCY BRYANT,

Claimant,

v.

ORDER

TRANSIT MIX CONCRETE,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order and supplemental order of Administrative Law Judge Edie (ALJ) dated November 19, 2018, and March 4, 2019, respectively, that determined the respondents overcame the permanent impairment ratings of the Division-sponsored independent medical examiner (DIME) physician, and that determined the respondents were not barred from asserting a safety rule violation under §8-42-112(1)(a), C.R.S. We affirm in part, set aside in part, and remand the matter for new findings and a new order on the issue of whether the respondents have overcome the DIME physician's impairment ratings for the cervical and lumbar spinal regions.

The ALJ made the following pertinent factual findings. On September 11, 2017, the claimant suffered admitted work-related injuries when he rolled the cement mixer he was operating for the employer. The claimant was seen by Steven Byrne, PA-C at CCOM on the date of the industrial incident. He was diagnosed with "laceration left eyelid" and "laceration left hand."

Two days later, the claimant reported to the emergency room (ER) complaining of neck pain, although his range of motion in the neck was described as "normal." Imaging showed no acute abnormalities and conservative care was recommended. Intake reports from the ER note that at the time of the rollover, the claimant was unrestrained.

The claimant returned to CCOM on September 18, 2017. He reported he was "feeling much better but still having considerable amount discomfort through the left cervical paraspinal and posterior shoulder girdle."

The claimant's initial visit with his authorized treating physician, Dr. Neubauer, was on September 25, 2017. The claimant reported lower back and left leg pain. The claimant's neck paraspinals were tender to palpation, with pain in all planes upon range of motion. The paraspinals were tender in his lower and upper back. Physical therapy continued to be recommended.

The claimant underwent a short course of physical therapy. He reported cervical pain, pain in both shoulders, and lower back pain. As of his physical therapy visit on October 6, 2017, the claimant still was reporting a high level of pain with end range cervical motion and difficulty sleeping due to neck pain. He also reported that he continued to have low back pain and stiffness.

The claimant returned to Dr. Neubauer on October 9, 2017, complaining of ongoing neck and back pain. It was noted the claimant was having pain with activity and the back was specifically described as being tight. Physical examination documented pain in the neck with all planes of motion. Examination of the back documented tenderness to palpation in the low back and buttocks and decreased/painful forward flexion, extension, rotation, and lateral flexion; the mid-back symptoms were no longer noted. At a subsequent appointment with Dr. Neubauer, the claimant had ongoing complaints of back and neck pain that was described as "aching/stiffness/tightness" and he was having pain/stiffness with activity and movement of the back and neck. Dr. Neubauer recommended continued therapy and referred the claimant to Dr. Abercrombie for chiropractic care.

The respondents filed a General Admission of Liability (GAL) on October 18, 2017, admitting for medical benefits but denying temporary total disability benefits on the basis that the "claimant was responsible for his own termination."

By October 23, 2017, the claimant was reporting 2-3 out of 10 pain, which he described as mild pain and consisting mostly of aching/stiffness/tightness.

At his initial visit with Dr. Abercrombie on October 26, 2017, the claimant reported overall improvement, but still had "some lower back, neck and left shoulder pain." Moderately reduced range of motion was noted in his lumbar and cervical regions.

On November 29, 2017, Dr. Neubauer documented that the claimant still was reporting 3 out of 10 neck and low back pain, and that he continued "to have stiffness with motion of the neck and low back. . . ."

On January 4, 2018, Dr. Neubauer noted that the claimant was reporting low back pain and tightness. His closing comments indicated that the claimant still had neck and low back tightness, but he nevertheless placed the claimant at maximum medical improvement (MMI) with no impairment and instructions to finish chiropractic care. Dr. Neubauer's final note from January 24, 2018, indicated the claimant was greatly improved, but that he continued to have minimal objective residual problems.

On January 24, 2018, after his release at MMI, the claimant's chiropractor, Dr. Abercrombie, also released the claimant. Dr. Abercrombie's final note from January 24, 2018, indicated the claimant was greatly improved but that he continued to have minimal objective residual problems as noted in his report:

> Overall, he has responded very well to treatment noting very minimal symptoms at this time. He had some lower back stiffness this past week of unknown cause however denies pain, and the stiffness resolved. Otherwise, he denies neck or mid back symptoms. He is performing at this time all activities of daily living without difficulty…
>
> Examination on today's visit reveals normal spinal/paraspinal symmetry. Range of motion is full and all cervical, thoracic and lumbar planes and (sic) without symptoms.

The respondents submitted a Final Admission of Liability (FAL) admitting for 0% impairment. The FAL indicated the claimant received TTD from September 12, 2017, through December 13, 2017, the date he was released to work without restrictions. The respondents' FAL made no mention of any alleged violation of a safety rule. The FAL admitted to a general award of maintenance care. The FAL appeared to be a "reversal" of the respondents' prior position in the GAL wherein all TTD had been denied due to the claimant's termination for cause.

The claimant objected to the respondents' FAL and sought a DIME. Dr. Higginbotham performed the DIME on April 24, 2018. In his report, Dr. Higginbotham cited to the claimant's symptom subjective checklist: "[c]licking and popping and pain of the jaw; asthma with shortness of breath; muscle cramps; joint swelling, pain, and

stiffness; depression and nervousness." The claimant also reported "nausea, blurred vision, tingling of the hands and feet; swelling of the feet; trouble falling asleep and staying asleep; and mood swings." The claimant further reported that his "lower back feels stiff and tight, and he feels a sharp pull about the left side of the neck and back and lower extremity when he increases his physical activity." Dr. Higginbotham provided impairment ratings of 7% for the cervical spine resulting from 4% range of motion deficit, combined with 4% from Table 53(II)(B). He also assigned 10% for the lumbar spine, noting 5% from Table 53(II)(B) and 5% range of motion deficit. These two ratings combined for a 16% impairment rating of the whole person. Dr. Higginbotham's narrative of his physical examination made several references to tenderness in the claimant's lumbar and cervical regions.

The respondents subsequently filed their application for hearing, endorsing the issues of "Overcoming Division IME; Failure to Utilize Safety Device/Violation of a Safety Rule; Causation; Set-offs."

At the request of the respondents, Dr. McCranie performed a medical record review. Dr. McCranie explained that Dr. Higginbotham's DIME report did not comply with the AMA Guides and Level II training, which require "objective" findings in order to provide an impairment rating. More specifically, Dr. McCranie opined that "Impairment Ratings are given when a specific diagnosis and objective pathology is identified." Dr. McCranie stated that the claimant's records were devoid of any objective findings of pathology, and only reflected the claimant's subjective complaints of pain and occasional stiffness. Dr. McCranie instead found that the claimant's sole diagnosis was muscular strains. Dr. McCranie stated that by their nature muscle strains are temporary.

During the hearing, Dr. McCranie testified that the records demonstrated what should be expected from diagnosed muscular strains, with a progression of conservative care to a release at MMI, but without any residual range of motion deficits. She stated that the lack of residual range of motion deficits is echoed in Dr. Neubauer's MMI report, finding full range of motion in the back. She further stated that the post-MMI release report of Dr. Abercrombie indicated transient low back stiffness "of unknown cause" with a complete resolution of symptoms and full range of motion in the lumbar, thoracic, and cervical spines. She opined that findings of mild tenderness and tightness on palpation are not objective findings that would support a rating under the AMA Guides or Level II training. Dr. McCranie further testified that the available medical records, including Dr. Higginbotham's report, were devoid of objective evidence to support an impairment rating in accordance with the AMA Guides and Level II training. That is, the claimant's subjective complaints of stiffness and pain, coupled with the diagnosis of

muscular strain injuries were insufficient to support a Table 53 rating. She further opined that if the claimant was not entitled to a Table 53 rating, a range of motion rating would be inapplicable.

The claimant obtained an independent medical examination with Dr. Rook. In his report dated September 3, 2018, Dr. Rook stated that upon rolling his cement truck, the claimant fell six feet from the driver's seat to the passenger door, rotating as he fell and struck the back side of the passenger side door. Upon physical examination of the neck, Dr. Rook found moderate to severe tenderness associated with increased muscle tone on palpation of the left sternocleidomastoid muscle. Evaluation of the lower back documented increased muscle tone with moderate tenderness of the left-sided lower paralumbar musculature overlying the L4, L5, and S1 facet joints. Back pain was increased when elicited with spinal extension and bending to the left. The same maneuver was negative on the right. Dr. Rook addressed the final chiropractic report from Dr. Abercrombie dated January 24, 2018. He explained that Dr. Abercrombie's report documented increased muscle tone in the same muscles that Dr. Rook had identified eight months later. Dr. Abercrombie also found problems with the left-sided facet joints based on provocative testing at that visit. Dr. Rook identified those same findings on his examination. He stated "[t]hese constitute objective findings and therefore "Dr. Higginbotham was correct in providing the patient with a table 53 rating." Dr. Rook disagreed with Dr. McCranie's opinion on a lack of objective findings, and stated that her opinions constituted a mere difference of opinion with the DIME physician.

The claimant testified during the hearing. He testified he found the seatbelt to be difficult to put on. The claimant admitted he was not wearing a seatbelt at the time of the incident.

The ALJ ultimately determined that the respondents overcame Dr. Higginbotham's DIME opinions by clear and convincing evidence. He found that Dr. Higginbotham improvidently applied Table 53(II)(B) to the claimant, stating:

> H. The medical records contain sufficient references to pain-*and rigidity*- from the date of the accident, up through Claimant's final visit with his chiropractor on January 24, 2018- a period of just over 4 months. The DIME exam occurred just over 7 months after the accident. All Dr. Higginbotham was required to do to support a Table 53IIB impairment rating was medically document some kind of

> *rigidity* in his physical exam of Claimant for his cervical and lumbar regions. *This he did not do.* At most, he noted Claimant's self-reported complaints of stiffness. Without further explanation or sufficient documentation of objective pathology, he then combined Claimant's range of motion values (which the ALJ finds have not been overcome) with the additional ratings from Table 53IIB. *This he cannot do.* Pain for 6 months is not enough to qualify, even when combined with 6 months of *self-reported* rigidity.
>
> I. The ALJ concurs with Dr. McCranie in this case that there is simply no basis to apply Table 53IIB with the objective evidence available. There is not 6 months of medically documented *objective* pathology-expressed as *rigidity*-here. While Dr. Rook purports to have noted some objective evidence of rigidity at his IME months later, this was not known to Dr. Higginbotham at his DIME exam, since this report didn't yet exist. There is no evidence that Dr. Higginbotham supplemented his findings based upon what Dr. Rook may have observed. The ALJ finds, by clear and convincing evidence, that Dr. Higginbotham's DIME opinion has been overcome by Respondents, due to his improvident application of Table 53IIB to Claimant. (emphasis in original)

The ALJ further ruled that the DIME physician erred in combining the claimant's range of motion values with the additional ratings from Table 53(II)(B). After finding that the DIME physician's report was overcome, he then calculated the claimant's impairment rating to be 0%. The ALJ also held that the respondents were barred from asserting the safety rule violation because they did not raise the issue in their FAL. He also determined the equitable relief of waiver also prevented the respondents from raising the issue of a safety rule violation.

After the parties filed their petitions to review and briefs in support and opposition, the ALJ issued a supplemental order. The ALJ "withdrew" his prior determination that the respondents had waived the right to assert a safety rule violation by failing to address it in the FAL. He also "withdrew" his determination that the respondents had waived the right to assert a safety rule violation. Instead, the ALJ ruled that even though the respondents did not raise the issue of a safety rule violation in their

FAL, they nevertheless did not waive the right to assert the issue at hearing. He further held the respondents did not expressly or impliedly waive their right to assert a safety rule violation under §8-42-112(1)(a), C.R.S.

I.

On appeal, the claimant argues that the ALJ erred in determining he was not entitled to cervical and lumbar impairment ratings due solely to a lack of documented objective rigidity by the DIME physician. The claimant contends that the ALJ's interpretation of "rigidity" and what is necessary to demonstrate "rigidity" are not supported by the AMA Guides. The claimant further argues that contrary to the ALJ's determination, there is no requirement that the claimant's documented pain and rigidity be objective. We agree.

Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of medical impairment "may be overcome only by clear and convincing evidence." Under this statute, the question of whether the DIME physician properly applied the AMA Guides in determining the impairment rating, and whether the rating was overcome by clear and convincing evidence are questions of fact to be determined by the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Proof of a deviation from the rating protocols provides some evidence from which the ALJ may infer that the DIME physician's rating has been overcome. *See Id.; see also Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). An ALJ must consider the deviation in the context of all other relevant evidence, and need not find that the rating has been overcome unless the deviation casts substantial doubt on the overall validity of the rating. *See Id.; see also Wilson v. Industrial Claim Appeals Office, supra.* Because the issue of whether the DIME physician impairment rating has been overcome by clear and convincing evidence is factual, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This narrow standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving and Storage Co. v. Gussert, supra*.

As pertinent here, Table 53(II)(B) of the AMA Guides permits the examiner to rate specific disorders of the cervical, thoracic, and lumbar spine if the injured person has an intervertebral disc or other soft-tissue lesion which is "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *none-to-minimal* degenerative changes on structural tests." (emphasis in original.) In *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999), the Colorado Court of

Appeals held that the AMA Guides do not require that the pain and rigidity occur before MMI in order to award a rating under Table 53.

Moreover, the Division of Workers' Compensation Desk Aid #11 for Impairment Rating Tips provides in pertinent part as follows:

> **General Principles**
>
> **1. Impairment Ratings Based on Objective Pathology**: Impairment ratings are given when a specific diagnosis and objective pathology is identified. *(Reference: C.R.S. §8-42-107(8)(c))* . . . .
>
> * * *
>
> **Spinal Rating**
>
> **1. Table 53 and Application of Spinal Range of Motion**: In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (References: Spine section of the *AMA Guides, 3rd Edition (rev.)*; Level II Accreditation Curriculum, Spinal Impairment). (emphasis in original)

Thus, under Table 53(II)(B) of the AMA Guides and Desk Aid #11, the examiner may assign an impairment value for impairment or a specific disorder of the lumbar or cervical regions of the spine, so long as the medical evidence establishes the presence of a specific diagnosis, objective pathology, and six months of medically documented pain and rigidity.

Here, the ALJ is reading an objective standard as to "rigidity" where none exists in Table 53(II)(B) of the AMA Guides, Desk Aid #11, or Level II Accreditation. By imposing such a standard, the ALJ has erred. Nowhere in Table 53(II)(B) does it implicitly or explicitly require that the six months of medically documented rigidity be objective. Further, while Desk Aid #11 provides that impairment ratings are given when a specific diagnosis and "objective pathology" are identified, it does not state that there must be six months of medically documented rigidity which must be objective. Our interpretation of "objective pathology" cited to in Desk Aid #11, is referring to the identification of a problem, injury, disorder, condition, or disease that can be identified

by virtue of objective signs or analysis. Further, the term "objective pathology" is in addition to the "six months of medically documented pain and rigidity."[1] The "objective pathology" identified in Desk Aid #11 is not referring to the "six months of medically documented pain and rigidity." This is supported by the Division of Workers' Compensation Level II Accreditation principles, which do not require that the six months of rigidity be objective:

> Use Table 53 (p.80) (Specific Disorders of the Spine) to determine if the patient qualifies for a spinal impairment. *According to Table 53, the lowest level to qualify for impairment is 6 months of treatment for medically documented pain and rigidity. There is currently not an accepted definition for rigidity, thus the documented need for treatment over 6 months is the main criteria.* On occasion treatment may not have continued up to six months, however; no further treatment is necessary despite new functional improvement. Only the primary diagnosis related to the work injury should be considered for rating on Table 53. Table 53 spine rating is in whole-person units. (emphasis added)

See Division of Workers' Compensation Level II Accreditation, Spine Impairment General Principles at p. 132 (rev. 02/2018).[2]

Consequently, we conclude that the ALJ erred in applying an incorrect basis when determining whether the respondents overcame the DIME physician's cervical and lumbar permanent impairment ratings. We therefore remand the matter for the ALJ to apply the correct basis when determining whether the respondents have overcome, by clear and convincing evidence, the DIME physician's cervical and thoracic permanent impairment ratings. That is, on remand, the ALJ shall determine whether the medical evidence establishes the presence of a specific diagnosis, objective pathology, and six months of medically documented pain and rigidity. Again, it is not required by Table 53(II)(B) of the AMA Guides, Desk Aid #11, or the Division's Level II Accreditation that the six months of medically documented rigidity be objective. The ALJ may conduct

[1] We recognize that under §8-42-107(8)(c), C.R.S., a medical impairment rating for chronic pain shall not be rendered without anatomic or physiologic correlation, and that anatomic correlation must be based on objective findings. *See also* §8-42-101(3.7), C.R.S. However, here, we are not addressing chronic pain under §8-42-108(c), C.R.S. Instead, we are addressing cervical and lumbar spinal ratings under Table 53(II)(B) and the six months of medically documented rigidity required for such ratings.

[2] The Division of Workers' Compensation Level II Accreditation subsequently was revised in January 2019.

such further proceedings, as in his discretion, he considers appropriate to comply with this remand. Nothing in this order should be construed as dictating any particular outcome on remand.

II.

Next, the claimant argues the ALJ erred in finding that the respondents did not waive their right to assert a safety rule violation. As we understand the claimant's argument, he reasons that the record shows the respondents received documentation that the claimant was an unrestrained driver two days after the accident occurred, and this record was received months before the respondents filed their FAL. Since the respondents filed their FAL admitting to pay the full amount of TTD and failing to assert any safety rule violation, the claimant contends the respondents, therefore, have intentionally relinquished the right to assert the safety rule violation. We disagree.

In general, once an employer admits liability, the employer is bound by that admission and must pay benefits accordingly. Section 8-43-203(2)(b)(I), C.R.S.; *see e.g. Cibola Construction v. Industrial Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998)(employer admitting liability bound by admission and must pay, accordingly). And, issues admitted to in a filed FAL are closed unless the claimant timely objects. Section 8-43-203(2)(b)(II)(A), C.R.S.

Here, the respondents filed an FAL admitting to TTD from September 12, 2017, through December 13, 2017, and to a general award of maintenance care. In their FAL, the respondents did not specifically assert a safety rule violation. However, the claimant subsequently objected to the respondents' FAL and sought a DIME. After the DIME physician provided his permanent impairment ratings, the respondents then filed an application for hearing on the issues of overcoming the DIME, failure to utilize a safety device/violation of a safety rule, causation, and set offs. In *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250, 253 (Colo. App. 1990),[3] the Colorado Court of Appeals held that "if an admission of liability is contested by either party, the determination of the matter thus placed in issue is subject to determination by the ALJ at the adversarial hearing. The admission is binding only until the controverted issue is determined after the hearing."

[3] In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354, 357 (Colo. App. 2009), *rev'd on other grounds*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals explained that part of the holding in *HLJ Management*, which is not at issue here, is no longer good law. That holding involved when an employer's mistake in an admission results from its own erroneous calculation, it cannot retroactively withdraw or modify the admission and is bound thereby, at least until an ALJ enters an order as to prospective payments. The Court explained in 1997, the General Assembly amended §8-43-303(1) & (2)(a), C.R.S. 2008, to permit reopening of an award on grounds of "overpayment," and specified that the reopening would not affect an earlier award as to money already paid "except in cases of overpayment."

Thus, *HLJ Management* holds that a respondent may controvert its own admission of liability by timely applying for a hearing. Consequently, when the claimant here objected to the respondents' FAL and sought a DIME, the respondents' FAL did not become final, and the case was not closed. The respondents then contested the DIME and their own previous admission of liability by timely applying for a hearing, and endorsing as an issue the claimant's failure to utilize a safety device/violation of a safety rule. Under these circumstances, we agree with the respondents that they were free to raise the issue of the claimant's safety rule violation when they filed an application for hearing. As explained in *HLJ Management*, the claimant here cannot seek to enforce liability under the very admission he initially sought to contest. *See also Franco v. Denver Public Schools*, W.C. No. 4-818-579 (April 23, 2013)(respondent may controvert its own previous admission of liability by timely applying for a hearing); *see also Bauer v. Boulder County*, W.C. No. 4-020-145 (March 22, 1993). Thus, we conclude the respondents did not waive the issue of a safety rule violation.

IT IS THEREFORE ORDERED that the ALJ's order and supplemental order dated November 19, 2018, and March 4, 2019, respectively, are affirmed, in part, to the extent they determined the respondents were not barred from asserting a safety rule violation under §8-42-112(1)(a), C.R.S.;

IT IS FURTHER ORDERED that the ALJ's order and supplemental order are set aside, in part, and remanded for new findings and a new order on the issue of whether the respondents have overcome the DIME physician's impairment ratings for the cervical and lumbar spinal regions consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

CERTIFICATE OF MAILING

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

6/5/19 by TT .

MCDIVITT LAW FIRM PC, Attn: AARON S KENNEDY ESQ, 19 E CIMARRON ST, COLORADO SPRINGS, CO, 80903 (For Claimant)
NATHAN DUMM & MAYER PC, Attn: TIM R FIENE ESQ, 7900 E UNION AVE SUITE 600, DENVER, CO, 80237 (For Respondents)

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Workers' Compensation
7 CCR 1101-3
WORKERS' COMPENSATION RULES OF PROCEDURE

Rule 9 Division of Workers' Compensation Dispute Resolution

9-1 DISCOVERY

One of the goals of the workers' compensation system is to minimize litigation, but disputes do arise and a system for resolution is necessary. One of the underlying premises of an administrative adjudication system is that parties should be able to resolve disputes in, as much as possible, a quick, inexpensive and simple manner. Therefore, when discovery is authorized and appropriate, the following apply:

(A) Upon agreement of the parties or for good cause shown, an administrative law judge may allow additional discovery, may limit discovery or may modify the time limits set forth in this rule. Good cause shall include but not be limited to agreement of the parties or setting of a hearing on an expedited basis.

(B) Interrogatories and requests for production

(1) Written interrogatories and requests for production of documents may be served upon each adverse party. The number of interrogatories, including the requests for production of documents, to any one party shall not exceed 20.

(2) The responses to the interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.

(3) The interrogatories and the requests for production of documents may not be submitted later than 60 days prior to hearing, except for expedited hearings.

(C) Depositions

(1) Depositions may be taken upon written motion and order, or by written consent of the parties.

(2) Absent consent of the parties, permission to take a deposition of a party will be granted only when there is a specific showing:

(a) That a party who has been served with written interrogatories has failed to respond to the interrogatories; or

(b) That the responses to the written set of interrogatories are insufficient.

(3) A non-party witness may object to being deposed in writing to the requesting party within five (5) days of service of the subpoena.

(a) The subpoena must be accompanied by notice to the non-party deponent of the right to object in writing.

(b) If the non-party deponent objects, the requesting party may schedule a prehearing conference to request an order compelling the deposition.

(D) Each party is under a continuing duty to timely supplement or amend responses to discovery up to the date of the hearing.

(E) Discovery, other than depositions, shall be completed no later than 20 days prior to the hearing date, except for expedited hearings.

(F) If any party fails to comply with the provisions of this rule and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule. However, attorney fees may be imposed only for violation of a discovery order.

(G) Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful.

9-2 MEDIATION, SETTLEMENT CONFERENCES, PREHEARING CONFERENCES AND ARBITRATION

(A) Mediation. Parties to a dispute may consent to submit any dispute to mediation. A request for mediation may be presented to either the Division of Workers' Compensation or the Office of Administrative Courts. If all parties agree, a conference will be scheduled.

(B) Settlement Conferences. Parties to a dispute may request a settlement conference subject to the limitations set forth in § 8-43-206.

(C) Prehearing Conferences. The Director, administrative law judges in the Office of Administrative Courts, or any party to a claim may request a prehearing conference before a prehearing administrative law judge. Prehearing administrative law judges may order any party to a claim to participate in a prehearing conference.

(1) The issues raised for consideration may be raised by written or oral motion at the time of setting. At the time of setting, the party setting the conference shall notify the prehearing conference unit of the issues to be heard. The prehearing conference unit will notify all parties of the issues via e-mail.

(2) Within two (2) business days of the setting, any party may add issues to be heard by providing written notice to the prehearing conference unit and all other parties.

(a) Issues added more than two (2) business days after the setting may be heard at the discretion of the prehearing administrative law judge.

(3) A party may request additional time to respond to an issue raised at the prehearing conference. It shall be within the discretion of the prehearing administrative law judge to determine if such additional time is necessary to protect the rights of the parties.

(4) Once a prehearing conference has been requested by a party to a claim, it shall be set. If any party objects to the prehearing conference as set, the following procedures shall apply:

(a) A party objecting to the setting of a prehearing conference or refusing to participate in the conference shall e-mail, fax or hand-deliver any

objections to the prehearing unit within 2 business days following the date the prehearing conference is set. If the prehearing administrative law judge orders that the prehearing conference proceed as set, the requesting party shall send written notice of the time and place of the prehearing conference to all other parties.

(5) Any party to a claim may request that the prehearing conference be recorded electronically either in advance or on the date of the prehearing conference. If a request for electronic recording is made, a party shall have until the date of the merit hearing, if such hearing date is pending at the time of the prehearing conference, or 100 days following the prehearing conference, whichever is shorter, within which to request that the prehearing conference unit provide a copy of the electronic recording.

(6) A party requesting a prehearing conference must make a good faith effort to confer with all opposing parties regarding both the proposed scheduling of the conference and the matters to be addressed at the conference at least one business day before setting the conference.

(D) Arbitration. Parties to a dispute may consent to submit any dispute to binding arbitration by written agreement. Binding arbitration shall be conducted by an eligible prehearing administrative law judge of the parties' mutual choice, or pursuant to arbitration procedures as provided by the Colorado Rules of Civil Procedure. Unless otherwise provided by the administrative law judge or upon mutual consent of the parties and/or upon the order of the arbitrator(s), proceedings in any such arbitration shall be conducted in a manner consistent with the Colorado Rules of Civil Procedure.

9-3 MOTIONS

(A) All matters for the Director's determination shall be filed with the Division of Workers' Compensation, to the attention of the Director. Matters for the Director's determination include but are not limited to:

(1) Requests for penalties for consideration by the Director;

(2) Requests for attorney fee determinations made by the Director;

(3) Matters regarding claims handling or administration, for example, benefit distribution, petitions to modify, terminate or suspend temporary benefits and lump sum requests;

(4) Requests for payment of costs of a transcript due to indigence pursuant to §8-43-213 (3);

(5) Closure orders;

(6) Matters involving uninsured employers;

(7) Utilization reviews, unless the Director has referred the matter on appeal;

(8) Applications for admission to the major medical or medical disaster funds;

(9) Disputes regarding medical payments.

(B) Motions shall be filed exclusively with either the Division of Workers' Compensation or the Office of Administrative Courts. Duplicate copies of motions shall not be filed. Copies of these documents may be filed if required as attachments, evidence submissions, and other instances to complete the record for determination of a matter before the Director.

(C) Every motion must include a certification by the party or counsel filing the motion that he or she has conferred, or made a good faith effort to confer, with opposing counsel and unrepresented parties. If no conference has occurred, an explanation must be included in the motion.

(D) The motion shall conspicuously state in the caption if the motion is contested, uncontested or stipulated. If a motion is stipulated, or uncontested, the motion may be granted immediately.

(E) Any response or objection shall be filed within 10 days from the date the initial motion was filed. A response or objection must be simultaneously served on the opposing parties. The certificate of service must indicate that service was executed on the date of filing and indicate the method of service.

(F) The parties shall submit a proposed order with each motion and response. The proposed order shall include a certificate of service containing the e-mail addresses for all parties, or if the parties do not have e-mail addresses, the facsimile numbers. The resulting order shall be sent either by e-mail or facsimile to all parties. If e-mail or facsimile information is not available for all parties, the order shall be sent to the moving or prevailing party who is responsible for distribution of true and correct copies of the order to all remaining parties promptly, and in any event no later than five calendar days after the date the order is received.

(G) Motions filed for consideration by a prehearing administrative law judge may be submitted via electronic mail.

9-4 PRIVILEGES AND PRIVILEGE LOGS

(A) In discovery and disclosure disputes in which a privilege is being asserted (including but not limited to discovery and requests for claim files pursuant to §8-43-203) the party asserting the privilege shall prepare a privilege log with sufficient description to allow the other parties to assess the applicability of the privilege claims.

(B) The privilege log shall contain, at a minimum:

1. The date of the item for which the privilege is being asserted;

2. The author and recipient of the item;

3. A description of the subject matter sufficient to explain, without disclosing the substance of the allegedly privileged material, why the item qualifies for the asserted privilege;

4. The legal and factual basis for the claim of privilege;

5. If the privileged item contains a communication, the names and titles of the parties to that communication;

6. The page or bates number of the item for which privilege is asserted.

9-5 TRUST DEPOSITS AND SURETY BONDS

(A) The Special Funds Unit of the Division of Workers' Compensation is designated as trustee for purposes of §8-43-408(2). When the provisions of §8-43-408 apply, an administrative law judge or the Director shall compute, using the best information available, the present value of the total indemnity and medical benefits estimated to be due on the claim. The employer shall provide the funds so ordered by check within ten days of the order. The trustee shall pay an amount to bring the claim current, and continue to pay the claimant benefits on a regular basis in an interval and amount ordered by an administrative law judge or the Director. The trustee shall also make payments for medical services consistent with the order of an administrative law judge or the Director. Any interest earned shall accrue to the benefit of the trust. The amount ordered to be placed in trust can be amended from time to time, and any excess amount shall be returned to the employer. The trustee shall make such disbursements as appropriate so long as funds are available, and shall not be subject to penalties or any other actions based on administration of the trust.

(B) In the alternative to the establishment of a trust, the employer shall provide a bond as set forth in §8-43-408(2). In the event that the employer fails to bring the claimant current with medical and indemnity benefits owed, or fails to continue to pay the claimant such benefits on a regular basis in an interval and amount ordered by an administrative law judge or the Director, the surety will be obliged to do so. The surety's liability to fulfill such obligation shall extend to the amount fixed, which can be amended by order, and exist in the form prescribed by the Director.

(C) Any disputes about the proper disbursement of funds in the trust shall be made to the Director or an administrative law judge for determination.

9-6 CONSOLIDATION AND MERGER OF CLAIMS

(A) Two or more claims or applications may be consolidated for hearing or other purposes upon the order of a judge or the Director for good cause shown.

(B) Duplicate claims may be merged into one file with one workers' compensation number upon the order of an administrative law judge or the Director. Merger of files shall be requested via motion specifying the surviving workers' compensation number and any other identifying information requested by the Division.

(C) No motion will be required in instances where a duplicate claim has been created as the result of a typographical error in the claimant's social security number. When duplicate claims exist as a result of such an error, the claims may be merged upon written request to the Division with copies to all parties identifying the typographical error and supplying the correct information.

9-7 PENALTY PROCEDURES

A party requesting that the Director assess penalties shall file a motion with the Division of Workers' Compensation directed to the attention of the Director which states with specificity the grounds upon which penalties are being sought and includes all evidence upon which the requesting party is basing the request. If no response to the motion is filed the Director may issue an order to show cause why penalties should not be imposed. Failure to respond to the order to show cause may be deemed a confession of the facts alleged in the motion and a waiver of the right to be heard in response to the request for penalties.

9-8 ATTORNEY REPRESENTATION

(A) To represent a party in a claim at the Division of Workers' Compensation, an attorney shall file an entry of appearance with the Division.

(B) When a claim has closed, an attorney may withdraw by filing a notice of withdrawal sent to the client and all parties.

(C) When a claim is not closed, an attorney may withdraw by filing a substitution of counsel signed by both the attorney withdrawing and the attorney entering the claim and sent to all parties. Otherwise, an attorney must request an order allowing withdrawal from the claim by filing a motion to withdraw including the required notice. The motion must be sent to the client and all parties. The notice must contain all the following:

(1) A statement that the attorney wishes to withdraw;

(2) A statement that the client is responsible for keeping the Division of Workers' Compensation and the other parties informed of the client's current address and telephone number;

(3) A statement that the claim may be closed if no further action is taken;

(4) The date scheduled for any future hearings, the dates by which any pleadings or briefs are to be filed (including, if applicable, the date by which any objection to an admission must be filed); and notice that these dates will not be affected by the withdrawal of counsel;

(5) A statement that the client may object to the withdrawal by filing a written objection within 10 days of the date on the certificate of mailing of the notice, and mailing a copy of the objection to the attorney.

9-9 SETTLEMENT PROCEDURES

(A) When the parties enter into a full and final settlement of a claim, they shall use the form settlement agreement prescribed by the Division of Workers' Compensation. The parties shall not alter the prescribed form, except as set out in this rule. Parties who are settling a claim for a fatality are not required to use the Division's prescribed form settlement agreement.

(B) The parties may include terms in paragraph 9(A) that are both specific to that agreement and involve an issue or matter that falls within the Workers' Compensation Act.

(C) The parties may reference exhibits attached to the agreement in paragraph 9(B) of the settlement agreement. These exhibits may include a workers' compensation Medicare set-aside arrangement (WCMSA) or other information related to the workers' compensation claim.

(D) The parties may attach other written agreements to the prescribed form and shall list these agreements in paragraph 9(C) of the settlement agreement. These other written agreements may include an agreement involving employment, or a waiver of a claim for bad faith.

(E) Any exhibits and/or agreements attached to a settlement agreement pursuant to subsection (D) above are included for the convenience of the parties and shall not be

reviewed by the Division. Approval of the settlement agreement does not constitute approval of any attachments to the settlement agreement.

(F) The monetary amount of the settlement as reflected in the written agreement shall not include any consideration for any agreements which fall outside the jurisdiction of the division of workers' compensation.

(G) The parties shall file the settlement agreement and a completed settlement routing sheet with a proposed order in the form prescribed by the Division. The settlement agreement must be signed by all parties with the claimant's signature verified by a notary public consistent with the notaries public act. The filed copy of the agreement will be retained by the Division. The parties will be responsible for retaining a copy for their records. The completed order will be distributed in accordance with the attached certificate of service. If the parties request the order be returned via mail, self-addressed stamped envelopes must be supplied.

(H) Parties requesting approval of a stipulation resolving one or more issues in dispute shall submit a motion for approval of joint stipulation to the Director or an ALJ and should not use the Division's prescribed form settlement agreement.

(I) The settlement agreement must be accompanied by a statement from the claimant on the Division provided form indicating if an appropriate in-person advisement has occurred, if the right to an in-person advisement is waived and/or if a telephone or online advisement by Division staff is requested.

(1) A self-represented (pro se) claimant who has waived advisement may withdraw the waiver in writing, provided a written notice of withdrawal is received by the division within three days of the settlement documents being signed and request either an in-person or telephone advisement.

9-10 CLAIM FILES

(A) The file at the Division of Workers' Compensation will be retained in its original form at the Division until the claim is closed and is not subject to subpoena for administrative hearings. A scanned electronic version of the file will be retained for at least seven years from the date of closure. Certified copies of any documents in the Division file can be tendered by a party to the office of administrative courts and shall be considered self-authenticating. Parties may obtain certified copies of documents in the Division file by contacting the Division of Workers' Compensation, customer service section.

(B) Absent extraordinary circumstances, no employee of the Division of Workers' Compensation shall be expected or required to testify at a hearing.

9-11 DISFIGUREMENT AWARD (PHOTO)

(A) Requests for determination of additional compensation for disfigurement based upon submission of photographs shall be filed on the form prescribed by the division.

(B) Requests shall be accompanied by at least one photograph, clearly showing the disfigurement, taken after the injured worker has been placed at maximum medical improvement or at least six months after the disfiguring event.

(C) The back of each photograph shall be signed and dated by the injured worker. The signature shall certify the photographs are a true and accurate representation of the disfigurement at the time the request is being made.

(D) Any party dissatisfied with an order regarding disfigurement benefits issued pursuant to this rule may file an application for hearing before the office of administrative courts.