COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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March Case Law Update

Presented by Judge David Galivan

This update covers ICAO and appellate court decisions issued between January 17, 2017 to February 10, 2017

Colorado Supreme Court Decision

Colorado Court of Appeals Decisions

Industrial Claims Appeals Office Decisions

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ADVANCE SHEET HEADNOTE
February 21, 2017

2017 CO 11

No. 16SC283, Youngquist v. Miner—Workers' Compensation —Personal Jurisdiction—Specific Jurisdiction.

In this case, the supreme court considers whether Colorado has jurisdiction to award benefits for out-of-state work-related injuries and impose a statutory penalty on an employer under section 8-41-204, C.R.S. (2016), when the employer is not a citizen of Colorado and has no offices or operations in Colorado, but hired a Colorado citizen within the state. The supreme court concludes that under the facts of this case, Colorado lacks personal jurisdiction over the employer and therefore the employer cannot be subject to the Workers' Compensation Act of Colorado, sections 8-40-101 to 8-47-209, C.R.S. (2016). Accordingly, the supreme court reverses the judgment of the court of appeals.

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

2017 CO 11

Supreme Court Case No. 16SC283
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1165

Petitioner:

Youngquist Brothers Oil & Gas, Inc.,

v.

Respondents:

Travis Miner and the Industrial Claim Appeals Office of the State of Colorado.

Judgment Reversed
en banc
February 21, 2017

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CHIEF JUSTICE RICE delivered the Opinion of the Court.

¶1 This case requires us to determine whether Colorado has jurisdiction to award benefits for out-of-state work-related injuries and impose a statutory penalty on an employer under section 8-41-204, C.R.S. (2016), when the employer is not a citizen of Colorado and has no offices or operations in Colorado, but hired a Colorado citizen within the state. We hold that on the facts presented here, Colorado lacks personal jurisdiction over the employer.[1]

I. Facts and Procedural History

¶2 Respondent Travis Miner was a resident of Colorado when a friend told him that Petitioner Youngquist Brothers Oil & Gas, Inc. ("Youngquist"), a North Dakota corporation, was looking for employees to work on its oil rigs in North Dakota. On the morning of December 23, 2013, from his home in Colorado, Miner applied online for a job as a derrickhand for Youngquist. That afternoon, a representative from Youngquist called Miner to conduct a phone interview. Miner was hired during the call, and the representative asked if Miner could come to North Dakota the next day. Miner said that he could, and Youngquist then purchased Miner a plane ticket from Grand Junction to North Dakota and e-mailed it to him.

[1] We granted certiorari on the following issue:

> Whether the court of appeals erred in concluding that Colorado has jurisdiction to award benefits for out-of-state work-related injuries and impose a statutory penalty on the employer under the Workers' Compensation Act, section 8-41-204, C.R.S. (2015), when the employer is not a citizen of Colorado, has no offices or operations in Colorado, but hired a Colorado citizen within the state.

¶3 When Miner arrived at the work site on December 24, he completed paperwork, including a W-2 tax withholdings form and an I-9 eligibility for employment form. On the paperwork, Miner indicated his residence was in Grand Junction, Colorado. Once he filled out the paperwork, Miner started working as a derrickhand.

¶4 On December 25, during his second shift working for Youngquist, Miner was injured. He did not report the injury right away but eventually reported it on December 29. He then returned to Colorado. Youngquist, which had workers' compensation insurance in North Dakota, reported Miner's injury to North Dakota's workers' compensation agency. North Dakota denied Miner's workers' compensation claim because Miner had a pre-existing back injury, and Miner did not appeal the denial. Miner then sought Colorado workers' compensation benefits, and in October 2014, a Colorado administrative law judge ("ALJ") conducted a hearing.

¶5 The ALJ found that Miner had suffered a compensable work-related injury and awarded him benefits. The ALJ also determined that Miner was hired in Colorado and was injured within six months of leaving Colorado, meaning Miner's claim was subject to the Workers' Compensation Act of Colorado ("Act"), sections 8-40-101 to 8-47-209, C.R.S. (2016). The ALJ also imposed a fifty-percent penalty on Youngquist for failing to carry workers' compensation insurance in Colorado, as mandated by the Act. See § 8-43-408(1), C.R.S. (2016).

¶6 Youngquist appealed to the Industrial Claim Appeals Office of the State of Colorado which affirmed the ALJ's Order. Then, Youngquist appealed to the court of appeals, arguing that Colorado lacked personal jurisdiction over it and that it therefore

was not subject to the Act. The court disagreed and affirmed the ALJ's Order. Youngquist Bros. Oil & Gas, Inc. v. ICAO, 2016 COA 31, ¶¶ 2, 10, __ P.3d __. We granted certiorari. We now reverse the court of appeals.

II. Analysis

¶7 The crux of the issue before us is whether Colorado may constitutionally exercise personal jurisdiction over Youngquist for the purposes of Miner's workers' compensation claim. We hold that Youngquist did not have sufficient minimum contacts with Colorado for the state to exercise personal jurisdiction over Youngquist. Therefore, Youngquist cannot be constitutionally subject to the Act.

A. Standard of Review

¶8 Whether the facts as found by the ALJ support the exercise of personal jurisdiction is reviewed de novo. See Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187, 1192 (Colo. 2005), as modified on denial of reh'g (Dec. 19, 2005).

B. Personal Jurisdiction

¶9 For a Colorado court to exercise jurisdiction over a non-resident defendant, the court must find jurisdiction under an applicable statute, and such a finding must comport with due process. See id. at 1193.

¶10 Like other states, Colorado has promulgated statutes that govern benefits claims for workers who are injured in the course and scope of their employment. Specifically, the General Assembly promulgated the Act and outlined in the Act's extraterritorial provision, section 8-41-204, when it is appropriate for Colorado to exercise jurisdiction over workers' compensation claims arising from injuries that occur outside of Colorado.

This section provides that an employee is entitled to workers' compensation benefits when an injury occurs outside Colorado, so long as the injured worker was "hired" in Colorado and not more than six months have elapsed since the employee left Colorado. § 18-41-204. The parties do not dispute that Miner's injuries occurred outside of Colorado, that Miner was hired while in Colorado, and that the injury occurred within six months of Miner's leaving Colorado. Therefore, there is no dispute that Youngquist is subject to the Act's extraterritorial provision. Instead, the parties dispute whether the Act can constitutionally be applied to Youngquist. Specifically, Youngquist contends that it has insufficient contacts with Colorado, and that Colorado therefore may not constitutionally exercise personal jurisdiction over it. As a result, Youngquist asserts that the ALJ's decision awarding benefits to Miner and imposing penalties on it pursuant to the Act violated its due process rights.

¶11 The due process clauses of the United States and Colorado constitutions operate to limit a state's exercise of personal jurisdiction over non-resident defendants. See Keefe v. Kirschenbaum & Kirschenbaum, P.C., 40 P.3d 1267, 1270 (Colo. 2002); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–14 (1984). Specifically, due process requires that a non-resident corporate defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). "The quantity and nature of the minimum contacts required depends on whether the plaintiff alleges specific or general jurisdiction." Archangel, 123 P.3d at

1194. Here, because no party asserts that Youngquist is subject to general jurisdiction, we discuss only specific jurisdiction.

¶12 "Specific jurisdiction is properly exercised where the injuries triggering litigation arise out of and are related to 'activities that are significant and purposefully directed by the defendant at residents of the forum.'" Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). To determine whether the defendant has sufficient minimum contacts, we consider "(1) whether the defendant purposefully availed himself of the privilege of conducting business in the forum state, and (2), whether the litigation 'arises out of' the defendant's forum-related contacts." Id. The "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random or fortuitous contacts or the unilateral activity of [a third party]." Burger King, 471 U.S. at 475 (internal quotation marks and citations omitted). "[S]ingle or occasional acts related to the forum may not be sufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an 'attenuated' affiliation with the forum." Keefe, 40 P.3d at 1271 (citing Burger King, 471 U.S. at 475–76; Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)). However, "when a defendant has deliberately created 'continuing obligations' between himself and residents of the forum, he has manifestly availed himself of the privilege of conducting business there." Id. Ultimately, the question of jurisdiction does not turn on "mechanical tests or conceptualistic theories of the place of contracting or performance." Id. at 1272. Instead, it often involves an "ad hoc analysis of the facts." Id.

¶13 Once it is established that a defendant has the requisite minimum contacts, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Id. at 1271 (citing Burger King, 471 U.S. at 476). These "fairness factors" include "the burden on the defendant, the forum state's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief." Id.

C. Personal Jurisdiction over Youngquist

¶14 Here, Youngquist's contact with Colorado was limited—a representative from Youngquist made a phone call to Miner while Miner was in Colorado in response to an employment inquiry made by Miner, and then Youngquist paid for Miner to fly to North Dakota. Though the parties do not dispute that Youngquist hired Miner during this phone call, this fact alone is not dispositive of jurisdiction. Instead, Youngquist's contact with Colorado creates only the "attenuated affiliation with the forum" deemed insufficient to establish jurisdiction. See id. A single responsive telephone call followed by payment for a ticket cannot constitute purposeful availment of the privileges of conducting business inside of Colorado if the requirement of purposeful availment is to be meaningful. This contact is better characterized as "random and fortuitous contact" with Colorado. See Burger King, 471 U.S. at 475. For example, Miner could have easily been in another state when a Youngquist representative called him and he then could have flown from that state to North Dakota. Therefore, Youngquist's contact with Colorado was unintentional—it was simply "random and fortuitous" that Youngquist contacted Miner while he was in Colorado.

¶15 Moreover, Youngquist's actions were neither "significant" nor "purposefully directed at residents of the forum." See Archangel, 123 P.3d at 1194. It was at best coincidental that Miner, or any job applicant to whom Youngquist responded, was in and from Colorado.[2] Youngquist did not specifically recruit Miner or other Colorado residents, its representative did not physically come to Colorado, and it has no physical business location in Colorado. Ultimately, Youngquist did not purposefully avail itself of the benefits and protections of Colorado's laws and does not have sufficient minimum contacts with Colorado for Colorado to exercise personal jurisdiction over it. Therefore, Youngquist cannot constitutionally be subject to the Act. As such, we do not need to reach the second step of the personal jurisdiction analysis of whether or not subjecting Youngquist to personal jurisdiction comported with fair play and substantial justice.[3]

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[2] Miner attempts to characterize Youngquist as recruiting employees from Colorado to work on its North Dakota oil rigs. However, the record establishes that Youngquist recruits from all over the United States. During the hearing before the ALJ, a Youngquist employee testified that Youngquist hires employees from places where oil and gas industries are prevalent, and he listed Texas, Oklahoma, Indiana, and Colorado as examples. That workers with skills relevant to the oil and gas industry can generally be found in states that have the resources to support that industry is not surprising. This does not constitute evidence that Youngquist actively recruits employees from any particular state.

[3] Nonetheless, we acknowledge that if Youngquist had sufficient minimum contacts with Colorado, it is likely that the "fairness factors" would weigh heavily towards a finding of jurisdiction. Namely, as evidenced by section 8-41-204, Colorado has an interest in providing redress for injured residents and Miner has an obvious interest in obtaining relief.

D. Minimum Contacts and Workers' Compensation Claims

¶16 Relying on Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532 (1935), the court of appeals concluded that the above minimum contacts analysis is different for workers' compensation cases because such cases do not require the same extent of contacts as other types of cases. Youngquist, ¶ 25. However, this reliance on Alaska Packers was misplaced—workers' compensation cases require the same constitutional analysis as all other cases.

¶17 In Alaska Packers, the United States Supreme Court upheld an extraterritorial provision in a workers' compensation statute that is similar to section 8-41-204. 294 U.S. at 541. In that case, an employee entered into a written employment contract with the Alaska Packers Association ("Alaska Packers") in San Francisco to work in Alaska for the salmon canning season. Id. at 538. The contract stipulated that the parties were subject to and bound by the Alaska Workmen's Compensation Law. Id. The employee was subsequently injured in Alaska. Id. Upon returning to California, the employee filed a successful workers' compensation claim in California. Id. Even though the parties had agreed to use Alaska's workers' compensation law and the employee was injured in Alaska, the Court upheld the award of California workers' compensation. Id. at 549. The Court concluded that California's extraterritorial provision did not violate due process, even though California was imposing its own laws on an injury sustained in another state. Id. at 541.

¶18 The court of appeals concluded that since the United States Supreme Court held in Alaska Packers that California's extraterritorial provision did not lack a rational basis

or involve any arbitrary or unreasonable exercise of state power, similar extraterritorial provisions (like section 8-41-204) are unlikely to violate due process. Youngquist, ¶ 30. However, Alaska Packers is not dispositive of the question before us because the Court assumed the existence of personal jurisdiction in California over Alaska Packers. Indeed, the Court noted that Alaska Packers was "doing business" in California. See Alaska Packers, 294 U.S. at 538. Instead, Alaska Packers was challenging the fact that it was being subjected to California's workers' compensation law even where the relevant contract explicitly dictated that Alaska's workers' compensation law would be binding on an injury suffered in Alaska. Id. at 539. Thus, the case did not involve a dispute about personal jurisdiction, but rather one of due process and full faith and credit.

¶19 Moreover, Alaska Packers was decided ten years before International Shoe, which was the first in a long line of United States Supreme Court cases introducing the now-applicable minimum contacts analysis. Therefore, it is inapposite to rely on Alaska Packers for the proposition that the minimum contacts analysis is somehow different for workers' compensation cases. Ultimately, this court must consider only whether or not there were sufficient minimum contacts under International Shoe and its progeny for Colorado to properly exercise personal jurisdiction over Youngquist for the purposes of Miner's workers' compensation claim.

III. Conclusion

¶20 For the foregoing reasons, we reverse the judgment of the court of appeals and remand the case to that court with instructions to return the case to the Industrial Claim Appeals Office to vacate its judgment consistent with this opinion.

DATE FILED: February 23, 2017
CASE NUMBER: 2016CA249

Court of Appeals No. 16CA0249
Industrial Claim Appeals Office of the State of Colorado
W.C. No. 84-1545878

Dami Hospitality, LLC,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Division of Workers' Compensation,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE WEBB
Dunn and Davidson*, JJ., concur

Announced February 23, 2017

Law Offices of Daniel T. Goodwin, Daniel T. Goodwin, Caroline R. Kert, Paige Orgel, Broomfield, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Cynthia H. Coffman, Attorney General, Emmy A. Langley, Assistant Attorney General, Denver, Colorado, for Respondent Division of Workers' Compensation

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 Is a fine of $841,200 imposed by the Division of Workers' Compensation (the division) on a small employer for having failed over several years to maintain workers' compensation insurance excessive under the Eighth Amendment?[1] On the particular facts presented, which include a failure to perform the required fact-specific constitutional analysis, we answer this novel question "yes."

¶ 2 The employer, Dami Hospitality, LLC, appeals the fine as unconstitutional, challenging the underlying statute both facially and as applied; as contrary to other provisions of the Workers' Compensation Act of Colorado, sections 8-40-101 to 8-47-209, C.R.S. 2016 (the Act); and as a procedural due process violation.

¶ 3 We uphold the facial constitutionality of section 8-43-409, C.R.S. 2016, the statute underlying the fine. But on an as-applied basis, we conclude that because the Director of the division (Director) failed to apply the excessive fine factors adopted under the Eighth Amendment to the particular facts that Dami presented,

[1] Because the wording of Colorado Constitution article II, section 20 is identical, we do not address it separately.

the fine must be set aside as excessive. We reject Dami's remaining contentions.

¶ 4 Therefore, we set aside the decision of the Industrial Claim Appeals Office (Panel) affirming the Director's decision and remand the case to the Panel with directions to order the Director to reconsider imposing a fine calculated according to this opinion.

I. Background and Procedural History

¶ 5 Dami operates a motel in Denver, Colorado. For a period in 2006, Dami failed to carry workers' compensation insurance as required by section 8-43-409. It was fined approximately $1200 for that violation, paid the fine, and obtained the necessary insurance.

¶ 6 In 2014, the division notified Dami that it was again without workers' compensation insurance and had been for periods during 2006 and 2007, as well as from September 2010 through the date of the division's notice. The Director's "Notice to Show Compliance" advised Dami that within twenty days it had to answer an attached questionnaire, had to submit documents establishing coverage, and could "request a prehearing conference on the issue of default." Dami admits that it received this notice on June 28, 2014, but denies having received a notice the division said had been sent four

months earlier. Although Dami obtained the necessary insurance by July 9, 2014, it neither submitted a response to the Notice to Show Compliance nor requested a prehearing conference.[2]

¶ 7 Information provided by the division's coverage enforcement unit — which Dami does not contest — showed that Dami had been without coverage from August 10, 2006, through June 8, 2007, and again from September 12, 2010, through July 9, 2014. On this basis, the Director fined Dami from $250 to $400 per day, through September 18, 2006. From September 19, 2006, through June 8, 2007, and from September 12, 2010, through July 9, 2014, Dami was fined $500 per day. The Director calculated the fine based on the formula adopted by the division under section 8-43-409(1)(b)(II) in Department of Labor & Employment Rule 3-6, 7 Code Colo. Regs. 1101-3 (Rule 3-6), discussed in Part III.B below.

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[2] Section 8-43-409, C.R.S. 2016, requires the Director to notify an employer "of the opportunity to request a prehearing conference on the issue of default." However, the statute does not define "default." Such a request must be made within twenty days of the notice. And an employer is not entitled to a hearing as a matter of right. Rather, "*if necessary*, the [D]irector *may* set the issue of the employer's default for hearing." § 8-43-409(1) (emphasis added). The statute is also silent whether the division may request a hearing or the Director may hold one sua sponte.

¶ 8 Dami's owner, Soon Pak, sent a letter to the Director captioned "Petition to Review," asking the Director to reconsider the fine. The Director treated the letter as a petition to review his findings of fact, conclusions of law, and order.

¶ 9 In the letter/petition, Ms. Pak explained that she "believed" the insurance policies she obtained for the motel had "included the required coverage." She blamed her insurance agent for the lapse in coverage, asserting that her trust "in insurance professionals to quote and secure . . . competitive workmen's compensation insurance" was "obviously" misplaced. The petition also asked the Director to reduce the penalty because "$842,000 is more that [sic] my business grosses in one year. . . . My payroll each year is less than $50,000 per year. . . . If the penalty stands as presented, I have no choice but to declare personal and business bankruptcy and go out of business."

¶ 10 In a letter that Ms. Pak's insurance agent submitted to the Director, the agent accepted responsibility for the lack of workers' compensation insurance: "I think I feel part of responsibility for this matter that I did not tell about Worker's Compensation and I will be managing my client in the future. . . . Actually she confused

Property Insurance and Worker's Compensation." Later, Dami's counsel filed a brief in support of the petition to review. Attached to the brief was Ms. Pak's affidavit reiterating her reliance on the insurance agent.

¶ 11 In a supplemental order following Dami's petition and brief, the Director again ordered Dami to pay the fine. He found that because of the earlier fine, Dami had been aware of the need to maintain insurance and failure to do so was within its control. As for Dami's asserted inability to pay, the Director concluded that neither section 8-43-409 nor Rule 3-6(D) contains "an exclusion or exemption from incurring and paying a fine based upon a Respondent's financial inability to pay."

¶ 12 On Dami's appeal of the supplemental order, the Panel remanded the case to the Director. It held that the Director had failed to consider the factors set out in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), to protect against constitutionally excessive fines or penalties. The Panel summarized those factors as follows:

- the degree of reprehensibility of the defendant's misconduct;

- the disparity between the harm or potential harm suffered and the fine to be assessed; and
- the difference between the fine imposed and the penalties authorized or imposed in comparable cases.

¶ 13 Without taking additional evidence, the Director issued an order on remand. Still, the Director did not analyze the factors that Dami had presented under *Associated Business Products*. Instead, he concluded that because Rule 3-6 inherently incorporates these factors, no further consideration was necessary. Then for the third time, the Director ordered Dami to pay a fine of $841,200.

¶ 14 Again, Dami appealed. But this time the Panel agreed with the Director's analysis and affirmed the order on remand. The Panel's decision is now before us.

II. Was Dami Deprived of Procedural Due Process?

¶ 15 Although procedural due process is not Dami's primary argument, we begin there because if Dami is correct, the fine must be set aside and the broader constitutional issues would no longer be ripe for decision. Courts "have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues

that need not be resolved in order to determine the rights of the parties to the case under consideration." *Cty. Court v. Allen*, 442 U.S. 140, 154 (1979); *see also People v. Montour*, 157 P.3d 489, 503-04 (Colo. 2007) (Under "the doctrine of constitutional avoidance, . . . courts have a duty to interpret a statute in a constitutional manner where the statute is susceptible to a constitutional construction."). However, we discern no due process violation.

¶ 16 On procedural due process grounds, Dami challenges the method by which it was notified that it lacked workers' compensation insurance, explaining "common sense indicates that simple notice by mail is not reasonable." Alternatively, it argues that a hearing should have been held before the fine was imposed. Neither of these assertions provides a basis for setting aside the Panel's order.

¶ 17 The "fundamental requisites of procedural due process are notice and the opportunity to be heard." *Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009).

¶ 18 The Director's Notice to Show Compliance, informing Dami of its "subsequent violation" of section 8-43-409 for failure to carry

workers' compensation insurance, appears to have been mailed to the address the division had on file for Dami. Dami does not point to any evidence in the record that it had ever advised the division of a new mailing address.

¶ 19 More importantly, despite Dami's argument that notice was inadequate, Ms. Pak admitted in her affidavit to the Director that she had received a second notice in June 2014, just four months after the first notice of subsequent violation had been mailed. Dami does not assert that the passage of these four months created constitutional prejudice. And when a party has received actual notice of an agency's action, the party cannot claim a procedural due process violation based on an alleged defect in the method of giving notice. *See Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶¶ 1, 20 ("We conclude that when the parties received actual notice which afforded them an opportunity to present their objections and no prejudice resulted, we will not disturb a completed foreclosure sale."); *see also Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995) ("If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, the due process clause is not offended.").

¶ 20 Dami's assertion that a hearing should have been held fares no better. In responding to the Notice to Show Compliance, Dami never asked for a prehearing conference.[3] Nor did Dami request a remand hearing in its first appeal to the Panel. And Dami does not offer any supporting authority or legal argument for the assertion that despite its own inaction, a hearing should have been held.

¶ 21 Instead, Dami argues only that, "reading between the lines," the division failed to follow the Panel's "suggestion" that the Director hold a hearing. But "[g]iven the dearth of legal grounds offered," we decline to address this issue on its merits. *Meza v. Indus. Claim Appeals Office*, 2013 COA 71, ¶ 38; *see also Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007) (declining to address "underdeveloped arguments").

¶ 22 For these reasons, we conclude that Dami has not articulated a cognizable claim for due process violations based on either inadequacy of the notice or failure to hold a hearing.

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[3] Dami did not contest the wording of the notice below and does not do so on appeal. For that reason, we do not address what "you may request a prehearing conference on the issue of default" would mean to a reasonable person. Be that as it may, lack of a hearing at which the record could have been more fully developed plagues this appeal.

III. Was the Fine Imposed on Dami Constitutionally Excessive?

A. Dami's Excessive Fine Arguments

¶ 23 Dami challenges the $841,200 fine on three grounds.

¶ 24 First, Dami argues that section 8-43-409 is unconstitutional on its face. According to Dami, the General Assembly's removal of a penalty cap from the statute in 2005, plus the absence of any statutory deadline within which the Director must notify an employer that it is in violation of the mandate to carry workers' compensation insurance, effectively grants the Director "complete discretion regarding the timing of notice and thus the size of the fine." Dami points out that this lack of any deadline — combined with the Director's formulaic approach in imposing the fine — resulted in a penalty grossly disproportionate both to the fines anticipated by the legislature and to the risk of harm to Dami's employees.

¶ 25 Second, arguing unconstitutionality as applied, Dami asserts that because the Director wrongly deemed the *Associated Business Products* factors for weighing excessive fines incorporated into Rule 3-6, the Director abused his discretion in failing to apply the factors to Dami's particular situation.

¶ 26 Third, Dami argues that the fine is grossly disproportionate both to its ability to pay and to the harm caused by the lack of workers' compensation insurance. It asserts the Director should also have considered its ability to pay when weighing the constitutionality of the fine.

¶ 27 Although we do not discern a facial flaw in the statute, we conclude that its application violated Dami's constitutional protections against excessive fines. In so concluding, we agree with Dami that because the constitutional factors are not sufficiently incorporated into Rule 3-6, the Director abused his discretion in failing to consider facts specific to Dami — including Dami's ability to pay — when he reimposed the fine after the Panel had directed him to address the *Associated Business Products* factors.

B. Statutory and Regulatory Provisions at Issue

¶ 28 Dami was fined under section 8-43-409, which requires the Director to order the violating employer "to cease and desist immediately from continuing its business operations during the period such default continues," or

> (b) 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:
>
> . . . .
>
> (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation.

§ 8-43-409(1).

¶ 29 To implement this provision, the division adopted Rule 3-6. As pertinent here, the rule provides:

> 3-6 FINES FOR DEFAULTING EMPLOYER
>
> (A) Following the Director's determination that an employer has failed to obtain the required insurance or has failed to keep such insurance in force or has allowed the insurance to lapse or has failed to renew such insurance, the Director will impose fines on the defaulting employer and/or will compel the employer to cease and desist its business operations.
>
> . . . .
>
> (D) 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

C. Facial Challenge to Section 8-43-409

¶ 30 "A law is void for vagueness where its prohibitions are not clearly defined." *People v. Baer*, 973 P.2d 1225, 1233 (Colo. 1999). "Vague laws are unconstitutional and 'offend due process because they (1) fail to give fair notice of the conduct prohibited, and (2) do not supply adequate standards for those who apply them in order to prevent arbitrary and discriminatory enforcement.'" *Denver Health & Hosp. Auth. v. City of Arvada*, 2016 COA 12, ¶ 14 (quoting *Baer*, 973 P.2d at 1233) (*cert. granted in part* Sept. 12, 2016). Even so, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). And at least in Colorado, "[t]he party challenging the facial constitutionality of a statute has the burden of showing the statute

is unconstitutional beyond a reasonable doubt." *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007).[4]

¶ 31 First, we reject Dami's assertion that the absence of a penalty cap renders the statute unconstitutional.[5]

¶ 32 For purposes of the Eighth Amendment, "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

¶ 33 Numerous sentencing cases have held that the absence of a maximum cap does not invalidate a statute. For example,

> [s]uch a statute is not subject to the attack that it is void because it is vague and indefinite. There are many laws such as this upon the statute books of the Federal Government, as well as of the various states, fixing a minimum sentence and leaving it within the power of the court to fix the maximum sentences. In every instance the validity of such statutes has been upheld.

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[4] In *Tabor Foundation v. Regional Trans. Dist.*, 2016 COA 102, our supreme court has granted certiorari to consider this standard. 16SC639, 2017 WL 280826 (Colo. Jan. 23, 2017).

[5] Section 8-43-409 was amended in 2005 to remove the cap that had prohibited any penalty from "exceed[ing] the annual cost of the insurance premium that would have been charged for such employer." Ch. 49, sec. 1, § 8-43-409, 2005 Colo. Sess. Laws 199.

Binkley v. Hunter, 170 F.2d 848, 849 (10th Cir. 1948); *see also United States v. Kuck*, 573 F.2d 25, 26 (10th Cir. 1978) ("A sentencing statute is not unconstitutional because of failure to provide a maximum term.").

¶ 34 In contrast, Dami has not cited authority holding a statute that imposes a fine or penalty facially unconstitutional for lack of a cap. Nor have we found any such authority in Colorado.

¶ 35 Looking outside of Colorado, the notion that the absence of a maximum fine renders a statute facially unconstitutional "represents the clear minority rule on the issue. In fact, the majority of courts considering this issue have upheld the constitutionality of statutes which set a minimum fine or punishment but which do not prescribe a maximum fine or punishment." *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002); *see, e.g.*, *United States v. Hayes*, 589 F.2d 811, 825 (5th Cir. 1979) ("While the statute does not provide for a specific maximum sentence in situations of life imprisonment for the principal, failure to provide a clearer maximum possible sentence does not render the statute constitutionally infirm. Leaving the determination of

maximum sentences to the court is not uncommon.") (citation omitted); *Ex parte Robinson*, 474 So. 2d 685, 686 (Ala. 1985); *State v. Nelson*, 11 A.2d 856, 862 (Conn. 1940); *Mannon v. State*, 788 S.W.2d 315, 322 (Mo. Ct. App. 1990) ("A statute which fixes a minimum punishment but provides no maximum term is neither constitutionally invalid nor void because of indefiniteness.").

¶ 36 Second, we reject Dami's assertion that the absence of a deadline for division action against an employer lacking insurance — which allows the fine to ratchet up — renders the statute facially unconstitutional. Again, Dami has not offered any cases supporting its position. To the contrary, substantial authority suggests the opposite.

¶ 37 To begin, the Supreme Court has upheld a court's authority to impose daily fines under a statute that lacked both a cap and a deadline for notifying the offending parties of accumulating fines. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 243 (1975) (remanding for recalculation of daily fines under the Clayton and Federal Trade Commission Acts).

¶ 38 Likewise under Colorado law, daily penalties that accumulated for continuing violations have been upheld. *See Crowell v. Indus.*

Claim Appeals Office, 2012 COA 30, ¶ 15 ("[W]hen there is ongoing conduct, the continuation of the penalty is mandatory, rather than discretionary."); *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1100 (Colo. App. 1996) (mandating imposition of the penalty at a "daily rate" where violation was continuing).

¶ 39 Some lower federal courts have taken the same approach. In *Center for Biological Diversity v. Marina Point Development Associates*, 434 F. Supp. 2d 789 (C.D. Cal. 2006), for example, the defendants were found to have been in violation of the Clean Water Act from at least October 2002 to 2006. Because they were subject to daily penalties of $27,500 to $32,500 over the course of their violations, "the maximum penalty" could have been as high as "$15,445,000." *Id.* at 799. The court imposed a penalty of $2500 for each day of violation "from October 7, 2002 to April 16, 2004," totaling $1,312,500. *Id.* at 800. Similarly, in *Honey v. Dignity Health*, 27 F. Supp. 3d 1113 (D. Nev. 2014), daily penalties were imposed against an employer for violating the notice provision in the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §§ 1161-1169 (2012). The court noted that it "ha[d] discretion to impose a penalty and to set its amount, subject only to

a $110 per day statutorily set maximum." *Honey*, 27 F. Supp. 3d at 1124.

¶ 40 None of the courts in these cases pondered whether the fines should be tempered because the underlying statutes did not require the regulating authorities to provide timely notice of a violation. Instead, at least as best we can determine, like Rome burning as Nero fiddled, fines mounted while the regulators said nothing.[6]

¶ 41 Given all this, we conclude that Dami has not met its burden of showing that section 8-43-409 is facially unconstitutional beyond a reasonable doubt. Even so, our inquiry does not end, as the statute's application in this case could still be unconstitutional.

D. As-Applied Constitutional Challenges to Fines

¶ 42 Dami's as-applied challenge to section 8-43-409 differs from its facial challenge to the statute.

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[6] To be sure, Dami might distinguish some of these cases on the basis that the party fined could not dispute its knowledge of the conduct triggering the fine. For example, *Crowell v. Industrial Claim Appeals Office*, 2012 COA 30, involved the employer's affirmative action. In contrast, Dami maintains that it did not know the insurance coverage had lapsed. But Dami's alleged ignorance can be addressed under reprehensibility, one of the factors from *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), as discussed in Part III.D.4.a below.

> A plaintiff bringing an "as-applied" challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. If a statute is held unconstitutional "as applied," the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative.

Sanger v. Dennis, 148 P.3d 404, 410 (Colo. App. 2006). "For as-applied constitutional challenges, the question is whether the challenging party can establish that the statute is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011) (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008)). Yet again, "the burden of establishing the unconstitutionality of a statute, as applied, [is] beyond a reasonable doubt." *People v. Gutierrez*, 622 P.2d 547, 555 (Colo. 1981).

¶ 43 Statutory penalties, like those assessed under section 8-43-409, are subject to the constitutional prohibition against excessive fines. *See Associated Bus. Prods.*, 126 P.3d at 326; *Wolford v. Pinnacol Assurance*, 81 P.3d 1079, 1084 (Colo. App. 2003), *rev'd on other grounds*, 107 P.3d 947 (Colo. 2005). The Eighth Amendment provides that "[e]xcessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

¶ 44 As a division of this court noted, the Supreme Court first applied this provision to "civil cases where the government seeks, at least in part, to punish a party" in 1993, when it announced *Austin v. United States*, 509 U.S. 602 (1993). *Toth*, 924 P.2d at 1099-1100. In *Austin*, the Supreme Court applied the Eighth Amendment to an in rem civil forfeiture, noting that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, 509 U.S. at 610. After *Austin*, fines assessed for non-criminal statutory violations have been subject to the Eighth Amendment's protections against excessive fines.

¶ 45 More recently, Colorado courts have applied the constitutionally excessive limitation to civil fines. *See Associated Bus. Prods.*, 126 P.3d at 326; *Boulder Cty. Apartment Ass'n v. City of Boulder*, 97 P.3d 332, 338 (Colo. App. 2004). But exactly when is a fine excessive?

¶ 46 The Supreme Court has held that a civil fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Likewise, a

division of this court has said that a penalty "is excessive if the amount is so disproportionate to a defendants [sic] circumstances that there can be no realistic expectation that the defendant will be able to pay it." *Boulder Cty. Apartment Ass'n*, 97 P.3d at 338.

¶ 47 This much is clear: the principle of proportionality encompassed in the constitutional protection against excessive fines "is that the punishment should fit the crime." *Id.* at 337. Yet, "[i]f this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult." *Lovejoy v. Denver & Rio Grande R.R. Co.*, 59 Colo. 222, 229, 146 P. 263, 265 (1915). Taking up that task, we start with the standard of review.

1. Standard of Review

¶ 48 The party challenging a fine bears the "the burden of proving the fine is 'grossly disproportionate.'" *Associated Bus. Prods.*, 126 P.3d at 326 (quoting *Toth*, 924 P.2d at 1100). But deciding whether that burden has been met implicates conflicting standards of appellate review.

¶ 49 On the one hand, "when a punitive damages award is reviewed for excessiveness under the Due Process Clause and the Eighth Amendment, a de novo standard of review should be applied." *Id.* at 325. And as discussed in Part III.D.4 below, courts have applied de novo the punitive damages criteria in deciding whether a civil fine or penalty is excessive.

¶ 50 On the other hand, "[a] trial court enjoys considerable discretion in assessing a penalty." *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 787 (Colo. App. 2002). Similarly, "[a]n [administrative law judge] has discretion to determine the amount of the penalty, provided that the amount does not exceed the legislatively enacted penalty range." *Crowell*, ¶ 17. And as explained in the prior subsection, the statute before us no longer caps the fine.

¶ 51 Likewise, as to statutes underlying civil penalties, "legislatures have extremely broad discretion in setting the range of permissible punishments for statutorily enumerated offenses and . . . judicial decisions operating within the legislatively enacted guidelines are typically reviewed for abuse of discretion." *Associated Bus. Prods.*, 126 P.3d at 325 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp.,*

Inc., 532 U.S. 424, 432 (2001)). And here, because the rule that the Director applied tracks the statute, his decision enjoys the same protection.

¶ 52 True, this case does not involve a punitive damages award, as in *Cooper Industries*. But like the challenge in *Associated Business Products*, Dami asks us to examine the excessiveness of a "legislatively enacted penalt[y]," which is also reviewed de novo. *Associated Bus. Prods.*, 126 P.3d at 325.

¶ 53 An abuse of discretion occurs when the fact finder enters an order that is unsupported by the evidence or misapplies or is contrary to the law. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). As has been so often stated, discretion is abused when the decision "is manifestly arbitrary, unreasonable, unfair, or misapplies the law." *Patterson v. BP Am. Prod. Co.*, 2015 COA 28, ¶ 67.

¶ 54 *Associated Business Products* recognized — but did not resolve — the tension between de novo review and review for an abuse of discretion. And where a constitutional interest is in play, sometimes the latter bleeds into the former. *Cf. People v. Dunham*, 2016 COA 73, ¶ 13 ("Ordinarily, we review a defendant's preserved

contention that the trial court erred in limiting cross-examination of a witness for an abuse of discretion. But where, as in this case, a defendant contends that the trial court so excessively limited his cross-examination of a witness as to violate the Confrontation Clause, *see* U.S. Const. amend. VI, we review that contention de novo.") (citations omitted). In any event, we avoid reconciling this tension because ultimately we conclude that the Director abused his discretion by misapplying the law.

2. Constitutional Protections Afforded Corporations

¶ 55 In its answer brief, the division preliminarily questions whether the Eighth Amendment's excessive fines protections even apply to corporations. The answer to this question is unresolved in Colorado and unclear elsewhere. We conclude that corporations enjoy these protections.

¶ 56 To begin, the cases relied on by the division, as well as the opinions of several other courts, have assumed that corporations are entitled to the Eighth Amendment's protections. *See, e.g.*, *United States v. Pilgrim Mkt. Corp.*, 944 F.2d 14, 22 (1st Cir. 1991) ("We will assume for purposes of our discussion that the eighth amendment proscription against excessive fines applies to

corporations, although this is a very tenuous assumption."); *United States v. Seher*, 686 F. Supp. 2d 1323, 1327 n.2 (N.D. Ga. 2010) ("The Court assumes that the corporate Defendants are entitled to raise an Eighth Amendment challenge. Whether the protections of the Eighth Amendment extend to a corporation is an open question that remains unaddressed by this Circuit or the Supreme Court."), *aff'd sub nom. United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011) ("Our analysis assumes, but does not hold, that the Eighth Amendment applies to corporations. The Supreme Court has never held that this amendment applies to corporations.").[7]

¶ 57 But despite these cases, we decline to reach the as-applied Eighth Amendment question by the expedient of assuming without deciding the preliminary constitutional question of whether Dami is entitled to constitutional protection against excessive fines. Doing so would be contrary to the doctrine of constitutional avoidance. *Cf. Allen*, 442 U.S. at 154; *Montour*, 157 P.3d at 503-04. For the

[7] Other courts have ignored the question altogether. *See United States v. Bucuvalas*, 970 F.2d 937, 946 (1st Cir. 1992) ("We bypass the unresolved question whether a corporation may assert an Eighth Amendment claim."), *abrogated on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000).

following reasons, we conclude that despite Dami's corporate status, it enjoys the Eighth Amendment's protection.

¶ 58 Other divisions of this court that have examined the constitutionality of fines imposed against corporate entities are silent on this issue. *See Associated Bus. Prods.*, 126 P.3d at 325-27; *Boulder Cty. Apartment Ass'n*, 97 P.3d at 337-38. The opinions do not indicate whether the issue was raised. But since these cases were decided, the Supreme Court has extended other constitutional protections to corporations. This tidal shift in constitutional law leads us to resolve the issue for Dami.

¶ 59 In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court extended First Amendment protection for political speech to corporations. *Id.* at 342-43. The Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Declining to follow prior precedent that had permitted limitations on corporate speech, *Citizens United* held that "the Government may not suppress political speech on the

basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 365.

¶ 60 Like the First Amendment, the Second Amendment, and the Fourth Amendment, the wording of the Eighth Amendment is not restricted to "natural persons." *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 761 (N.D. Ill. 2015) (corporations may assert both First and Fourth Amendment challenges); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 428 (W.D. Pa. 2013) ("[A] for-profit, secular corporation has standing to assert the religious exercise claims of its owners in certain circumstances . . . .").

¶ 61 In sum, we are unable to discern a reason for limiting the Eighth Amendment protection against excessive fines to natural persons. After all, such fines adversely impact both corporations and natural persons, and the financial condition of some persons may be stronger than that of some corporations. Nor does the division present one. Thus, we conclude that Dami's status as a corporation does not deprive it of Eighth Amendment protection.

3. Director's Discretion

¶ 62 In his supplemental order, the Director assumed that section 8-43-409 and Rule 3-6 require a formulaic calculation of any fine. Notwithstanding Dami's claimed inability to pay such a large fine, the Director concluded that neither the statute nor the rule permitted consideration of an employer's economic situation and that fines imposed under the statute and rule were "not discretionary."

¶ 63 The Panel rejected the Director's view in part. In its final order, the Panel observed that Rule 3-6 mandates that fines "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*." (Emphasis added.) Embracing this language, the Panel held that Rule 3-6 grants the Director authority to modify a fine which would otherwise be "calculated solely on the basis of the number of days involved."

¶ 64 In its brief, the division acknowledges but does not contest the Panel's interpretation. Instead, the division argues that the Director used his discretion "to determine which factor to prioritize"

and to consider "mitigating and aggravating factors" before reimposing Dami's fine in the supplemental order.

¶ 65 We give "due deference to the interpretation of the statute adopted by the Panel as the agency charged with its enforcement." *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 273 (Colo. App. 2005). In general, "an administrative agency's interpretation of its own regulations is generally entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with such regulations." *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002). "The Panel's interpretation will therefore be set aside only 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 37 (quoting *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998)).

¶ 66 We conclude that the Panel's interpretation of the regulatory language is reasonable. *See id.*; *Support, Inc.*, 968 P.2d at 175. Thus, the Director can modify a penalty under section 8-43-409 and Rule 3-6, although no reason for doing so is identified in the rule or was addressed by the Panel.

¶ 67 At the same time, we disagree that Rule 3-6 adequately incorporates the three factors articulated in *Associated Business Products*. On remand, the Director concluded — and the Panel agreed — that Rule 3-6 sufficiently incorporated these factors. He explained as follows:

- as to the first factor, Rule 3-6 reflects reprehensibility because the fine increases for a second violation;
- as to the second factor, because the risk to employees increases the longer an employer is without insurance, the rule recognizes the potential magnitude of the harm by increasing the amount of the fine based on how long an employer remains uninsured; and
- as to the third factor, by providing a uniform formula for fining all noncomplaint employers, the rule assures uniformity in its application while penalizing employers with longer periods of noncoverage more heavily.

(Those factors are discussed fully in the following subsection of this opinion.)

¶ 68 But these observations go only so far. For example, an employer's reasons for a second lapse of coverage may affect its

reprehensibility. The duration of that lapse will often be determined by how much time passes between the lapse beginning and notice of noncompliance from the division. And this timing dimension — not addressed in either the statute or any regulation that has been called to our attention — could erode uniformity.[8]

¶ 69 As addressed in the following subsection, to pass constitutional muster the factors that the Panel ordered the Director to consider must be applied on a case-by-case basis, with due consideration given to each employer's unique situation. For this reason, we reject the Director's and the Panel's contrary interpretations. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001) (rejecting doctrine of agency deference "[w]here an administrative interpretation of a statute would raise serious constitutional problems").[9]

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[8] Disuniformity is not the only potential problem resulting from the absence of a statutory or regulatory limitation of fines based on the failure to afford an employer prompt notice of noncompliance. Lack of such a limitation also invites future disputes over excessive fines.

[9] The Panel's interpretation also suffers from lack of consistency. If Rule 3-6 already and adequately encompasses the *Associated Business Products* factors, as the Panel ultimately held after remand, then the Panel had no reason to remand to the Director for him to consider those factors. *See, e.g.*, *Turney v. Civil Serv. Comm'n*, 222 P.3d 343, 352 (Colo. App. 2009) ("Although courts

¶ 70 With these conclusions in mind, we turn to the propriety and proportionality of the fine imposed on Dami.

4. Applying the *Associated Business Products* Factors in Weighing Whether a Fine Is Grossly Disproportionate and Thus Constitutionally Excessive

¶ 71 Because the constitutional line demarcating an excessive fine is "inherently imprecise" and "not marked by a mathematical formula," determining whether a fine is "grossly disproportionate" can be difficult. *Associated Bus. Prods.*, 126 P.3d at 326 (first quoting *Cooper Indus.*, 532 U.S. at 425; then quoting *Toth*, 924 P.2d at 1100). But cases addressing the constitutional limitations on punitive damages awards — from which the three *Associated Business Products* factors evolved — provide context for doing so.

¶ 72 In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 580, 583 (1996), the Supreme Court first articulated factors that should be considered when weighing the "reasonableness of a punitive damages award." In deciding whether the constitutional line for an excessive fine "has been crossed," the Court later condensed these factors by instructing lower courts to "focus[] on the same three

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extend deference to an agency's interpretation of its own rules, they are not bound by it, particularly where the agency's interpretation is not uniform or consistent.").

criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Cooper Indus.*, 532 U.S. at 425.

¶ 73 Although *Gore* and *Cooper* addressed only punitive damages, the factors have been more broadly applied. As pertinent here, a statutory damage award could be "devastatingly large . . . out of all reasonable proportion to the actual harm suffered," which could be a "sufficiently serious case [that] the due process clause might be invoked." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *see also St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (Although states have wide latitude in setting penalties for statutory violations, states cannot impose penalties "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."). Not surprisingly, *Associated Business Products*, 126 P.3d at 326, adopted the *Gore* factors and applied them to statutory penalties and civil fines.[10]

[10] *Associated Business Products*, 126 P.3d at 326, quoted the recitation of the factors in *Cooper Industries*, 532 U.S. at 425;

¶ 74 Dami asserts that the Director did not adequately apply these factors in his supplemental decision. True, the Director discussed the factors in his order on remand, although only after having been directed to do so by the Panel. But recall the Director determined that because the factors were incorporated into section 8-43-409 and Rule 3-6, no further fact-specific analysis was required. In our view, this approach sells the necessary constitutional inquiry short.

¶ 75 When the *Gore*/*Cooper Industries* analysis has been applied by divisions of this court and by courts in other jurisdictions, the factors were examined in the context of the fined party's actual behavior. No less is required here.

¶ 76 Consider *Associated Business Products*, 126 P.3d at 324, where an employer and its insurer were fined $24,900 for delaying or failing to pay $107.79 in medical bills incurred by an injured worker. A division of this court upheld the fine. In applying the *Gore* factors, it noted that the employer's and its insurer's actions met the reprehensibility factor because they had (1) previously been fined for failing to pay bills; (2) showed a pattern of delaying

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Cooper Industries summarized and compiled the factors articulated in *Gore*, 517 U.S. at 575, 580, 583.

payment of the worker's bills; (3) failed to adhere to orders requiring them to pay for attendant care services, medical supplies, and prescriptions; and (4) disobeyed an order requiring them to identify the claims adjuster handling the file and provide a complete copy of the claims file and payment records. *Id.* at 326. The division went on to compare the fine to the range of penalties allowed under the statute and found it to be "well below the maximum" daily fine. *Id.* at 327.

¶ 77 Next consider *Blood*, 252 P.3d at 1094, where the Colorado Supreme Court applied the *Gore* factors to decide whether an $18 million punitive damages award assessed against Qwest was "excessive and disproportionate." A jury had awarded the punitive damages to a lineman who suffered grave injuries when the pole he was climbing — owned by Qwest — collapsed and fell to the ground. The court examined Qwest's behavior de novo. It noted that Qwest (1) lacked "a periodic pole inspection program," which demonstrated a "conscious indifference to the safety of linemen"; (2) had failed to implement such an inspection program for five decades; and (3) should have foreseen the plaintiff's injuries caused by the collapse of a pole due to rot as the natural result of never inspecting its

poles. *Id.* at 1095-97. Based on these particular facts, the court affirmed the award.

¶ 78 Similarly, courts in other jurisdictions have applied the *Gore*/*Cooper Industries* factors using a fact-specific analysis. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1065-73 (10th Cir. 2016) (reducing a punitive damages award against an apartment management company for tenant's carbon monoxide poisoning injuries on grounds that, under *Gore* factors, the amount was excessive when compared to other carbon monoxide poisoning cases); *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (rejecting a $5 billion punitive damages award against Exxon in part because "there was no violence, no intentional spilling of oil (as in a 'midnight dumping' case), and no executive trickery to hide or facilitate the spill"); *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463, 475-81 (Cal. Ct. App. 2002) (upholding a civil penalty because it did not violate the *Gore* factors); *In re Marriage of Miller*, 860 N.E.2d 519, 523-24 (Ill. App. Ct. 2006) (comparing the $1,172,100 penalty imposed against an employer for failure to garnish the wages of an employee who owed child support against the maximum fine for the criminal offense of failing to pay

child support and concluding that the penalty was excessive), *rev'd*, 879 N.E.2d 292 (Ill. 2007) (reconsidering the factors in light of the evidence and reinstating the $1,172,100 penalty).

¶ 79 We consider these decisions well reasoned and apply them here. Thus, when Dami challenged the fine as constitutionally excessive, the Director should have weighed the facts specific to Dami. By failing to do so, the Director misapplied the law and abused his discretion. *See Patterson*, ¶ 6; *Heinicke*, 197 P.3d at 222.

¶ 80 Even so, could we set aside the Panel's final order upholding the fine unless the Director's failure to make a fact-specific inquiry harmed Dami? After all, as the Director recognized, the formula in Rule 3-6 gives limited voice to the *Gore* factors.

¶ 81 The record contains Dami's written assertions and Ms. Pak's affidavit.[11] In his supplemental order and order on remand, the

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[11] As indicated, Ms. Pak's affidavit explained that she relied on her insurance agent to obtain and maintain all necessary insurance coverages, but she asserted inability to pay the fine only in her separate letter to the division, which served as Dami's initial petition to review. Of course, appellate courts may only consider assertions that are supported by record evidence, *McCall v. Meyers*, 94 P.3d 1271, 1272 (Colo. App. 2004), and mere arguments of counsel must be disregarded. *Lucero v. People*, 166 Colo. 233, 237,

Director accepted these assertions as true. The division did not controvert any of this information before the Panel, nor does it do so on appeal. And "a legal conclusion drawn by the Panel from undisputed facts is a matter for the appellate court." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993). So, we apply the *Gore*/*Cooper Industries* factors to those undisputed facts as follows.

a. Reprehensibility

¶ 82 In a punitive damages case, our supreme court has adopted the Supreme Court's criteria for assessing reprehensibility:

> The [United States Supreme] Court has analyzed the *Gore* reprehensibility guidepost according to the following five criteria:
>
> > the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

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442 P.2d 820, 822 (1968). But exactly what must be included in such a petition to make a sufficient record is not resolved by statute, regulation, or case law.

> "The existence of any one of these [criterion] weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."

Blood, 252 P.3d at 1094-95 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

¶ 83 Dami said that it was unaware of the lapses of workers' compensation insurance. The Director found that Dami should have known about the lapses, but relied only on the prior violation in doing so. Instead, the uncontroverted evidence provided in Ms. Pak's affidavit indicates she trusted her insurance agent to maintain the necessary coverages. In turn, the agent agreed that Ms. Pak was likely confused, that she did not realize she lacked the insurance, and that he "did not tell" her Dami lacked workers' compensation insurance.

¶ 84 These facts put Dami at the low end of the reprehensibility scale. By any fair reading of *Blood*, Dami did not act with "indifference to or reckless disregard for the safety of others," nor did it act with intentional malice, trickery or deceit.

b. Disparity Between Actual or Potential Harm to Employees and the Fine

¶ 85 Dami submitted its unemployment records showing that it had fewer than ten employees and its annual payroll was less than $50,000. Dami also said that a workers' compensation claim has never been filed against it. The division could easily have controverted the latter statement, but has not done so. This information is significant in two ways.

¶ 86 First, because no claims have been filed against Dami, the lack of workers' compensation insurance did not actually harm any of Dami's employees.

¶ 87 Second, as for potential harm, Dami has few employees. *Cf. Blood*, 252 P.3d at 1079, 1098 (noting that Qwest's failure to inspect any of its 157,000 poles for five decades endangered "linemen and the public"). And Dami's lengthy history with no reported claims also suggests that the risk of injury to those few employees is low.

¶ 88 Yes, as the Director observed, "an employer that continues to operate without insurance for a lengthy period of time creates an ever-growing risk that a worker will be injured and be forced to rely

solely on the employer to pay for the injury." Because the record does not include any evidence of particular risks arising from the nature of Dami's operations, however, this observation paints an incomplete picture. Of course, all employees working for an employer without workers' compensation coverage are at financial risk should an injury occur and the employer be unable or unwilling to compensate the injured worker. But the magnitude of that risk depends on the likelihood of severe or fatal injury.

¶ 89 As to that likelihood, the Director observed only that housekeeping and maintenance work involved potentially heavy lifting, which could lead to injury. But he did not refer to industry-specific data from Colorado. Nor have we found any.

¶ 90 To fill this void, we have taken judicial notice of federal government reports. *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 359 n.7 (Vt. 1994) ("The Court in *Nyquist* took judicial notice of enrollment data from publicly available government reports, exactly the type of information we have used here. *See Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 n. 23 (1973)."). According to the United States Department of Labor's most recent reports, the "leisure and

hospitality" industry ranks below the midpoint of other industries for incidence of nonfatal workplace injuries and well below that point for fatal injuries.[12]

c. Comparable Penalties

¶ 91 The record is barren of any evidence comparing Dami's fine against fines imposed on other uninsured employers. We cannot fault Dami for this void because it would lack access to such information. Nor has the division provided it.

¶ 92 Instead, Dami identifies a 2005 "State Fiscal Impact Statement" related to the amendment of section 8-43-409, which estimated that the total fines collected from all violators of the statute in 2006-2007 would be "$200,000." Further, Dami points out that the General Assembly anticipated the average fine would be $28,500, and that its fine exceeds this estimate by 2900%.[13]

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[12] The reports are released by the Bureau of Labor Statistics and can be found at Bureau of Labor Statistics, *Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2015* (Nov. 10, 2016), https://perma.cc/G4QQ-FM7V (nonfatal injuries); and Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Summary, 2015* (Dec. 16, 2016), https://perma.cc/Q7DF-XK7U (fatal injuries).

[13] Dami's brief refers to a January 18, 2005, "State Fiscal Impact Statement" and attaches a "Summary of Legislation under State Revenues." The Summary does not state from where it derived the

¶ 93 Even so, according to the Director, the fines imposed on different employers must be similar because all of them were imposed solely by applying the formula in Rule 3-6. This assertion, even if accurate, accounts for only one-half of the process. Although we have rejected Dami's vagueness argument, we agree that the more time that lapses before the division gives notice to an uninsured employer, the more the fine will have mounted. Due to this variable, significantly disparate fines could be imposed, despite the Director's formulaic approach.

5. Ability to Pay

¶ 94 Dami next argues that the Director should have considered its ability to pay before imposing the penalty. As indicated, the Director did not do so, asserting lack of statutory or regulatory authority.

¶ 95 No Colorado case that Dami has cited, or that we have found, requires that ability to pay be considered before imposing a civil fine. However, Colorado courts consider ability to pay before imposing criminal fines. *See, e.g.*, *People v. Stafford*, 93 P.3d 572,

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figures. In any event, the division does not contest the accuracy of this information.

574 (Colo. App. 2004) ("[A] sentencing court must consider the defendant's financial status in determining the appropriate amount of any fine to be levied."); *People v. Pourat*, 100 P.3d 503, 507 (Colo. App. 2004) ("[I]n imposing a fine, a trial court must consider a defendant's ability to pay.").

¶ 96 As well, the United States Supreme Court has held that a defendant's ability to pay must be considered before a monetary civil contempt sanction may be imposed. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) ("It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.").

¶ 97 Other states have required that ability to pay be considered before imposing a civil penalty. *See Parisi v. Broward Cty.*, 769 So. 2d 359, 366 (Fla. 2000) ("[I]n imposing both criminal fines or coercive civil contempt fines, the court must consider the financial resources of the contemnor in setting the amount of the fine.").

¶ 98 In a case remarkably similar to this one, the Minnesota Court of Appeals listed ability to pay as one of the factors to be considered before a fine could be imposed against an employer for failing to carry workers' compensation insurance. *See State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 555 N.W.2d 908, 913 (Minn. Ct. App. 1996) (citing *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896-97 (Minn. Ct. App. 1992)), *modified*, 558 N.W.2d 480 (Minn. 1997). *Wintz Parcel Drivers* upheld a penalty against a trucking firm in excess of $1.2 million for failure to carry workers' compensation insurance. Although the opinion does not say how many employees Wintz had or describe its financial status, the court mentions that Wintz's workers' compensation insurance premium for the uncovered period would likely have been over $1 million. *Id.*[14]

¶ 99 Guided by these authorities, we conclude that ability to pay should be considered when determining whether a penalty imposed against an employer for failure to carry workers' compensation insurance is constitutionally excessive.

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[14] The record does not contain any comparable information for Dami.

¶ 100 Ms. Pak's letter asserted that Dami cannot afford to pay a fine of $841,200, which would put it — and her — into bankruptcy. The record does not include any contrary information. Nor does the division argue otherwise.

¶ 101 Thus, although the Director did not exercise his statutory power to seek a cease and desist order putting Dami out of business, which Dami could have opposed, the fine indirectly achieved this result. Still, the record does not fully describe Dami's financial condition, such as its net worth. For this reason, we are unable to say whether Dami could pay a reduced fine.

¶ 102 Based on all of these facts, we conclude that the present record shows the $841,200 fine to be excessive. In saying this much, however, we take care to emphasize what we are not saying — that a lower fine against Dami would necessarily also fail a constitutional challenge. To the contrary, the constitutionality of such a fine can be addressed only when that fine has been imposed and any additional record is before us.

IV. Incorporating Provisions of Section 8-43-304 into Section 8-43-409

¶ 103 Dami next contests the fine by contending that provisions of section 8-43-304, C.R.S. 2016, must be read into section 8-43-409. In particular, Dami focuses on provisions in section 8-43-304 that (1) grant a violator twenty days to cure a violation and thus avoid a penalty, § 8-43-304(4); (2) require a party charging an opponent with a violation to prove by clear and convincing evidence that the violation occurred, § 8-43-304(4); and (3) mandate that a party alleging a violation file a claim within one year of when it knew or reasonably should have known of the alleged violation, § 8-43-304(5).

¶ 104 Based on these provisions, Dami argues that the fine must be set aside because (1) it cured its failure to carry workers' compensation insurance within twenty days; (2) the division did not prove Dami's violation by clear and convincing evidence; and (3) the division did not file its notice of violation within one year of when Dami's violation should reasonably have been discovered. But Dami's conclusion fails because its premise that the provisions of section 8-43-304 must be read into section 8-43-409 is flawed.

¶ 105 As with any statute, the provisions of the Act must be read "harmoniously, reconciling conflicts where necessary." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 327 (Colo. 2004). But that general principle does not give a reviewing court license to read provisions from one statute into a different statute. To the contrary, courts are expressly prohibited from reading provisions into the Act. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) ("We have uniformly held that a court should not read nonexistent provisions into the Colorado Workmen's Compensation Act.").

¶ 106 Relying on *Holliday v. Bestop, Inc.*, 23 P.3d 700, 705 (Colo. 2001), Dami argues that nothing in section 8-43-304 prohibits its provisions from being read into section 8-43-409. Then Dami insists that because the limiting phrase in section 8-43-304 — "for which no penalty has been specifically provided" — only applies to one of the four different acts giving rise to penalties under that statute, the other three types of actions leading to penalties may be read broadly and into section 8-43-409.

¶ 107 *Holliday* held as follows:

> The legislature's use of the disjunctive conjunction "or" in section 8-43-304(1) plainly demarcates four different acts giving rise to penalties. The legislature's use of "or" makes clear that the statute penalizes the person who: (1) "violates any provision of [the Workers' Compensation Act]," (2) "does any act prohibited thereby," (3) "fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided," or (4) "fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles."

23 P.3d at 705 (citation omitted) (quoting § 8-43-304(1)).

¶ 108 Thus, *Holliday* does not carry the weight that Dami places on its shoulders. Had the General Assembly intended to incorporate a cure provision, a limitation period, or a clear and convincing burden of proof into section 8-43-409, it would have done so expressly. Because it did not, we are not free to do so by judicial fiat. *See City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 954-55 (Colo. App. 2006) ("If [the General Assembly] intended to limit death benefits where the death results from mental impairment, we conclude it would have done so expressly.").

¶ 109 For these reasons, we decline to incorporate the provisions of section 8-43-304 into section 8-43-409. Therefore, the Director was

not obligated to credit Dami for curing the violation, was not required to prove by clear and convincing evidence that Dami violated section 8-43-409, and did not have to file notice of Dami's violation within one year of Dami's lapse.

V. Conclusion

¶ 110 The fine must be set aside because the Director abused his discretion when he failed to apply the *Associated Business Products* factors — derived from *Gore* and *Cooper Industries* — to Dami's specific circumstances. Facts relevant to that application include Dami's ignorance that the required insurance had lapsed. While not mandated by *Gore*, the failure to notify Dami of the lapse for almost half a decade and Dami's ability to pay are also relevant. On remand, the fine may be recalculated, but only after these facts have been weighed.

¶ 111 We conclude that Dami's other contentions — challenging the facial constitutionality of section 8-43-409, seeking to incorporate the provisions of section 8-43-304 into section 8-43-409, and alleging procedural due process violations — do not provide a basis for setting aside the Panel's final order affirming the Director's remand order.

¶ 112 The Panel's order is set aside and the case is remanded to the Panel with directions to return it to the Director for recalculation of Dami's fine in accordance with this opinion.

JUDGE DUNN and JUDGE DAVIDSON concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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COLORADO COURT OF APPEALS

DATE FILED: February 16, 2017
CASE NUMBER: 2016CA1037

Court of Appeals No. 16CA1037
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-962-974

Evergreen Caissons, Inc.; Jose E. Balquier, decedent; and Travelers Indemnity Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado; Jennifer M. Munoz Botello; and Jose E. Balquier Munoz,

Respondents.

APPEAL DISMISSED

Division VI
Opinion by JUDGE FOX
Román and Booras, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 16, 2017

Ray Lego & Associates, Jonathan Robbins, Gregory Plank, Greenwood Village, Colorado, for Petitioners

No Appearance for Respondents

¶ 1 In this workers' compensation proceeding, Evergreen Caissons, Inc. and its insurer, Travelers Indemnity Co. (collectively, employer), appeal an order of the Industrial Claim Appeals Office (Panel). Because the Panel's order is not final and appealable, we dismiss the appeal without prejudice.

I. Background

¶ 2 Jose E. Balquier (decedent) worked for employer as a driver and laborer. He died as a result of injuries arising out of and in the course of his employment. Employer admitted that decedent's minor child was entitled to dependent death benefits. But employer contested whether Jennifer M. Munoz Botello (claimant) was decedent's surviving spouse and therefore also entitled to such benefits.

¶ 3 After a hearing, an administrative law judge (ALJ) issued a written order, determining that claimant was decedent's common law spouse and therefore his dependent. The ALJ directed the parties to "set a hearing to determine the remaining issues including allocation of death benefits between the dependents."

¶ 4 Employer petitioned the Panel to review the ALJ's order. The Panel dismissed the petition for review without prejudice. In

particular, the Panel found that (1) the hearing was limited to a determination of whether claimant was decedent's dependent and (2) the ALJ's order specifically instructed the parties to schedule another hearing to determine the allocation of benefits between the dependents. Thus, the Panel concluded, the ALJ's order did not award death benefits to claimant and was therefore not final.

¶ 5 Employer appeals.

II. Discussion

¶ 6 Employer contends that the Panel erred in concluding that the ALJ's order was not final. We disagree.

¶ 7 Section 8-43-301(2), C.R.S. 2016, permits a party dissatisfied with an ALJ's final order to petition the Panel for review. *Jefferson Cty. Pub. Sch. v. Indus. Claim Appeals Office*, 181 P.3d 1199, 1200 (Colo. App. 2008). To be final, an order must grant or deny benefits or penalties. *Ortiz v. Indus. Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003). And to avoid piecemeal litigation, if benefits or penalties are granted, the ALJ must determine their amount before the ruling is final for purposes of review. *See UPS, Inc. v. Indus. Claim Appeals Office*, 988 P.2d 1146, 1147 (Colo. App. 1999); *cf. Ball Corp. v. Loran*, 42 Colo. App. 501, 596 P.2d 412

(1979) (an order that determines a party's liability but defers for future consideration the question of damages is not a final appealable order).

¶ 8 At the outset of the hearing, the ALJ stated that the only issue for his determination was whether claimant qualified as decedent's dependent. The ALJ's order was likewise limited to that issue. The order determined that "[c]laimant is [d]ecedent's dependent" within the meaning of the relevant statute, but reserved for future determination all "[i]ssues not resolved by this order," including the allocation of death benefits between the dependents and the proper safeguarding and disposition of the minor child's benefits. Because the ALJ's order did not specifically award death benefits to the claimant, we agree with the Panel that it was not final and therefore not reviewable.

¶ 9 The ALJ's order did not expressly grant or deny any benefits, but merely determined claimant's status as a dependent.[1] And

[1] We note that employer relied on *Trujillo v. Indus. Claim Appeals Office*, (Colo. App. No. 15CA1238, June 23, 2016) (not published pursuant to C.A.R. 35(e)), in support of an argument that the ALJ's order had the effect of awarding death benefits to claimant. *Trujillo* is an unpublished decision of this court, however, and has no

because the ALJ reserved the issue of allocation of the death benefits, which is a discretionary matter, we cannot conclude that, under the circumstances here, the ALJ's dependency determination had the effect of granting a specific amount of benefits. *See* § 8-42-121, C.R.S. 2016 (death benefits are to be apportioned in a just and equitable manner, and there is no presumption that an equal distribution is the most equitable); *see also Spoo v. Spoo*, 145 Colo. 268, 271, 358 P.2d 870, 871 (1961). Thus, the ALJ's order was not final and the Panel did not err in so concluding. *See UPS*, 988 P.2d at 1147.

III. Conclusion

¶ 10 For the same reasons the ALJ's order was not final, neither was the Panel's order final. *See* § 8-43-307(1), C.R.S. 2016; *Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d 448, 449 (Colo. App. 2008). Accordingly, the appeal is dismissed without prejudice.

JUDGE ROMÁN and JUDGE BOORAS concur.

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precedential value. *See Welby Gardens v. Adams Cty. Bd. of Equalization*, 71 P.3d 992, 999 (Colo. 2003).

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

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BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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COLORADO COURT OF APPEALS

DATE FILED: March 2, 2017
CASE NUMBER: 2016CA1036

Court of Appeals No. 16CA1036
Industrial Claim Appeals Office of the State of Colorado
WC No. 495-427-104

Brian Josue,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Anheuser-Busch, Inc.; and ACE American Insurance Company,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE FREYRE
Hawthorne and Ashby, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 2, 2017

Law Office of O'Toole & Sbarbaro, P.C., Neil D. O'Toole, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Lee + Kinder, LLC, Kelsey R. Bowers, Tiffany S. Kinder, Denver, Colorado, for Respondents Anheuser-Busch, Inc. and Ace American Insurance Company

¶ 1 In this workers' compensation action, claimant, Brian Josue, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the decision of an administrative law judge (ALJ) ordering him to pay back an overpayment. We affirm.

I. Background

¶ 2 Claimant is employed by Anheuser-Busch, Inc. (employer). In March 2014, he sustained an admitted, work-related injury to his left knee. Employer sent claimant to an authorized treating provider (ATP) for medical care. However, conservative care — consisting mostly of physical therapy — did not substantially decrease claimant's knee pain. He was eventually diagnosed with "sartorius tendinosis . . . a kind of degeneration and inflammation" of the tendon.

¶ 3 Nearly a year after the incident, the ATP referred claimant to another physician who specializes in sports medicine for treatment and evaluation. On February 18, 2015, that physician injected claimant's left knee with platelet rich plasma (PRP). He ordered claimant to be off work for four to six weeks after the procedure.

¶ 4 A claims examiner who was adjusting claimant's claim filed a general admission of liability (GAL) indicating claimant would

receive temporary total disability (TTD) benefits commencing February 18, 2015. However, the adjuster did not learn about the PRP injection until February 23, 2015, five days after the injection, when she received a medical report describing the treatment. She testified that she did not receive a request for prior authorization for the procedure before it was performed. Employer and its insurer petitioned to modify, terminate, or suspend claimant's TTD benefits effective the date of the procedure because "pre-authorization for this injection was not requested by the ATP, and no authorization for [the] procedure was given."

¶ 5 Claimant objected to the petition, a hearing was held in early July 2015, and the ALJ determined that because prior authorization for the PRP injection was not obtained, claimant was not entitled to the treatment or the resulting TTD. In a summary order dated September 23, 2015, the ALJ granted employer's petition "to modify, terminate, or suspend TTD benefits beginning February 18, 2015," and permitted employer to file an amended GAL which "terminat[ed] TTD benefits as of the date of the PRP injection and reinstate[d] [temporary partial disability (TPD)] benefits from February 18, 2015, until terminated by law." It is

undisputed that claimant did not seek review of this order and it therefore became final and unappealable.

¶ 6 Later, employer filed a final admission of liability (FAL) claiming an overpayment in excess of $17,000 for the TTD benefits it had paid to claimant. Claimant asked for a hearing, asserting that "there is no overpayment as benefits were due when paid."

¶ 7 Employer requested summary judgment, arguing that, because the ALJ found claimant not to be entitled to TTD benefits, it was "entitled to this overpayment as a matter of law." But, employer lessened the overpayment amount to just over $16,000 after recalculating the TPD benefits it owed claimant. A different ALJ agreed and granted employer's motion. That ALJ ordered claimant "to repay the overpayment in this case of $16,222.32." The Panel affirmed this order, rejecting claimant's argument that he should not have to repay funds that he was statutorily entitled to receive when he received them.

II. Issue Preclusion

¶ 8 Employer contends that issue preclusion bars claimant's challenge to its entitlement to an overpayment. It argues that the question of whether it is entitled to recoup an overpayment invokes

identical facts and law as the previously answered question of whether claimant was entitled to TTD. In other words, employer contends that the overpayment issue was resolved by the first ALJ's TTD order, and that claimant cannot now separately litigate that issue. We conclude that employer's contention is not preserved for our review.

¶ 9 Employer raised this issue to the Panel in its brief in opposition to claimant's petition to review, but, contrary to claimant's counsel's statement at oral argument, employer did *not* raise issue preclusion in its motion for summary judgment before the ALJ. And, the Panel did not address employer's issue preclusion argument at all. The failure to raise an issue before the ALJ renders an issue unpreserved. *See City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997) ("Petitioners did not raise this specific argument before the ALJ and it was only raised before the Panel in petitioners' reply brief, which was stricken from the record by the ALJ." The argument therefore was not addressed on appeal.). Here, because employer did not raise issue preclusion in its motion for summary judgment, the issue is not preserved for appellate review and we will not address it.

III. Entitlement to Overpayment

¶ 10 Claimant raises two primary arguments on appeal. He argues that (1) under the applicable statutory definition, no overpayment occurred because the benefits were statutorily due and owing when they were paid; and (2) requiring him to repay the overpayment violates the beneficent purposes of the Workers' Compensation Act (Act) as well as public policy. We are not persuaded by either of these arguments to set aside the Panel's decision.

A. Standard of Review

¶ 11 "[S]ummary judgment may be sought in a workers' compensation proceeding before the ALJ." *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 232 (Colo. App. 2007). Under the Office of Administrative Courts Rule 17, a party may move "for summary judgment seeking resolution of any endorsed issue for hearing." Dep't of Pers. & Admin. Reg. 17, 1 Code Colo. Regs. 104-3. Like a motion for summary judgment pursued under C.R.C.P. 56, summary judgment may be granted in a workers' compensation case if "there is no disputed issue of material fact and . . . the party is entitled to judgment as a matter of law." *Id.*; *see also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800, 802

(Colo. App. 1988) (noting that the Colorado Rules of Civil Procedure apply to workers' compensation proceedings unless inconsistent or in conflict with the procedures and practices followed under the Act).

¶ 12 We review an ALJ's legal conclusions on summary judgment de novo. *See A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 865 (Colo. 2005). But, we may only set aside an ALJ's factual findings if they are unsupported by substantial evidence in the record. § 8-43-308, C.R.S. 2016.

> We must therefore accept the ALJ's statements of undisputed facts . . . if substantial evidence in the record supports that statement of facts, but we must set aside the grant of summary judgment in an employer's favor if we determine that conflicts in the evidence are not resolved in the record or the order is not supported by applicable law.

Fera, 169 P.3d at 233.

B. Statutory Entitlement to Benefits and an Overpayment

¶ 13 The Act defines an overpayment as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable

> under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

§ 8-40-201(15.5), C.R.S. 2016. Claimant argues that because employer's GAL admitted he was entitled to TTD after the PRP injection, those benefits were due and owing when paid; he was therefore "entitled to receive" them, and they do not constitute an overpayment within the meaning of section 8-40-201(15.5).

¶ 14 But, claimant's reading of the statutory definition ignores the second sentence of the subsection. By including a provision in the statute specifying that an overpayment may become due even if that overpayment did *not* "exist at the time the claimant received disability or death benefits," the legislature anticipated that overpayments may result from a later finding that a claimant was not entitled to the benefits he or she received. "In interpreting a comprehensive legislative scheme, we must construe the statutory provisions to further the intent of the General Assembly. A comprehensive regulatory scheme such as the Act must also be construed as a whole to give effect and meaning to all its parts." *Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005)

(citation omitted). Because we must give effect to all provisions of the Act, we cannot ignore this sentence, as claimant would have us do.

¶ 15 Looking at the Act as a whole, it is apparent, in our view, that the legislature intended employers to recoup overpayments even though those payments were due and owing when paid. Indeed, the Act expressly permits an employer to seek to reopen a closed claim to recover an overpayment. § 8-43-303(1), C.R.S. 2016. Nowhere does the Act expressly exclude from overpayments funds that may have been due and owing when paid but were later found to be improperly received. We are not at liberty to read provisions into the Act and decline to do so here. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) ("We have uniformly held that a court should not read nonexistent provisions into the . . . Act."); *Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 16.

¶ 16 The Panel has also interpreted the Act to allow employers to seek repayment of disability benefits that were due when paid. Specifically, the rules adopted by the Panel and the division admonish parties and ALJs to "expedite" hearings addressing suspension, modification, or termination of temporary disability

benefits "because overpayment of benefits may result if the suspension, modification or termination is granted." Dep't of Labor & Emp't Reg. 6-4(D), 7 Code Colo. Regs. 1101-3. This language unambiguously anticipates a claimant may have to pay back moneys he or she received if it is later determined that the claimant was not entitled to those funds.

¶ 17 "Since the Panel is charged with interpreting the statutes and regulations governing the Division of Workers' Compensation, we defer to the Panel's 'reasonable interpretations' of its own regulations, and only set aside the Panel's interpretation 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 31 (quoting *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 37). The Panel's interpretation concerning recoupment of overpayments is consistent with the legislative intent and we therefore find no reason to stray from it.

¶ 18 Despite this plain language, claimant maintains that case law mandates that he keep the TTD he has been paid. He argues that a division of this court has rejected an employer's bid to recoup an overpayment which was due when paid. *See Rocky Mountain*

Cardiology v. Indus. Claim Appeals Office, 94 P.3d 1182, 1184 (Colo. App. 2004) ("Once an employer admits liability, it is bound by that admission and must pay benefits accordingly."). It is true that unless one of the statutory conditions enumerated in section 8-42-105(3), C.R.S. 2016, is met, benefits made under an admission must be paid until an ALJ orders that the benefits cease. But, claimant's reliance on *Rocky Mountain Cardiology* is misplaced because it ignores a key procedural difference between that case and claimant's situation. In *Rocky Mountain Cardiology*, the division rejected the employer's request to recover a disability overpayment because the employer never properly sought to stop those payments. Unlike employer here, the employer in *Rocky Mountain Cardiology* "did not file an amended admission to terminate temporary disability benefits on the basis that it contested causation or that claimant had reached maximum medical improvement" nor did it petition the division to terminate, suspend, or modify its admission. *Id.* at 1185. The employer's failure to follow that procedural step stymied its attempt to cease disability payments.

¶ 19 Claimant also cites to *Cooper v. Industrial Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005), to support his position. In *Cooper*, an injured worker passed away shortly after receiving a settlement for her workers' compensation claim. The insurer attempted to recoup the payment from the worker's estate. A division of this court held that once the lump sum settlement payment had been made, it became a vested right. *Id.* at 1059. But, *Cooper* also cautioned that its holding was narrow, applying only to those situations in which a deceased worker had received "a lump sum payment that was calculated to compensate future costs and needs," but "in no way forecloses an employer's right to recover, as 'overpayments,' portions of lump sums which are awarded on the basis of mathematical miscalculations or which are shown to be subject to specific statutory offsets." *Id.* at 1060. Thus, *Cooper*, too, fails to support claimant's position.

¶ 20 Finally, claimant relies on *United Airlines v. Industrial Claim Appeals Office*, 2013 COA 48, ¶ 35, for the proposition that "requiring a claimant to pay back benefits to which the claimant was entitled — and presumably needed — could create a hardship at odds with the beneficent purpose of the Act." As with *Cooper* and

Rocky Mountain Cardiology, though, *United Airlines* does not provide claimant with foundation to support his contention. Rather, *United Airlines* is also fact-dependent and therefore distinguishable from the case currently before us. In *United Airlines*, the employer sought to recoup as an overpayment disability benefits it paid in excess of the statutory cap. Unlike claimant's situation here, though, the overpayment in *United Airlines* did not result from the claimant's receipt of benefits terminated by statute or order. Because the employer was obligated to continue paying benefits until terminated by operation of section 8-42-105(3), and nothing in the statutory cap required a worker to pay back amounts over the cap, the division held that the payment over the cap did not constitute an overpayment. *Id.* at ¶ 12. Here, in contrast, an ALJ found that claimant was *not* entitled to the disability benefits he received. Thus, the TTD payments claimant received fell within section 8-40-201(15.5)'s definition of "overpayment."

¶ 21 As employer points out, moreover, a division of this court has already permitted the retroactive repayment of an overpayment to an employer. *See Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, vacated in part*

sub nom. Benchmark/Elite, Inc. v. Simpson, 232 P.3d 777 (Colo. 2010). *Simpson* held that overpayments included "sums that are erroneously paid by an employer." *Id.* at 358. In concluding that the employer was entitled to recoup its overpayment, *Simpson* found that, unlike the claimant in *Rocky Mountain Cardiology*, the *Simpson* claimant had received moneys to which he was not entitled, and the employer and insurer were entitled to recover those funds even after an admission erroneously overcalculating the claimant's benefits had been filed. *Id.* at 361. Likewise, here, the fact that employer admitted TTD payments to claimant did not prohibit employer from later seeking to recover those funds after learning that claimant was not entitled to them.

¶ 22 Accordingly, we perceive no error in the Panel's determination that employer was entitled to an overpayment from claimant for the TTD benefits it paid him after the PRP injection.

C. Public Policy

¶ 23 Claimant also contends that requiring him to repay the overpayment violates both the Act's beneficent purpose and public policy. He argues that awarding employer an overpayment has the effect of "making an injured worker responsible for a subsequent

determination of medical authorization, or risk having to pay subsistence TTD benefits, subject to recoupment." He also asserts that he is essentially being punished for following his doctor's orders and should not be held accountable for a later determination that the doctor's actions were unauthorized. We are not persuaded.

¶ 24 The legislature declared its intent "that the [Act] be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." § 8-40-102(1), C.R.S. 2016. Colorado courts have repeatedly recognized this mandate and made clear that the Act must be liberally construed in favor of injured workers. *See City of Brighton v. Rodriguez*, 2014 CO 7, ¶ 13; *see also Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 398 (Colo. 2010) ("To effectuate its remedial and beneficent purposes, we must liberally construe the Act in favor of the injured employee."); *Williams v. Kunau*, 147 P.3d 33, 38 (Colo. 2006) ("The Act is remedial and beneficent in purpose and should be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families.").

¶ 25 But, that mandate does not give courts license to disregard the plain meaning of a statute. As addressed above, the legislature intended employers to recoup overpayments and anticipated that in some circumstances those overpayments would arise from benefits that may have been due and owing when paid. *See* § 8-4-201(15.5). The Panel echoed this interpretation. *See* Dep't of Labor & Emp't Reg. 6-4(D), 7 Code Colo. Regs. 1101-3.

¶ 26 Moreover, claimant's public policy argument paints an incomplete picture of benefits payments. Claimant essentially contends that requiring claimants to pay back funds to which they are later found to be unentitled places an undue financial burden on claimants. Although we do not disagree that paying back benefits can be difficult for claimants, we note that the alternative — obtaining an order on contested claims before payments are made in order to avoid an overpayment — would likely impose an even greater burden on claimants. As employer points out, if employers are unable to recoup benefits later found to be improper, "they would be less willing to grant benefits in the first instance without thorough investigation and litigation." Such circumstances could leave disabled claimants with no income while they wait for

resolution of any challenges to their benefits. Conversely, if employers have no means to recoup overpayments, claimants could be emboldened to delay litigation or resolution in order to continue receiving benefits they know an employer will not be able to recoup. Neither of these scenarios conforms with the legislative purposes of the Act. *See* § 8-40-102.

¶ 27 Finally, at oral argument claimant suggested that section 8-42-101, C.R.S. 2016, may provide an avenue for a claimant to recover overpayments from a physician who performed an unauthorized procedure. Section 8-42-101(4) provides that once an employer is found to be liable for medical benefits, "a medical provider shall under no circumstances seek to recover such costs or fees from the employee." But, the physician who performed claimant's injection is not attempting to recover funds from him — employer is — and, as we read the statute, it provides no means for a claimant to recover overpaid funds from a physician, even if that physician erred. Indeed, we know of no provision in the Act, and claimant has not pointed to any other, that permits such recovery.

¶ 28 Although we recognize that this result is particularly harsh for injured workers such as claimant — who simply followed his

doctors' instructions and treatment plan and relied on his physicians to obtain any necessary insurance authorizations — we conclude that the Act mandates this outcome. Under the Act, an employer may recoup funds it paid to a claimant who was not entitled to receive them, such as the TTD payments mistakenly paid to claimant for an unauthorized procedure, even if employer began paying the benefits pursuant to a valid admission.

¶ 29 We therefore conclude that requiring claimant to repay employer does not violate public policy or the Act's "beneficent purposes."

IV. Conclusion

¶ 30 The order is affirmed.

JUDGE HAWTHORNE and JUDGE ASHBY concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* *http://www.cba.cobar.org/repository/Access%20to%20Justice/AppelateProBono/CBAAppProBonoProg_PublicInfoApp.pdf*

COLORADO COURT OF APPEALS **2017COA29**

Court of Appeals No. 15CA2039
Jefferson County District Court No. 14CV32279
Honorable Christopher J. Munch, Judge

City of Lakewood, Colorado,

Plaintiff-Appellant and Cross-Appellee,

v.

Safety National Casualty Corporation,

Defendant-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE HARRIS
Lichtenstein and Richman, JJ., concur

Announced March 9, 2017

Sherman & Howard, L.L.C., Christopher R. Mosley, Jennifer Kirk Morris, Denver, Colorado, for Plaintiff-Appellant and Cross-Appellee

Treece Alfrey Musat P.C., Paul E. Collins, Carol L. Thomson, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

¶ 1 The City of Lakewood (City) has an insurance policy that covers losses arising from the workers' compensation or employers' liability laws of any state on account of bodily injury to an employee.

¶ 2 After a City police officer was killed by friendly fire, his widow filed a lawsuit under 42 U.S.C. § 1983 (2012), alleging that the City and various fellow officers had violated the deceased officer's rights under the Federal Constitution. The City sought indemnification for its own defense costs and those of the officers named in the lawsuit, which the City has an independent statutory duty to cover. The insurance company, Safety National Casualty Corporation, denied coverage.

¶ 3 The district court concluded that a § 1983 claim does not arise under an employer liability law of any state and granted summary judgment for the insurance company. We agree. And while the district court did not reach the separate question of whether the officers' defense costs are covered by the policy, we conclude that they are not. Accordingly, we affirm the summary judgment in favor of the insurance company.

I. Background

¶ 4 The insurance company issued a "Specific Excess Workers' Compensation and Employers' Liability Insurance Agreement" to the City. The policy indemnified the City, as an employer, for "Loss sustained by the EMPLOYER because of liability imposed upon the EMPLOYER by the Workers' Compensation or Employers' Liability Laws of" Colorado or other states, "on account of bodily injury by accident" to "Employees of the EMPLOYER" engaged in job-related activities.

¶ 5 "Loss" included two categories of reimbursable costs. First, the City could recoup from the insurance company any "actual payments, less recoveries, legally made by the EMPLOYER to Employees and their dependents in satisfaction of: (a) statutory benefits, (b) settlements of suits and claims, and (c) awards and judgments." Second, the City could recoup its "Claim Expenses," which is defined as the City's own litigation expenses.

¶ 6 During the term of the policy, one of the City's police officers was accidentally shot and killed by a fellow officer while both were on duty. The slain officer's widow later filed a lawsuit under 42 U.S.C. § 1983, alleging that the fellow officer, two of his supervising

officers, and the City had violated her husband's federal constitutional rights by subjecting him to the unreasonable use of deadly force.

¶ 7 The City sought indemnification under the policy for the costs of its own defense and the defense of the individual officers. When the insurance company denied the claim, the City filed a declaratory judgment action.

¶ 8 On cross-motions for summary judgment, the district court reasoned that § 1983 did not qualify as an "employers' liability law" of the State of Colorado or any other state, and therefore it concluded that the policy did not cover the City's losses incurred in connection with its defense of the lawsuit. The court did not address the City's separate claim that it suffered additional losses because of liability imposed by sections 24-10-110 and 29-5-111, C.R.S. 2016, which require the City to cover defense costs for its peace officers.

II. Discussion

¶ 9 On appeal, the City contends that the district court erred in granting summary judgment to the insurance company because the

policy unambiguously covers all defense costs incurred by the City in connection with the § 1983 lawsuit.

A. Standard of Review and Principles of Interpretation

¶ 10 We review a trial court's decision granting summary judgment de novo. *Oasis Legal Fin. Grp., LLC v. Coffman*, 2015 CO 63, ¶ 30. Summary judgment is appropriate only if the pleadings and supporting documents demonstrate no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Laughman v. Girtakovskis*, 2015 COA 143, ¶ 8. The interpretation of an insurance policy presents a question of law and, therefore, is appropriate for summary judgment. *Mt. Hawley Ins. Co. v. Casson Duncan Constr., Inc.*, 2016 COA 164, ¶ 3.

¶ 11 An insurance policy is "merely a contract that courts should interpret in line with well-settled principles of contract interpretation." *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). Accordingly, words should be given their plain and ordinary meaning, unless contrary intent is evidenced in the policy. *Id.*; *see also Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990). Provisions of the policy should

be read as a whole, rather than in isolation. *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 239 (Colo. 1992).

B. Reimbursement of the City's Own Costs of Defense

¶ 12 There is no dispute that the City has suffered a loss as defined by the policy. A "Loss" for purposes of coverage includes the City's "Claim Expenses," defined as its own costs of defense. The question is whether the loss is a result of liability imposed on the City by "Employers' Liability Laws" of Colorado or "other State(s)."

¶ 13 The term "Employers' Liability Laws" is not defined in the policy. But courts and commentators generally agree that an employer liability policy is designed to cover an employer's liability to employees for work-related injuries that do not fall within the exclusive remedy provisions of workers' compensation statutes. *See, e.g.*, *TKK USA, Inc. v. Safety Nat'l Cas. Corp.*, 727 F.3d 782, 791 (7th Cir. 2013) (Employer liability insurance policies "fill 'gaps in workers' compensation law that sometimes allow an employee to sue his employer in tort, bypassing the limits on workers' compensation relief.'" (quoting *Hayes Lemmerz Int'l, Inc. v. Ace Am. Ins. Co.*, 619 F.3d 777, 779 (7th Cir. 2010))); *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 786 (Alaska 2015) (stating that employers'

liability insurance provides coverage for claims that do not come within workers' compensation statutes); 7B John Appleman, *Insurance Law and Practice* § 4571, at 2 (Walter F. Berdal ed., 1979) ("[W]orkers' compensation is routinely written in combination with an employer's liability policy to provide protection for those situations where [workers'] compensation may not apply and thus avoid a gap in protection because employee claims subject to workers' compensation law are generally excluded in other types of liability policies.").

¶ 14 The City argues that the § 1983 municipal liability claim must be covered by the employers' liability portion of the policy because it is a claim based on work-related injuries that falls outside the ambit of the workers' compensation laws. But this overstates the scope of the coverage under the policy.

¶ 15 An "employers' liability law" cannot mean *any* statutory or common law claim that might subject the employer to liability because of an employee's bodily injury. If the insurance company had intended to provide such broad coverage, it would not have restricted coverage to claims arising under workers' compensation or employers' liability laws; it would simply have agreed to

reimburse the City for any losses it became obligated to pay on account of bodily injury by accident to an employee. The City's construction reads any limitation out of the contract, a result we cannot endorse. In construing a contract, we must give effect to all of its words and provisions so that none are rendered meaningless. *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009).

¶ 16 But if not all claims for employees' injuries fall within the term "employers' liability laws," which claims does the policy cover? Applying the pertinent law, we conclude that employers' liability laws are workers' compensation-type claims: they include employee injury statutes that have displaced common law claims — occupational disease laws, for example — as well as employer liability-type common law tort claims that might fall outside the relevant statutes. *See TKK*, 727 F.3d at 788 (rejecting insurer's argument that "Employers' Liability Laws" included only statutes that displace the common law, and reading the term to include common law claims); *Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 553 S.E.2d 257, 262 (W. Va. 2001) (finding employers' liability policy covers an "action for common law damages" that is

not barred by workers' compensation laws). By the policy's plain terms, though, the common law claims must arise under the laws of Colorado or "other State(s)."

¶ 17 Thus, the City's claim for reimbursement of its costs incurred in defending the § 1983 lawsuit is covered only if § 1983 qualifies as a state "employers' liability law," meaning it is either a state statute that displaces an employee's common law claims for workplace injuries, or it constitutes a state common law claim related to, but falling outside, a workers' compensation scheme. We conclude that it is neither.

¶ 18 Section 1983 is not a workers' injury statute that displaces common law claims with a new cause of action. Indeed, the statute is not itself the source of *any* substantive rights, *Espinoza v. O'Dell*, 633 P.2d 455, 460 (Colo. 1981); rather, it serves as a statutory vehicle to provide remedies for the deprivation of rights granted by the Federal Constitution or by other federal laws. *Mosher v. City of Lakewood*, 807 P.2d 1235, 1238 (Colo. App. 1991).

¶ 19 Nor could § 1983 be construed as a "common law" claim. The statute allows a plaintiff to vindicate rights conferred under the Federal Constitution and federal statutes, not under the common

law. Assertion of a common law claim "is not only not required, it is not sufficient to state a claim under § 1983." *Meier v. McCoy*, 119 P.3d 519, 526 (Colo. App. 2004).

¶ 20 In any event, as the City acknowledges, § 1983 is not a law of Colorado or any other state. Still, it insists that fact is not an obstacle to coverage because federal laws are included in the policy's definition of "state" laws. We disagree.

¶ 21 Under the policy, "State" means "any state, territory, or possession of the United States of America and the District of Columbia." The City says that because the United States territories and the District of Columbia fall under the exclusive jurisdiction of the federal government, *see* U.S. Const. art. I, § 8, cl. 17 (Congress has exclusive jurisdiction over District of Columbia); U.S. Const. art. IV, § 3, cl. 2 (Congress has exclusive jurisdiction over United States territories), these entities are governed exclusively by federal law and, therefore, their inclusion in the definition of "State" demonstrates that "state" law encompasses federal law. The argument stumbles at the second step.

¶ 22 True, Congress has jurisdiction over the District of Columbia and all United States territories, but the United States Code is not

the exclusive law that applies. Puerto Rico, for example, has its own constitution and its own civil and criminal code. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974). Included within its code is a workers' compensation statute. *See* P.R. Laws Ann. tit. 11, §§ 1-42 (2016) (Compensation System for Work-Related Accidents Act); *see also* D.C. Code §§ 32-1501 to -1545 (2016) (workers' compensation). Thus, we interpret the inclusion of the District of Columbia and United States territories within the definition of "States" as an acknowledgment that, for purposes of workers' compensation and employers' liability laws, those entities function essentially as independent states.

¶ 23 Moreover, had the insurance company intended to cover claims arising under federal law, it is unlikely that it would have expressed that intent by reference to the District of Columbia or United States territories. More likely, the policy would simply say that coverage is provided for loss sustained by an employer because of liability imposed by workers' compensation or employers' liability laws of Colorado, any other state, or the United States. *See Flores-Rosales v. United States*, Nos. EP-08-CV-98-KC & EP-06-CR-1717-KC, 2009 WL 1783703, at *2 (W.D. Tex. June 3, 2009) ("The term

'laws of the United States' unambiguously means federal laws . . . ."); *see also Grand Lodge A. O. U. W. of Okla. v. Hopkins*, 52 P.2d 4, 12 (Okla. 1935) ("If appellant intended to reduce the term of extended insurance on account of loans to the insured, it would have been an easy matter to have so provided in the policy; and the inference from its failure to do so is that it did not so intend.").[1]

We therefore conclude that the City's defense costs, which were sustained because of liability imposed as a result of the widow's § 1983 claim, did not arise from a state workers' compensation or employers' liability law and were not covered by the policy.

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[1] The City's argument that it had a reasonable expectation of coverage is based on the same argument that the policy purported to cover federal claims. For the reasons explained above, we disagree that an ordinary insured would have construed the term "Laws of [Colorado], or other State(s)" to mean federal law. Accordingly, the doctrine of reasonable expectations does not apply to extend coverage under the policy to the City's litigation costs. *See Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1054 (Colo. 2011) (stating that under doctrine of reasonable expectations, even if policy language is not technically ambiguous, it may be construed in favor of coverage where the insured would reasonably believe that claim is covered, but doctrine does not expand coverage on a "general equitable basis" (quoting *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995))).

C. Reimbursement of the Officers' Defense Costs

¶ 24 Next, the City contends it is entitled to reimbursement for amounts it paid to cover the fellow officers' defense costs. The district court did not address this claim, but we may decide the issue without a remand because the scope of coverage presents a question of law subject to de novo review in any case. *See Bd. of Cty. Comm'rs v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119, 1124 (Colo. App. 2003).

¶ 25 Again, coverage turns on whether the City has suffered a defined loss that resulted from liability arising under a state employers' liability law.

¶ 26 Under the Colorado Governmental Immunity Act, section 24-10-110, a municipality is liable for the costs of defense of any of its employees where the claim against the employee arises out of injuries sustained from an act of that employee conducted during the course and scope of his employment. In addition, section 29-5-111 requires a municipality to provide a defense for its peace officers to any civil action alleging a tort committed within the scope of their employment.

¶ 27 Even if sections 24-10-110 and 29-5-111 qualify as employers' liability laws — an issue we do not decide — the City must have suffered a "loss" under the policy because of liability imposed by those statutes. The City says the indemnification payments to the fellow officers named in the widow's § 1983 lawsuit qualify as a "loss" because those amounts constitute "actual payments . . . to Employees . . . in satisfaction of . . . statutory benefits." We are not persuaded.

¶ 28 As an initial matter, if the policy was intended to cover third-party indemnification claims, it would likely have included express language to that effect. *See, e.g.*, *Clackamas Cty. v. Midwest Emp'rs Cas. Co.*, No. 07-CV-780-PK, 2009 WL 4916364, at *2 (D. Or. Dec. 14, 2009) (holding policy provided coverage to employer for defense costs paid to employees in connection with § 1983 lawsuit where policy expressly covered "[d]amages for which [the county is] liable to a third party by reason of a claim or suit against [the county] by that third party to recover the damages claimed against such third party as a result of injury to [the county's] employee"); *see also Cyprus*, 74 P.3d at 299 (in construing

an insurance policy, courts may not add provisions to extend coverage beyond those contracted for).

¶ 29 In the absence of an actual third-party indemnification provision, the City attempts to shoehorn its indemnification payments into the definition of "loss," but the resulting construction is counterintuitive and at odds with the plain language and obvious intent of the loss provision. Under the policy, "Loss" is defined as follows:

> (1) "Loss" – shall mean actual payments, less recoveries, legally made by the EMPLOYER to Employees and their dependents in satisfaction of: (a) statutory benefits, (b) settlements of suits and claims, and (c) awards and judgments. Loss shall also include Claim Expenses, paid by the Employer, as defined in Paragraph (2) of this Section. The term Loss shall not include the items specifically excluded by Paragraph (3) of this Section.
>
> (2) "Claim Expenses" – shall mean court costs . . . and the reasonable allocated costs of investigation, adjustment, defense, and appeal . . . of claims, suits or proceedings brought against the EMPLOYER under the Workers' Compensation or Employers' Liability Laws of [Colorado] or other State(s) . . . .

Under the City's reading of paragraph (1), "Loss" includes any payments made by the employer to *any* of its employees in

connection with an employers' liability law, so long as the payment relates to some employee's accidental injury. We reject that broad construction.

¶ 30 The policy provides the following definition of "Employee":

> [A]s respects liability imposed upon the EMPLOYER by the Workers' Compensation Law of any State, the word Employee shall mean any person performing work which renders the EMPLOYER liable under the Workers' Compensation Law of [Colorado], which is the State of the injuries or occupational disease sustained by such person.

¶ 31 Under a narrow reading, this definition indicates that an "Employee" includes only persons performing work for which the employer is liable under the workers' compensation law of Colorado, and not other employers' liability laws, as those laws are not referenced in the definition. Thus, the City's liability to the fellow officers, which does not arise under workers' compensation laws of Colorado, is not covered.

¶ 32 But even under a broader reading, the definition makes clear that the term "Employee" refers to the *injured* employee, not to an employee potentially responsible for the injury. The policy defines "Employee" with respect to claims arising under workers'

compensation laws, and does not mention employers' liability laws. If we apply the same definition of "Employee" to liability imposed under closely related employers' liability laws, *cf. Sullivan v. Indus. Claim Appeals Office*, 22 P.3d 535, 538 (Colo. App. 2000) ("[D]efinitions of words used elsewhere in the same statute furnish authoritative evidence of legislative intent."), the fellow officers still do not qualify as "Employees." An "Employee" is the "person" who has "sustained" the "injuries or occupational disease."

¶ 33 Moreover, only this definition of "Employee" gives effect to the phrase "less recoveries." The policy limits reimbursable loss to "actual payments, less recoveries," made by the employer to the employee in satisfaction of statutory benefits. We read the "recovery" contemplated by this provision as a reference to the requirement that a workers' compensation claimant who recovers from a third-party tortfeasor must reimburse the employer or its insurer for any benefits paid. *See Jorgensen v. Colo. Comp. Ins. Auth.*, 967 P.2d 172, 173 (Colo. App. 1998), *aff'd*, 992 P.2d 1156 (Colo. 2000). If loss includes payments to non-injured employees, we are left to wonder about the meaning of the term "recoveries."

¶ 34 Finally, an interpretation that calls for the insurance company to reimburse the City for payments made to any of its employees under various indemnification statutes would transform a workers' compensation-employers' liability policy into a third-party indemnification policy. We must avoid a construction that contradicts the clear intent of the policy to cover only workers' injury claims. *See Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 792 (Colo. App. 2001) ("A contract must always be interpreted in light of the intentions of the contracting parties."), *abrogated on other grounds by Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

¶ 35 Thus, we conclude that "loss" means payments made by the City to the injured employee and his or her dependents. Under this definition, the City's indemnification payments to the officers named in the lawsuit do not qualify as "losses" under the policy, and the City is not entitled to reimbursement from the insurance company.

III. Conclusion

¶ 36 The judgment is affirmed.[2]

JUDGE LICHTENSTEIN and JUDGE RICHMAN concur.

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[2] In light of our disposition, we need not address the insurance company's claim asserted on cross-appeal.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-985-129-01

IN THE MATTER OF THE CLAIM OF

VIRGIE ROSS,

Claimant,

v.

FINAL ORDER

ST. THOMAS MORE HOSPITAL,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated September 30, 2016, that denied and dismissed her claim for additional medical benefits. We affirm.

This matter went to hearing on July 7, 2016, on whether the claimant established by a preponderance of the evidence that the lumbar decompression and fusion procedure recommended by Dr. Bhatti was reasonable and necessary. After the hearing, the ALJ found that the claimant sustained an admitted injury on June 3, 2015, when she was standing on a milk crate, it slipped, and she fell injuring her low back and right hip. She was seen at St. Thomas More Hospital complaining of low back and right leg pain. X-rays taken demonstrated degenerative disc disease at L5 and degenerative low lumbar facet arthropathy. There were no acute findings noted.

The claimant testified that following the accident, she has been unable to work. She testified to daily sharp right leg pain and numbness in her right foot which hampers her activity level. The claimant explained that she has difficulty picking up and holding her two-and-a-half year old grandchild. She further explained that she can stand for 10 minutes, move and walk for 15 minutes, and sit for 30-45 minutes. Her leg pain causes her to limp when she walks, but the limp comes and goes. She also testified that she cannot carry any objects and can only bend about 10-15 degrees, but slightly more with pain.

The claimant was examined by physician's assistant, Steven Quackenbush. The claimant ambulated with an antalgic gait, had reproducible pain with palpation of the lumbar spine without pain into her right hip or SI joint, and she had no paraspinous muscular spasm. The claimant complained of 7/10 pain 90% of the time. Mr. Quackenbush recommended physical therapy and a MRI.

The claimant underwent physical therapy. The physical therapy, however, aggravated the claimant's pain levels, resulting in a suspension of further treatment after two appointments. The MRI showed no bulging discs, and "[n]o levels of significant spinal stenosis or neural foraminal compromise seen." There was "minimal posterior disk bulge seen at L4-5" but this did not cause "significant spinal stenosis or neural foraminal impingement." The radiologist's impression was "[m]ild degenerative disc disease. Nothing acute. No levels a significant spinal stenosis or neural foraminal compromise."

The claimant was seen by Dr. Leggett. The claimant complained of sharp shooting pain that traveled from her back to her buttocks, and back of the right leg into the heel. She occasionally had weakness and instability primarily involving her right leg and over time numbness and tingling into the foot, growing in intensity. She rated her pain as 7/10, and typically 5-9/10.

The claimant underwent an L5/S1 and S1 transforaminal epidural corticosteroid injection. The claimant informed Dr. Leggett that she became ill afterwards and her pain intensified to 10/10 the following night. She stated she was overall 0% better after the injection.

After a follow-up visit to Dr. Leggett on October 26, 2015, the claimant reported intense pain. Multiple pain behaviors were noted throughout the examination. Dr. Leggett subsequently examined the claimant's MRI of the spine. He did not have an explanation for the claimant's progressive back pain, and he had no further treatment to offer. He did not believe that physical therapy, chiropractic, or massage would be of benefit. Dr. Leggett could not find an anatomical correlation to substantiate the claimant's ongoing symptoms.

Thereafter, Dr. Nanes referred the claimant to Dr. Bhatti for a surgical evaluation. Dr. Bhatti never performed an examination of the claimant, but instead all examinations of the claimant were performed by a physician's assistant (PA) in his office. The PA's examination showed back tenderness to palpation throughout the claimant's lumbar spine. Dr. Bhatti reported that the claimant's complaint was not specific to anything and

non-anatomic. The examination also showed sensation decrease to pin prick over the entire right foot, which Dr. Bhatti also explained was not anatomic. Dr. Bhatti opined that the claimant had right sided disc herniation at L5-S1 with degenerative disease, worse on the right, with right foraminal stenosis for which he recommended an L5-S1 decompression and fusion with instrumentation.

During his subsequent deposition, Dr. Bhatti testified that the claimant's MRI did not show a large disc herniation, but degenerative arthritis worse on the right at L5-S1. Initially, it was his opinion that surgery would help the claimant by greater than 50%. He testified that he does not rely on EMG findings or diagnostic injections, but only on the patient's complaints when determining the need for surgery. Dr. Bhatti testified that part of the reason he wanted to perform surgery is that the claimant was reporting 8/10 pain. Nonetheless, he noted that there were at least two findings on his PA's examination that were non-anatomic. It concerned him that other doctors also found non-anatomic findings. He noted that the more non-anatomic findings present, the less chance of a successful operation. Following review of other physician's reports, Dr. Bhatti changed his opinion and stated that the chances of a successful surgery would be 30% to 40%. He thought the surgery was reasonable, but questioned whether it was necessary. Ultimately, he recommended the surgery with the caveat that there is a significant failure rate.

At the request of the respondents, the claimant underwent an independent medical examination with Dr. Reiss. Dr. Reiss did not believe there was significant nerve compression that would be alleviated with surgical intervention, noting that there was no instability of the lumbar spine and a one level fusion procedure at an arbitrary level without evidence that the level was producing the pain was unlikely to help. He reported that there was no evidence that the claimant had discogenic pain. It was his opinion that the claimant had non-physiologic findings, subjective complaints out of proportion to objective findings with severe pain complaints, and no observed pain behaviors. He did not believe the surgical intervention would be appropriate or helpful. Dr. Reiss also was shown surveillance videotape of the claimant. After reviewing the videotape, Dr. Reiss testified that the claimant's activities of bending, lifting, and carrying her grandchild were inconsistent with her pain complaints of 9/10. Dr. Reiss ultimately opined that the claimant did not require further treatment, and was at maximum medical improvement.

As pertinent here, during the hearing, the claimant objected to the respondents' submission of the surveillance videotapes of the claimant. The claimant objected on the grounds of discovery violations. While the discovery is not part of the record, it appears to be undisputed that the claimant submitted interrogatories to the respondents inquiring on the identity of the witnesses who were going to testify and the content of their

proposed testimony, and whether any surveillance or investigative reports had been conducted. The claimant argued that the surveillance was not done until mid to late June 2016, which was right before the hearing, and the respondents supplemented their discovery responses on June 27, 2016, and June 30, 2016, with the surveillance tapes which was 10 days and 7 days from the date of the hearing, in violation of W.C.R.P. 9-1. The claimant further argued that prior to the hearing, the respondents attempted to add as a witness the person who conducted the surveillance but the ALJ denied the respondents' motion. The claimant therefore argued that since the respondents did not have a witness who could testify when the videotapes were taken or how they were taken, they could not establish a foundation for admission of the videotapes.

In response, the respondents contended that they did not violate any discovery rules. They explained that at the time they responded to the claimant's discovery, no surveillance had been conducted. The respondents further explained that when they received the videotapes, interrogatories were immediately supplemented since the discovery rules allow for supplementation up to the date of the hearing. The respondents further added that it was their understanding that the claimant did not dispute that she was in the videotapes, and that this was enough foundation for the videotapes to be admitted into evidence. The respondents added that if admission of the videotapes was prejudicial to the claimant, then they would agree to a continuance of the hearing.

The ALJ then stated that if the claimant wanted an extension of time regarding the videotapes, then he would entertain that motion. He also stated that the claimant had had the videotapes with sufficient time to be able to either move for an extension of time, to bring a witness, or to have the claimant rebut what is seen on the videotapes. He stated that outside of that, he would allow the videotapes into evidence. The claimant responded that she was not going to request an extension of time as she had been waiting long enough for the surgery. Tr. at 10-18. The claimant further stated that based on the ALJ's ruling that the videotapes were admissible, she stipulated that she was the person in both of the videotapes. Tr. at 19.

The ALJ ultimately determined that the claimant failed to demonstrate that the proposed surgery was reasonable or necessary. The ALJ reviewed the surveillance videotapes dated June 14 and June 26, 2016. He found that the claimant's gait appeared normal, she was bearing weight on her right leg while ascending and descending stairs and stoops, and was walking on both level and inclined surfaces, without pain behavior noted. The claimant was bending at the waist 10-15 degrees on numerous occasions while looking into her car, and was able to enter, exit, and drive her vehicle without apparent difficulty. The ALJ also found that the claimant was lifting her granddaughter

into her car and bending to place and secure her in a car seat in the back of the claimant's car. She also was later seen carrying her granddaughter in her left arm to the car where she twisted and bent slightly to place the child in the back seat. The claimant also was seen carrying a car seat to her car in preparation of taking her grandchild swimming. The ALJ specifically noted that the videotape showed that the claimant was devoid of pain behaviors. Based on his review of the videotapes, the ALJ found the claimant's testimony regarding her pain level and functional abilities out of proportion to his objective findings from the videotapes. The ALJ also credited the opinions of Dr. Reiss over the contrary opinions of Dr. Bhatti. He found that Dr. Bhatti was largely basing his recommendation for surgery based upon the claimant's pain complaints and asserted functional decline which he found not credible. The ALJ also found that the claimant's symptoms were out of proportion to the objective findings on examination and imaging study. He found there was a demonstrated lack of anatomical correlation to the claimant's ongoing complaints during examination. The ALJ also found that the objective testing did not support the claimant's subjective pain complaints, and the claimant's MRI, EMG, and nerve blocks did not adequately identify the L5 nerve root as a pain generator responsible for causing her pain. The ALJ therefore denied and dismissed the claimant's claim for additional medical benefits.

On appeal, the claimant argues the ALJ erred in admitting the surveillance videotapes and testimony regarding the surveillance tapes into evidence. The claimant argues that the respondents provided the tapes to her 10 days prior to hearing in violation of W.C.R.P. 9-1(E). Further, the claimant contends that the respondents had no witnesses to endorse the tapes. Accordingly, the claimant contends the tapes were admitted into evidence in violation of CRE 901. We are not persuaded the ALJ erred.

W.C.R.P. 9-1 provides in pertinent part as follows:

> (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.

Cf. Ortega v. Indus. Claim Appeals Office, 207 P.3d 895 (Colo. App. 2009); *see also* §8-43-210, C.R.S.

Additionally, it is well settled that the ALJ has wide discretion to control the course of a hearing and make evidentiary rulings. Section 8-43-207(1)(c), (h) and (j), C.R.S.; *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). The appellate standard on review of an alleged abuse of discretion is whether the ALJ's order exceeds the bounds of reason, as where it is contrary to the applicable law or unsupported by the evidence. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985). Moreover, the party alleging an abuse of discretion must show sufficient prejudice before it is reversible error. CRE 103(a); *Williamson v. School District No. 2*, 695 P.2d 1173 (Colo. App. 1984).

Here, we are unable to say that the ALJ abused his discretion in allowing the surveillance videotapes into evidence. As explained above, it is undisputed that at the time of the hearing, the respondents had supplemented or amended their discovery responses consistent with the requirements set forth in W.C.R.P. 9-1(D). Further, the ALJ's remedy for any claimed prejudice, as alleged by the claimant under W.C.R.P. 9-1(E), was to entertain a motion from the claimant to continue the hearing. During the hearing, the respondents stated that they would not object to a continuance of the hearing. The claimant, however, expressly stated that she would not ask for a continuance in order to prepare for the evidence contained in the surveillance videotape. Tr. at 19. We further add that during the hearing, the claimant testified that she had a chance to look at one of the videotapes. Through her own testimony, the claimant had the opportunity to rebut the inferences created by the videotapes. Tr. at 26-27, 34, 40-41. The claimant did not deny that she was the person shown in the videotapes. Tr. at 104-05. Given the ALJ's broad discretion in the conduct of evidentiary proceedings, we cannot say that ALJ's action in allowing the surveillance videotapes into evidence was beyond the bounds of reason.

The claimant further argues that the respondents failed to lay a proper foundation for admission of the videotapes, in violation of CRE 901. The claimant contends that the respondents had no witnesses who were endorsed to establish a foundation for the videotapes. Initially, we disagree with the respondents' contention that the claimant failed to "sufficiently" raise her objection under CRE 901 at hearing to alert the ALJ to the alleged error. Tr. at 13-14. CRE 901(a) expressly provides that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *See* §8-43-

210, C.R.S. (Colorado rules of evidence shall apply in all hearings). The Panel long has held that a claimant's identification of herself provided a proper foundation for admission of a videotape exhibit, and the absence of the investigator who conducted the surveillance might affect the weight but not the admissibility of such evidence. *See Garrison v. Direct Sales, Tires, Inc.*, W.C. No. 3-892-130 (Dec. 28, 2007)(claimant identified himself as individual in the videotape and Panel perceived no difficulty that adequate foundation for admission of videotape was laid), *aff'd,* Colo. App. No. 08CA0101 (Dec. 11, 2008)(NSOP); *see also Brownson-Rausin v. Valley View Hospital*, W.C. No. 3-101-431 (Oct. 3, 2006)(claimant's identification of herself provided proper foundation for admission of exhibit, and absence of investigator or editor might affect weight but not admissibility of evidence), *aff'd*, Colo. App. No. 07CA0269 (March 27, 2008)(NSOP); *see also Copeland v. City of Aurora*, W.C. No. 3-907-084 (April 15, 1991)(claimant's identification of himself on surveillance videotape provided proper foundation for admission of exhibit and absence of investigator might affect weight but did not affect admissibility of evidence). Consequently, we will not disturb the ALJ's order on this ground.

The claimant's argument notwithstanding, we also conclude that substantial evidence outside of the contents of the surveillance tapes does exist to support the ALJ's order. As noted above, after considering the medical evidence, the ALJ found that the claimant's testimony regarding her symptoms was out of proportion to the objective findings on examination and imaging study. He specifically found that the claimant's MRI, EMG, and nerve blocks did not adequately identify the L5 nerve root as a pain generator responsible for causing her pain. Ex. AA at 93-95; Ex. Y at 86-87, 90; Ex. JJ at 144-147; Ex. N at 41; Depo. of Dr. Reiss at 15-16. The ALJ also credited Dr. Reiss's opinion that there was no evidence that the claimant had discogenic pain, and that her subjective complaints were out of proportion to objective findings with severe pain complaints. Ex. JJ at 144-145; Depo. of Dr. Reiss at 6-7, 9. The ALJ further found Dr. Bhatti's opinion not persuasive. The ALJ explained that Dr. Bhatti was largely basing his recommendation for surgery on the claimant's pain complaints, which the ALJ found not credible. Order at 8-9 ¶G; Depo. of Dr. Bhatti at 43. The ALJ also found that Dr. Leggett could not find an anatomical correlation to the claimant's ongoing complaints. Ex. JJ at 144-147. Consequently, we have no basis to disturb the ALJ's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 30, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

2/16/17 by TT .

SCHIFF & SCHIFF PC, Attn: HERBERT S SCHIFF, ESQ, 332 BROADWAY AVENUE, PUEBLO, CO, 81004 (For Claimant)
RITSEMA & LYON PC, Attn: SUSAN K REEVES, ESQ, C/O: DAVID R BENNETT, ESQ, 111 SOUTH TEJON STREET SUITE 500, COLORADO SPRINGS, CO, 80903 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-979-208-02

IN THE MATTER OF THE CLAIM OF:

SANDI ARNHOLD,

Claimant,

v.

UPS,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurer,
Respondents.

ORDER OF REMAND

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated November 15, 2016, that denied the claimant's request that a penalty be assessed against the respondent insurance carrier. We set aside the decision of the ALJ and remand the matter for further proceedings.

The claimant suffered a work related injury to her left knee on March 20, 2015. The respondents disputed the compensability of the claim. The claimant missed time from work due to the injury. While the claim was contested, the claimant sought and was paid short term disability benefits pursuant to a policy administered by TeamCare. A hearing was requested by the claimant in regard to compensability and temporary disability benefits. Prior to the initiation of the hearing in March, 2016, the parties negotiated a preliminary agreement that called for the respondents to accept liability for the claimant's injury and to pay the claimant temporary disability benefits (TTD). The respondents then filed a General Admission of Liability (GAL) on March 14, 2016. The respondents' claims adjustor, Brittany Pintor, sent the claimant a check for TTD benefits owed in the amount of $16,215.90. Ms. Pintor testified she had deducted from the TTD owed the amount of $9,785.51, which represented the payments Ms. Pintor calculated the claimant had been paid by TeamCare for short term benefits.[1]

[1] This amount was withheld pursuant to § 8-42-103 (d)(I)(B). It was to be paid to TeamCare so as to retire its lien arising through its insurance contract which precluded liability once workers' compensation disability benefits were paid.

The parties then amended their previous agreement and reduced it to a written stipulation on March 24. Paragraph 6 (b.) of the stipulation provided:

> Within 15 days of the issuance of the order approving this Stipulation, Respondents agree to pay the TTD amount owed under the worker's compensation with the expectation that the claimant reimburse TeamCare any and all monies paid for short term disability.

The claimant was then required to provide the respondents within 15 days following the payment of this TTD amount a written notice that TeamCare's claim for reimbursement had been satisfied. The stipulation was approved by an ALJ in a written order which was emailed to the parties on March 25, 2016.

Ms. Pintor testified she miscalculated the date any further TTD payments were due to be paid to the claimant. On April 12, Ms. Pintor requested a check for $9,785.51 be issued and sent to the claimant for the balance of the TTD owed. That check was written and mailed to the claimant on April 13. The check was received in the mail by the claimant's counsel on April 19.

On May 12 the claimant endorsed for hearing the issue of penalties pursuant to § 8-43-304 (1) alleging the respondents were in violation of the March 25, 2016, ALJ order directing payment of TTD benefits within 15 day. The claimant asserted payment was due on April 9, but that she was not paid the TTD benefits until April 19. The claimant requested a penalty be assessed of up to $1,000 per day for the ten days the respondents were late in making payment. The respondents replied in defense that the cure provision in § 8-43-304 (4) applied.

Section 8-43-304 (1) states in pertinent part:

> Any . . . person who violates any provision of . . . this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel . . . or fails, neglects, or refuses to obey any lawful order made by the director or panel . . . shall also be punished by a fine of not more than one thousand dollars per day for each such offense ….

An order of an ALJ is an "order made by the director …" *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001). The imposition of a penalty under § 8-43-304 (1) is governed by an objective standard of negligence. As such, it is measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable or in bad faith. Thus, penalties may be assessed against an insurer neglecting to take action that a reasonable insurer would take to comply with either a lawful order or a provision of the Workers' Compensation Act. *Pueblo School Dist. v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Section 8-43-304 (4) provides that if the violator cures the violation within 20 days of a request for the assessment of a penalty, the party requesting a penalty must establish by clear and convincing evidence the violator reasonably should have known they were in violation.

Following the testimony of Ms. Pintor at an August 11, 2016, hearing, the ALJ denied the request for a penalty. The ALJ held that the claimant had presented no credible evidence that the respondents knew or should have known they were in violation of the March 25 stipulation and order. The ALJ determined Ms. Pintor reasonably believed she was acting within the time frame of the order when she had a check for TTD benefits sent to the claimant on April 13. The ALJ observed that Ms. Pintor made three calls and sent a fax message to the TeamCare representative to verify the amount of the short term disability payments TeamCare was asserting. The ALJ noted that when Ms. Pintor received no response to her last call to TeamCare on April 12, she went ahead and requested a check be sent to the claimant for $9,785.51. The ALJ concluded a human error in miscalculating the date the TTD payment was due was not unreasonable.

The ALJ also concluded that even in the case that a penalty was established pursuant to the terms of § 8-43-304 (1), the circumstances of any violation of the March 25 order in this matter justified no penalty. The ALJ noted the claimant did not testify and presented no evidence of harm. The claimant had been paid all of the TTD benefits owed at the point the respondents filed their GAL which was weeks prior to the date of the stipulation and order of the ALJ. The payment due after the ALJ's order was to be passed on from the claimant to TeamCare. The ALJ found the duration of the violation was only two days. The motivation behind the respondents' tardy payment was said to be verification of the TeamCare lien amount. The fact that the TTD owed had already been paid a month previously was reasoned by the ALJ to indicate an absence of any malevolence on the part of the respondents. The ALJ surmised that a penalty assessed in

this matter would not serve to deter any future misconduct. Accordingly, the ALJ declined to impose a penalty as requested by the claimant.

On appeal, the claimant contends the March 25 ALJ order was violated as of April 9 when no TTD payment was made. It is asserted the claims adjuster knew of the requirement to pay the benefits within 15 days and was found negligent for failing to do so. The claimant notes the ALJ found the adjuster was negligent but that negligence was reasonable. It is argued 'reasonable' and 'negligent' are mutually exclusive findings in the context of a § 8-43-304(1) penalty. The claimant observes that the efforts the adjuster took to contact TeamCare were unnecessary and of no consequence pertinent to her duty to comply with the March 25 order. The claimant reasons the application of the cure provision is ineffective to alter the result of any penalty finding in this matter. It is contended payment of the TTD was not made upon the sending of a check, but, rather, upon the claimant's receipt of the check. The claimant concludes by requesting the case be remanded to the ALJ for the calculation and assessment of a penalty.

We agree with the claimant that the record and the findings of the ALJ require a determination that a penalty pursuant to § 8-43-304(1) is to be assessed. However, we also take note of the ALJ's findings in the alternative that such a penalty in any more than a de minimis amount is not justified.

The 15th day following the March 25 order of the ALJ is April 9, 2016. That day is a Saturday. Pursuant to W.C. Rule of Procedure 1-2, 7 Code Colo. Reg. 1101-3, the computation of days is consistent with Rule 6 of the Colorado Rules of Civil Procedure. Rule 6 specifies that when the last day of a period is a Saturday or Sunday the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Accordingly, the respondents had until Monday, April 11, to make payment in compliance with the March 25 order.

We have previously noted that when payment is required, the date of the payment corresponds to the date the payment is mailed to the claimant, and not the date it is received. Ms. Pintor testified the TTD check was mailed to the claimant on April 13, pursuant to the respondent's business practice. Tr. at 75. The existence of a business custom or practice is sufficient to warrant a presumption that a particular letter was duly posted. *National Motors, Inc. V. Newman*, 29 Colo. App. 380, 484 P.2d 125 (1971). In *Jones v. Duckwall/ALCO Stores*, W.C. No. 4-430-994 (ICAO, March 28, 2003), *aff'd*, *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); the claimant alleged a violation of CRS 8-42-105 (2) (a) because she received temporary benefits checks more than two weeks after a prior check. We determined this was not a violation

of the statute.

> Consequently, the claimant reasons, Liberty [Mutual] violated the statue because the check was not received until five days after the expiration of the two week interval.
>
> .....
>
> . . . [w]e do not find this argument persuasive. The statute does not state compensation must be "received" within the two week period, merely that it must be "paid." We agree with Liberty that if the General Assembly required that compensation be "received" within the two-week period it would have so provided. . . . This is particularly true since mailing is a common method of delivering benefit checks, and the record does not indicate the claimant objected to this method of payment. Where payment by mail is authorized by implication, the time of delivery is generally considered to be the date the properly addressed payment is placed in the mail with sufficient postage.

In addition, W.C. Rule of Procedure 5-6 (B) provides that temporary benefits due on a specified date may be timely 'paid' on that date even though not 'received' by the claimant until five days later. The ALJ's finding that the respondents paid the claimant the required TTD benefits on April 13 is therefore supported by substantial evidence in the record.

We do not then, find error in the ALJ's determination that the March 25 order required payment of the TTD benefits no later than April 11, and that the required payment was made two days later on April 13.

We do find error in the ALJ's determination there was no violation of the March 25 order. Ms. Pintor testified she knew the respondents were to pay the claimant the balance of any TTD benefits admitted within 15 days. However, she stated she miscalculated the 15th day after March 25 to be April 13. Tr. at 87. She noted she actually became aware of her mistake on April 12. Tr. at 70. She provided no explanation or excuse for making this mistake. The ALJ found Ms. Pintor miscalculated the date the TTD payment was due. Since these circumstances were admitted by the respondents, the higher standard of proof required by the cure statute did not affect this finding. Whether Ms. Pintor reasonably should have known she was in violation of the

March 25 order was determined by her testimony to which there was no dispute. As a result, it was of little consequence whether her admission was reviewed as a preponderance of the evidence or as clear and convincing evidence. It simply constituted the entirety of the evidence on that issue. Thus, the cure provision in 8-43-304(4), is of no consequence. Because of this miscalculation, the ALJ concluded Ms. Pintor did not know she was out of compliance on April 12 when the period allowed for payment had expired. Therefore, the ALJ resolved Ms. Pintor did not 'intentionally' disregard the March 25 order of the ALJ. The ALJ also referenced Ms. Pintor's efforts to pin down the amount of short term disability benefits the claimant was paid by TeamCare. The ALJ surmised Ms. Pintor acted in an objectively reasonable manner "by attempting to verify the lien amount prior to issuing payment for the short term disability reimbursement."

The claimant argues the respondents cannot be both negligent in miscalculating the date the TTD payment was due and also be deemed reasonable in doing so. This point is well taken. Negligence, as opposed to recklessness and other standards of conduct, connotes an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable. Therefore, in the context of § 8-43-304 (1), penalties may be assessed against an insurer that neglects to take the action a reasonable insurer would take to comply with a lawful order. Without more explanation, the negligent miscounting of a due date does not constitute the action of an objectively reasonable insurance carrier. Because the finding of the ALJ was that the claims adjuster mistakenly counted the end of a 15 day period, the respondents violated the March 25 order in a manner an objectively reasonable insurance carrier would have avoided. Section 8-43-304 (1) therefore requires the assessment of a penalty.

The ALJ's reasoning that efforts to determine the amount of TeamCare's short term disability payment were a circumstance that justified Ms. Pintor's delay in payment does not apply in this matter. The March 25 ALJ order required the respondents to pay the TTD benefits due pursuant to the respondents' admitted liability. Ms. Pintor testified she had calculated the amount of TTD owed the claimant as early as March 11. At that time she caused to be issued a payment to the claimant for that amount minus $9,785.51. The money withheld was her estimation of the short term disability lien. Accordingly, when the ALJ approved the stipulation on March 25 which made the payment of the lien the claimant's responsibility, Ms. Pintor knew she was obligated to send to the claimant a check for $9,785.51 which was all that remained of the respondents' TTD obligation. Ms. Pintor's attempts to reach TeamCare in regard to their lien amount were unnecessary. An objectively reasonable insurance carrier would not have delayed payment while waiting for this superfluous information.

In the final section of the ALJ's conclusions of law the ALJ applies several considerations pertinent to the amount of a penalty to be assessed. However, the ALJ holds that when the application of these criteria shows the goal sought to be achieved by the imposition of a penalty cannot be attained, no penalty may be ordered. We find this conclusion to represent a misreading of the statute. The amount of the penalty may be based on consideration of several factors including the extent of harm to the claimant, the duration and type of violation, the insurer's motivation for the violation, the insurer's mitigation, and whether or not the misconduct is representative of a pattern of misconduct. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (November 23, 2004): *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (September 16, 2005). The ALJ found the delay in payment of the TTD constituted no harm to the claimant. The violation was determined to last only two days. The motivation was deemed to be related to the adjuster's need to verify the correct offset amount. The violation was noted to represent neglect and not an intention to breach the order. There was then, discerned, no pattern of misconduct to sanction. While these findings may telegraph a predisposition to calculate a minimal amount of a penalty, § 8-43-304 (1) does provide a violator "shall also be punished by a fine …." It shall not be more than one thousand dollars per day, but it must necessarily be at least 1¢ per day.

Accordingly, we set aside the ALJ's finding there was no violation of the March 25 order of the ALJ. We affirm the ALJ's ruling that the violation was of only two days duration. We remand the matter to the ALJ to calculate and assess an appropriate penalty in regard to the violation.

IT IS THEREFORE ORDERED that the ALJ's order issued November 15, 2016, is set aside and the case is remanded to the ALJ for further proceedings as discussed above.

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

2/24/17 by TT .

THE MCCARTHY LAW FIRM PC, Attn: JOHN D MCCARTHY, ESQ, 7884 RALSTON ROAD, ARVADA, CO, 80002 (For Claimant)
LEE & KINDER LLC, Attn: MATT B BOATWRIGHT, ESQ, C/O: JOSEPH W GREN, ESQ, 3801 EAST FLORIDA AVENUE SUITE 210, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-904-266-06

IN THE MATTER OF THE CLAIM OF:

JORGE LOZANO,

Claimant,

v.

FINAL ORDER

ALVARADOS, INC.,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Broniak (ALJ) dated September 30, 2016, that determined the claimant was not at maximum medical improvement (MMI) for his right shoulder and right knee conditions, and that ordered the respondents liable for medical benefits and temporary total disability (TTD) benefits. We affirm.

This matter went to hearing on overcoming the opinions of the Division-sponsored Independent Medical Examination (DIME) physician regarding MMI.

After the hearing, the ALJ found that the claimant worked for the respondent employer as a roofer. On November 27, 2012, the claimant fell approximately 30 feet from a third story roof, landed on a fence with his legs, and then landed in a sitting position onto gravel. The claimant testified that he tried to reach out and grab anything to break his fall. He attempted to grab a gutter with his right hand. The claimant ultimately sustained an L1 burst fracture and a T12 compression fracture. The claimant underwent surgery at Littleton Adventist to repair the fractures. He was discharged to Porter Rehabilitation on December 1, 2012. The discharge note indicates that the claimant was able to move all extremities with equal and excellent strength.

On January 2, 2013, the claimant followed up with Dr. Kawasaki. The claimant did not report reaching out or any other attempt to break his fall. The claimant reported

difficulty with sitting greater than eight minutes, and difficulty standing and walking greater than 15 minutes. The claimant described achiness in his low back and pins and needles in his anterior thighs. Dr. Kawasaki's impression was L1 burst fracture with T-11-L3 fusion. Dr. Kawasaki continued to treat the claimant over the next two months and symptoms and impressions remained the same.

The claimant began physical therapy in March. A March 25, 2013, physical therapy note documented "ongoing pain in the right shoulder and knee concern him."

Dr. Kawasaki saw the claimant on April 4, 2013. The claimant reported right shoulder, right knee, and right hip pain. The claimant estimated that this had started six weeks prior. Dr. Kawasaki noted that the claimant's physical therapist had contacted the nurse case manager to inform him that the claimant had right knee and right shoulder pain which seemed to be interfering with the claimant's progress. The claimant also reported psychological issues, including disturbed sleep, and anxiety about his finances because he was unable to work. Dr. Kawasaki referred the claimant to Dr. Esparza for psychological counseling.

Dr. Esparza assessed the claimant with a depressive disorder, a cognitive disorder, and relational problems. The claimant received psychological counseling with Dr. Esparza until September 5, 2013, when Dr. Esparza determined that the claimant had reached MMI for his psychological condition. He gave the claimant a psychological impairment rating of 16%.

Dr. Kawasaki ultimately opined that the claimant's right knee, right hip, and right shoulder complaints were not, within medical probability, related to the claimant's November 2012 injury, but if the shoulder and knee were to be worked up, he would recommend MRI scans for each.

The MRI scans of the claimant's right knee and shoulder occurred on April 9, 2013. Dr. Kawasaki concluded that the changes found on the MRI scans were degenerative in nature and not from a traumatic fall. Dr. Kawasaki explained that had the claimant injured his shoulder or knee when he fell, the symptoms would have manifested sooner than when the claimant reported.

Dr. Kawasaki ultimately determined that the claimant reached MMI overall on September 27, 2013. His impairment rating was 32% whole person.

The respondents filed a Final Admission of Liability (FAL) on November 21, 2013, and an Amended FAL on March 7, 2014. The claimant objected and applied for a DIME.

Dr. Ryan conducted the DIME on March 3, 2014. Dr. Ryan opined that the claimant had not reached MMI for his work-related injury. Dr. Ryan diagnosed a right hyperabduction/flexion injury to the claimant's right shoulder. He also diagnosed right knee medial and lateral meniscal injuries, probably caused by the work-related fall. Dr. Ryan further diagnosed a mild traumatic brain injury (TBI), which he noted was "not fully characterized." Dr. Ryan concluded the claimant "probably" was at MMI for his thoracic spine injury and fusion from T11 through L3. He also noted that the claimant had a disc herniation and anterolisthesis at L3-4 and L4-5 with significant spinal stenosis. He stated that the claimant probably was at MMI for this condition but he would suggest another view. Dr. Ryan went on to recommend that the claimant have a second spine surgical evaluation to get another opinion and reasonable treatment for the stenosis. He also recommended a high field MRI. Additionally, Dr. Ryan opined the claimant was not at MMI for his psychological condition or post-traumatic stress disorder. Also, Dr. Ryan opined the claimant suffered from sexual dysfunction, discussed, but not fully characterized. He opined that the claimant was not at MMI for sexual dysfunction since it had not been fully evaluated and it could have a neuropathic component in light of the claimant's spine injury.

The respondents filed an application for hearing and endorsed, among other issues, overcoming the opinions of Dr. Ryan.

At the request of the respondents, the claimant underwent an independent medical examination with Dr. Primack. The claimant reported the mechanism of injury as he had reported it to Dr. Kawasaki. He also reported to Dr. Primack that he had been focusing more on his back than on his right knee and right shoulder at first. Dr. Primack ultimately opined that the claimant required no further medical treatment for any body part and recommended a functional capacity evaluation to determine any permanent work restrictions. As pertinent here, Dr. Primack agreed with Dr. Kawasaki that the claimant's knee, shoulder, and hip complaints were not related to the industrial injury. Dr. Primack noted that in the rehabilitative program, multiple joints would have been used to optimize function. In essence, he concluded that since the rehabilitative notes lack any complaints related to the right knee, right shoulder, or right hip, those body parts were not injured during the fall. Dr. Primack subsequently opined that the claimant did not sustain a mild TBI and no sexual dysfunction related to a spinal cord injury. Dr. Primack reported that Dr. Ryan's opinions were clearly in error.

The claimant sought an independent medical examination with Dr. Gellrick. Dr. Gellrick opined that the impact of the claimant's fall affected his whole body, including his right knee and right shoulder. She ultimately agreed with Dr. Ryan that the claimant was not at MMI for his right knee or right shoulder.

On July 1, 2015, Dr. Primack issued an addendum report after reviewing additional medical records and surveillance of the claimant. Dr. Primack believed that the claimant's right knee MRI demonstrated findings of a multi-planar tear within the body of the posterior horn of the medial meniscus, a peripheral tear within the posterior horn, and a horizontal cleavage tear at the anterior horn with a 1.9 cm meniscal cyst. Dr. Primack further explained that the act of abducting the shoulder would not result in the shoulder injury asserted. Dr. Primack opined that the MRI findings are degenerative in nature and not traumatic. Dr. Primack opined that Dr. Gellrick erred in her assessments of the claimant, and that the claimant was consciously misrepresenting his physical capabilities.

At the respondents' request, Dr. Gutterman performed an independent medical examination to determine the extent of the claimant's psychiatric or psychological issues. Dr. Gutterman concluded that the claimant probably experienced a Depressive Disorder and Anxiety Disorder following the work-related fall. He did not believe, however, that the claimant suffered a mild TBI leading to cognitive deficits. Dr. Gutterman did not believe additional psychological treatment was warranted, and he concurred with Dr. Esparza that the claimant reached MMI from a psychological perspective in September 2013. He gave the claimant a mental impairment rating of 6%.

During the hearing, Dr. Kawasaki testified that the claimant's knee and shoulder complaints were not related to the fall. He noted that these issues were not present on initial examination and neither did the hospital records document knee or shoulder symptoms. After reviewing the claimant's MRI scans, he concluded that the claimant's knee and shoulder conditions were preexisting in nature and not from a traumatic fall. He testified that had the claimant injured his shoulder or knee when he fell, then his symptoms would have manifested sooner than when the claimant reported. Dr. Kawasaki agreed with Dr. Primack that the claimant's right knee, hip, and shoulder symptoms would have presented in the rehabilitation facility.

The ALJ ultimately determined that the respondents failed to overcome the DIME physician's opinion that the claimant's right knee and right shoulder conditions are related to the work injury. She found that the opinions of Dr. Primack and Dr. Kawasaki regarding the lack of documentation in the medical records immediately subsequent to

the injury, did not constitute clear and convincing evidence. As pertinent here, the ALJ also found that "[t]he records from Porter Rehabilitation were not offered into evidence." She further found in pertinent part as follows:

> 52. Respondents failed to overcome the opinion that Claimant's right knee and right shoulder conditions are related to the work injury. The opinions of Dr. Primack and Dr. Kawasaki that the lack of documentation in the medical records immediately subsequent to the injury does not constitute clear and convincing evidence. Rather, it is more probably true than not that Claimant was focused on his significant injury and failed to recognize symptoms in other parts of his body until after his back injury had improved. Dr. Primack's opinions concerning the rehabilitation facility are not persuasive. Claimant has proven that he is entitled to receive treatment for the knee and shoulder injuries as recommended by the DIME physician.

However, the ALJ also found that the respondents overcame the DIME physician's opinions regarding the claimant's mild TBI and psychological conditions. The ALJ credited the opinions of Dr. Gutterman in this regard. She also found that the respondents overcame the opinions of Dr. Ryan regarding any diagnosis of sexual dysfunction. Moreover, the ALJ rejected the treatment recommendations regarding the spinal stenosis. She found that Dr. Ryan's opinions in this regard were inconsistent with his finding that the claimant "probably" was at MMI for this. The ALJ ordered the respondents liable for medical benefits for the claimant's right shoulder and right knee, and TTD benefits commencing from September 28, 2013, and ongoing until terminated pursuant to law.

The respondents have petitioned to review the ALJ's order regarding her determination that the claimant is not at MMI for his right knee and right shoulder. They do not seek review, however, of the ALJ's order regarding the claimant's spinal conditions, mild TBI, urological conditions, or psychiatric issues. The claimant also does not seek review of the ALJ's order regarding the claimant's spinal conditions, mild TBI, urological conditions, or psychiatric issues.

On appeal, the respondents contend the ALJ erred in finding that they failed to submit into evidence the hospital records from Porter Hospital. The respondents argue that since they admitted the Porter Hospital records in one of their Exhibits, the ALJ's finding in this regard is reversible error. They contend the ALJ's error negatively impacted her credibility determinations and ultimate finding that the knee and shoulder were components of the claimant's claim. The respondents further argue that since a

large portion of their case-in-chief was from both Dr. Kawasaki and Dr. Primack, who specifically addressed these records in their testimony, the ALJ's finding denies them procedural due process. We are not persuaded there is reversible error.

If a DIME physician has rendered an opinion regarding MMI or medical impairment, those opinions must be overcome by clear and convincing evidence. Sections 8-42-107(8)(b)(III), 8-42-107(8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *see also Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482-483 (Colo. App. 2005)("DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect . . . [and] are binding unless overcome by clear and convincing evidence."). Further, the DIME physician's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. *Qual-Med, Inc., v. Industrial Claim Appeals Office*, *supra; Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App.1998).

"Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME impairment rating or MMI finding are incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d at 592. A party has met the burden of establishing that a DIME impairment rating and diagnosis are incorrect if the claimant has demonstrated that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the ALJ's determination. *Metro Moving & Storage Co. v. Gussert*, *supra*. We must uphold the factual determinations of the ALJ if the decision is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Christie v. Coors Transp. Co*., 919 P.2d 857 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

Contrary to the respondents' contention, we perceive no reversible error in the ALJ's order regarding the Porter rehabilitation records. It is true, as the respondents contend, that they submitted a number of the Porter rehabilitation records into evidence, and the ALJ incorrectly found that they were not offered into evidence. Ex. J; Order at 3 ¶5. Based on the ALJ's findings in paragraph 52, however, she nevertheless accepted, as

true, Dr. Primack's and Dr. Kawasaki's opinions that the claimant did not complain of right shoulder or hip pain during his rehabilitation at Porter. The ALJ merely found that this medical evidence did not amount to clear and convincing evidence to overcome the DIME physician's opinion that the right knee and right shoulder conditions were work related. The ALJ explained that this was because the claimant was more focused on his "significant back injury" rather than other parts of his body while he was in rehabilitation. Section 8-43-310, C.R.S. (harmless error to be disregarded). We conclude that this is a reasonable inference made by the ALJ and supports her conclusion that the claimant's right knee and right shoulder conditions are related to the work injury. We further add that in her order, the ALJ expressly found that when the claimant was discharged from Littleton Adventist to Porter Rehabilitation, the discharge note indicated that the claimant was able to move all extremities with equal and excellent strength. Order at 2 ¶ 4. Thus, based on her findings, it is clear that the ALJ was aware that the initial medical records indicated the claimant did not complain of right shoulder or knee pain, and she accepted this as true. The ALJ simply was not convinced that this evidence was sufficient to overcome the DIME physician's opinions regarding the right knee and right shoulder. Under these circumstances, we are unable to conclude that the ALJ's error with regard to the Porter rehabilitation records amounts to reversible error. *See* §8-43-310, C.R.S. (harmless error standard for review of workers' compensation cases.); CRE 103(a) (error may not be predicated on the admission of evidence unless a substantial right of the party is affected). Consequently, we will not disturb the ALJ's determination in this regard. Section 8-43-301(8), C.R.S.

The respondents also appear to argue that Dr. Ryan's DIME opinions should be overturned because he stated in his report that "he did not review the rehabilitative notes." The respondents contend that this is error and his opinions therefore should be found to have been overcome. Brief In Support at 9; Ex. 2 at 4. Presumably, the respondents are referring to Dr. Ryan's statement in his DIME report that "[t]ranscribed notes from that hospitalization are not available." Ex. 2 at 4. We nevertheless conclude that this evidence merely concerns the weight to be afforded the DIME's opinion, which is a matter solely within the ALJ's discretion. We may not reweigh the evidence on appeal, or substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of the evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). We further add that in Dr. Ryan's report, he noted that when the claimant was discharged from Littleton Adventist on December 1, 2012, he was able to move all four extremities with good strength. He also stated that Dr. Kawasaki noted the claimant was reporting complaints of right shoulder, right hip, and right knee pain and "[t]his supposedly began six weeks prior." He stated that Dr. Kawasaki opined that the claimant's right shoulder, hip, and knee pain were not related to the work injury. Ex. 2 at

4, 5. In his DIME report, Dr. Ryan explained his opinion as to why the claimant was delayed in reporting his right shoulder and right knee pain:

> 4. Right shoulder hyperabduction/flexion injury, most probably related to him grabbing for the gutter when he fell. This was not initially of concern, until he started to become more active. Up until that time he had been quite immobile and immobilized, due to his compression fractures. He was also taking medication during this period of time, which probably masked his symptoms. . . .
>
> 5. Right knee medial and lateral meniscal injuries, most probably caused by his fall. Dr. Kawasaki notes the mechanism of injury, and this is significant. However, what was not mentioned was the initial numbness in the anterior aspect of his thighs, most probably masking the complaints. Note that his right lower extremity sensation seemed to recover before the left side, and this likely was responsible for his symptoms announcing themselves late. With no other mechanism of injury, it seems highly improbable that this is unrelated to the three-story fall. Ex. 2 at 6-7.

Again, therefore, it is apparent that Dr. Ryan was well aware that the claimant did not initially complain of right shoulder or knee pain. Dr. Ryan was convinced, however, that these symptoms either were masked because the claimant was immobilized and taking medication or because of the delay in recovery of his right lower extremity sensation. The ALJ weighed this evidence, as well as the contrary evidence presented by the respondents, and was not persuaded that the respondents overcame the DIME physician's opinions in this regard. *See Crandall v. Watson-Wilson Transportation System, Inc*., I71 Colo. 329, 467 P.2d 48 (1970)(ALJ is presumed to have considered entire record). As noted above, we may not reweigh the evidence or substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of the evidence to reach a different result. *Rockwell International v. Turnbull, supra*. As such, we perceive no basis upon which to disturb the ALJ's determination in this regard.

The respondents also argue that the ALJ failed to apply the principals set forth in *Deleon v. Whole Foods Market,* W.C. No. 4-600-477 (Nov. 16, 2008) with regard to the claimant's right shoulder and knee. They explain that once they overcame the spine, MTBI, urological issues, and MMI by clear and convincing evidence, then the ALJ had the option of applying the preponderance of the evidence standard to the extremity issues. They contend that their medical evidence constituted, at the very least, a preponderance of the evidence that the claimant's right shoulder and right knee injuries were not work

related. They argue that the ALJ erred in not applying this lesser standard. Again, we perceive no reversible error.

In *Deleon* the Panel ruled that once a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. The Panel explained, however, that this does not mean that an ALJ is required to reject every other component of a DIME physician's rating. *See also Lee v. J. Garlin Commercial Furnishings*, W.C. No. 4-421-442 (Dec. 17, 2001).

In *York v. Manpower Inc*., W.C. No. 4-837-612-04 (May 4, 2016), *aff'd*, *York v. Industrial Claim Appeals Office*, Colo. App. No. 06CA0877 (Jan. 26, 2017) (NSOP), we similarly concluded that when an ALJ determines the DIME physician's opinion on the MMI date has been overcome, the question of the claimant's correct MMI date becomes a question of fact for the ALJ.

The respondents' argument notwithstanding, we conclude that *Deleon* is inapposite here. It is true, as the respondents argue, that they overcame the DIME physician's MMI opinions on the claimant's spinal conditions, mild TBI, urological conditions, and psychiatric issues. However, the ALJ also held, with record support, that the respondents did not overcome the DIME physician's opinion that the claimant is not at MMI for his right shoulder and right knee. We long have held that a claimant is not at MMI until each component of the injury has been determined to be at MMI. *See Raymond v. The Hair Corral*, W.C. Nos. 4-129-600 & 4-229-574 (Feb. 1, 1996)(claimant not MMI until treating physician for each component has determined MMI). The determination of MMI is not divisible among multiple body parts affected by the same injury. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429, 433 (Colo. App. 2010); *DeLourdes v. Pho Siagon*, W.C. No. 4-933-176-03 (Sept. 15, 2015). Consequently, the ALJ here could not determine the claimant's impairment rating by a preponderance of the evidence standard. Accordingly, we will not disturb the ALJ's order on this basis. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 30, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

2/27/17 by TT .

CASTANEDA LAW OFFICE, Attn: JANIE C CASTANEDA, 1385 S COLORADO BLVD BUILDING A SUITE 708, DENVER, CO, 80222 (For Claimant)
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