COLORADO
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November Case Law Update

Presented by Judge Elsa Martinez-Tenreiro and Judge Craig Eley

This update covers COA and ICAO decisions issued from
October 16, 2019 to November 15, 2019

Court of Appeals

Industrial Claim Appeals Office

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DATE FILED: October 17, 2019
CASE NUMBER: 2018CA2088

SUMMARY
October 17, 2019

2019COA158

No. 18CA2088, *Peoples v. ICAO* — Workers' Compensation — Benefits — Recovery of Overpayments

In this workers' compensation case, the division considers whether an employer's listing of an overpayment on a final admission of liability constitutes an "attempt to recover" the overpayment under the Workers' Compensation Act of Colorado, section 8-42-113.5(1)(b.5)(I), C.R.S. 2019. The division concludes that when a claimant's temporary total disability and permanent partial disability benefits exceed the statutory cap, an employer's listing of an overpayment on a final admission of liability does not constitute an "attempt to recover" the overpayment.

COLORADO COURT OF APPEALS **2019COA158**

Court of Appeals No. 18CA2088
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-819-262

Carold Peoples,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and State of Colorado Department of Transportation,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE FURMAN
Webb and Brown, JJ., concur

Announced October 17, 2019

Irwin Fraley, PLLC, Roger Fraley, Jr., Centennial, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Nancy C. Hummel, David R. Bennett, Denver, Colorado, for Respondent State of Colorado Department of Transportation

¶ 1 In a workers' compensation case, after an employer files a final admission of liability (FAL) and learns of an overpayment, the Workers' Compensation Act of Colorado (Act), section 8-42-113.5(1)(b.5)(I), C.R.S. 2019, requires the employer to "attempt to recover" that overpayment from a claimant within one year of learning of its existence. (We will refer to section 8-42-113.5(1)(b.5)(I) as the statute of limitations.)

¶ 2 This workers' compensation case asks us to determine whether an employer's listing of an overpayment on the FAL satisfies the "attempt to recover" term of the statute of limitations when a claimant's temporary total disability (TTD) and permanent partial disability (PPD) benefits exceed the statutory cap. *See* § 8-42-107.5, C.R.S. 2019 (capping a claimant's combined TTD payments and PPD payments). We conclude it does not because, in this circumstance, the claimant did not receive ongoing benefits from which the employer could recoup an overpayment. *Id.*; § 8-42-113.5(1)(a), (c).

I. Claimant's Work-Related Injuries

¶ 3 Claimant, Carold Peoples, sustained admitted work-related injuries in February 2010. Employer, State of Colorado Department

of Transportation (CDOT), began paying claimant TTD benefits in March 2010. When claimant reached maximum medical improvement (MMI) in April 2013, his TTD payments totaled $83,569.36. The parties agree this amount exceeded the applicable statutory cap on benefits of $75,000, as set by section 8-42-107.5.

¶ 4 In May 2012, the Social Security Administration determined that claimant qualified as disabled under its provisions and awarded him a monthly sum of social security disability benefits (SSDI). Claimant received a lump sum payment of $13,938.75 for "money . . . due for September 2010 through April 2012," and thereafter would receive $954 monthly. As required by section 8-42-113.5(1)(a), on May 30, 2012, claimant promptly and timely advised CDOT of his SSDI award.

¶ 5 According to claimant's counsel, after claimant notified CDOT of the SSDI award, CDOT revised its general admission of liability to reflect an overpayment and began taking a $78 deduction from claimant's ongoing TTD payments. This was consistent with the Act, which mandates that SSDI benefits first be deducted from workers' compensation disability benefits. § 8-42-113.5(1)(a).

¶ 6 In April 2013, after claimant reached MMI, CDOT filed a FAL (2013 FAL), which included a calculated overpayment of $17,632.79. This calculation reflected the offsets. But because claimant's TTD benefits ended at MMI, and his benefits had already exceeded the statutory maximum award for combined TTD and PPD benefits set by section 8-42-107.5, he would receive no ongoing benefits. Consequently, CDOT could not deduct the overpayment from future disability payments because there would be none. And, although CDOT could have sought an order for repayment under section 8-42-113.5(1)(c), it did not do so at that time or within the following year. Because neither party sought a hearing, the FAL automatically closed.

¶ 7 The parties agree that the case was reopened approximately four years later so claimant could receive needed surgery. In November 2017, CDOT filed an amended FAL modifying claimant's scheduled permanent impairment and noted its payment of $4000 for disfigurement. CDOT again listed the overpayment of $17,632.79 it had included in its 2013 FAL.

¶ 8 Soon after, claimant applied for a hearing, seeking an additional disfigurement award for scars left by his most-recent surgery. He also endorsed the following issue:

> Respondents [CDOT and its third-party administrator, Broadspire] have alleged a right to recover the $17,632.79 overpayment thay [sic] claim exists. They might have a right to claim overpayment but they do not have a right to recover it as the exact same amount of claimed overpayment was on the 4/16/13 FAL and Sec. 8-42-113.5(1)(b.5)(I) sets a one year limit on recovering such overpayments which lapsed over three years ago.

In its response to the application for hearing, CDOT framed the issue as, "[w]hether contesting overpayment is ripe since claimant did not dispute overpayment in prior [FAL], credit for any disfigurement award against overpayment, credit for previously paid disfigurement, attorney fees."

¶ 9 The matter proceeded to a hearing. Before the hearing, the parties stipulated that the overpayment totaled $17,632.79. The presiding administrative law judge (ALJ) rejected CDOT's ripeness contention but ruled that CDOT, by including the claimed overpayment in its 2013 FAL, satisfied the statutory requirement to assert an attempt to recover the overpayment within one year of

discovering it. Thus, the ALJ rejected claimant's contention that the statute of limitations had expired.

¶ 10 The ALJ awarded claimant $2175 for disfigurement, which he then credited against the overpayment. The ALJ also ordered claimant to repay the recalculated remaining overpayment of $15,257.79 to CDOT "at the rate of $50.00 per week/$200.00 per month."

¶ 11 On review to the Industrial Claim Appeals Office (Panel), claimant contended that (1) recovery of the overpayment was not properly before the ALJ; (2) the ALJ misinterpreted the statute of limitations; and (3) his disfigurement award should not have been credited against the overpayment. The Panel rejected all three arguments, determining that, based on the record, recovery of the overpayment was an issue before the ALJ, CDOT was not barred from recovering the overpayment because filing either a FAL or an application for hearing to seek an order for repayment satisfied the statute of limitations, and the ALJ therefore properly deducted claimant's disfigurement award from the total overpayment.

¶ 12 On appeal, claimant mounts the same three challenges as he did to the Panel. Because we conclude that the statute of

limitations barred CDOT from recovering the overpayment, we set aside the Panel's determination.

II. Statute of Limitations Applicable to Overpayment

¶ 13 The Panel interpreted the statute's "attempt to recover" provision broadly to require nothing more than CDOT setting forth the overpayment amount on the 2013 FAL.

¶ 14 Claimant takes issue with the Panel's interpretation. He points to the uniqueness of this case, contending that his TTD and PPD benefits exceeded the then-applicable statutory cap of $75,000. As he explains, because his benefits exceeded the statutory cap by 2013, he could receive no more TTD or PPD benefits. In turn, CDOT could not deduct installments from future PPD benefits payments to repay the overpayment because there were no anticipated future PPD benefits. Instead, CDOT could have recovered the overpayment at that time, only if it had sought an order of repayment and an ALJ had entered such order. *See* § 8-42-113.5(1)(c). Thus, claimant reasons, merely listing the overpayment on the 2013 FAL did not satisfy CDOT's burden to "attempt to recover" the overpayment and the statute of limitations expired on May 30, 2013, one year from when he informed CDOT of

the overpayment. So, claimant contends, the statute of limitations barred CDOT from seeking recovery of the overpayment in 2017.

¶ 15 We agree with claimant.

A. Applicable Statutory Provisions

¶ 16 We begin with the statutory provisions relevant to our analysis:

> (1) If a claimant has received an award for the payment of disability benefits or a death benefit under articles 40 to 47 of this title and also receives any payment, award, or entitlement to benefits under the federal old-age, survivors, and disability insurance act, an employer-paid retirement benefit plan, or any other plan, program, or source for which the original disability benefits or death benefit is required to be reduced pursuant to said articles, but which were not reflected in the calculation of such disability benefits or death benefit:
>
> (a) Within twenty calendar days after learning of such payment, award, or entitlement, the claimant . . . shall give written notice of the payment, award, or entitlement to the employer or . . . to the employer's insurer. If the claimant or legal representative gives such notice, any overpayment that resulted from the failure to make the appropriate reduction in the original calculation of such disability benefits or death benefit shall be recovered by the employer or insurer in installments at the same rate as, or a lower rate than, the rate at which the overpayments were made. Such

> recovery shall reduce the disability benefits or death benefit payable after all other applicable reductions have been made.
>
> . . . .
>
> (b.5)(I) After the filing of a final admission of liability, except in cases of fraud, any attempt to recover an overpayment shall be asserted within one year after the time the requester knew of the existence of the overpayment.
>
> . . . .
>
> (c) If for any reason recovery of overpayments as contemplated in paragraph (a) or (b) of this subsection (1) is not practicable, the employer or insurer is authorized to seek an order for repayment.

§ 8-42-113.5(1)(a), (b.5)(I), (c).

¶ 17 This statute gives injured workers twenty days to notify their employer or their employer's insurer about any other sources of benefits, such as SSDI. *See* § 8-42-113.5(1)(a). The provision mandates that the employer or insurer then deduct installment payments toward the overpayment from the injured worker's disability benefit. *See id.* ("[S]uch disability benefits . . . shall be recovered by the employer or insurer in installments at the same rate as, or a lower rate than, the rate at which the overpayments were made.").

¶ 18 If recouping an overpayment by deducting from future benefits is not "practicable," an employer or insurer "is authorized to seek an order for repayment." § 8-42-113.5(1)(c). And, the employer or insurer must "assert[]" an "attempt to recover the overpayment" within one year of learning of its entitlement to an overpayment. § 8-42-113.5(1)(b.5)(I).

¶ 19 When it filed its 2013 FAL, CDOT had no means of deducting any remaining overpayment from claimant's future PPD benefits because claimant would be receiving no such benefits. His TTD benefits exceeded the statutory cap, foreclosing his entitlement to future PPD benefits. Thus, it was not practicable for CDOT to follow the offset procedure contemplated by section 8-42-113.5(1)(a). The parties agree, though, that CDOT could have sought an order for repayment as authorized by section 8-42-113.5(1)(c) but did not do so in 2013.

¶ 20 We must now determine whether the Act barred CDOT from seeking an order of repayment in 2017 because it chose not to do so in 2013. We conclude it did.

B. Rules of Statutory Construction and Standard of Review

¶ 21 We review statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006).

¶ 22 If its language is clear, we interpret the Act "according to its plain and ordinary meaning." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). And, "when examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

¶ 23 Although we may give deference to the Panel's reasonable interpretations of the statute it administers, *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006), we are "not bound by the Panel's interpretation" or its earlier decisions, *United Airlines v. Indus. Claim Appeals Office*, 2013 COA 48, ¶ 7; *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). But "the Panel's interpretation will be set aside only if it is inconsistent

with the clear language of the statute or with the legislative intent." *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998).

C. Scope of "Attempt to Recover" Under Section 8-42-113.5(1)(b.5)(I)

¶ 24 Relying on one of its earlier decisions, the Panel determined that CDOT's filing of the 2013 FAL, in which it listed the overpayment amount, constituted a satisfactory "attempt to recover" the overpayment under the statute of limitations. In this earlier decision, the Panel had rejected the employer's contention that its "informal" attempts to recover an overpayment — primarily letters to opposing counsel demanding payment — satisfied the statute of limitations. Through informal correspondence, the employer "recommended that the insurer receive $50 a week from [PPD] benefits to recover the overpayment." *Maez v. Adelphia Commc'ns Corp.*, W.C. No. 4-609-410, 2011 WL 308226, at *1 (Colo. I.C.A.O. Jan. 25, 2011). The Panel determined this correspondence did not constitute an attempt to recover within the statute of limitations. Rather, the Panel determined the employer should have "either file[d] a [FAL]" listing the overpayment or sought "an order to

recover the overpayment" to preserve its right to recover the overpayment. *Id.* at *3.

¶ 25 Following the reasoning in *Maez*, the Panel here determined that employer's listing of the overpayment in its 2013 FAL satisfied the statute. The Panel noted that section 8-42-113.5(1)(b.5)(I) broadly states that "*any* attempt to recover" (emphasis added) an overpayment within one year of learning of its existence satisfies the statute of limitations; therefore, the Panel reasoned, CDOT's 2013 FAL, which first identified the overpayment, fulfilled its statutory obligation. We disagree. Neither *Maez* nor the statute's plain language mandate this outcome.

¶ 26 The *Maez* employer did not learn of the overpayment until after it had filed its first FAL. And, because the *Maez* claimant still could receive disability benefits, the *Maez* employer could recover the overpayment by reducing payments of ongoing disability benefits. Thus, the *Maez* employer could have filed a revised FAL within the statute of limitations that claimed specific offset against future benefits to which the claimant was entitled, and that would have constituted an "attempt to recover." Not so, here. CDOT knew about claimant's SSDI benefits well before it filed its 2013 FAL but

could not recover the overpayments by deducting payments from ongoing disability benefits — because claimant could receive no more TTD or PPD benefits.

¶ 27 Turning to the statutory language, we also conclude that section 8-42-113.5(1)(b.5) does not support the Panel's interpretation in this circumstance. *See Support, Inc.*, 968 P.2d at 175. The Act does not define "attempt." But, a common meaning of this term includes "to make an effort to" accomplish an end. Merriam-Webster Dictionary, https://perma.cc/57Q3-QMUL. And, attempt does not include merely asserting an overpayment because "attempt" modifies "to recover." *See* § 8-42-113.5(1)(b.5)(I). "Recover" is defined as "to get back" or "to gain by legal process." Merriam-Webster Dictionary, https://perma.cc/S5NT-DF2C. Thus, the term "attempt" in section 8-42-113.5(1)(b.5)(I) cannot be a mere assertion of an overpayment; it must include some effort to regain the overpayment. CDOT did not make such an effort to regain the overpayment when it learned of the overpayment. Rather, the 2013 FAL simply provided notice to claimant that an overpayment existed.

¶ 28 For these reasons, we agree with claimant that the 2013 FAL, which merely declared the amount of the overpayment, did not satisfy the statute of limitations.

¶ 29 And, if the statute of limitations can be satisfied simply by asserting the overpayment in a FAL when no means to deduct installments are available, rather than making an effort to recover the overpayment, what is to prevent an employer from stopping the statute of limitations clock with a FAL, waiting an unconscionable length of time, and then, much later, filing an application for hearing seeking an order for repayment? We do not believe the legislature intended to create a loophole through which employers can extend the statute of limitations indefinitely. Such an outcome would be contrary to the legislature's intent of limiting employers' right to collect repayment of an overpayment to within one year of learning of the overpayment. § 8-42-113.5(b.5)(I).

¶ 30 Such a result also runs counter to the Act's stated goal of assuring "the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers." § 8-40-102(1), C.R.S. 2019. The closure of claims advances this goal. But allowing an employer to extend the deadline to seek repayment

of overpayments solely by listing the overpayment in a FAL when no means to deduct installments are available, which can occur under the Panel's interpretation, thwarts the goal of closure. *See Olivas-Soto*, 143 P.3d at 1179 (The statute that provides for automatic closure of claims thirty days after filing of a FAL "is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy.").

¶ 31 We therefore conclude that, where, as here, an employer cannot offset its overpayment by deducting from ongoing disability payments, an employer must seek an ALJ's order of repayment within one year of learning of its entitlement to an overpayment. § 8-42-113.5(1)(b.5). So, we also conclude that the Panel and the ALJ erred by determining that CDOT had satisfied this statute when it filed its 2013 FAL listing the overpayment.

D. CDOT Was Not Entitled to Recoup the Overpayment

¶ 32 After it filed its 2013 FAL, CDOT should have made an "attempt to recover [the] overpayment" within one year of learning of the overpayment. § 8-42-113.5(1)(b.5)(I). Because it did not pursue

a course of action that could lead to recovery of the overpayment — relying instead on the mere uncollectable identification of the overpayment in the FAL — the statute of limitations expired. Consequently, CDOT was barred from seeking recovery of the overpayment. The Panel therefore erred when it affirmed the ALJ's order of repayment and credit against claimant's disfigurement award.

III. Recovery of the Overpayment Was Properly Before the ALJ

¶ 33 Having determined that CDOT was time barred from seeking repayment of the overpayment, we need not address claimant's contention that repayment had not been endorsed properly or timely.

IV. Conclusion

¶ 34 We set aside the Panel's order and remand the case for issuance of a new order in accordance with this opinion.

JUDGE WEBB and JUDGE BROWN concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-084-877-001

IN THE MATTER OF THE CLAIM OF:

FELIX MONTOYA,

Claimant,

v.

FREMONT COUNTY SHERIFFS OFFICE,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

ORDER

The claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated May 1, 2019, that denied the compensability of his claim and his request for temporary disability and medical benefits. We reverse the decision finding the claim not compensable and denying temporary benefits, and remand for consideration of issues involving medical benefits and the timely reporting of an injury.

The claimant worked as a sheriff's deputy until August 11, 2018. The claimant asserted he suffered from post-traumatic stress disorder (PTSD) arising from experiences he had viewing individuals who had suffered violent deaths and encountering the bodies of victims involved in similar fatalities through the course of his work in law enforcement.

Effective July 1, 2018, the section of the statute dealing with claims of mental impairment, §8-41-301, C.R.S., was amended by House Bill 17-1229. The amendments effective on that date broadened the category of compensable mental impairment injuries to include PTSD arising from events "within a worker's usual experience" where: "The worker repeatedly visually witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident." *See* §8-41-301(3)(b)(II)(C), C.R.S.

Prior to July 1, 2018, however, a compensable mental impairment was limited to a psychologically traumatic event that arose out of and in the course of employment when the accidental injury "consists of a psychologically traumatic event that is generally outside of a worker's usual experience …." *See* §8-41-301(2)(a) C.R.S.

In this matter, the ALJ ruled the date of onset for the claimant's occupational disease of PTSD occurred prior to July 1, 2018. Accordingly, the former version of §8-41-301 was determined to render the claimant's mental impairment injury not compensable due to its characterization as being 'within' the claimant's usual experience.

The claimant appealed the ALJ's order. However, his petition to waive the cost of a transcript of the February 14, 2019, hearing was denied. The case was presented to us without a hearing transcript or without the benefit of briefs. The hearing featured testimony from the claimant, a human resources representative from the respondent employer, and from Dr. Kleinman, the respondents' IME psychiatrist. Consequently, in the absence of a transcript, we must presume that the ALJ's factual determinations are supported by substantial evidence in the record. *Nova v Industrial Clam Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

The ALJ denied the claim due to two principal pieces of analysis. The ALJ concluded the date of onset of the claimant's occupational disease of PTSD occurred prior to July 1, 2018, the effective date of the amendments to §8-41-301. The ALJ then applied the statute as it existed previously and determined the claim of PTSD did not qualify as a compensable mental impairment injury.

The claimant asserts in his petition to review that the findings of fact by the ALJ do not support the order. Following a review of the factual findings, we agree that the conclusions of law pertinent to the date of the onset of the occupational disease are not supported by the findings of fact.

The ALJ made findings that described the essential duties of a patrol deputy and patrol sergeant for the employer. These included, among others, enforcement of state laws, making arrests, responding to calls for assistance, aiding victims of injury accidents, assisting emergency personnel in treating and transporting victims of crime, traffic and other accidents, briefing investigators on their arrival at accident and crime scenes, assisting with search and rescue operations, and carrying a side arm and being prepared to use it with deadly force in defense of life. A patrol sergeant's job was the same as that of a deputy but with additional supervisory duties.

The ALJ's decision summarized a series of incidents the claimant described as traumatic encounters that led him to suffer adverse psychological reactions. In 2008, the claimant responded to an accident involving a tanker truck carrying gas. The tanker caught on fire and the driver was burned alive screaming for help. The fire prevented the claimant from rescuing the driver and he later found the badly burned corpse in the debris. In 2010, the claimant found the badly mangled body of a motorcycle driver when responding to a traffic accident. A similar occurrence in 2011 involved the body of a female driver ejected from a car through a windshield that struck a large boulder. In 2012, he viewed a three month old child, the victim of child abuse. He was called to the scene of a suicide by hanging in 2013; a suicide by shotgun blast to the head in 2014; and a suicide of a 17 year old by a shot to the head that same year. In 2015, the claimant on a welfare check encountered a bloated dead body covered in maggots. Other incidents involved recovering drowning victims and individuals who died despite the claimant's attempts to revive them with CPR. The claimant also participated in a four hour shoot out in 2017. The claimant indicated all of these occurrences were related to his job as a patrol officer and they were not outside an officer's usual experience.

The ALJ noted the claimant experienced a change in his psychological condition in approximately 2016. The claimant described anger issues at home and at work. He had trouble sleeping and screamed at night. He suffered from nightmares and intrusive thoughts about the past incidents viewing death. He began drinking more often. Many functions of his job such as writing reports, radio dispatch, and dealing with other deputies irritated him. He suffered feelings of anxiety and stress. He began treating with a licensed clinical social worker at the Pueblo Community Health Center in February, 2017. The social worker diagnosed the claimant with PTSD in May 2017. In April 2018, the claimant saw a psychiatrist, Dr. Goodwin, at the Community Health Center who agreed with the PTSD diagnosis, linked it to his past encounters at work with violent death, and recommended continued therapy. Dr. Goodwin advised that the claimant's continued presence in his work environment would exacerbate his PTSD symptoms.

The ALJ found that in June 2018, the claimant was involved as a witness in a department internal affairs investigation where he lost his temper and yelled at an investigator. The claimant contacted his supervisor, Lieutenant Johnston, and requested he be taken off his front line duties and be placed in an alternate position. Lieutenant Johnston required the claimant to attend a "fitness for duty evaluation" with psychologist Dr. Waxman on July 20, 2018. Dr. Waxman issued a report on August 20, 2018. The report noted the claimant's supervising sergeant did not have any concerns with the claimant's actions at work. Nonetheless, the claimant described for Dr. Waxman the symptoms he had been experiencing the past two years involving his psychological stress

and anxiety. These admitted symptoms in addition to two psychological tests administered by Dr. Waxman, led the psychologist to conclude the claimant was currently unfit for duty. The claimant was described as having encountered over 100 incidents that involved violent trauma, loss of life, and the event where he had been shot at over a four hour period. Dr. Waxman resolved the claimant suffered from PTSD and should be provided treatment with a trauma trained therapist for at least 26 sessions. The claimant submitted a written report of a PTSD injury to the employer on August 15, 2018, and filed a workers' claim for compensation involving PTSD and mental stress on October 4, 2018. His last day of work for the employer was in August 2018.

In his conclusions of law, the ALJ determined the claimant's PTSD condition was impairing his ability to effectively and properly perform his regular employment prior to July 1, 2018. Notwithstanding the date Dr. Waxman determined the claimant was unfit for duty was August 20, 2018, the ALJ relied on information compiled by Dr. Goodwin and by Lieutenant Johnston. The ALJ noted "While the evaluation took place in August 2018, the sequela prompting the referral and the referral itself were ongoing and occurred before July 1, 2018." The ALJ resolved the claimant was unfit for duty as early as June 11, 2018, and no later than June 13, 2018. The ALJ found Dr. Goodwin recounted the claimant's symptoms reported to him on April 19, May 20, and June 13. These included intrusive thoughts, recollections, and nightmares, increased psychomotor activity, anger, and depression. The claimant indicated he believed he would be fired if he revealed his symptoms to people at work. The claimant discussed stress he felt as a witness in the internal affairs investigation. Dr. Goodwin prescribed individual therapy and medication. On August 30, Dr. Goodwin wrote to the employer and recommended the claimant be reassigned to lighter duty.

Lieutenant Johnston was found to have related in a written report provided to Dr. Waxman for the July 20, 2018, psychological interview that the claimant approached him on June 11 to ask about assistance from the employer for psychological counseling. The Lieutenant also referenced a discussion with the Undersheriff that had been conducting the internal investigation interview with the claimant. Lieutenant Johnston stated he checked with the claimant's sergeant and asked if he had any concerns with the claimant's work and was told the sergeant had no concerns.

Because the ALJ determined the date of onset of the claimant's occupational disease involving PTSD occurred prior to July 1, 2018, the ALJ reviewed the statutory standards set forth in § 8-41-301(2)(a) as applicable prior to that date. Those standards included:

- A recognized, permanent or temporarily disability.
- Arises from an accidental injury involving no physical injury.
- Involves a psychologically traumatic event.
- Is generally outside of the claimant's usual experience.
- The event would evoke significant symptoms of distress in a worker in similar circumstances.
- The event does not arise from a good faith disciplinary action.
- The mental impairment must be sufficient to render the claimant disabled from pursing the occupation from which the claim arose or to require medical care.
- The mental impairment shall have arisen primarily from the claimant's occupation.

The ALJ found the events that led to the PTSD were not 'outside of the claimant's usual experience' because they were all common to the claimant's job duties as a patrol deputy. The ALJ then found that because the employer's evidence did not show any of the other 24 patrol deputies complained of PTSD, it was established the events encountered by the claimant would not evoke symptoms of distress in a worker in similar circumstances. The ALJ however, added the qualification: "in a similarly situated worker called upon to respond to such calls." Conclusions of Law ¶ (I)(ii). Finally, the ALJ credited the opinion of Dr. Kleinman that the claimant's demotion from patrol sergeant to patrol deputy in August 2017 was at least partially involved in the presentation and perpetuation of his PTSD symptoms. The ALJ found the idea that claimant's PTSD was not "caused or contributed to" by a good faith disciplinary action represented by the claimant's demotion was "unconvincing." The failure of the claimant's PTSD to satisfy the criteria referenced in § 8-41-301(2)(a) prior to July 1, 2018, led the ALJ to deny the compensability of the claim.

In contrast, § 8-41-301(3)(b)(II)(C) as amended on July 1, 2018, allows a claim of PTSD to be compensable when caused by an event "within a worker's usual experience." The claimant must be diagnosed as suffering from PTSD by a licensed psychologist or psychiatrist and must have experienced exposure to an event where: "(C) The worker repeatedly visually witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident."

The findings of fact by the ALJ do not establish that the date of onset of the claimant's occupational disease of PTSD occurred prior to July 1, 2018. Accordingly, the ALJ was in error to apply the pre July 1, 2018 terms of the statute instead of those in effect as of July 1, 2018.

An 'occupational disease' is defined in § 8-40-201(14) as a disease that follows naturally from the conditions under which work was performed. The character of such an injury, as opposed to an 'accidental' injury, often makes difficult the act of locating the date to be assigned the injury. Nonetheless, the issue is significant because the "rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability." *Henderson v. RSI, Inc*., 824 P.2d 91, 96 (Colo. App. 1991). The ALJ indicated the standard for measuring the onset of disability was set forth in *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595, 597 (Colo. App. 1998) and in *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118, 1119-20, (Colo. App. 1991). That standard provides: "The onset of disability occurs when the occupational disease impairs the claimant's ability effectively and properly to perform his or her regular employment, or rendered the claimant incapable of returning to work except in a restricted capacity." *Ortiz v. Charles J. Murphy & Co.* 964 P.2d at 597.

More specifically, in *Union Carbide v. Industrial Claim Appeals Office*, 128 P.3d 319 (Colo. App. 2005), the Court dealt with the same issue presented in this matter involving the timing of a statutory amendment. The claimant in *Union Carbide* worked as a miner until he retired in 1984. Prior to 1994 he was diagnosed with an occupational disease featuring silicosis. He died of silicosis in 1999. Effective April 1, 1994, the statute concerning the occupational disease that afflicted the claimant was changed to end any further liability of the Subsequent Injury Fund and instead, left it all with the employer on the risk. The employer contended the change should not affect the claim due to the claimant's diagnosis and symptoms prior to 1994. However, the Court ruled "'Rights and liabilities for occupational diseases under the Colorado Workmen's Compensation Act accrue at the time the disability for which compensation is sought occurs.'" *Id*. at 322 (quoting *Mendisco & Urralbura Mining Co. v. Johnson*, 687 P.2d 492, 493 (Colo. App. 1984)). Because the date of disability occurred subsequent to the April 1, 1994, change, the employer and not the SIF was held liable for the benefits. The Court resolved the General Assembly intended the date of disability, rather than that of diagnosis, to apply. "[T]his interpretation neither renders noncompensable an otherwise compensable occupational disease nor excludes from liability for benefits the employer who has subjected the worker to the risk of disability." *Id*. at 322.

The standard requiring the 'impairment of regular employment' was most recently applied by the Court of Appeals in *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504 (Colo. App. 2004). In that case, the Court addressed the issue of whether the claimant's occupational disease was barred by the two year statute of limitations when he filed his claim for benefits on February 28, 2001. The claimant had

worked as a firefighter for more than 30 years. His work included exposure to smoke. In 1992 he began to experience tightness in his chest, persistent coughing and congestion. Through the next eight years he pursued treatment with his family doctor as well as with several specialists. The claimant realized in the early 1990s that his respiratory problems were related to his smoke exposure at work. He notified his employer of a work related injury in November 1999. The claimant continued to work as a firefighter until he retired in February 2000, believing he was no longer capable of performing his duties. The ALJ originally found the date of onset of the occupational disease was in 1992 when the claimant developed symptoms he connected to work. The claim was therefore denied as untimely filed. The Panel set aside the order and remanded the matter to the ALJ to consider specifically when the occupational disease became "to some extent disabling and entitle the claimant to compensation in the form of disability benefits." *Sopp v. City of Colorado Springs*, W.C. No. 4-443-162 (January 10, 2002).

On remand, the ALJ found the respiratory disease became disabling when the claimant missed work and retired in 2000. That was then determined to be the date of onset. The statute of limitations therefore did not bar the claim. The Panel and the Court affirmed the ALJ. The Court agreed the question involved the determination of the onset of disability. The decision also indicated the standard for locating the onset of disability asks when "the occupational disease impairs the claimant's ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity." *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d at 506. The Court explained:

> Here, the ALJ found that claimant did not recognize the probable compensable nature of the disease until the effects of the disease forced him to retire in 2000. As discussed, until then, claimant continued performing his regular duties and could not have maintained an action for workers' compensation disability benefits. *See Romero v. Indus. Comm'n*, 632 P.2 1052 (Colo. App. 1981). Under these circumstances, the Panel correctly affirmed the ALJ's determination that the claim was not barred by the statute of limitations.
>
> That claimant actively sought treatment during the 1990s does not persuade us to reach a contrary conclusion. Because a claimant's need for treatment of an occupational disease does not necessarily coincide with the disability, *see Leming v. Indus. Claim Appeals Office*, *supra*,

> the ALJ could properly find that claimant only later became aware that his injury was compensable. *Id.* at 507.

In this case, the ALJ does not select a specific date to assign to the onset of the claimant's occupational disease of PTSD, other than to state it occurred prior to July 1, 2018. The ALJ noted the claimant was demoted in August 2017, from patrol sergeant to patrol deputy. The reasons given for the demotion had to do with his subordinates' difficulty locating the claimant on the radio, using unprofessional language in the work place and difficulty with the writing of his reports. The ALJ found these circumstances were consistent with the disabling effects of PTSD. The demotion coincided with a reduction in pay.

However, the ALJ did not assign August 2017 as the date of onset. The supervisory duties that distinguished the job of patrol sergeant from patrol deputy were not involved in the development of the claimant's PTSD. He was returned to the deputy position which included the activities that caused the claimant's distress. The claimant performed that job as he had been for another year until August 20, 2018. The job encompassed the functions the ALJ found to represent the essential duties of a patrol deputy and sergeant. Findings of Fact ¶ 2. The statute both before and after July 2018 specifies that when considering whether the mental impairment involved temporary disability it shall be established the mental impairment must be, in and of itself, sufficient to render the employee disabled "from pursuing the occupation from which the claim arose", i.e. patrol duty. Section 8-41-301(2)(d), C.R.S. That did not occur in August 2017. Rather, based on the ALJ's findings, this occurred on August 20, 2018, when Dr. Waxman concluded the claimant was "unfit for duty." Findings of Fact 23 & 24.

The ALJ also held that the disciplinary action of demotion was a good faith disciplinary action and that it caused the PTSD. Conclusion of Law (I)(iii). The older version of the statute provides that a mental impairment found to be the result of a disciplinary action or demotion taken in good faith "shall not be considered to arise out of and in the course of employment." Section 8-41-301(2)(a), C.R.S. The ALJ's analysis then is that the demotion caused the PTSD. Accordingly, the ALJ did not consider the demotion to have been caused by the PTSD. Rather the sequence of causation featured the converse. The demotion caused the PTSD. Accordingly, the ALJ's indication that some of the reasons for the claimant's demotion, such as irritability and inattention to report writing, may have been influenced by PTSD symptoms, did not lead the ALJ to find the date of onset coincided with his demotion.

The ALJ found instead: "… the sequela prompting the referral (to Dr. Waxman) itself were ongoing and occurred before July 1, 2018. … [T]he claimant was probably unfit for duty as early as June 11, 2018, when he confided to Deputy Johnson that he was having problems with symptoms consistent with the disabling effects of PTSD and certainly by June 13, when it was documented in Dr. Goodwin's notes that he requested to be removed from his front line position." Conclusion of Law ¶ E.

The findings of the ALJ indicate the claimant did experience symptoms of PTSD in 2016 and that he also sought treatment for his PTSD at that time. The ALJ made findings pertinent to the essential duties and responsibilities of a patrol deputy. Findings of Fact ¶ 2. However, there was no finding the claimant was not performing those duties prior to August 2018. There is also no finding the claimant missed work as a patrol deputy or was constrained to modified duty prior to Dr. Waxman's 'not fit for duty' report as of August 20, 2018. Because the symptoms of an occupational disease and the "need for treatment of an occupational disease does not necessarily coincide with the disability," the findings of the ALJ are insufficient to support the order's conclusion that the date of onset of the claimant's occupational disease occurred prior to the amendments of § 8-41-301(2) and (3) on July 1, 2018.

We have had occasion to apply the *City of Colorado Springs* holding in such a fashion. In *Leverenz v. The Evangelical Lutheran Good Samaritan Society*, W. C. No. 4-726-429 (July 7, 2010), the claimant worked in the maintenance department where he was subjected to dust and smoke that aggravated a lung condition. He filed a claim on June 5, 2007. The respondents contended the claim was barred by the two year statute of limitations. The ALJ did find the claimant experienced symptoms from the dust and smoke exposure in 2001. The symptoms included shortness of breath, labored breathing, the inability to climb stairs or walk across the parking lot. However, the claimant's supervisors stated that despite the claimant's worsening condition he always completed all of his job duties. The claimant indicated the he finally had to cut his work hours down to 32 per week in 2006. The ALJ applied the standard from *City of Colorado Springs* and concluded the date of onset of the occupational disease was in 2006 when the claimant first experienced restricted duty and loss of income. The claim was deemed to be timely filed. The Panel agreed and noted "the courts have further held that an injury is not compensable where a claimant continues to work and to receive regular wages." The Panel also observed the findings demonstrated the claimant was not rendered "incapable of returning to work except in a restricted capacity" until 2006. The findings supported a date of onset in 2006.

In this case, the findings do not establish the employer had any cause to limit, modify, or restrict the claimant's work as a patrol deputy until August 2018. The ALJ found the employer only initiated a psychological inquiry into the claimant's fitness when the claimant asked for a job reassignment. It was not due to assertions the claimant was unable to perform his regular work as a patrol deputy. The findings indicated Lieutenant Johnston asked the claimant's supervisor, his patrol sergeant, if he had any concerns regarding the claimant's job performance. The response was that there were no performance problems. Findings of Fact ¶ 18. Applying the analysis set forth in *City of Colorado Springs*, the ALJ's findings of fact do not support the legal conclusion the date of onset of the claimant's occupational disease occurred prior to July 1, 2018. Instead, they require a determination the date of onset did not occur until August, 2018.

Section 8-41-301(2) and (3) effective July 1, 2018, includes a subparagraph (3)(b)(II) pertinent solely to a disability diagnosed as PTSD. Pursuant to that subsection, the PTSD need not be due to events generally outside the workers' usual experience and the PTSD need not be seen as evoking symptoms of distress in a worker in similar circumstances. The PTSD must follow exposure by the worker to one of three sets of circumstances. The third set, in subparagraph (3)(b)(II)(C), involves: "The worker repeatedly visually witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of intentional act of another or an accident."

The ALJ found the claimant did sustain a mental injury represented by PTSD. Conclusion of Law (B). The ALJ also determined the PTSD arose out of the usual experience of a patrol deputy. Conclusion of Law (I)(i). Finally, the ALJ held the claimant's PTSD developed from viewing the burning to death of a tanker truck driver, the mangled bodies of traffic accident victims, the bodies of suicide victims, the victim of violent child abuse, and the death of an individual despite his personal resuscitation efforts. Conclusion of Law (D). These events occurred at various points during each year between 2010 and 2017, and in 2008. Findings of Fact ¶ 5. The findings establish the prerequisites necessary for the claimant's PTSD injury to be compensable. The claimant has demonstrated he sustained a compensable injury in the form of an occupational disease of PTSD with a date of onset of August 20, 2018, the date of Dr. Waxman's report declaring the claimant unfit for duty due resulting from PTSD.

The record indicates the parties stipulated to an average weekly wage of $888.23. The claimant sought temporary disability benefits commencing August 20, 2018. The employer formally discharged the claimant due to being unfit for duty on January 29, 2019. Exhibit 4. The record and the findings support an award of temporary total

benefits beginning January 29, 2019, based on the stipulated average weekly wage, to continue until terminated by operation of law.

The issues pertinent to the authorized treating physician, the liability for specific medical treatments, whether there was timely reporting of the injury pursuant to § 8-43-102 and for any additional temporary disability benefits prior to January 29, 2019, are remanded for further determination by the ALJ in accordance with the above decision.

Accordingly, we reverse the determination of the ALJ that the claim is not compensable and set aside the ALJ's denial of the claimant's request for temporary disability benefits following his August 20, 2018, occupational disease.

IT IS THEREFORE ORDERED that the ALJ's order dated May 1, 2019, is reversed, the claim is ordered compensable, and the respondents are liable for temporary disability benefits as of January 29, 2019. The matter is further remanded to the ALJ for resolution of the issues of the authorized treating physician, liability for specific medical treatments, timely reporting of the injury and for additional temporary disability benefits prior to January 29, 2019.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

10/16/19 by TT .

FELIX MONTOYA, 1502 E 10TH ST, PUEBLO, CO, 81001 (Claimant)
DWORKIN CHAMBERS WILLIAMS YORK BENSON & EVANS, Attn: DAVID J DWORKIN ESQ, 3900 E MEXICO AVENUE STE 1300, DENVER, CO, 80210 (For Respondents)

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-050-003

IN THE MATTER OF THE CLAIM OF:

MARTHA PEREZ DE CHAVEZ,

Claimant,

v.

FINAL ORDER

GCA SERVICES GROUP INC,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurer,
Respondents.

The claimant seeks review of an order of the Director of Division of Workers' Compensation, Paul Tauriello, (Director) dated June 25, 2019[1], that granted the respondents' Motion to Close. We affirm the Director's order.

The claimant in this case sustained an alleged injury on May 11, 2017. A first report of injury was filed on June 23, 2017. The respondents filed a notice of contest on June 28, 2017. The claimant filed a workers' claim for compensation on September 18, 2017, the same date counsel for the claimant entered his appearance.

On March 8, 2018, a Pre-hearing Administrative Law Judge (PALJ) entered an order compelling the claimant to respond to interrogatories. The respondents stated they received the claimant's responses to interrogatories on March 23, 2018. There was no further activity in the case until the respondents filed a Motion to Close for failure to prosecute pursuant to WCRP 7-1(C) on September 24, 2018. The Director issued an Order to Show Cause on October 9, 2018, directing the claimant to show good cause why the claim should not be closed for failure to prosecute. On November 8, 2018, the claimant filed an application for hearing and a response to the Order to Show Cause stating that "[t]he claimant has applied for a hearing. A copy of that application is

[1] The Director's order is dated June 25, 2018, which we construe to be a typographical error.

attached hereto as Exhibit A." The claimant requested that the Director find that good cause had been shown.

The Director entered an order on November 14, 2018, granting the claimant a 120-day Extension of Time to Show Cause until March 14, 2019. As we understand the Director's order, the Director interpreted the claimant's act of filing an application for hearing as a representation that there is a need for an extension of time to show cause why this claim should not be closed. *See* WCRP 7-1(C) (2), (an application for hearing without further action does not automatically constitute prosecution). The Director's extension specifically required the claimant to set and attend a hearing *or* to file a written motion requesting an additional extension of time.

The claimant did not set the November 8, 2018, application for hearing and the application for hearing was struck by the Office of Administrative Courts (OAC) on December 9, 2018.

On March 21, 2019, the Director issued an order granting the respondents' Motion to close the claim. The Director noted that the claimant failed to comply with the Extension of Time to Show Cause and ordered the claim closed.[2]

The claimant appealed the Director's March 21, 2019, order. The claimant contended that the Director's order is not supported by the facts or applicable law and the Director abused his discretion. The claimant further alleged that she made efforts in further of prosecution of her claim which included a notice of a change of address and the claimant's attempts to obtain some health care for her occupational injury. The claimant's counsel also stated that he was unable to set the hearing because of medical problems and a new application for hearing had to be filed. The claimant also made general allegations of due process violations.

On June 25, 2019, the Director entered another order on the claim, which we understand to be a supplemental order. The Director addressed the claimant's arguments, noting that the claimant failed to comply with the order to show cause or the extension of time to show cause. The Director further noted that although the claimant stated that she filed a notice of a change of address, the Division has no record of any change of address at any time and that such an action would not be an activity in furtherance of prosecution.

[2] Although the respondents filed a second motion to close the claim the Director noted that he was not ruling on that motion and is instead closing the claim pursuant to the terms of the November 14, 2018, extension to show cause.

The Director then concluded that the claim was closed as of March 21, 2019, subject to the reopening provisions of §8-43-303, C.R.S.

The claimant has appealed the Director's June 25, 2019 order, incorporating the arguments from the prior brief and asserting that the Director's order is unsupported by the facts and applicable law, the process for a motion to close violates due process, access to the courts and equal protection and further asserts that the Director is biased against the claimant's counsel and "his occupationally disabled Mexicano clients." The claimant also asserts that the Director's order substitutes "action" for "activity" and that the Director failed to recognize that the claimant attempted to prosecute a claim even though her counsel and his longtime workers' compensation paralegal were both continually battling medical problems. We are not persuaded the Director committed reversible error.

Section 8-43-207(1)(n), C.R.S., authorizes the Director to dismiss a claim where there has been no activity for a period of at least six months. W.C. Rule of Procedure 7-1 (C), provides that where no activity in furtherance of prosecution has occurred in a claim for a period of at least six months, a party may request the claim be closed. Rule 7-1(C) further provides that following receipt of a request to close a claim, the Director may issue the order to show cause why the claim should not be closed. Rule 7-1(C), also provides that if a response is timely received, the Director will determine whether the claim should remain open.

Because the Director's authority is discretionary, we may not interfere with the Director's order unless an abuse is shown. *Martinez v. Qwest Communications,* W.C. No. 4-741-525 (April 26, 2010); *Milner v. Wal-Mart,* W. C. No. 4-567-972 (June 17, 2005). An abuse exists if the Director's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Rosenberg v. Board of Education of School District No. 1,* 710 P.2d 1095 (Colo. 1985).

Here, it is undisputed that the claimant filed a claim for compensation in 2017. The initial compensability of the claim had been at issue for almost two years by the time the Director entered the order closing the case because of failure to prosecute. The claimant has not put forth any argument that she was unable to comply with the Director's Order requiring her to request an extension of time if it was not possible to set the hearing on the November 2018 application for hearing. The claimant also asserts that the act of changing her address with the Division constituted an act in furtherance of prosecution. The Director found however that there is no evidence in the record that the claimant has submitted a change of address. Like the Director, we conclude that even if

there were a change of address in the record, this does not establish an effort on the claimant's behalf to prosecute her claim. *See Koon v. Barmettler*, 134 Colo. 221, 225, 301 P.2d 713, 715 (1956) (burden rests on plaintiff, not defendant, to prosecute case without unusual delay). Under these circumstances we cannot say that the Director abused his discretion in closing the claim.

Nor are we persuaded by the claimant's general assertions that her constitutional rights have been violated. The claimant has not directed our attention to anything specific in the record to support this assertion. An appellate tribunal need not search the record for evidence to support a factual proposition, nor search out legal authorities to support vague assertions that an error was committed. *Raygor v. Board of County Commissioners*, 21 P.3d 432, 439 (Colo. App. 2000). A party's right to procedural due process is met if the party is provided with notice and an opportunity to be heard. *Pub. Utils. Comm'n v. Colo. Motorway, Inc.*, 165 Colo. 1, 10, 437 P.2d 44, 48 (1968). The essence of procedural due process is fundamental fairness. *City & County of Denver v. Eggert*, 647 P.2d 216, 224 (Colo. 1982).

The record supports the Director's findings that the claimant was given the opportunity to set the application for hearing or to file an extension of time with the Director. Although the claimant's counsel asserted that medical problems in his office prevented him from attending a hearing by the required date, the application for hearing was struck in December and the claimant failed to file an extension to time prior to the March 2019 deadline. In our view the claimant was afforded notice and an opportunity to be heard. Consequently, we are not persuaded that the claimant was deprived of due process of law or other constitutional rights.

We are also not persuaded by the claimant's contention that the Director is biased against her counsel and his clients. We note initially that the Director is entitled to the presumption that he is competent, impartial, and unbiased "until the contrary is shown." *See Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1189 (Colo. App. 1995). To establish that a court was biased, a party must show that the court had "a substantial bent of mind against him or her. Speculative statements and conclusions are insufficient to satisfy the burden of proof." *People v. James*, 40 P.3d 36, 44 (Colo. App. 2001).

The claimant's statements in her brief do not demonstrate any bias on the part of the Director. It is well established that adverse rulings, even if numerous and continuous, do not in themselves show bias. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.*, 745 P.2d 1034 (Colo. App. 1987); *In re Marriage of Johnson*, 40 Colo. App. 250, 576 P.2d 188 (1977). The allegations mentioned in the claimant's petition to review contain

nothing to suggest that the Director's actions were improper or the product of bias. Further, the statement that the claimant's counsel has not "prevailed at a Workers' Compensation hearing this entire millennium" is a matter of opinion and unreviewable without further factual context.

IS THEREFORE ORDERED that the Director's order dated June 25, 2019, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

10/21/19 by TT .

LAW OFFICES OF RICHARD K BLUNDELL, Attn: RICHARD K BLUNDELL ESQ, 3535 12TH STREET SUITE D, GREELEY, CO, 80634 (For Claimant)
POLLART MILLER LLC, Attn: AMANDA J BRANSON ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)
DIVISION OF WORKERS COMPENSATION, Attn: TAYLOR DURAN, 633 17TH STREET SUITE 400, DENVER, CO, 80202 (Other Party)

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

COLORADO COURT OF APPEALS
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DENVER, CO 80203

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-043-243-004

IN THE MATTER OF THE CLAIM OF:

BRITTANY PRIBBLE,

Claimant,

v.

WALMART STORES INC,

Employer,

and

NEW HAMPSHIRE INSURANCE
c/o CLAIMS MANAGEMENT INC,

Insurer,
Respondents.

REMAND ORDER

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) that assessed a cancellation fee charged by the respondents' expert witness against the claimant after the May 17, 2019, hearing was vacated. We set aside the order insofar as the ALJ assessed the cancellation fee against the claimant and remand for further proceedings.

A review of the record shows that the claimant sustained an admitted injury on July 15, 2016. The claimant was placed at MMI on August 7, 2017, and given a zero percent impairment. The respondents filed a final admission of liability on March 14, 2018. The claimant objected and underwent a Division independent medical examination (DIME) by Dr. Watson. Dr. Watson concluded that the claimant reached MMI and sustained a 16 percent whole person rating. The respondents filed an application for hearing seeking to overcome the DIME and the claimant filed an application for hearing seeking additional temporary disability benefits. The applications for hearing were joined and scheduled to be heard on March 22, 2019.

The claimant then filed three more applications for hearing on the issue of penalties. A hearing was set for May 10, 2019, on the first penalty application. The parties later stipulated to consolidate all of the hearing applications to be heard at a scheduled hearing on May 17, 2019.

On May 8, 2019, the claimant filed an opposed motion to vacate the May 17, 2019, hearing. The claimant's attorney stated that he was physically unable to participate in the hearing because of ongoing serious health problems. After a telephone pre-hearing status conference, ALJ Turnbow, entered an order dated May 15, 2019, granting the motion to vacate the hearing and ordered the claimant to pay the cancellation fee from the respondents' expert witness that was scheduled to testify at the hearing.

The claimant filed a motion for corrected order/petition to review. In the motion, the claimant asserts that the order is a violation of the claimant's rights to due process, fundamental fairness, access to the courts and to a hearing and to equal protection of the laws and that there is no basis in law or in fact for the "$2000 penalty" against the claimant. Because the ALJ's order is insufficient to permit appellate review, we set aside the assessment of cancellation fees against the claimant.

We initially recognize that the ALJ's order on its face does not grant or deny a specific benefit or penalty. We nevertheless consider the ALJ's order final on the issue of the cancellation fee for purposes of our review. We have no authority to review an order that does not satisfy the finality criteria of § 8-43-301(2), C.R.S., which provides that any dissatisfied party may seek review of an order "that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty. . . ." *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003). The ALJ's assessment of the cancellation fee appears to be a penalty for the claimant's cancellation of the hearing because we know of no other statutory authority to assess an expert witness cancellation fee against an opposing party. *But see* §8-43-315, C.R.S. (witness costs may be awarded for incompetent, irrelevant or sham issues).

We further note that although ALJ Turnbow's order does not specify the amount of the cancellation fee assessed against the claimant, the record indicates that the parties do not dispute that the amount of the fee is $2000.00. Under the circumstances here we determine that this portion of the ALJ's order is final. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989)(an order may be partially final and reviewable and partially interlocutory).

The ALJ's order assessing the cancellation fee against the claimant, however, contains no findings of fact, conclusions of law or any indication of the ALJ's factual or legal basis to assess the cancellation fee. *See*; OAC Rule of Procedure 17 (indicates an order concerning summary judgment must include findings of fact, conclusions of law, and an order). Moreover, there are no pleadings or transcript to indicate that the issue of

the cancellation fee was even properly before the ALJ[1]. *See Bill Dreiling Motor Co. v. Schultz*, 168 Colo. 59, 450 P.2d 70 (Colo. 1969)(issues should not be permitted unless there is no reasonable doubt that the issue was intentionally and actually tried); *Colorado Board of Medical Examiners v. Palmer*, 157 Colo. 40, 400 P.2d 914 (1965)(due process protections require that a person be given adequate notice of the proceeding and its nature, and a fair opportunity to be heard).

It is therefore necessary for us to remand this matter for additional findings and entry of a new order. §8-43-301(8), C.R.S. On remand the ALJ shall conduct additional proceedings as deemed necessary to enter another order containing sufficient factual findings and the legal basis to permit review of her determination that a cancellation fee should be assessed against the claimant.

IT IS THEREFORE ORDERED that the ALJ's order dated May 15, 2019, is set aside insofar as it assesses a cancellation fee against the claimant and remanded for further proceedings consistent with this order.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

[1] The order states that the "*claimant*' made an oral motion to assess the cancellation fee against the "claimant." We presume that was a typographical error and are unclear whether the respondents made the oral motion during the pre-hearing conference or if the issue was raised *sua sponte* by the ALJ.

CERTIFICATE OF MAILING

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

11/8/19 by TT .

LAW OFFICE OF RICHARD BLUNDELL, Attn: RICHARD BLUNDELL ESQ, 3535 W 12TH STREET SUITE D, GREELEY, CO, 80634 (For Claimant)
LEE & BROWN LLC, Attn: M FRANCES MCCRACKEN ESQ, 3801 EAST FLORIDA AVENUE SUITE 210, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-850-887-02

IN THE MATTER OF THE CLAIM OF:

TERRY OPP,

Claimant,

v.

FINAL ORDER

REGIONAL TRANSPORTATION DISTRICT,

Self-Insured Employer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Peter Cannici (ALJ) dated April 29, 2019, that granted respondent's Motion for Summary Judgment. We dismiss claimant's Petition to Review as jurisdictionally untimely.

This matter was previously before us. The ALJ entered an order on October 23, 2018, granting the respondent's Motion for Summary Judgment. The claimant appealed this order to the Panel. By order of March 18, 2019, we concluded that the record was insufficient as it lacked certain prehearing orders dated May 6, 2016 and July 10, 2018. We remanded the matter for the ALJ to perfect the record on appeal. The ALJ was directed to review and include the prehearing orders, which would assist us in determining whether there are genuine issues of material fact in dispute, and to enter a new order on summary judgment if applicable.

The ALJ entered a new order on April 29, 2019, again granting the respondent's Motion for Summary Judgment. The claimant filed a Petition to Review on May 21, 2019. Thereafter, respondent filed a Motion to Strike the Petition to Review as untimely filed and thus jurisdictionally barred. On June 11, 2019, the ALJ denied respondent's motion. The matter was again forwarded to the Panel for consideration of claimant's appeal as to the merits of the summary judgment issue. Because we dismiss the claimant's petition to review as jurisdictionally time barred, we do not consider the issues involved with the summary judgment order.

The ALJ's summary judgment order on remand was issued on April 29, 2019. Under § 8-43-301(2), C.R.S., a petition to review "shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be

final." Claimant's Petition to Review was certified as being filed on Tuesday, May 21, 2019, twenty-two calendar days after the order had been served on the parties.

In objecting to the respondent's Motion to Strike the Petition to Review, claimant essentially contended that the late filing was excusable because the order did not contain the advisement of appellate rights; that the ALJ's order did not comply with the Panel's remand order and thus § 8-43-301(2) did not apply; that the claimant's previous petition to review of the October 23, 2018, order should apply under the relate-back doctrine of C.R.C.P. 15; and that counsel misread her calendar and thought Monday, May 20, 2019, was the federal and state Memorial Day holiday thus extending the deadline to file to May 21.[1] Despite the clear and plain language of § 8-43-301(2), the ALJ denied the respondent's Motion to Strike the Petition to Review.

Section 8-43-301(2) provides that if a petition to review is not filed within 20 days after the date of the certificate of mailing of the ALJ's order, then the order shall be final. This statute provides, in pertinent part:

> (2) Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review with the division, if the order was entered by the director, or at the Denver office of the office of administrative courts in the department of personnel, if the order was entered by an administrative law judge, and serve the same by mail on all the parties. *The petition shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be final.*

The statutory time limits governing appellate review of workers' compensation decisions are jurisdictional. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 24 P.3d 1 (Colo. App. 2000). Thus, absent the filing of a timely petition to review, we lack jurisdiction to review the ALJ's order. *See Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998); *Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991). This provision is strictly enforced. *Youngs v. Industrial Claim Appeals Office*, 316 P.3d 50 (Colo. App. 2013); *Brodeur v. Industrial Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007); *Buschmann v. Gallegos Masonry, Inc., supra.* A jurisdiction filing deadline may not be extended, even for excusable neglect. *Speier v. Indus. Claim Appeals Office*, 181 P.3d 1173 Colo. App.

[1] Memorial Day in 2019 was observed on Monday, May 27.

2008). Consequently, we conclude that the ALJ's order denying the respondent's Motion to Dismiss the Petition to Review misapplied the statutory jurisdictional deadline and is erroneous as a matter of law. Because the claimant's petition to review was jurisdictionally defective, we are barred from a review of the ALJ's order. *Buschmann v. Gallegos Masonry, Inc., supra.*

Inclusion of an advisement regarding appellate rights at the bottom of an ALJ's order is not a statutory or regulatory requirement. Rather, it serves only as an informational notification. See § 8-43-215(1), C.R.S.; Rule 25(A), of the Rules of Procedure of the Office of Administrative Courts, 1 Code Colo. Reg., 104-3 at 7; *Indus. Comm'n v. Martinez*, 77 P.2d 646 (1938) ([statute] only requires notice of an award, not notice of appellate rights). Furthermore, the claimant stated that she mistakenly thought she was filing within the 20-day deadline (as extended one day by the Memorial Day holiday). From this statement the claimant concedes she was fully aware of the 20-day appeal deadline despite the absence of the advisement of appellate rights in the order.

Claimant also essentially argued that the ALJ's order on remand failed to comply with the Panel's remand order, although she did not specify how the ALJ failed to comply. Nonetheless, we view this contention as a merits argument regarding the summary judgment order, not as an error that would extend the jurisdictional deadline for filing a petition to review.

Additionally, claimant submits that her previous petition to review (of the October 23, 2018, order) was timely filed and the relate-back doctrine under Rule 15, C.R.C.P., should apply here. We disagree. Rule 15 applies to amended and supplemental pleadings. Claimant's May 21, 2019, petition to review is neither.

We conclude that the claimant's May 21, 2019, petition to review is jurisdictionally deficient as untimely.

IT IS THEREFORE ORDERED that the claimant's petition to review the ALJ's order dated April 29, 2019, is dismissed with prejudice.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

David G. Kroll

CERTIFICATE OF MAILING

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

11/15/19 by TT .

JULIE SWANBERG ESQ, 13918 E MISSISSIPPI AVENUE #148, AURORA, CO, 80012 (For Claimant)
RITSEMA & LYON, C/O: PAUL KRUEGER, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)

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

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

OFFICE OF THE ATTORNEY GENERAL
STATE SERVICES SECTION
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