COLORADO
Department of Labor and Employment

Division of Workers' Compensation
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November Case Law Update

Presented by Judge Susan Phillips and Judge David Gallivan

This update covers COA and ICAO decisions issued from
Stepmber 12, 2020, to November 13, 2020

Court of Appeals

Industrial Claim Appeals Office

Superior Court of New Jersey, Appellate Division

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COLORADO COURT OF APPEALS

DATE FILED: September 17, 2020
CASE NUMBER: 2019CA2042

Court of Appeals No. 19CA2042
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-050

Martha Perez De Chavez,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, GCA Services Group, Inc., and Indemnity Insurance Company of North America,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE RICHMAN
Terry and Johnson, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 17, 2020

Richard K. Blundell, Greeley, Colorado for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Pollart Miller LLC, Eric J. Pollart, Greenwood Village, Colorado, for Respondents GSA Services Group, Inc. and Indemnity Insurance Company of North America

¶ 1 In this workers' compensation action, claimant, Martha Perez De Chavez, seeks review of a final order of the Industrial Claim Appeals Office (Panel) upholding the closure of her claim for failure to prosecute. We affirm.

I. Background

¶ 2 Claimant worked as a cleaner/custodian for employer, GCA Services Group, Inc. On May 11, 2017, she injured her low back and tail bone at work when she tripped and fell backwards while moving pallets with a pallet jack. Employer filed its first report of injury a few days later, but subsequently contested the claim. Claimant, through her retained counsel, then filed a claim for compensation on September 12, 2017.

¶ 3 Employer served claimant with interrogatories on January 18, 2018. Having received no response to the interrogatories by early March 2018, employer obtained an order compelling claimant to answer the interrogatories by March 19, 2018. Employer received claimant's responses on March 23, 2018.

¶ 4 No activity occurred in the case for several months thereafter, however. On September 24, 2018, employer moved to close the claim pursuant to Workers' Compensation Rule of Procedure

(W.C.R.P.) 7-1(C) for failure to prosecute. *See* Dep't of Labor & Emp't Rule 7-1(C), 7 Code Colo. Regs. 1101-3.

¶ 5 The Director of the Division of Workers' Compensation issued a show cause order on October 9, 2018, requiring claimant to provide the Division, in writing and within thirty days, good cause why her claim should not be closed. On the thirtieth day, claimant responded to the show cause order, indicating only that she "ha[d] applied for a hearing. A copy of that application is attached hereto as Exhibit A."

¶ 6 The Director interpreted claimant's response as a request for additional time to respond to the show cause order, and, on November 14, 2018, sua sponte granted claimant 120 days within which to "set and attend a hearing before the Office of Administrative Courts on all issues ripe for adjudication **OR** obtain an order extending the deadline or otherwise resolving this order." Alternatively, a stipulation between the parties agreeing to keep the claim open could suffice. Claimant thus had until March 14, 2019, to take steps to avert closure of her claim.

¶ 7 However, claimant neither set the matter for a hearing nor filed a request for extension of time within 120 days. On March 20,

2019, employer filed a second motion to close the claim for failure to prosecute. The Director issued an order closing claimant's claim the next day.

¶ 8 On April 10, 2019, claimant filed a "verified motion for corrected order/petition to review," seeking to set aside "the perfunctory, baseless, groundless dispositive order of the [] Director." In the motion, claimant challenged the "non-existent Findings of Fact and Conclusions of Law" as "grossly insufficient to permit appellate review." She also accused the Director of violating her right to due process with the "predetermined, utterly biased, baseless . . . Order, . . . particularly since the undersigned [claimant's counsel] was given no opportunity to respond thereto before some unknown person utilized the Director's signature stamp to enter the retaliatory, discriminatory, recriminatory, baseless, and extraordinarily cruel, perfunctory dispositive Order." Finally, claimant argued that it was unclear what "activity" she should have undertaken to avoid closure of her claim, and asserted, without corroborating evidence, that her counsel had filed a notice of change of address "during the preceding 6 months."

¶ 9 In a written order entered June 25, 2018, the Director rejected claimant's request for a corrected order. He disputed claimant's contention that her counsel had filed a notice of change of address; found that even if a change of address had been filed, such a form would not amount to further prosecution of her claim; and further found that she had five months after the issuance of the show cause order to take action in her case but had failed to do so.

¶ 10 Thereafter, the Panel affirmed the Director's order closing the claim. It concluded that because evidence supported the Director's decision, the Director had not abused his discretion. It further held that the record established claimant had been given ample notice and opportunity to respond, and therefore found no violations of her rights to due process or other constitutional protections. It further concluded that claimant had failed to show the Director's actions were the "product of bias." Claimant now appeals.

II. Claimant's Contentions

¶ 11 In a lengthy opening brief, claimant challenges the Director's and Panel's orders on a variety of grounds. Her arguments fall under four primary contentions, the first of which she supports with several sub-arguments. She argues that:

(1) The Director abused his discretion by closing her claim even though:

a. the application for a hearing demonstrated her "activity" — a term she argues is not properly defined in the applicable statute or rule — in prosecuting her claim and should have precluded closure;

b. the Division should have known and taken into consideration her counsel's medical condition;

c. she could not schedule a hearing within the 120-day time limit set by the Director because of the "crowded Greeley docket";

d. she allegedly filed another application for a hearing on March 20, 2019;

e. the closure was carried out "solely for reasons of expediency without any claim or showing of prejudice"; and,

(2) The Director violated her constitutional right to due process by depriving her of her protected property interest in her workers' compensation benefits when the Director

closed her claim without weighing the "fundamental fairness" factors.

(3) The order closing her claim lacks sufficient fact finding to conduct meaningful appellate review.

(4) The Director and the Division are biased against her counsel and retaliated against him by closing her claim.

We are not persuaded by any of these assertions to set aside the Panel's decision.

III. Law and Standard of Appellate Review

¶ 12 Section 8-43-207(1)(n), C.R.S. 2019, authorizes the Director to dismiss a claim where there has been no activity for a period of at least six months. Department of Labor & Employment Rule 7-1(C) and (D) flesh out the procedure for resolving such situations. W.C.R.P. 7-1(C) provides that "[w]here 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." "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" and "[i]f a response is timely received, the Director may determine whether the claim should remain open." W.C.R.P. 7-1(C)(2). Furthermore, "[a]n

application for hearing . . . without further action (i.e. setting and attending a hearing . . .) does not automatically constitute prosecution." *Id.* Less pertinent here but nonetheless crucial to the benefits scheme, W.C.R.P. 7-1(D) guarantees that despite a claim's closure, a claimant is still entitled to receive "previously admitted and/or ordered" maintenance medical benefits and permanent medical impairment benefits.

¶ 13 Because the Director's authority is discretionary, we may not interfere with the Panel's affirmance of that order unless an abuse of discretion is shown. *See Colo. Dep't of Labor & Emp't v. Esser*, 30 P.3d 189, 193 (Colo. 2001) ("[A] decision involving the application of facts to law on behalf of the agency is normally subject to review under an abuse of discretion standard."); *Cordova v. Indus. Claim Appeals Offic*e, 55 P.3d 186, 189 (Colo. App. 2002) (noting that when statutory language is permissive, a decision is discretionary); *see also* § 8-43-308, C.R.S. 2019 (limiting grounds for setting aside an award); *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006) ("[R]eviewing courts must apply the substantial evidence test in determining whether the evidence supports the ALJ's findings of fact."). "An abuse of

discretion occurs when the . . . order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law." *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002).

IV. Director Did Not Abuse His Discretion

¶ 14 The Director closed claimant's claim after she did not set the matter for hearing within six months of employer's motion to close. Claimant contends that her application for hearing should have staved off closure because it constituted "activity" within the meaning of W.C.R.P. 7-1(C). Essentially claimant argues that her November 8, 2018, application for hearing served as a placeholder that precluded closure.

¶ 15 But an application for hearing cannot serve that purpose indefinitely. Further steps must be taken to move the claim forward. W.C.R.P. 7-1(C) cautions, in fact, that "[a]n application for hearing . . . without further action . . . *does not automatically constitute prosecution*." (Emphasis added). The Director ordered claimant to set the matter for hearing within four months of the November 14, 2018, order, but she never did so. The time elapsed with no indication from claimant of her intent to pursue her claim.

¶ 16 Claimant contends, though, that obtaining a hearing date on the crowded docket in Greeley's branch of the Office of Administrative Courts hampered her ability to prosecute her claim. Assuming this to be true, though, the record does not reflect, and claimant does not suggest, that she made any attempt to set a hearing. She suggests that she was placed in an untenable position because, she apparently assumed, no hearing could be scheduled in the time allotted. Yet, nowhere in the record is there any indication claimant attempted to contact the Division to try to schedule a hearing in the time afforded her, and claimant does not point us to any evidence to the contrary.

¶ 17 Moreover, even if a hearing was unobtainable, the Director afforded claimant the opportunity to, also within 120 days, ask for an extension of time within which to schedule her hearing. She did not avail herself of that alternative, either.

¶ 18 Instead, claimant asserts she filed another application for hearing "on March 19 or 20, 2019, on the same issues." However, in support of this claim, she cites to a numbered paragraph in the opening brief of her petition to review before the Panel, not to a second application for hearing. We have reviewed the record in its

entirety and have not found any application for hearing other than the application claimant filed on November 8, 2018, in response to the Director's order to show cause. We note, too, that in rejecting the petition to review, the Director alluded to the absence of a second application for hearing and expressly disputed claimant's assertion that she filed a change of address form.

¶ 19 To the extent claimant contends that her counsel's illness prevented her from prosecuting her claim, this argument was not preserved. Claimant made no mention of an illness in her November 8, 2018, response to the show cause order, and did not notify the Division of her counsel's condition until she filed her "verified motion for corrected order/petition to review" on April 10, 2019, after the claim had already been closed. Such information should have been conveyed in a motion for extension of time filed before the time allotted expired. *See City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997) (concluding that an argument not raised before ALJ was not preserved for appellate review).

¶ 20 Claimant took no action to prosecute her claim from March 2018 until September 2018, when employer filed its first motion to close for failure to prosecute. In response, she filed an application

for hearing on November 8, 2018, but subsequently filed no further pleadings until after the claim was closed. Given this timeline and the circumstances discussed above, we cannot say that the Director abused his discretion by closing claimant's claim for failure to prosecute. *See Esser*, 30 P.3d at 193.

V. No Constitutional Violation

¶ 21 Nor are we persuaded that the closure of her claim violated any of claimant's constitutionally protected rights. Claimant asserts, correctly, that an injured employee may have a property interest in workers' compensation benefits and that such benefits consequently cannot be taken away without due process. *See Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 719 n.8 (Colo. 1994) ("We hold that a claimant possesses a property interest in receiving workers' compensation benefits.").

¶ 22 However, a property interest in workers' compensation benefits only arises after a claimant has either been awarded benefits or an employer has admitted it is liable for the worker's benefits. *Id.* at 719 ("A claimant who has been awarded benefits in a workers' compensation case is entitled to procedural due process before those benefits may be terminated."). "Due process does not

guarantee that claimants will always receive the benefits they request. Rather, due process ensures that those benefits — *once admitted to or awarded* — will not be taken away without 'notice and the opportunity to be heard by an impartial tribunal.'" *Yeutter v. Indus. Claim Appeals Office*, 2019 COA 53, ¶ 34 (quoting *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995)) (emphasis added).

¶ 23 The record before us reveals that claimant did not possess a property interest in benefits: no admission of liability had been filed because employer contested the claim for benefits and no order awarding claimant benefits had been issued. Consequently, claimant had no protected property interest in workers' compensation benefits. *Yeutter*, ¶ 34; *Wecker*, 908 P.2d at 1188.

¶ 24 But even if we were to assume claimant possessed a property interest in workers' compensation benefits, it is clear she was afforded due process before her claim was closed. "The fundamental requisites of due process are notice and the opportunity to be heard by an impartial tribunal." *Wecker*, 908 P.2d at 1188. "The essence of procedural due process is fundamental fairness." *Avalanche Indus., Inc. v. Indus. Claim*

Appeals Office, 166 P.3d 147, 150 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *see also Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009) (Due process "requires fundamental fairness in procedure.").

¶ 25 Here, claimant had both notice of employer's challenge and an opportunity to respond. She received employer's motions and the Director's orders. The Director clearly and unambiguously set forth the steps claimant would be required to take to avoid closure and afforded her ample time to respond to keep her claim viable. Her failure to take those steps in a timely fashion is not a due process violation.

¶ 26 In the absence of an accrued property interest in workers' compensation benefits, and in the presence of ample evidence of notice and an opportunity to be heard, claimant cannot establish a due process violation. Because she cannot establish her prima facie due process claim, no analysis of fundamental fairness or prejudice suffered by employer was necessary. *See Nofio*, 886 P.2d at 719; *Yeutter*, ¶ 34; *Wecker*, 908 P.2d at 1188.

VI. Director's Order was Adequate

¶ 27 Claimant also contends that the Director's "dispositive order" failed to include sufficient findings of fact to conduct meaningful appellate review. Because our analysis hinges on the chronology established by the record, we disagree that additional factual findings would ease appellate review.

¶ 28 The Director issued two orders pertaining to closure: (1) a March 21, 2019, order granting the motion to close the claim; and (2) a June 25, 2019, order again granting the motion to close, but made effective March 21, 2019. The Director issued the June 2019 order in response to claimant's petition to review, and in it he discussed the bases for closure. Claimant does not specify to which order she refers. Regardless, identifying which order is at issue will not change the outcome here because the record establishes the chronology critical to our analysis.

¶ 29 The Director acted on employer's motion to close the claim for failure to prosecute. The merits of claimant's claim were not at issue. The only issue before us is whether the Director acted appropriately when he closed the claim for failure to prosecute. That question can be resolved by reviewing the chronology of the claim, the notices sent to claimant, and the mandates of the orders

issued. The record adequately answers these queries. Additional findings of fact consequently would not assist us in analyzing the question presented.

VII. No Evidence of Bias

¶ 30 Last, claimant contends that the Director and the Division are biased against her counsel. In support of this contention, she cites to the case of another claimant represented by her counsel whose claim was closed under similar circumstances the same day her claim was closed. She contends that after several decades representing "vulnerable non-English speaking" workers, her counsel's relationship with the Division and the Director has become "overtly adversarial or hostile." She argues that the "baseless" closure of her claim represents the Division's "clear retaliation" against her and her counsel. We are not persuaded.

¶ 31 First, "we assume [the Director] to be competent and unbiased until the contrary is shown." *Wecker*, 908 P.2d at 1189. To establish bias, a claimant must show "that the judge 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).

Unsubstantiated accusations and conclusory statements "are not legally sufficient to require disqualification." *Bocian v. Owners Ins. Co.*, 2020 COA 98, ¶ 15. Further, "it is well established that adverse legal rulings, standing alone, do not constitute grounds for claiming prejudice or bias." *Id.* at ¶ 23.

¶ 32 Here, claimant offers no examples of this alleged bias other than the mere coincidence that another case prosecuted by her counsel was closed on the same day that the Director issued an order of closure in her case. Two adverse rulings against clients of the same attorney (one of whose file is not in the record) are insufficient to show bias. *Id.* Likewise, claimant's unsubstantiated, conclusory accusations that the Director "detests" her counsel cannot support her bias claim. *Id.* at ¶ 15. Claimant therefore has not demonstrated the Director bore any bias against her or her counsel and we decline to set aside the Panel's order on this basis.

VIII. Conclusion

¶ 33 The order is affirmed.

JUDGE TERRY and JUDGE JOHNSON concur.

COLORADO COURT OF APPEALS

DATE FILED: October 15, 2020
CASE NUMBER: 2019CA1975

Court of Appeals No. 19CA1975
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-084-877

Fremont County Sheriff's Office and CTSI,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Felix Montoya,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE DUNN
Freyre and Brown, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 15, 2020

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., David Dworkin, Denver, Colorado, for Petitioners

No Appearance for Respondents

¶ 1 In this workers' compensation action, we must determine whether the Industrial Claim Appeals Office (Panel) erred by reversing the decision of an administrative law judge (ALJ) that denied Felix Montoya's (claimant) claim for workers' compensation benefits.

¶ 2 The ALJ denied the claim finding that the onset date of claimant's occupational disease predated an amendment to the Workers' Compensation Act (Act) under which the claim would be compensable. The Panel disagreed and reversed the ALJ's order, concluding that claimant's occupational disease had a later onset date and that his claim was therefore compensable under the amendment.

¶ 3 The Fremont County Sheriff's Office seeks review of the Panel's order, contending the Panel exceeded its authority by disregarding the ALJ's factual findings. Because we agree, we set aside the Panel's order and remand with instructions to reinstate the ALJ's order.

I. Background

¶ 4 Claimant worked for the Fremont County Sheriff's Office as a patrol sergeant but was later demoted to a patrol deputy. As part of

his law enforcement duties in both positions, claimant was exposed to several disturbing and traumatic accidents and crime scenes between 2008 and 2018.

¶ 5 As a result, claimant began to experience anger issues, severe anxiety, sleep deprivation, and intrusive thoughts. By May 2017, claimant sought treatment, was diagnosed with post-traumatic stress disorder (PTSD), and began attending weekly psychotherapy sessions.

¶ 6 In August 2017, the Sheriff's Office demoted claimant from sergeant to deputy for job performance issues, including failure to supervise, failure to listen to his radio and respond to dispatchers, use of "extremely unprofessional language" over the radio, and "poor report writing and report approval."

¶ 7 In May 2018, claimant reported to his treating psychiatrist, Dr. Matthew Goodwin, that he felt like he needed to speak to his lieutenant about seeing a "comp doctor" for his problems.

¶ 8 And on June 11, 2018, claimant confided in his supervising lieutenant that he was having trouble sleeping and controlling his anger. Two days later, he told Dr. Goodwin that he "approach[ed] his lieutenant and requested to receive help for his psychological

problems as well as to be taken off of his current front line duties and placed in an alternate position." He reported to Dr. Goodwin that the Sheriff's Office had scheduled him to see the "psych doctor."

¶ 9 After this, claimant's lieutenant spoke with claimant's supervising sergeant who had no concerns about claimant's work but said he also had "a similar conversation" with claimant about these issues a few days" before.

¶ 10 Less than two weeks later, Dr. Goodwin reported that claimant had an "'outburst' where he 'screamed' at a superior deputy during an [internal affairs] investigation (of another deputy) . . . [and] indicated that the nature of the investigation was 'triggering his PTSD' at the time." Claimant's lieutenant confirmed that he discussed the "outburst" with the investigator and both felt it was "out of character" for claimant.

¶ 11 After the June "outburst," the Sheriff's Office referred claimant for a psychological fitness for duty evaluation. Claimant then met with psychologist Dr. Chad Waxman on July 20, 2018. Dr. Waxman issued his report on August 20, 2018, confirming claimant's PTSD diagnosis and noting its impact on claimant's

"relationships, his health, . . . and his work as a Patrol Deputy." Dr. Waxman concluded that "to a reasonable degree of psychological certainty, . . . [claimant] is ***unfit*** for duty at this time."

¶ 12 Based on Dr. Waxman's report, the Sheriff's Office placed claimant on paid leave but later terminated his employment because of the "prognosis for [his] return to duty."

¶ 13 Claimant then filed a claim for workers' compensation benefits, which the Sheriff's Office contested. After a hearing — the transcript of which is not part of the record — the ALJ denied and dismissed the claim, finding that the onset of claimant's occupationally induced PTSD occurred before July 1, 2018, and thus predated an amendment to section 8-41-301, C.R.S. 2019, of the Act which expanded benefits for occupationally induced mental impairment claims.

¶ 14 The ALJ made the following findings supporting this conclusion:

- The incidents claimant witnessed were within the normal scope of a deputy's or sergeant's usual work experience.

- "By August 22, 2017, the debilitating effects of [c]laimant's PTSD . . . had resulted in performance issues [that] warranted discipline," and resulted in claimant's demotion.
- Claimant's PTSD impaired his ability to perform his regular duties "at various times prior to July 1, 2018."
- Claimant "was probably unfit for duty as early as June 11, 2018, when he confided to [the lieutenant] that he was having problems with symptoms consistent with the disabling effects of PTSD and certainly by June 13, when it was documented . . . that he requested to be removed from his front line position."
- The disabling effects of claimant's "occupationally induced PTSD" became evident before July 1, 2018, and the onset of his injury therefore predated the statutory amendment.

The ALJ also rejected as unpersuasive claimant's assertion that he "had no injury" and "was not disabled" until August 2018 when Dr. Waxman issued his report finding claimant unfit for duty.

¶ 15 On review, the Panel reversed the ALJ's order. The Panel held that the ALJ's factual findings necessarily supported the conclusion that claimant's injury arose in August 2018, when Dr. Waxman found him unfit for duty. Based on this, the Panel further concluded the amended version of section 8-41-301 applied and claimant was entitled to temporary total disability (TTD) benefits from the date of his termination. And it remanded the case to the ALJ to determine, among other things, whether claimant was entitled to TTD benefits before his termination date.

II. Analysis

¶ 16 The Sheriff's Office contends that the Panel exceeded its authority when it set aside the ALJ's denial of claimant's TTD benefits claim. More specifically, it argues the Panel was bound by the ALJ's factual findings regarding the onset of claimant's occupationally induced PTSD and that those findings support the conclusion that the onset date was before July 1, 2018 — the effective date of amended section 8-41-301. We agree.

A. Standard of Review

¶ 17 When reviewing an ALJ's decision, the Panel may only "correct, set aside, or remand" an ALJ's order on the grounds that

> the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the [P]anel.

§ 8-43-301(8), C.R.S. 2019.

¶ 18 Whether a claimant has met his burden of establishing a compensable mental impairment is a question of fact for determination by the ALJ. *See Pub. Serv. of Colo. v. Indus. Claim Appeals Office*, 68 P.3d 583, 585 (Colo. App. 2003) ("The causes of a claimant's mental impairment and the commonality of those causes are questions of fact to be resolved by the ALJ."). Therefore, the Panel, and this court, "must uphold the ALJ's findings of fact if such are supported by substantial evidence in the record." *Nelson v. Indus. Claim Appeals Office*, 981 P.2d 210, 213 (Colo. App. 1998); *see also* § 8-43-301(8); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995) ("By statute, both the Panel and reviewing courts must apply the substantial evidence test in determining whether the evidence supports the ALJ's findings of fact."). As well, we and the Panel "must defer to the ALJ's

resolution of conflicts in the evidence, credibility determinations, and the plausible inferences that [the ALJ] drew from the evidence." *Nelson*, 981 P.2d at 213 (citing *Metro Moving & Storage Co.*, 914 P.2d at 415).

¶ 19 If the Panel exceeds its statutory powers or "the award or denial of benefits is not supported by applicable law," we may set aside its decision. § 8-43-308, C.R.S. 2019; *see Pella Windows & Doors, Inc. v. Indus. Claim Appeals Office*, 2020 COA 9, ¶ 46 (setting aside the Panel's order where the Panel exceeded its authority "by reweighing the evidence presented" to the ALJ).

B. Law Governing Mental Impairment Injuries

¶ 20 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 date of onset of an occupational disease is a question of fact, *see City of Colorado Springs v. Indus. Claim Appeals Office*, 89 P.3d 504, 507 (Colo. App. 2004), and "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 595, 597 (Colo. App. 1998). *See also Ricks v. Indus. Claim Appeals Office*, 809 P.2d 1118, 1120 (Colo. App. 1991) ("[T]he commencement of disability . . . may also be established by evidence which demonstrates . . . that a claimant is able to return to work following the accident only in a restricted capacity.").

¶ 21 Until July 2018, a claimant seeking to establish a claim for "mental impairment" had to prove he suffered from a

> permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally *outside of a worker's usual experience* and would evoke significant symptoms of distress in a worker in similar circumstances.

Ch. 103, sec. 2, § 8-41-301(2)(a), 1999 Colo. Sess. Laws 299-300 (emphasis added); *see Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004) (discussing mental impairment claim as an occupational disease).

¶ 22 Effective July 1, 2018, the legislature broadened the definition of "mental impairment" in section 8-41-301 to include "a recognized, permanent disability arising from an accidental injury

arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event." § 8-41-301(3)(a).

¶ 23 And under the definition of "psychologically traumatic event," the legislature expanded the category of compensable mental impairment injuries to include PTSD arising from the exposure to events "*within* a worker's usual experience." § 8-41-301(3)(b)(II) (emphasis added); *see* Ch. 328, sec. 1, § 8-41-301(3), 2017 Colo. Sess. Laws 1756-57. The amended statute applies "to injuries sustained on or after" July 1, 2018. Ch. 328, sec. 2, § 8-41-301, 2017 Colo. Sess. Laws 1758.

C. The Panel Exceeded Its Authority

¶ 24 Because it appears undisputed that claimant's mental impairment claim is compensable under the amended statute and not compensable under the pre-amendment version, the only issue is the onset date of claimant's occupationally induced PTSD.[1] That

[1] The Sheriff's Office does not contest that the traumatic events witnessed by claimant fall under the definition of "psychologically traumatic event" if the amended statute applies, nor does it argue claimant's PTSD was not occupationally induced.

is, if the onset date is before July 1, 2018, it's not compensable; but if after that date, it is.

¶ 25 The Panel held that the ALJ's factual findings "do not establish that the date of onset of the claimant's disabling occupational disease of PTSD" occurred before July 1, 2018. Instead, the Panel concluded the "date of onset did not occur until August, 2018," when Dr. Waxman issued his report finding claimant unfit for duty. To reach this conclusion, the Panel pointed to the finding that claimant's supervising sergeant denied having concerns about claimant's work in early June 2018. The Panel then focused on the lack of findings that claimant "was not performing" the "essential duties and responsibilities of a patrol deputy" or had "missed work . . . or [been] constrained to modified duty" before Dr. Waxman's determination that he was unfit for duty. In the Panel's summation, the ALJ's findings did not "establish [the Sheriff's Office] had any cause to limit, modify, or restrict . . . claimant's work as a patrol deputy until August 2018."

¶ 26 But in focusing on some of the facts, the Panel (1) ignored or disregarded other facts that support the ALJ's finding and (2)

disregarded the scope of the legal test to determine the onset date of claimant's occupationally induced PTSD.

1. Evidence in the Record Supports the ALJ's Findings

¶ 27 To begin, although claimant appealed the denial of his workers' compensation claim, neither he nor the Sheriff's Office submitted briefs or the transcript to the Panel. And without the transcript, we and the Panel must presume that the evidence presented supports the ALJ's findings and conclusions. *See Nova v. Indus. Claim Appeals Office*, 754 P.2d 800, 801 (Colo. App. 1988); *accord Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1252 (Colo. 1994).

¶ 28 Here, the record supports the ALJ's finding that claimant was "probably unfit for duty as early as June 11, 2018, . . . and certainly by June 13." According to a report by claimant's treating psychiatrist, Dr. Goodwin, claimant self-reported to his lieutenant in early June 2018 and asked not only for help with "his psychological problems" but also asked "to be taken off of his front line duties and placed in an alternate position." Thus, because Dr. Goodwin's report supports the ALJ's finding that claimant's "occupationally induced PTSD was impairing his ability to effectively and properly" perform his regular duties before July 1,

2018, the Panel was bound by it. *See City of Colorado Springs*, 89 P.3d at 507; *see also Pella Windows & Doors*, ¶ 44.

¶ 29 The ALJ also found that the events "prompting the referral [to Dr. Waxman] and the referral itself" occurred before July 1, 2018. Indeed, according to Dr. Waxman's report, claimant's "outburst" in late June 2018 led the Sheriff's Office to seek the evaluation. The ALJ therefore rejected as "unpersuasive" claimant's position that he "was not disabled until Dr. Waxman found him 'unfit for duty' on August 20, 2018."

¶ 30 True, some facts could support a different conclusion. For instance, after claimant self-reported his psychological problems and asked to be reassigned in June 2018, his immediate supervisor did not report any concerns with claimant's "actions at work" (a fact the Panel relied on). But even if "other evidence in the record" may support a contrary inference, it's for the ALJ to resolve such conflicts and "draw plausible inferences" from the evidence. *Univ. Park Care Ctr. v. Indus. Claim Appeals Office*, 43 P.3d 637, 640-41 (Colo. App. 2001).

¶ 31 We also find misplaced the Panel's reliance on what it characterized as the ALJ's "finding" that claimant's "demotion

caused his PTSD." That's not an accurate summary of the ALJ's findings. The ALJ found claimant's PTSD symptoms had led to his demotion (not, as the Panel suggested, the converse).

¶ 32 And to the extent the Panel relied on the fact that the ALJ did not assign the 2017 demotion as the specific date for the onset of claimant's occupationally induced PTSD (or another date certain before July 1, 2018), the precise onset date was not important given that the ALJ's findings support his determination that claimant's PTSD manifested before the amendment to section 8-41-301 took effect.

¶ 33 For these reasons, we conclude that substantial record evidence supports the ALJ's determination that the onset of claimant's occupationally induced PTSD occurred before July 1, 2018. Because substantial evidence supports this finding, the Panel erred in disturbing it. *See City of Colorado Springs*, 89 P.3d at 507; *see also Pella Windows & Doors*, ¶ 44.

2. The Panel Misapplied the Law When Assessing the Date of Onset

¶ 34 The Panel's analysis also disregards part of the test for determining the onset date of an occupational disease. As stated

above, an occupational disease arises when the symptoms of the disease "impair[] 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*, 89 P.3d at 506 (emphasis added).

¶ 35 The Panel focused on the second part of this test to conclude that the onset of claimant's occupationally induced PTSD had to coincide with Dr. Waxman's report that claimant was unfit for duty. In doing so, however, the Panel ignored the first part of the test which recognizes that an occupational disease also arises where it "impairs" the worker's ability to "effectively and properly" carry out his work duties. *Id.*

¶ 36 The ALJ found that claimant's occupationally induced PTSD led to performance problems resulting in his demotion in August 2017. The ALJ also found that claimant self-reported his psychological problems in June 2018 and asked to be reassigned from front line duties. These findings support the ALJ's conclusion that claimant's PTSD impaired his ability to effectively and properly perform his job duties before July 2018, satisfying the first part of the test set forth in *City of Colorado Springs*, 89 P.3d at 506.

¶ 37 To be sure, we sympathize with claimant. No one questions the trauma he suffered or the resulting PTSD. And we recognize that the ALJ's determination that his PTSD manifested before July 2018 barred the application of amended section 8-41-301, which now allows employees to receive compensation for occupationally induced PTSD brought on by exposure to traumatic events "within a worker's usual experience." § 8-41-301(3)(b)(II); *see also* Ch. 328, sec. 1, § 8-41-301(3)(b)(II), 2017 Colo. Sess. Laws 1757. The ALJ's onset determination necessarily deprived claimant of workers' compensation benefits.

¶ 38 But we can't judicially change the effective date of the statute. *See Hickman v. Catholic Health Initiatives*, 2013 COA 129, ¶ 8 ("[W]e presume that a statute 'operates on transactions occurring after its effective date.'" (quoting *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 977 (Colo. App. 2004))). Nor can we bend the standards of review. *Metro Moving & Storage Co.*, 914 P.2d at 415 (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ).

¶ 39 Because the ALJ found, with record support, that the onset of claimant's occupationally induced PTSD occurred before the amendment to section 8-41-301, claimant's mental impairment claim is not compensable. The Panel therefore erred in reversing the ALJ's order denying claimant's claim for worker's compensation benefits.

III. Conclusion

¶ 40 We set aside the Panel's order and remand the case with directions to reinstate the ALJ's order.

JUDGE FREYRE and JUDGE BROWN concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-094-168

IN THE MATTER OF THE CLAIM OF:

ISAIAH MURAMATSU,

Claimant,

v.

ORDER

OUTSOURCE TELECOM LLC,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated April 17, 2020, that ordered a change in the authorized treating physician. We dismiss the petition to review without prejudice pursuant to § 8-43-301 (2), C.R.S.

The claimant sustained an injury to his right hand on December 1, 2017, when a spool of wire slipped and crushed his wrist. The claimant reported the injury to his supervisor. The employer arranged for him to be driven to a Concentra Clinic. No list of four medical providers was given to the claimant to allow him to choose a doctor as required by § 8-43-404(5)(a)(I)(A) C.R.S.

The claimant was seen by Dr. Huntress at the Concentra Clinic. The doctor referred the claimant to physical therapy and occupational therapy. A referral was also made to Dr. Wolf for an orthopedic consultation. The possibility of complex regional pain syndrome (CRPS) led to another referral to Dr. Chan. QSART and thermogram tests were negative for CRPS. In September, 2018, Dr. Wolf performed surgery on the wrist. Dr. Chan suspected the claimant may have developed CRPS subsequent to surgery. He referred the claimant to Dr. Burke, a neurologist, and to Dr. Disorbio and Dr. Gutterman for psychological counseling. Additional QSART and thermogram testing on May 21, 2019, confirmed a diagnosis of CRPS.

On September 20, 2019, the claimant's counsel sent a letter to the respondents stating the claimant had not exercised his right to choose a treating doctor by treating at the Concentra Clinic or with the doctors he was referred to by Concentra. The claimant sought to exercise his right to choose a physician by selecting Dr. Tashof Bernton. Tr. at 3, 7. The claimant testified at hearing that he had no complaint with any of the treatment he had received to date, but he had looked at Dr. Bernton's on-line website, noted that Dr. Bernton specialized in the treatment of CRPS, and determined he would like to treat with Dr. Bernton. Tr. at 19, 28, 30.

The claimant requested a hearing on the issue of the claimant's choice to treat with Dr. Bernton. Tr. at 3-4. It was stipulated the claimant was never provided a choice of doctor's list at the time of his injury in December, 2017, or thereafter. It was also agreed that the application of Workers' Compensation Rules of Procedure 8-2(E), 7 CCR 1101-3, allowed the choice of physician to pass to the claimant when the choice of doctors list was not timely provided. The respondents contended the claimant's treatment with Concentra and the numerous medical referrals made over the preceding two years represented a choice of physician on the part of the claimant. Following the March 11, 2020, hearing the ALJ entered his order on April 17. The ALJ ruled:

> 14. In this matter, claimant was taken by employer to Concentra Medical Center. Claimant was never provided with a list of physicians authorized to treat claimant for his injury. Claimant's actions of continuing to treat with the original provider selected by employer to treat his injury does not constitute claimant "selecting" a physician to treat his injury. Therefore, the ALJ finds that claimant has demonstrated that it is more likely than not that he has not selected a physician to treat his work related injuries in this case. Therefore, claimant is entitled at this point to select Dr. Bernton as the physician authorized to treat claimant for his work related injuries.

The respondents appealed, arguing the evidence in the record of extensive treatment provided and used by the claimant for two years, including numerous physician referrals, surgery and a considerable amount of other treatments, is evidence indicating the claimant exercised his right of selection when it passed to him by choosing the Concentra Clinic and its referrals. The claimant maintains the ALJ's order allowing him to select a treating physician as provided by Rule 8-2(E) is not reviewable on appeal pursuant to § 8-43-301(2) because the order does not grant or deny a benefit. The claimant alternatively contends the circumstance where the employer drives the claimant to the Concentra Clinic and the

claimant continues to treat pursuant to the directions of those providers does not qualify as the 'selection' of a treating physician.

The claimant cites to the language in § 8-43-301(2) pertinent to the type of ALJ orders which may be reviewed by the Panel. That section states: "Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant a penalty may file a petition to review." Orders which do not meet the statutory criteria are interlocutory and not subject to review. *Rivas v. Cemex Inc.*, W.C. No. 4-975-918-02 (December 22, 2016).

Insofar as the ALJ's order allows the claimant to select Dr. Bernton as an authorized treating physician pursuant to Rule 8-2(E), but does not order the respondent to pay for additional medical benefits, the order does not require the respondent pay any penalty or benefit. To the contrary, "authorization" refers to a physician's legal authority to treat, but is not itself a "medical benefit." *Jeppsen v. Herfano Medical Center*, W.C. No. 4-440-444 (December 17, 2003). *See*, *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995)(authorization refers to treating physician rather than particular treatment or procedure recommended).

Under these principles, our jurisdiction is purely statutory. *See Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992). The absence of a final, reviewable order is fatal to our jurisdiction. *See Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991). Here, the ALJ addressed the limited issue of whether the claimant may select Dr. Bernton to treat his work injury. The order does not require the respondents to pay any particular medical benefit as a result of that determination. Under these circumstances the ALJ's order is not final and reviewable and the respondents' petition to review must be dismissed without prejudice. *McNeley v. AMS Staffing*, W.C. No. 4-511-838 (October 14, 2004); *Thomas v. Four Corners Health*, W.C. No. 4-484-220 (December 17, 2002); *Canales v. City and County of Denver*, W.C. No. W. C. Nos. 4-476-907, 4-476-906 & 4-356-910 (July 10, 2002).

IT IS THEREFORE ORDERED that the respondents' petition to review the ALJ's April 17, 2020, order is dismissed without prejudice.

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

10/26/2020 by TT .

THE FRICKEY LAW FIRM, Attn: JANET FRICKEY ESQ, 940 WADSWORTH BLVD 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)
POLLART MILLER LLC, Attn: BRAD J MILLER ESQ, C/O: AMANDA J BRANSON ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (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. 5-112-091-003

IN THE MATTER OF THE CLAIM OF:

ROBERT STANFIELD,

Claimant,

v.

MARU LLC,

Non-Insured Employer,

Respondent.

FINAL ORDER

The respondent seeks review of an order of Administrative Law Judge (ALJ) Sidanycz dated July 29, 2020, that assessed penalties against the respondent under §8-43-304, C.R.S. and §8-43-305, C.R.S., (general penalty statutes) and that assessed penalties and attorney fees against the respondent under §8-43-408(4), C.R.S. for its failure to deposit money with the Trustee of the Colorado Division of Workers' Compensation (trustee) or post a bond in that same amount. We dismiss, without prejudice, the respondent's petition to review the issue of attorney fees. We modify the ALJ's miscalculation of the penalties and, as modified, affirm the order.

This matter went to hearing on the issues of penalties under the general penalty statutes against the respondent for its failure to comply with ALJ Mottram's orders dated December 30, 2019, March 10, 2020 and March 30, 2020, and penalties and attorney fees pursuant to §8-43-408(4), C.R.S. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. A compensability hearing was held on December 12, 2019, before ALJ Mottram. In an order dated December 30, 2019, ALJ Mottram determined that the claimant's claim for medical benefits and temporary disability benefits against this uninsured employer was compensable. The respondent was ordered to pay $30,844.60 in medical bills and $20,571.43 in temporary total disability (TTD) benefits and to pay $12,854.0l to the Colorado Uninsured Employer Fund. These funds were ordered to be paid within 10 days of the date the order was served. Alternatively, the order provided that the respondent could deposit the total of $64,270.04 with the trustee or post a bond in that same amount. On December 31, 2019, Gina Johannesman, Trustee, Special Funds Unit, Division of Workers' Compensation, sent an email to the respondent regarding ALJ Mottram's order. In that email, Ms. Johannesman referred to § 8-43-304(1), C.R.S. and notified the respondent that failure to comply with ALJ Mottram's order could

lead to additional penalties. On January 17, 2020, the respondent timely filed a petition to review regarding the December 30, 2019, order.

On March 10, 2020, ALJ Mottram issued a Supplemental Order. The order included additional factual findings and did not result in a different outcome. The respondent was provided with an additional ten days to make the ordered payments to the trustee or post a bond as outlined above. On March 27, 2020, the respondent timely filed a petition to review the March 10, 2020, order.

On March 30, 2020, ALJ Mottram issued a second Supplemental Order. In this order, ALJ Mottram clarified that the amount of $12,854.01 was to be paid directly to the Colorado Uninsured Employer Fund and was not to be paid to the trustee or made a part of the bond. ALJ Mottram further clarified that the remaining amount of $51,416.03 was to be paid to the trustee, or a bond was to be posted in that amount. Ten days from the date of service of this order was April 10, 2020. The respondent filed a timely petition to review this order on April 8, 2020.

All three of ALJ Mottram's orders found the respondent to be non-insured and contained the following language:

> **IT IS FURTHER ORDERED:** That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or file a bond. §8-43-408(2), C.R.S.

The claimant testified that the respondent has made no payments in compliance with any of ALJ Mottram's orders.

On June 10, 2020, we issued a Remand Order of ALJ Mottram's March 30, 2020, order, in which the issue of temporary disability benefits was remanded to ALJ Mottram. The order affirmed as to all other issues. The respondent appealed our order and the matter is currently pending at the court of appeals.

The ALJ here found that the respondent failed to comply with all three of ALJ Mottram's orders by failing to either make the payment to the trustee or post a bond as required by those orders. The ALJ rejected the respondent's contention that they were not required to comply with the orders because a petition to review was properly filed.

The ALJ instead relied on §8-43-408(2), C.R.S., which provides, in pertinent part:

> The filing of any appeal, including a petition to review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond.

The ALJ concluded, therefore, that the respondent's petitions to review did not suspend the obligation to comply with ALJ Mottram's orders to pay the designated sum to a trustee or to file a bond. The ALJ further concluded that the respondent's actions were not objectively reasonable, noting that the respondent was informed in all three of the orders that they were to comply with this portion of the order, even in the event of a petition to review.

The ALJ assessed penalties against the respondent of $250.00 per day, for 129 days, in the amount of $32,250.00, payable in total to the claimant. The ALJ, however, miscalculated the amount of days for which she assessed penalties. The ALJ first determined that the respondent violated ALJ Mottram's December 30, 2019, order. The respondent had 10 days to pay the trustee or deposit the bond. The ALJ determined that the violation began on the 11th day after service of the order, which was December 31, 2019. The 11th day was January 11, 2020. Therefore, the respondent's violation of the first order was from January 11, 2020, through and including March 11, 2020, (the date of service of the supplemental order). Although the ALJ calculated this to be 30 days of penalties, it instead is 61 days of penalties.

The ALJ also found that the respondent violated ALJ Mottram's supplemental order dated March 10, 2020, served on the parties on March 11, 2020. The ALJ found that the violation began on the 11th day after the service of the order. Therefore the respondent's violation of that order was from March 22, 2020, through and including March 31, 2020, (the date of service of the second supplement order.) The ALJ correctly calculated this to be 10 days.

Finally, the ALJ found that the respondent violated ALJ Mottram's second supplemental order dated March 30, 2020, but mailed to the parties on March 31, 2020. The ALJ found that the violation began on the 11th day after service of the order which was April 11, 2020, through and including July 9, 2020 (the date of the hearing). The ALJ incorrectly calculated this to be 89 days. The correct time period instead is 90 days.

Based upon the forgoing, the correct total of penalties pursuant to §§8-43-304 and 305, C.R.S. for violation of ALJ Mottram's orders at $250.00 per day, for a total of 161 days is a total penalty of $40,250.00.

The ALJ also ordered the respondent to pay the claimant additional penalties in the amount of $25,708.02, plus attorney fees beginning April 11, 2020, pursuant to §8-43-408 (4), C.R.S., which provides for an additional 50 percent penalty and attorney fees against an employer who fails to comply with an order issued pursuant to §8-43-408(2) or (3), C.R.S.

On appeal,[1] the respondent argues that the ALJ erred as a matter of law in awarding penalties during a good faith appeal. The respondent further argues that the 50 percent increase in §8-43-408(4), C.R.S., is not applicable because the respondent contends that the claimant was only awarded medical benefits in the initial award.[2] We affirm the ALJ's award of penalties under the general penalty statutes and the award of penalties under §8-43-408(4), C.R.S.

I. Penalties pursuant to §8-43-304(1), C.R.S and §8-43-305, C.R.S.

Whether statutory penalties may be imposed under §8-43-304(1), C.R.S. involves a two-step process. That section provides for the imposition of penalties of up to $ 1000 per day where the party:

> … violates articles 40 to 47 of [title 8], 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, for which no penalty has been specifically provided, **or 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 the articles** shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offense… (Emphasis added)

Further, as pertinent here, §8-43-305, C.R.S. provides that "[e]very day during which an employer or its officer or agent fails to comply with any lawful order of an ALJ

[1] Although the record on review contains a Petition to Review with a mailed date of August 19, 2020, the respondent's Petition to Review was timely received by the Denver Office of Administrative Courts by email on August 18, 2020.
[2] We note that the respondent does not dispute the effect of ALJ Mottram's subsequent supplemental orders on the amount of penalties and, consequently, we do not address this issue on appeal. *See City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997) (party must raise specific argument at administrative level to preserve it on appeal).

shall constitute a separate and distinct violation thereof. In any action brought to enforce the same or to enforce any penalty provided for in said articles, such violation shall be considered cumulative and may be joined in such action."

Therefore, as recognized by the ALJ in her order, to award penalties under §8-43-304(1), C.R.S., the ALJ must first determine that the respondent's conduct constituted a violation of the Workers' Compensation Act, a rule, or an order. The conduct constituting the violation must also have been objectively unreasonable. Therefore, if the ALJ finds that a violation occurred, penalties may only be imposed if the ALJ concludes that the respondent's conduct was not reasonable under an objective standard. *E.g., Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). The reasonableness of the respondent's actions depends on whether they were predicated on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

In reviewing the ALJ's order imposing penalties, we are bound by her factual findings if they are supported by substantial evidence in the record. Section 8-43-304(8), C.R.S.; *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Moreover, where, as here, the appealing party fails to procure a transcript of the hearing, we must presume the ALJ's findings are supported by the evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Initially, we note that the respondent does not dispute that it did not comply with ALJ Mottram's orders requiring it to either pay the claimant as ordered or to deposit the sum with a trustee or post a bond. It follows, therefore, that the respondent violated ALJ Mottram's orders that were based on §8-43-408(2), C.R.S.; *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001)(violation of an order may be penalized under this statute regardless of whether the Act also imposes a specific penalty for the underlying conduct). The ALJ further found that the respondent's actions were not objectively reasonable given the language in the orders tracking the statutory provision in §8-43-408(2), C.R.S., that filing an appeal did not relieve the respondent of its obligation to either deposit the sum with a trustee or post the bond. The respondent looks to excuse the violation of ALJ's Mottram's order by saying it filed a good faith appeal and, therefore, any order should be stayed. We are not persuaded the ALJ erred.

ALJ Mottram relied on §8-43-408(2), C.R.S. when he ordered the respondent to either pay a trustee or file a bond. This statute provides, in pertinent part:

> The filing of any appeal, including a petition for review, *shall* not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge. (Emphasis added).

The plain language of the statute and the ALJ's orders based on that statute, clearly state that an appeal or petition to review of the order does not exempt the respondent from complying with this portion of the order. The respondent cites to *Industrial Commission v. Continental Investment Co*., 85 Colo. 475, 277 P. 303 (1929) and *Jiminez v. Industrial Claims Appeals Office*, *supra,* as support for its contention that penalties are not available so long as the appeal is pursued in good faith. The respondent's reliance on these cases, however, is misplaced.

In both *Continental Investment Co.* and *Jiminez*, the Court held that a penalty for failure to pay benefits that were awarded could not be imposed during the pendency of a good faith appeal. These cases are distinguishable from the circumstances here. In this case, the respondent is not being penalized for failure to pay the benefits ordered while an appeal of the order is pursued. Rather, the respondent here is being penalized for failure to secure payment of the benefits as ordered. The security is statutorily mandated regardless of whether an appeal is pursued, and the respondent's failure to post security constitutes noncompliance with the ALJ's order. The obvious intent of the security requirement is to ensure that an injured worker is protected in the case of an uninsured employer. This intent would be circumvented if no security could be required while an appeal is pursued. *See McFarland v. William Bunning d/b/a/ Craftsman Construction,* W.C. No. 3-825-915 (November 1989).

The claimant further contends that the requirement for a bond or payment in trust, as well as the penalty for failure to comply, are unconstitutional because they infringe upon the respondent's right to pursue a good faith appeal. However, inasmuch as these procedures are imposed by statute, we lack the authority to consider the respondent's arguments challenging the statute's constitutionality. *See Kinterknecht v. Industrial Commission* 175 Colo. 60, 485 P.2d 721 (1971); *Arnada v. Bingo West*, W.C. No. 3-958-262 (December 24, 1992).

II. Penalty and attorney fees pursuant to § 8-43-408(4), C.R.S.

The respondent further argues that the ALJ erred in concluding that claimant was entitled to an award of penalties and attorney fees under §8-43-408(4), C.R.S., contending that the claimant was only awarded medical expenses under the initial claim. We are not persuaded the ALJ erred.

Section 8-43-408(2), provides in relevant part:

> In all cases where ***compensation is awarded*** under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all ***unpaid compensation or benefits*** computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. ***The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded…*** (Emphasis added).

Section 8-43-408(4), C.R.S., provides as follows:

> Any employer who fails to comply with a lawful order or judgment issued pursuant to subsection (2) or (3) of this section is liable to the employee, if injured, . . . in addition to the amount in the order or judgment, for an amount equal to fifty percent of such order or judgment or one thousand dollars, whichever is greater, plus reasonable attorney fees incurred after entry of a judgment or order.

The panel previously has held in *Hanley v. James R. Hayes d/b/a Timberline Roofing*, W.C. No. 4-010-508, January 26, 1993, that the fifty percent increase in an award of benefits is mandatory where the employer fails to pay the award, or alternatively, fails to make the requisite deposit or post bond as provided in § 8-43-408(2). In *Hanley*, the panel stated that use of the words "is liable" in subsection (4) demonstrates a mandatory requirement. Because there is no dispute that the respondent here failed to make the

requisite deposit or post bond, the ALJ that had no discretion in increasing the award by fifty percent.

Furthermore, the respondent correctly states that case law has made a distinction between compensation and medical benefits for purposes of the Act. *Wild West Radio v. Industrial Claim Appeals Office*, 886 P.2d 304 (Colo. App. 1994). ALJ Mottram's orders in this case, however, initially awarded temporary disability benefits, which is "compensation." Therefore, the requirement to either pay the trustee or post a bond was properly required by the initial orders. Section 8-43-408(2), C.R.S. In our view, the fact that the order was eventually remanded for further proceedings on the issue of temporary total disability benefits does not change the mandatory nature of this requirement. It is for this reason that §8-43-408(2), C.R.S. specifically states that an employer will not be relieved of the obligation to pay the trustee or post the bond even in the event the order is appealed.

Also, as noted in the ALJ's order, §8-43-408(4), C.R.S. provides for an award of attorney fees:

> Any employer who fails to comply with a lawful order or judgment issued pursuant to subsection (2) or (3) of this section is liable to the employee. . .in addition to the amount in the order or judgement, for an amount equal to fifty percent of such order or judgment. . .*plus reasonable attorney fees incurred after entry of a judgment or order*. (emphasis added).

Insofar as the respondent disputes the ALJ's award of attorney fees pursuant to §8-43-408(4), C.R.S., the amount of attorney fees has not yet been determined, and this portion of the order does not represent an award or denial of benefits or penalties. Consequently, this aspect of the ALJ's order is not final for purposes of review. *United Parcel Service, Inc. v. Industrial Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999) (the portion of an order which determined liability for penalties without assessing specific amount of penalties was not final for purposes of review); *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *see also Cortez v. Minco Manufacturing, Inc*., W.C. No. 4-596-318 (March 20, 2008) (award of attorney fees subject to further proceedings to determine amount deemed interlocutory).

IT IS THEREFORE ORDERED that the petition to review the portion of the ALJ's order awarding attorney fees is dismissed without prejudice; and,

IT IS FURTHER ODERED that the ALJ's order dated July 29, 2020, is modified to reflect the correct penalty calculation. Penalties pursuant to §§8-43-304 and 305, C.R.S. at $250 per day for 161 days for a total of $40,250.00. Penalties pursuant to §8-43-408(4), C.R.S. in the amount of $25,708.02. The combined total amount of penalties is $65,958.02. The order is further modified to reflect that the amount necessary to secure payment by either depositing in trust or posting a bond is $65,958.02. We affirm the order as modified.

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

10/14/2020 by TT .

DONALD J KAUFMAN ESQ, 2520 SOUTH GRAND AVENUE SUITE 110, GLENWOOD SPRINGS, CO, 81601 (For Claimant)
NEILEY LAW FIRM LLC, Attn: RICHARD Y NEILEY JR ESQ, 6800 HIGHWAY 82 SUITE 1, GLENWOOD SPRINGS, CO, 81601 (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. 5-113-596

IN THE MATTER OF THE CLAIM OF:

BOBBY FOUST,

Claimant,

v.

FINAL ORDER

YRC FREIGHT,

Employer,

and

SELF INSURED,

Respondent.

The respondent seeks review of an order of Administrative Law Judge Sidanycz (ALJ) dated June 30, 2020. The ALJ ordered the respondent to pay for the recommended total left shoulder arthroplasty. We affirm.

This matter went to hearing on whether the claimant demonstrated that the left total shoulder replacement or arthroplasty, as recommended by Dr. Vance, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. After the hearing, the ALJ made factual findings and conclusions that are summarized below.

The claimant has worked for the respondent employer since 2006 delivering freight to various locations. The claimant's job duties include unloading and reloading freight to be delivered. The claimant testified that the items he would load and reload varied in weight from 25 pounds to over 2,000 pounds. The claimant also performed some of the delivery driving.

On July 15, 2019, the claimant was engaged in unloading a trailer of freight which included kayaks. While the claimant was reaching overhead to pull down two kayaks, a third kayak began to slip behind him and struck him in the upper back. The point of impact was between the claimant's shoulder blades and to the left. While this occurred, the claimant reached out with his left arm to brace himself against the wall of the trailer and

felt a pop. The claimant estimated that the kayak which struck him weighed approximately 80 pounds.

The claimant was referred to Dr. Stagg for medical treatment. The claimant saw Dr. Stagg on July 18, 2019, and reported left shoulder pain with intermittent tingling into the fingers on his left hand. Dr. Stagg diagnosed a cervical strain and a left shoulder strain. At that time, Dr. Stagg ordered x-rays of the claimant's cervical spine and left shoulder. He also referred the claimant to Dr. Vance for an orthopedic consultation and to physical therapy.

The x-ray of the claimant's left shoulder showed glenohumeral degenerative joint disease, with joint space narrowing and marginal osteophytes. The x-ray of the claimant's cervical spine showed degenerative disc disease.

The claimant returned to Dr. Stagg on July 19, 2019, because his pain symptoms had increased. Dr. Stagg noted that the claimant might have radiculopathy and/or a rotator cuff tear. Dr. Stagg recommended that the claimant seek treatment at the emergency department to address his pain symptoms.

The claimant received medical care at Community Hospital's Emergency Department on July 19, 2019, and was seen by Lynda Steinbach, FNP (Steinbach). Steinbach provided the claimant with a sling and prescribed Flexeril to address the claimant's pain symptoms.

The claimant subsequently was seen in Dr. Stagg's practice by James Harkreader, NP (Harkreader) on July 24, 2019. The claimant reported pain of 8/10, with tingling and numbness in his left fingers. Harkreader opined that the claimant likely had cervical radiculopathy and ordered an MRI of the claimant's cervical spine and left shoulder.

The claimant's left shoulder MRI scan showed a complete full-thickness tear of the supraspinatus tendon, moderate atrophy of the supraspinatus tendon, tendinopathy and low-grade partial thickness tearing of the infraspinatus tendon, and severe acromioclavicular osteoarthritis.

Thereafter, Dr. Vance recommended a left shoulder arthroscopy with rotator cuff repair. However, he opted to wait for one month for the claimant to quit smoking. Dr. Vance requested authorization for a left shoulder arthroscopy with rotator cuff repair.

Dr. Vance performed arthroscopic surgery on August 27, 2019. However, once the surgery began, Dr. Vance noted significant arthritic changes with complete loss of cartilage on the humeral side, and extensive degenerative tearing of the labrum. As a result, Dr. Vance did not repair the claimant's rotator cuff. Instead, the surgery was deemed diagnostic in nature. He removed a loose body of the ossified labrum and completed extensive intra-articular debridement.

The claimant returned to Dr. Vance on August 11, 2019. Dr. Vance noted that the claimant's rotator cuff was "minimally torn" so it was not repaired. Dr. Vance also noted that during the surgery he observed "bone on bone arthritis" and recommended a total shoulder replacement. An authorization request was submitted on the same date.

On September 18, 2019, the respondent's third party administrator, Sedgwick Claims Management Services (Sedgwick), filed a General Admission of Liability regarding the claimant's July 15, 2019, work injury. Sedgwick then sent a letter to Dr. Vance asking a number of questions related to the recommended shoulder replacement surgery. Dr. Vance addressed each question, noting that the goal of the surgery was to relieve the claimant's pain symptoms and improve his function. He also noted that the claimant had failed conservative treatment. He identified conservative treatment as "activity modification, home exercise program, oral NSAIDs, opioids, and arthroscopy." Subsequently, the respondent denied authorization for the surgery.

At the request of the respondent, the claimant underwent an independent medical examination with Dr. Lesnak. Dr. Lesnak opined that the claimant may have suffered a minor strain/sprain injury on July 15, 2019, but that the minor injury had resolved. Dr. Lesnak noted that the claimant has significant osteoarthritis in his left shoulder. It was Dr. Lesnak's opinion that the condition of the claimant's left shoulder is chronic and not the result of an acute injury. Dr. Lesnak noted that shoulder replacement may be reasonable treatment of the claimant's left shoulder but that treatment was unrelated to the minor injury the claimant sustained on July 15, 2019.

The claimant was seen by Dr. Stagg on December 4, 2019. Dr. Stagg agreed with Dr. Lesnak that the findings on x-ray and MRI predated the claimant's work injury. However, Dr. Stagg also noted that prior to July 15, 2019, the claimant was working full duty with no left upper extremity issues.

During the hearing, the claimant credibly testified that prior to July 15, 2019, he had no issues performing his job duties. He also credibly testified that he had no treatment to his left shoulder prior to July 15, 2019. With regard to his current symptoms, the claimant

testified that it is "virtually impossible" for him to raise his left arm, or reach his left arm behind his back. The claimant also testified that he cannot use his left arm without pain.

Upon review of all of the evidence and testimony presented, the ALJ issued her order determining that the claimant's need for a total left shoulder replacement is related to the admitted work injury. Crediting the claimant's testimony, medical records, and the opinions of Dr. Vance over the contrary opinions of Dr. Lesnak, the ALJ determined that the claimant's asymptomatic preexisting left shoulder arthritis became symptomatic because of the July 15, 2019, work injury. The ALJ held that based on the testimony of the claimant and the medical records, when the claimant was struck in the upper back on July 15, 2019, his preexisting left shoulder condition was aggravated and accelerated thereby necessitating his need for medical treatment. The ALJ ultimately determined the claimant demonstrated it was more likely than not that the recommended left shoulder surgery was reasonable medical treatment necessary to cure and relieve him from the effects of the admitted work injury. She ordered the respondents to pay for the recommended total left shoulder arthroplasty pursuant to the Colorado Medical Fee Schedule. As pertinent here, the ALJ made the following specific factual findings:

> 15. On September 20, 2019, Sedgwick sent a letter to Dr. Vance asking a number of questions related to the recommended shoulder replacement surgery. In his undated response, *Dr. Vance addressed each question*....
>
> * * *
>
> 19. *It is undisputed that the condition of the claimant's left shoulder should be treated with a total shoulder replacement*….
>
> 20. *The ALJ credits* the claimant's testimony, *the medical records*, and the opinions of Dr. Vance over the contrary opinions of Dr. Lesnak. The ALJ finds that the claimant's asymptomatic preexisting left shoulder arthritis became symptomatic because of the July 15, 2019 injury at work. Based upon the testimony of the claimant and the medical records, the ALJ finds that when the claimant was struck in the upper back on July 15, 2019, his preexisting left shoulder condition was aggravated and accelerated, necessitating medical treatment. Therefore, the ALJ finds that he claimant has demonstrated that it is more likely than not that the recommended left shoulder surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. (emphasis added)

The respondent has petitioned to review the ALJ's order, raising several allegations of reversible error.

I.

The respondent first argues that the ALJ's factual findings numbers 15 and 19 should be set aside because they are unsupported by substantial evidence, and factual finding number 20 should be set aside because it is insufficient to permit appellate review. According to the respondent, reversal of these findings warrants reversal of the ALJ's order. However, we perceive no reversible error.

Under §8-43-301(8), C.R.S., we are precluded from disturbing the ALJ's order unless the findings of fact are insufficient to permit appellate review, the ALJ has not resolved conflicts in the evidence, the record does not support the factual findings, the order is not supported by the findings, or the order is not supported by applicable law. The ALJ is not held to a crystalline standard in articulating her findings of fact. *George v. Industrial Commission*, 720 P. 2d 624 (Colo. App. 1986). Rather, the ALJ's order is sufficient for purposes of review if the legal and factual bases of the order are apparent from the findings of fact and conclusions of law. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Evidentiary determinations are, by and large, left to the trier of fact. *See Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867, 870 (Colo. App. 2001)(ALJ's sole prerogative to draw inferences from conflicting evidence).

Here, with respect to the ALJ's factual finding number 15 that "Dr. Vance addressed each question" posed by the Sedgwick claims adjuster, the respondent contends that the contrary is true. According to the respondent, Dr. Vance did not address each of the Sedgwick claims adjuster's questions, including the identification of the relevant Medical Treatment Guideline (Guideline) and causation of the osteoarthritis or relationship to the July 15, 2019, injury. It is true that contrary to the ALJ's finding, Dr. Vance did not address each of Sedgwick's questions, including the applicable Guideline and causation. Nevertheless, we conclude that such error is harmless and should be disregarded. Section 8-43-310, C.R.S. As detailed above, the issue before the ALJ was whether the claimant demonstrated that the left total shoulder replacement, as recommended by Dr. Vance, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. Consequently, merely because the ALJ incorrectly found that Dr. Vance addressed each question posed by the Sedgwick claims adjuster, does not persuade us to set aside the ALJ's order. As noted above, an ALJ is not held to a crystalline standard in articulating her findings of fact. *George v. Industrial Commission*, *supra*. Since we conclude that the legal and factual bases of the ALJ's order are apparent from the findings of fact and conclusions of law, and the order requiring the respondent to pay for

the recommended total left shoulder arthroplasty is supported by substantial evidence, as is set forth in more detail below, we have no basis to disturb it. Section 8-43-301(8), C.R.S.

Regarding the ALJ's factual finding number 19 that "[i]t is undisputed that the condition of the claimant's left shoulder should be treated with a total shoulder replacement," the respondent contends that it is, in fact, disputed by Dr. Stagg and Dr. Lesnak. However, as the claimant points out in his brief in opposition, the respondent's contention regarding Dr. Stagg's opinion is incorrect. In his report dated January 15, 2020, Dr. Stagg specifically opined that he "feel[s] the surgery recommended by Dr. Vance is appropriate." Ex. 1 at 24. It is true that during the hearing Dr. Lesnak disputed the claimant's need for a total shoulder replacement. Tr. at 66-67, 69-70. While the ALJ incorrectly found that the evidence regarding treatment for the claimant's left shoulder was "undisputed," she also found, with record support, that in his IME report, "Dr. Lesnak noted that shoulder replacement may be treasonable treatment of the claimant's left shoulder, but that treatment is unrelated to the minor injury the claimant sustained on July 15, 2019." Order at 4 ¶16; Ex. G at 77. Regardless, in her order, the ALJ expressly recognized that Dr. Lesnak's opinions were contrary to those of Dr. Vance, but she credited the opinions of Dr. Vance. Order at 5 ¶20. It was for the ALJ to determine the weight and credibility of the medical evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). We must defer to the ALJ's resolution of conflicts in the evidence, her credibility determinations, and the plausible inferences which she drew from the evidence. *Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). We therefore conclude the ALJ's error in factual finding number 19 regarding the evidence being "undisputed" is harmless and should be disregarded. Section 8-43-310, C.R.S.

The respondent argues that the ALJ's factual finding number 20 which credited, in part, "the medical records" and "the opinions of Dr. Vance" is insufficient because it did not specifically identify which medical records the ALJ was crediting, no medical provider identified in the record opined as to the reasonableness and necessity of the proposed surgery, and the finding is inadequate regarding a causal relationship. With regard to the respondent's contention that the ALJ did not specifically identify the particular medical records she was crediting, the ALJ is not required to make a specific finding on every piece of evidence. Rather, she only is required to enter findings on the evidence she found dispositive of the issues, which the ALJ generally did here. *See Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992); *cf. Dravo Corp. v. Industrial Commission*, 40 Colo. App. 57, 60-61, 569 P.2d 345, 348 (1977)("While the referee did not explicitly refer to these factors in his findings of fact, a presumption exists that the referee considered and gave due weight to all factors enumerated in the statute."). Again, the ALJ is not held to a crystalline standard in articulating her factual findings. *George v. Industrial Commission,*

supra. As detailed above, in Dr. Staggs' medical record dated January 15, 2020, he specifically opined that he "feel[s] the surgery recommended by Dr. Vance is appropriate." Ex. 1 at 24. Further, in Dr. Vance's medical record dated September 11, 2019, he opined that "a total shoulder arthroplasty would be better for the patient in the long run...." Ex. 2 at 49. Also, in Dr. Vance's response to the questions posed by the Sedgwick claims adjuster, he opined that "[t]otal shoulder arthroplasty is the only reasonable treatment option remaining." Ex. 2 at 54. This evidence which the ALJ found credible supports her inference that the proposed surgery is reasonable and necessary. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999)(ALJ's plausible inferences drawn from the evidence are binding on review).

We also reject the respondent's argument that the ALJ's factual finding number 20 is insufficient regarding causation. The respondent has failed to recognize that in making her determination on causation, the ALJ also credited the claimant's testimony that his preexisting asymptomatic left shoulder arthritis became symptomatic because of the July 15, 2019, injury at work. Order at 6 ¶7; Tr. at 23-26. The claimant's testimony, standing alone, is sufficient to support the ALJ's causation finding. *See Lymburn v. v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997)(pertinent lay testimony may support finding of causation despite conflicting medical evidence or testimony); *see also H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)(causation established where claimant proves industrial injury aggravated or accelerated preexisting condition so as to produce disability or need for treatment). Section 8-43-301(8), C.R.S.

II.

Next, the respondent argues that the ALJ disregarded the Guidelines when determining that the claimant demonstrated the need for the left total shoulder arthroplasty. According to the respondent, the ALJ entered no factual findings concerning application of the Guidelines, no factual findings concerning a reason for deviating for the Guidelines, no legal conclusions on whether the requested surgery was reasonable and necessary under the Guidelines, and no legal conclusions explaining how she arrived at her determinations as to reasonableness, necessity, and relatedness. The respondent therefore contends that the ALJ's order is unsupported by law and should be set aside. However, we disagree.

The Guidelines are contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, and provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. *See* §8-42-101(3)(b), C.R.S. (medical treatment guidelines shall be used by health care practitioners for compliance with section). In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the

Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *See Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005) (Guidelines are a reasonable source for identifying the diagnostic criteria). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given the ALJ to any particular medical opinion. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *see also Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009)(noting ALJ not required to award or deny medical benefits based on the Guidelines).

Additionally, we previously have noted the lack of authority mandating that an ALJ award or deny medical benefits based on the Guidelines. *See Thomas v. Four Corners Health Care*, *supra* (noting ALJ not required to award or deny medical benefits based on the Guidelines); *see also Andregg v. Arch Coal, Inc.*, W.C. No. 4-629-269-07 (Jan. 24, 2017)(noting ALJ not required to award maintenance medical benefits based on Guidelines); *see also Tafoya v. Associations, Inc.*, W.C. No. 4-931-088-03 (Jan. 13, 2017)(although ALJ evaluated need for surgery in context of medical issues tied to Guidelines, she was not bound by Guidelines when awarding medical benefits); *see also* §8-43-201(3), C.R.S. (when deciding whether certain medical treatment is reasonable, necessary and related "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.").

Here, despite the respondent's argument to the contrary, it is apparent that the ALJ did, in fact, consider the Guidelines and Dr. Lesnak's opinions and testimony that Dr. Vance did not comply with the Guidelines prior to recommending the surgery. See Tr. at 47, 43-57; Workers' Compensation Rule of Procedure 17, Exhibit 4, 7 CCR 1101-3; Order at 5 ¶20; Order at 6 ¶¶5, 6. However, the ALJ was not persuaded by Dr. Lesnak's testimony in this regard. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal, as

the respondent urges us to do. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). Further, as noted above, an expert's compliance with the Guidelines may affect the weight given the ALJ to any particular medical opinion, but does not dictate whether the expert's opinions constitute substantial evidence supporting a fact finder's determinations. *See Cahill v. Patty Jewett Golf Course*, *supra*; *see also Thomas v. Four Corners Health Care*, *supra.* Additionally, the respondent's argument notwithstanding, when determining that the claimant satisfied his burden of proving that the left total shoulder replacement was reasonable medical treatment necessary to cure and relieve him from the effects of the admitted work injury, the ALJ was not required to specifically identify the basis for deviating from the Guidelines. Rather, the ALJ's findings are sufficient if the basis for the ALJ's order is apparent from the findings, and we are able to discern from the order the reasoning that underlies the conclusions, which the ALJ did here. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*.

Even if specific indications for the left total shoulder replacement under the Guidelines were not shown to be present, under the circumstances here we are not persuaded that such a determination is definitive. *See Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (May 5, 2006), *aff'd Jones v. Industrial Claim Appeals Office No. 06CA1053* (Colo. App. March 1, 2007)(NSOP)(appropriate for ALJ to consider Guidelines on questions such as diagnosis, but Guidelines are not definitive)*; Siminoe v. Worldwide Flight Services, Inc.*, W.C. No. 4-535-290 (November 21, 2006)(appropriate for ALJ to consider Guidelines; however, deviation from Guidelines does not compel fact finder to disregard opinion of medical expert on issue of causal connection between work related injury and particular medical condition). The parties here presented the ALJ with conflicting interpretations of the Guidelines and the need for the recommended surgical procedure. The ALJ found credible and was satisfied by the opinions of Dr. Vance and Dr. Stagg that the recommended surgical procedure was sufficiently indicated by medical standards to be found reasonable and necessary. See Ex. 2 at 49, 54; Ex. 1 at 24. The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). We may not disturb the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Since we conclude that substantial evidence supports the ALJ's order, we have no basis to disturb it. Section 8-43-301(8), C.R.S. Consequently, we reject the respondent's contention that the ALJ erred when awarding medical benefits that did not coincide in all respects with the recommendations of the Guidelines.

IT IS THEREFORE ORDERED that the ALJ's order issued June 30, 2020, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

John A. Steninger

CERTIFICATE OF MAILING

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

10/21/2020 by TT .

WITHERS SEIDMAN RICE MUELLER GOODBODY PC, Attn: SEAN E P GOODBODY ESQ, 101 SOUTH THIRD STREET SUITE 265, GRAND JUNCTION, CO, 81501 (For Claimant)
MOSELEY BUSSER & APPLETON PC, Attn: SCOTT M BUSSER ESQ, 6855 S HAVANA STREET SUITE 630, CENTENNIAL, CO, 80112 (For Respondents)

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5033-18T4
A-5718-18T4

ANESTHESIA ASSOCIATES OF MORRISTOWN, PA,

Petitioner-Appellant,

v.

WEINSTEIN SUPPLY CORPORATION,

Respondent-Respondent.

SURGICARE OF JERSEY CITY,

Petitioner-Appellant,

v.

WALDBAUMS,

Respondent-Respondent.

Argued telephonically August 4, 2020 –
Decided October 7, 2020

Before Judges Rothstadt and Firko.

On appeal from the Department of Labor, Division of Workers' Compensation, Claim Petition Nos. 2018-29163 and 2018-19349.

Michael J. Smikun argued the cause for appellant Anesthesia Associates of Morristown, PA (Callagy Law, PC, attorneys; Rajat Bhardwaj, on the briefs).

Donna J. Sova argued the cause for respondent Weinstein Supply Corporation (Viscomi & Lyons, attorneys; Donna J. Sova, on the brief).

Rajat Bhardwaj argued the cause for appellant Surgicare of Jersey City (Callagy Law, PC, attorneys; Rajat Bhardwaj, on the briefs).

Francis W. Worthington argued the cause for respondent Waldbaums (Worthington & Worthington, LLC, attorneys; Francis W. Worthington, on the brief).

PER CURIAM

In these two appeals that we calendared back to back and have consolidated for the purpose of writing one opinion, we are asked to determine whether New Jersey medical providers can file an independent claim under the New Jersey's Workers Compensation Act (WCA), N.J.S.A. 34:15-1 to -146, to recover payment for their services from their patients' employers, where the patients lived and worked outside of New Jersey, were injured outside of New Jersey, and filed workers' compensation claims in their home states that resulted in payments being made to their New Jersey providers. For the reasons that

follow, we conclude that the New Jersey medical provider cannot maintain an action under the WCA under these circumstances.

Petitioners Anesthesia Associates of Morristown, PA (AAM) and Surgicare of Jersey City (SJC), both appeal from orders issued by two judges of compensation dismissing their medical provider claims (MPC) for lack of jurisdiction. AAM argues that the judge of compensation's decision was an "extraordinarily brazen, unsupportable misuse of authority," while SJC contends the judge's decision in its case was "incoherent," and "preposterous."

According to both providers, the WCA grants the Division of Workers' Compensation (Division) with broad exclusive jurisdiction over MPCs, even if there is no claim for compensation by an injured employee pending in New Jersey. Additionally, they argue MPCs are separate causes of action, rooted in breach of contract "over which the State of New Jersey has jurisdiction through the Division," and case law determining jurisdiction over injured employee claims is not binding. Also, in SJC's matter, it contends the judge of compensation, sua sponte, improperly dismissed its claim because of a lack of personal jurisdiction, but in doing so, the judge properly "conced[ed] that the Division may exercise subject matter jurisdiction over" its claim. We find no merit to any of these contentions.

I.

A.

The material facts of each claim are generally undisputed. In AAM's matter filed under docket number A-5033-18, the employee suffered compensable work-related injuries in an accident in 1998. The accident took place in Pennsylvania, the injured worker was a Pennsylvania resident, and the employer, respondent Weinstein Supply Corporation (Weinstein), was based in Pennsylvania. The injured worker filed a claim with the Pennsylvania Bureau of Worker's Compensation (PABWC).

On March 22, 2018, AAM provided services to the injured worker at a New Jersey hospital during a procedure. It then submitted a claim to the Pennsylvania Department of Labor and Industry (PDOLI) and received payment of $1,070.30 in accordance with the PDOLI fee schedule.[1] AAM did not challenge or otherwise appeal the award. AAM submitted a Health Insurance Claim Form for $12,992 to Liberty Mutual Insurance (Liberty), Weinstein's workers' compensation insurance carrier, seeking payment of the balance it originally billed.

[1] According to the judge of compensation, Pennsylvania has a fee schedule, while New Jersey bases payment on the "usual and customary charges" for the service provided within the provider's geographic area.

When the claim was not paid, on October 25, 2018, AAM initiated its MPC by filing a Medical Provider Application for Payment (MPAP) with the Division, even though, as stated in the MPAP, there was no pending workers' compensation claim filed in New Jersey by the employee.[2] Like all MPAPs, the document stated that AAM alleged that "the Employee sustained an injury by an accident arising out of and in the course of his/her employment with Respondent, [that was] compensable under [the WCA]."

Weinstein filed an Answer denying that the Division had jurisdiction and disclosing that the employee had filed a claim in Pennsylvania. It later filed a motion to dismiss for lack of jurisdiction, which AAM opposed. In support of its motion, Weinstein filed a certification from its counsel setting forth the facts that demonstrated there was no connection between New Jersey and the injured employee, who had filed a claim in Pennsylvania, or his employer. In opposition, AAM filed a brief that did not dispute any of the material facts, but argued that the court of compensation had jurisdiction over the claim because

[2] Although the MPAP indicated the same single date of service as the Health Insurance Claim Form, it also stated that the amount billed was $25,984.00, or twice as much as the amount submitted to Liberty and disclosed the $1,070.30, previously paid through the PDOLI. There is no explanation as to why the amounts billed are inconsistent.

N.J.S.A. 34:15–15 vested the Division with "exclusive jurisdiction for any disputed medical charge[,] and because New Jersey had a substantial interest in the subject matter – the payment of New Jersey medical providers' bills."

On June 19, 2019, the judge of compensation granted Weinstein's motion and dismissed AAM's claim for lack of jurisdiction. In her written decision, the judge rejected AAM's broad reading of N.J.S.A. 34:15–15, finding that it would distort the meaning of the statute. In her view, "[i]t should go without saying that when the Legislature amended N.J.S.A. 34:15–15 to give the workers' compensation court exclusive jurisdiction for any disputed charges arising from any claim for a work related injury or illness[,] that the claim had to be one compensable under New Jersey law." She concluded that the provider's claim was "derivative," of the injured worker's claim.

Applying the six "Larson factors," as relied upon by the New Jersey Supreme Court in Williams v. Port Auth. of N.Y. & N.J., 175 N.J. 82, 87–88 (2003) (establishing the proper jurisdictional analysis for an employee's occupational disease claim and discussing the common factors used to confer jurisdiction) (citing 9 Lex K. Larson et al., Larson's Workers' Compensation Law, §142.01 (Matthew Bender, rev. ed. 2000)), to determine whether New Jersey had jurisdiction, the judge found that under the circumstances,

> [n]one of these possible bases to assert New Jersey jurisdiction exist [because the employee] lived in [Pennsylvania], worked in [Pennsylvania], and the accident occurred in [Pennsylvania]. The contract of hire occurred in [Pennsylvania]. No contract exits between [AAM] and Weinstein. The only connection to New Jersey is that [the employee] underwent one day of medical treatment with [AAM] in New Jersey.

Citing to Wenzl v. Zantop Air Transport Inc., 94 N.J. Super. 326, 334 (Law Div.), aff'd o.b., 97 N.J. Super. 264 (App. Div. 1967) (explaining that an employee's in-state domicile alone, without any employment contacts, is insufficient to confer jurisdiction in New Jersey), the judge stated that as our courts have held "a petitioner's New Jersey residence alone is an insufficient basis for jurisdiction[, c]learly one day of treatment in New Jersey is insufficient to grant New Jersey jurisdiction over this [claim]." The judge continued by distinguishing the case before her from those argued by AAM in opposition to Weinstein's motion before concluding that the claim had to be dismissed. This appeal followed.[3]

[3] On July 23, 2019, the judge revised her written decision to correct her having mistakenly stated on page three of the opinion that the injured employee lived, worked, and was injured in New York, rather than Pennsylvania.

B.

Turning to SJC's matter filed under docket number A-5718-18, the facts are similar. The injured employee, a resident of New York, who had been hired in New York by his employer, Stop & Shop, suffered a compensable injury as a result of a work-related accident at work in Brooklyn, New York on February 20, 2010. The injured employee filed a workers' compensation claim in New York. On January 5, 2017, the employee's New York physician filed with the Workers' Compensation Board of New York (WCBNY) a request for authorization for the employee to undergo surgery, listing the injured worker's employer as Stop & Shop at a Brooklyn, New York address.

On March 6, 2017, the WCBNY determined that the injured employee had an ongoing medical disability and that surgery was necessary. The WCBNY's determination identified the employer as Stop & Shop and stated that the "employer is liable for the payment of these services in accordance with" New York law. On August 11, 2017, the employee underwent surgery at SJC's facility in Jersey City. SJC thereafter received a payment of $20,085.28 through the WCBNY.

On July 17, 2018, SJC initiated its MPC by filing a MPAP with the Division that contained the same allegation as in AAM's MPAP about the

worker's injury being compensable under the WCA, and further stated it billed $252,900 for services rendered to the employee and that it had been paid $20,085.28. The MPAP identified respondent Waldbaum's, located in Montvale, as the employer.[4]

Waldbaum's filed an answer averring that SJC had been paid "for all benefits due" to it. On August 2, 2018, it also filed a motion to dismiss for lack of jurisdiction. In support of its motion it filed a certification from counsel attesting to the facts that established New Jersey had no relation to the employee's injury or claim and for that reason SJC's claim should be dismissed. Citing to N.J.S.A. 34:15–15, Waldbaum's argued that the WCA "only allows . . . Applications for Payment when the injured employee has a cognizable claim pursuant to the" WCA.

SJC filed its opposition to the motion to dismiss. In its opposition, SJC raised the same arguments made by AAM in opposition to the motion filed in that matter. It also argued that since Waldbaum's did business in New Jersey and the employee was treated in New Jersey, the claim should not be dismissed.

[4] This inconsistency as to the injured employee's employer was never explained but, in any event, it was deemed inconsequential by the judge of compensation, as it was undisputed that the employee worked and was injured while employed in Brooklyn, New York.

Moreover, citing Williams v. A&L Packing & Storage, 314 N.J. Super. 460, 465–66 (App. Div. 1998), and unreported court of compensation cases, SJC contended that the filing of the New York action, did not bar SJC from pursuing its claim in New Jersey. Relying on language contained in a WCBNY form and New York case law, SJC also stated that if it could not secure relief in New Jersey, it would be left without any forum to recover as New York refused to address out of state claims. According to SJC, under the United States Supreme Court's holding in Marbury v. Madison, 5 U.S. 137 (1803), New Jersey was compelled to accept jurisdiction of SJC's claim so as to insure it had the ability to pursue recovery of its claim.

On July 18, 2019, the judge of compensation dismissed the action with prejudice for lack of jurisdiction. In her oral decision, placed on the record that day, the judge found that SJC

> provided medical treatment . . . to a patient who had sustained an injury in a work related accident; . . . the patient who lived in New York, who worked in New York for a New York employer, who was injured in New York and who received medical treatment in New York, was directed by his New York doctor to a surgical center in New Jersey for a single, one day visit. The patient's same day surgery was performed by a New York doctor using equipment and devices ordered by the New York doctor. The petitioner[] has filed claims in New Jersey's workers' compensation court seeking

> payment above and beyond that authorized by the workers' compensation law of the State of New York.

The judge then stated that while the issue of "subject matter jurisdiction vis a vis [sic] personal jurisdiction can be somewhat confounding . . . to [her,]" she turned to the facts relating to the contacts between the employee, his injuries and SJC's services to determine if she could consider SJC's claim. The judge stated that "a single contact with the State of New Jersey, namely one day of treatment in New Jersey or the provision of medical supplies to the doctor for that one day of treatment . . . does not rise to the standard of sufficient purposeful minimal contacts requisite to vest this court with personal jurisdiction."

The judge also noted the unexplained difference between the identification of the employee's employer as being Stop and Shop in Brooklyn, New York and Waldbaum's in Montvale, which she speculated was the parent company of the other and determined that it did not matter which was correct. Moreover, although she expressed sympathy for SJC not receiving more than it did through New York, she found that it was aware that its services would be reimbursed in accordance with New York's fee schedule as set forth on the authorization issued by the WCBNY for the employee's surgery.

The judge rejected SJC's contention that it was without a remedy and noted that SJC had one but it "simply [was] without the remedy [it] liked," referring to SJC's reimbursement through the New York compensation action. Turning to SJC's reliance on Williams, the judge concluded by observing she was the judge of compensation who originally decided that case and there she found "sufficient purposeful minimal contacts and therefore purposeful jurisdiction to hear the . . . case," but as to the present matter it was "not the case here." This appeal followed.

II.

A.

Our scope of review of a judge of compensation's decision "'is limited to whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, . . . with due regard to the agency's expertise.'" McGory v. SLS Landscaping, 463 N.J. Super. 437, 452 (App. Div. 2020) (quoting Hersh v. Cty. of Morris, 217 N.J. 236, 242 (2014)). Even if we may be inclined to do so, we "may not substitute [our] own factfinding for that of the [j]udge of [c]ompensation." Lombardo v. Revlon, Inc., 328 N.J. Super. 484, 488 (App. Div. 2000).

"However, 'interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Renner v. AT&T, 218 N.J. 435, 448 (2014) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Whether the Division has subject matter jurisdiction over a claim is a question of law, which this court reviews de novo. Marconi v. United Airlines, 460 N.J. Super. 330, 337 (App. Div. 2019).

B.

We begin our review by acknowledging that under certain circumstances, medical providers can pursue payment for services rendered to employees who suffer a compensable injury under the WCA. The Act generally requires that when a worker is injured in the course of his or her employment, the employer must furnish the injured worker with medical, surgical and other treatment required to cure and relieve the worker of the effects of the injury and to restore the worker's functions. N.J.S.A. 34:15–15. In 2012, the Legislature amended N.J.S.A. 34:15–15 to grant the Division "[e]xclusive jurisdiction for any disputed medical charge arising from any claim for compensation for a work-related injury or illness." Ibid. (emphasis added). The Legislature amended the statute to address an "increase in medical billing disputes between insurers and

medical providers," Plastic Surgery Ctr., PA v. Malouf Chevrolet-Cadillac, Inc., 457 N.J. Super. 565, 569 n.3 (App. Div. 2019) (addressing the applicable statute of limitation relative to a medical provider's claim), aff'd o.b., 241 N.J. 112 (2020), by "more formally herding all medical-provider claims into the Division." Id. at 569.

Ascribing to the amendment's plain language its "ordinary meaning and significance," id. at 570 (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)), and contrary to AAM's and SJC's arguments, by limiting its application to "claim[s] for compensation," the amendment did not apply to MPCs in matters where the Division did not have jurisdiction over an employee's related claim under the WCA. That limitation was recognized by both AAM and SJC when they executed their MPAPs that alleged the employees' claims were "compensable under [the WCA]." Unless the Division has jurisdiction over the underlying claim for a compensable work-related injury, it does not have jurisdiction over a MPC for payment.

Our conclusion is consistent with the statutory limits placed upon the Division. "[T]he Workers' Compensation Court [now Division] is statutory, with limited jurisdiction." Williams v. Raymours Furniture Co., 449 N.J. Super. 559, 562 (App. Div. 2017) (quoting Connolly v. Port Auth. of N.Y. & N.J., 317

N.J. Super. 315, 318 (App. Div. 1998)). Whether the Division has jurisdiction over a claim arising from compensable work-related injury depends upon the particular factors of each case. Marconi, 460 N.J. Super. at 337 (addressing a New Jersey resident's claim arising from an out of state work-related injury). The injured employee's "residency alone is an insufficient basis to confer jurisdiction on the Division for extraterritorial workplace injuries." Id. at 340.

In order to make the determination, a court of compensation must apply six bases: "(1) Place where the injured occurred; (2) Place of making the contract; (3) Place where the employment relation exists or is carried out; (4) Place where the industry is localized; (5) Place where the employee resides; or (6) Place whose statute the parties expressly adopted by contract." Williams, 449 N.J. Super. at 563 (quoting 13 Lex K. Larson et al., Larson's Workers' Compensation Law, § 142.01 (Matthew Bender, rev. ed. 2016)). See also Marconi, 460 N.J. Super. at 335; Connolly, 317 N.J. Super. at 319. Apart from these factors, if New Jersey is not the "location of the injury, location of the employment contract or hiring, or residency of the employee . . . jurisdiction may still arise where the 'composite employment incidents present a[n] . . . identification of the employment relationship with [New Jersey].'" Marconi, 460 N.J. Super. at 341–42 (quoting Connolly, 317 N.J. Super. at 320–21).

Applying these considerations to the two cases before us, we agree with the two judges of compensation that there was no cognizable claim for a work-related injury in either case. Therefore, the Division did not have jurisdiction over AAM's or SJC's claims and they were appropriately dismissed, substantially for the reasons expressed by the two judges of compensation.

We are not persuaded otherwise by the cases cited by AAM and SJC as, for the most part, the cases involved claims by medical providers where the Division had jurisdiction over the underlying employee's claim. In the one instance that the two providers cite to a case decided by another judge of compensation that appears to support their arguments, we disagree with the holding in that case to the extent it is applicable to AAM's and SJC's claims.

We also conclude that AAM's and SJC's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11–3(e)(1)(D). Suffice it to say that their contentions based on an alleged breach of contract are unsupported by any evidence of an agreement between either of them and the injured employees' employers. Absent such evidence, an employer's liability for an employee's medical bills relating to a work-related injury arises only by virtue

of the WCA.[5] See Hager v. M & K Constr., 462 N.J. Super. 146, 169 (App. Div.) ("If the workers' compensation court finds the injury compensable and the medical services reasonable and necessary, the employer is responsible for the expenses incurred by the employee for the treatment of the injury.") (quoting Christodoulou, 180 N.J. at 345), certif. granted, 241 N.J. 484 (2020).

Also, to the extent the one judge of compensation described the issue before her in SJC's case as being one of "personal jurisdiction" we are satisfied from the judge's analysis that she properly addressed the issue as one relating to subject matter jurisdiction. Even if she did not, "appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2010). Here, the judge's order dismissing the claim was correct.

[5] Any contract is typically between the service provider and the injured worker. See Univ. of Mass. Mem'l Med. Ctr., Inc. v. Christodoulou, 180 N.J. 334, 346 (2004) ("Although the Act grants the medical provider a statutory basis for seeking payment from an employer when it has rendered services to an injured worker, . . . it does not nullify the contractual right of the provider to seek payment directly from the employee, the beneficiary of the services." (citations omitted)).

III.

Finally, we would be remiss if we did not comment on AAM's and SJC's counsels' briefs that accused the two judges of either abusing their authority or rendering incoherent or preposterous decisions. We view these pejorative attacks on the judges to be totally unwarranted and disrespectful. The judges of the court of compensation, like other judges, are dedicated public servants who strive each day to properly assess the cases before them after giving due regard to the facts and the applicable law. Most times, as here, they render legally correct decisions. Other times, lawyers and appellate courts might disagree with them, or they might have made a mistake, but that does not render their thoughtful consideration of the case to be in any manner an abuse of their power, preposterous or incoherent. Such characterizations do little to advance a client's position and unjustifiably undermines the public's confidence in the judiciary. We hope that in the future counsel will think twice before resorting to such attacks.

Affirmed.