COLORADO
Department of
Labor and Employment

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

September Case Law Update

Presented by Judge John Sandberg and Judge Susan Phillips

This update covers COA and ICAO decisions issued from
August 13, 2020, to September 11, 2020

Court of Appeals

Industrial Claim Appeals Office

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DATE FILED: August 27, 2020
CASE NUMBER: 2019CA1783

SUMMARY
August 27, 2020

2020COA131

No. 19CA1783, *SkyWest v. ICAO* — Labor and Industry — Workers' Compensation — Scope of Employment — Personal Deviation — Limitation on Payments Due to Use of Controlled Substances

In this workers' compensation case, a division of the court of appeals determines that the Industrial Claim Appeals Office (Panel) did not err by reversing the decision of an administrative law judge (ALJ) regarding whether a decedent had returned to the course and scope of employment from a personal deviation at the time of his fatal accident. The ALJ found that decedent's deviation from travel status had not ended because he was intoxicated and had neither returned to nor appeared to be en route to his hotel. But the Panel held, based upon the ALJ's factual findings, that decedent's deviation ended when he attempted to return to a coworker's hotel.

The division affirms the Panel's decision ruling the claim compensable.

The division also determines, as a matter of first impression, that preservation of a second blood sample is required to limit a claimant's benefits due to an injured worker's intoxication under section 8-42-112.5, C.R.S. 2019. As relevant, that statute imposes a 50% reduction in nonmedical benefits if the work-related accident resulted from the presence in the worker's system of a blood alcohol level exceeding 0.10 percent. Because a second sample of decedent's blood had not been preserved as mandated by section 8-42-112.5, the Panel determined that the employer could not take advantage of the 50% reduction in benefits. The division affirms this ruling as well.

COLORADO COURT OF APPEALS **2020COA131**

Court of Appeals No. 19CA1783
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-079-980

SkyWest Airlines, Inc. and Indemnity Insurance Company of North America,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado, Luis Ordonez Gamez, Alayan Ordonez, Evan Ordonez, minor child, and Elija Ordonez, minor child,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE BROWN
Fox and Rothenberg*, JJ., concur

Announced August 27, 2020

Lee & Brown LLC, Joshua D. Brown, William M. Sterck, Kristi M. Robarge, Denver, Colorado, for Petitioners SkyWest Airlines, Inc. and Indemnity Insurance Company of North America

No Appearance for Respondent Industrial Claim Appeals Office

The Sawaya Law Firm, Katherine McClure, Denver, for Respondents Luis Ordonez Gamez, Alayan Ordonez, Evan Ordonez, and Elija Ordonez

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

¶ 1 In this workers' compensation case, we must determine whether the Industrial Claim Appeals Office (Panel) erred by reversing the decision of an administrative law judge (ALJ) regarding whether a decedent had returned to the course and scope of employment from a personal deviation at the time of his fatal accident. The ALJ found that decedent's deviation from travel status had not ended because he was intoxicated and had neither returned to nor appeared to be en route to his hotel. But the Panel concluded, based on the ALJ's factual findings, that decedent's deviation ended when he attempted to return to a coworker's hotel. We affirm the Panel's decision ruling the claim compensable.

¶ 2 We must also determine, as a matter of first impression, whether preservation of a second blood sample is required to limit a claimant's benefits due to an injured worker's intoxication under section 8-42-112.5, C.R.S. 2019. As relevant here, that statute imposes a 50% reduction in nonmedical benefits if the work-related accident resulted from the presence in the worker's system of a blood alcohol level exceeding 0.10 percent. Because a second sample of decedent's blood had not been preserved as mandated by section 8-42-112.5, the Panel determined that the employer could

not take advantage of the 50% reduction in benefits. We affirm this ruling as well.

I. Background

¶ 3 Decedent, Luis Ordonez-Gamez, worked as a pilot for employer, SkyWest Airlines, Inc.[1] He lived in California with his wife and two young children. In January and February 2018, he came to Denver for flight training. While training in Denver, decedent stayed at the SpringHill Suites, located at the southwestern intersection of 68th Avenue and Tower Road.

¶ 4 On February 14, 2018, decedent and his simulator partner, Baylee Ladner, took the difficult Initial Maneuvers Validation test from 6 p.m. to 10 p.m. After successfully completing the test, decedent and Ladner had dinner and "a couple of beers" at a nearby restaurant to celebrate. From the restaurant, they headed to a different establishment to continue drinking and celebrating.

¶ 5 At approximately 2 a.m. on February 15, 2018, decedent and Ladner stopped drinking alcohol, left the establishment, and

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[1] SkyWest's insurer, Indemnity Insurance Company of North America, is aligned with the SkyWest's interests in this case. Therefore, we refer to the SkyWest and the insurer collectively as "SkyWest."

returned to Ladner's hotel, the Fairfield Inn & Suites, located at the southwestern corner of 69th Avenue and Tower Road, one block north of and on the same side of Tower Road as the SpringHill Suites where decedent was staying. When they arrived at the Fairfield Inn, decedent approached the night desk attendant and asked her "to make his room key again because it wasn't working." The desk attendant informed decedent that the logo on his key referenced the SpringHill Suites and that he "wasn't at the right hotel." The desk attendant observed decedent "moving around a lot" and surmised he was intoxicated because "[h]e smelled like alcohol." After being told his room key would not work there, decedent proceeded to Ladner's room in the Fairfield Inn.

¶ 6 At about 5:30 a.m., decedent returned to the Fairfield Inn's front lobby and spoke with the same desk attendant. He again asked her for a new room key, and she reiterated that his key was for the SpringHill Suites "about two buildings over" from the Fairfield Inn. She testified that decedent still seemed inebriated and was struggling to put a lid on his coffee cup. The desk attendant turned to assist some other hotel guests and, after those guests left, she noticed that decedent "was gone."

¶ 7 A few minutes later, the desk attendant saw police lights outside. Decedent had left the Fairfield Inn, attempted to cross from the west side of Tower Road — where the Fairfield Inn, the SpringHill Suites, and SkyWest's training facility were located — to the east side, and had been struck by a vehicle traveling southbound on Tower Road. Decedent was transported to University of Colorado Hospital, where he received six units of blood and then had a blood sample taken which revealed a blood alcohol content (BAC) of 0.209 g/100ml. The parties stipulated that medical staff did not preserve a second blood sample. Decedent died later that morning at the hospital.

¶ 8 Decedent's widow, Alayan Ordonez, and children, Evan and Elija Ordonez (claimants) filed a claim for survivor benefits under the Workers' Compensation Act of Colorado (Act), sections 8-42-114 and -115, C.R.S. 2019. The matter proceeded to hearing before the ALJ in January 2019.

¶ 9 Based on the evidence, the ALJ found that

- decedent and Ladner "finished drinking" at approximately 2 a.m. on February 15, 2018;

- decedent was intoxicated when he was struck on Tower Road;
- because decedent was running away from his hotel and from SkyWest's training facility when he was struck, he was not returning to his hotel or to work; and
- no "persuasive evidence" supported claimants' contention that decedent was simply confused when he attempted to cross Tower Road.

Relying on these factual findings, the ALJ concluded that decedent "was in a personal deviation at the time of the accident due to hours of consuming alcohol" and had not returned to travel status within the course and scope of his employment. The ALJ "denied and dismissed" the claim, finding it noncompensable.

¶ 10 The Panel disagreed. It determined, based on the ALJ's factual findings, that "by the time decedent was involved in the collision, his personal deviation had ended." It noted that the ALJ found that decedent had stopped drinking about four hours before the accident, and that although he had not returned to his hotel room "he nevertheless had returned to lodging in Ladner's hotel room." The Panel rejected the ALJ's determination that because of

decedent's "high level of intoxication," he could not have been "within the course and scope [of his] . . . position as a commercial airline pilot." Citing *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995), the Panel noted that intoxication alone does not preclude compensation.

¶ 11 Finally, the Panel ruled that, to the extent the ALJ admitted toxicology results establishing that decedent's BAC was 0.209 just before his death to reduce claimants' benefits under section 8-42-112.5, she erred. The Panel observed that, under the express language of section 8-42-112.5(1), a second blood sample "must be preserved." Because a second sample was not preserved, the toxicology results could not be used to reduce claimants' benefits under the statute.

II. Deviation from Travel Status

¶ 12 SkyWest first argues that the Panel was bound by the ALJ's factual findings, particularly the ALJ's determination that decedent's personal deviation had not yet ended when the accident occurred. By reaching a different conclusion, it contends, the Panel improperly disregarded these findings, reweighed the evidence, and drew its own inferences from the facts. We disagree.

A. General Principles of Compensability

¶ 13 To receive workers' compensation benefits, an injured worker must establish, by a preponderance of the evidence, that he has sustained a compensable injury or death "proximately caused by an injury . . . arising out of and in the course of the employee's employment . . . ." § 8-41-301(1)(c), C.R.S. 2019; *see Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *Id.*

B. Law Governing Travel Status

¶ 14 Injuries occurring while an employee is away from home or work for a business purpose may arise out of and be within the course of employment and thus be covered under the Act. As relevant here, under the "travel status" doctrine, "if the employee's

job duties require travel[,] . . . that travel is considered to be a part of the job, and any injury occurring during such travel will be compensable." *Mountain W. Fabricators v. Madden*, 958 P.2d 482, 484 (Colo. App. 1997), *aff'd*, 977 P.2d 861 (Colo. 1999). And "if the employee is sent away from home for an extended period to attend upon the employer's business, the employee will be considered to be in the course and scope of employment during virtually all of such period." *Id.* (citing *Alexander Film Co. v. Indus. Comm'n*, 136 Colo. 486, 492-93, 319 P.2d 1074, 1078 (1957), which affirmed an award to an employee who died after being struck by a motor vehicle as he crossed the road separating the restaurant where he dined from his motel). The risks associated with the necessities of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of a traveling employee's employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9, 12 (Colo. App. 1995); *Staff Adm'rs, Inc. v. Indus. Claim Appeals Office*, 958 P.2d 509, 511 (Colo. App. 1997), *aff'd sub nom. Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999).

¶ 15 A traveling employee's injuries are not compensable, however, if the injury occurred while the employee was engaged in a

"personal deviation." *See Hirst*, 905 P.2d at 11 ("An employee whose work requires travel away from the employer's premises is held to be within the course and scope of employment continuously during the trip, except when the employee makes a distinct departure on a personal errand."); *Wild W. Radio*, 905 P.2d at 8 ("Generally, workers' compensation coverage of an employee away from home at the direction of the employer does not extend to injuries which occur while the employee makes a distinct departure on a personal errand."). When considering whether an employee was engaged in a personal deviation, "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Hirst*, 905 P.2d at 12. "However, when the employee's personal errand is concluded, the deviation ends and the employee is again covered for workers' compensation." *Wild W. Radio*, 905 P.2d at 8.

¶ 16 Whether an injured employee was in "travel status" or on a "personal deviation" at the time of his injury is a question of fact the ALJ decides. *See Staff Adm'rs, Inc.*, 958 P.2d at 511; *Wild W. Radio*, 905 P.2d at 8. Although the burden of proof is on the employer to

show that the employee made a distinct departure from the scope of employment while on travel status, the burden of proof is on the claimant to show a return to the course and scope of employment. *Wild W. Radio*, 905 P.2d at 8.

C. Standard of Review

¶ 17 We employ the same standard of review as the Panel. *Compare* § 8-43-307(8), C.R.S. 2019, *with* § 8-43-308, C.R.S. 2019; *see also Miller v. Indus. Claim Appeals Office*, 49 P.3d 334, 337 (Colo. App. 2001) ("The Panel and reviewing courts are bound to apply the substantial evidence test in determining whether the evidence supports the ALJ's findings of fact."); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995) ("[T]he evidentiary standard of proof applied by the ALJ is not the same as the *standard of review* applied by the Panel and reviewing courts in determining the correctness of the ALJ's order. 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."). When an ALJ's findings of fact are supported by substantial evidence, we are bound by them, even when the evidence is conflicting and would have supported a contrary result. *See* § 8-43-

308; *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001), *superseded by statute as recognized by City of Brighton v. Rodriguez*, 2014 CO 7, ¶ 39 n.12. But we may set aside an ALJ's decision if, among other things, the "findings of fact do not support the order" or the order "is not supported by applicable law." § 8-43-308. Thus, if the ALJ misconstrued or misapplied the law, we may set the decision aside. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 431 (Colo. App. 2010). And we review de novo the application of law to undisputed facts. *Hire Quest, LLC v. Indus. Claim Appeals Office*, 264 P.3d 632, 635 (Colo. App. 2011).

D. The Panel Properly Reversed the ALJ's Order Denying Benefits

¶ 18 There appears to be no dispute between the parties that decedent was in travel status while in Colorado or that he had engaged in a personal deviation. Rather, the dispute is whether decedent ended his deviation and returned to travel status before his fatal accident. The question we must answer is whether the law mandates an award of benefits based on the facts found by the ALJ. We conclude that it does.

¶ 19 In *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970), the Colorado Supreme Court upheld the commission's

finding that the claimants sustained compensable injuries. The claimants were staying overnight in Denver while on a business trip. They sustained injuries in a motor vehicle accident while returning to their Denver hotel after a non-work-related dinner with friends. *Id.* at 542, 474 P.2d at 614. The commission ruled that the claimants' deviation ceased the moment they commenced their return to their lodging. *See id.* at 542-43, 474 P.2d at 614. The supreme court affirmed the commission's decision because the claimants "had concluded their personal activities of the evening, and . . . at the time they sustained their injuries they were proceeding toward their lodging quarters for the night." *Id.* at 543, 474 P.2d at 615 (citing *Mohawk Rubber Co. v. Cribbs*, 165 Colo. 526, 440 P.2d 785 (1968), which affirmed a commission finding that the decedent had returned to the scope of employment from a deviation when he died in a one-car accident heading in the direction of his home, even though he was intoxicated and it was unclear from where he was traveling).

¶ 20 The ALJ distinguished this case from *Pat's Power Tongs* because decedent was not "proceeding toward" his "lodging quarters" when he ran across Tower Road. *See id.* at 543, 474 P.2d

at 615. We are not convinced that this fact is dispositive. True, decedent was not en route to *his* hotel and was, undisputedly, heading *away from* his hotel at the time of the accident. But, the ALJ also found, with ample record support, that before the accident (1) decedent and Ladner had stopped drinking, left the establishment where they were celebrating, and returned to Ladner's hotel; (2) decedent proceeded to Ladner's room after he was unable to obtain a room key from the night desk attendant; and (3) decedent and Ladner did not consume more alcohol or otherwise continue their celebratory activities upon reaching Ladner's room. To the contrary, the uncontroverted evidence suggests the pair talked for a while and then fell asleep. In other words, decedent had already returned to "lodging quarters for the night" (even if it was his colleague's room). The accident happened hours later.

¶ 21 We agree with the Panel that, under *Pat's Power Tongs*, these findings mandate an award of benefits to claimants. Although when a deviation ends is generally a question of fact for the ALJ's determination, *see Wild W. Radio*, 905 P.2d at 8, that determination must be made within the bounds of existing case law. Applying

Pat's Power Tongs to the facts of this case, we conclude that the decedent's deviation ended before his fatal accident.

¶ 22 SkyWest also contends that the ALJ correctly found that decedent continued in his "personal deviation at the time of the accident, due to hours of consuming alcohol." But more than twenty years ago, a division of this court rejected an employer's contention that its employee could not have ended her deviation and returned to the scope of employment "until she attained sobriety." *Wild W. Radio*, 905 P.2d at 8. The division observed that "the General Assembly has not evidenced an intent to preclude all compensation for excessive levels of intoxication." *Id.*

¶ 23 Despite multiple subsequent amendments to the Act, the General Assembly has not incorporated a provision barring an intoxicated worker from receiving benefits. And we lack authority to read such a provision into the Act. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) ("We have uniformly held that a court should not read nonexistent provisions into the . . . Act.").

¶ 24 We acknowledge that a division of this court held that "in some circumstances the act of consuming alcohol, by itself, can constitute a personal deviation sufficient to remove the claimant

from the scope of employment." *Pacesetter Corp.*, 33 P.3d at 1234. But, notwithstanding the broad statement quoted, *Pacesetter Corp.* is distinguishable on its facts because, "[b]ased upon the extent of claimant's intoxication and the circumstances of the accident," which included the claimant driving ninety miles per hour at the time of the one-car accident, "the ALJ inferred that claimant continued to drink after he left the motel." *Id.* Based on this inference, the ALJ determined, and the division agreed, that the claimant failed to prove he had returned to the scope of his employment at the time of the accident. *Id.*

¶ 25 Here, in contrast, the ALJ specifically found that decedent had "finished drinking at approximately 2:00 a.m." before returning to Ladner's hotel; the ALJ did not find that decedent continued imbibing after he left Ladner's hotel room hours later and tried to cross the street on foot.

¶ 26 We therefore affirm the Panel's decision reversing the ALJ's order denying and dismissing claimants' claim for benefits.

III. Admissibility of Toxicology Results under Section 8-42-112.5

¶ 27 SkyWest contends that the Panel erred by (1) addressing the admissibility of decedent's toxicology results under section 8-42-

112.5 even though the ALJ did not address the issue in her final order; and (2) concluding that an employer may only invoke the 50% intoxication penalty if there is a second blood sample preserved for review. We disagree.

A. The Panel Had Authority to Address the Issue

¶ 28 We first reject SkyWest's contention that the Panel lacked authority to determine the admissibility of the toxicology results under section 8-42-112.5 because the ALJ did not specifically address it in her final written order. Before the hearing, a prehearing ALJ (PALJ) granted claimants' motion to redact the toxicology results from the adjuster's notes, the medical records, and the medical examiner's report. The PALJ ruled that a second blood sample — which the parties stipulated had not been preserved — was "a prerequisite to reduce compensation under [section] 8-42-112.5." With no second sample, the PALJ ruled, the toxicology results were inadmissible for the purpose of imposing the 50% statutory penalty.

¶ 29 From the bench at the start of the hearing, the ALJ reversed and struck the PALJ's evidentiary ruling. Thus, the ALJ ruled on the evidence's admissibility, which ruling is subject to review. The

ALJ did not address the issue in her later written order because it was unnecessary for her to do so. Having found the claim noncompensable, it was irrelevant whether benefits should be reduced under the statute. In contrast, the Panel determined that the claim was compensable based on the ALJ's factual findings. It therefore properly addressed the admissibility of the toxicology results to reduce benefits under section 8-42-112.5.

B. The Toxicology Results Were Inadmissible

¶ 30 Turning to the admissibility of the evidence, SkyWest contends that the toxicology results are admissible for purposes of reducing benefits under section 8-42-112.5 even if a second blood sample is unavailable. It argues that if the legislature "intended that intoxication cannot be proven under any circumstance without a second blood sample, [it] would have stated that in the statute." SkyWest acknowledges that without a second sample it was not entitled to a *presumption* of intoxication but contends it could still establish decedent's intoxication for purposes of the 50% reduction

in benefits with other medical and nonmedical evidence.[2] We disagree.

1. Rules of Statutory Construction and Standard of Review

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

¶ 32 We review statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). Although we defer to the Panel's reasonable interpretations of the statute it administers, *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006), we are "not bound by the

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[2] To be clear, we do not address whether, in the absence of a second sample, toxicology results nonetheless may be admitted for purposes other than a 50% reduction in benefits under section 8-42-112.5, C.R.S. 2019.

Panel's interpretation" or its earlier decisions, *United Airlines v. Indus. Claim Appeals Office*, 2013 COA 48, ¶ 7; *see also Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). Still, "the Panel's interpretation will be set aside only if it is inconsistent with the clear language of the statute or with the legislative intent." *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998).

2. The Panel Properly Interpreted Section 8-42-112.5

¶ 33 Section 8-42-112.5 penalizes workers who are injured while intoxicated by reducing their benefits by 50% if certain conditions are met. As relevant, the statute provides as follows:

> (1) Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of . . . a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated

> and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

§ 8-42-112.5(1).

¶ 34 The PALJ interpreted the statute to require the preservation of a second sample to admit information about decedent's BAC for the purpose of reducing benefits under the statute. The ALJ disagreed, as her ruling from the bench reflects:

> I disagree with [the PALJ] and find that the presence of a second sample is only required if the respondents are relying on [a] presumption of intoxication. And that in that event, a second test must be made available to the claimant's side, and then they're able to rebut the presumption by clear and convincing evidence.
>
> I don't find that proof of intoxication is governed generally by this statute, rather a party can prove intoxication by a preponderance of the evidence as they could prove any other issue in any other claim, and that the second sample is required only if respondents try to avail themselves of a presumption of intoxication at a blood alcohol content level of .10 percent.
>
> So I find the general rule of proving intoxication is the larger rule, and that this statute, 8-42-112.5, carves out an exception when the responding parties are trying to rely upon the presumption of intoxication. So I will

> reverse and strike that portion of [the PALJ's] order.

¶ 35 SkyWest argues that the ALJ's interpretation is correct but admits that neither the supreme court nor any division of this court has addressed this question. Indeed, we know of no appellate case which has examined the ramifications of failing to preserve a second blood sample in a workers' compensation case. The Panel, however, has addressed this issue on more than one occasion.

¶ 36 In *Stohl v. Blue Mountain Ranch Boys Camp*, W.C. No. 4-516-764, 2005 WL 481322 (Colo. I.C.A.O. Feb. 25, 2005), for example, the Panel explained that the legislature enacted the second sample requirement

> as a procedural protection against the possible reduction of benefits from a false positive result in the first blood sample testing. The General Assembly determined that given the magnitude of the evidentiary presumption created by an initial test result showing 0.10 or greater blood alcohol level, the availability of a second sample for the claimant to independently test is a necessary safeguard to the wrongful loss of benefits. (*See* Respondents' Brief in Support of the Petition to Review, Exhibit C, House Committee on Business Affairs & Labor Transcript on Senate Bill 99-161, pp. 2, 4, 21, 29). Therefore, the General Assembly *conditioned application of the penalty statute on the availability of a*

> *second sample* for use by the claimant to contest the accuracy of the initial test.

Id. at *2 (emphasis added). As a result, the "preservation of a second sample is a condition precedent to the evidentiary presumption created by a 0.10 blood alcohol test from the first sample which in turn is required to assert a penalty under § 8-42-112.5." *Id.*

¶ 37 Consistent with this pronouncement, in cases in which a second sample was not available, the Panel has refused to reduce benefits under the statute. *See, e.g., Ray v. New World Van Lines*, W. C. No. 4-520-251, 2004 WL 2348543, at *7 (Colo. I.C.A.O. Oct. 12, 2004). The Panel's interpretation is consistent with the legislative intent reflected in the plain language of the statute. *See Sanco Indus.*, 147 P.3d at 8; *Support, Inc.*, 968 P.2d at 175.

¶ 38 When certain conditions are met, section 8-42-112.5 creates a presumption that a worker's injury resulted from his intoxication. The consequence of the presumption is that the injured worker's benefits are reduced by 50%. The presumption may only be overcome by clear and convincing evidence to the contrary. However, the presumption and the consequential reduction in

benefits apply only where (1) "the injury results from the presence in the worker's system, during working hours, of . . . a blood alcohol level at or above 0.10 percent"; (2) the impermissible blood alcohol level is "evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests"; *and* (3) "[a] duplicate sample from any test conducted [is] preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense." § 8-42-112.5(1). When all these conditions are met and "the test indicates the presence of . . . alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication." *Id.*

¶ 39 The legislature declared that a second sample "must be preserved and made available to the worker for purposes of a second test." *Id.* SkyWest suggests that this sentence modifies only the *next* two sentences which impose a presumption of intoxication if "the test indicates" a blood alcohol level at or above 0.10 percent. In other words, SkyWest argues that the absence of a second sample may prohibit it from relying on a *presumption* that decedent was intoxicated, but it does not prevent it from otherwise proving

that decedent's injury resulted from his intoxication such that his benefits must be reduced by 50%. SkyWest's argument is flawed for two reasons.

¶ 40 First, we reject SkyWest's contention that the second sample requirement affects only the sentences that follow it in the statutory subsection. On the contrary, the context establishes that the legislature intended the second sample prerequisite to apply to the entire statute. *See Jefferson Cty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) ("The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme.").

¶ 41 The first sentence of the statute authorizes a reduction in benefits only when a "test conducted by a medical facility or laboratory licensed or certified to conduct such tests" reflects a blood alcohol level at or above 0.10 percent. § 8-42-112.5(1). The very next sentence mandates that "[a] duplicate sample from *any test conducted* must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense." *Id.* (emphasis added). Thus, the plain language makes clear that the duplicate sample "from any test conducted" refers to

the "test conducted by a medical facility or laboratory," which is required by the first sentence to invoke the penalty in the first instance. *See id.* The last two sentences of the subsection do not refer to the second sample; rather, they refer to "the test" and the presumption that flows from a test result showing an impermissible level of alcohol in the worker's system. Indeed, the statute does not require that a second test be conducted on the second sample, or that two separate test results be admitted, to invoke the intoxication penalty.

¶ 42 Second, and more importantly, the presumption and the penalty cannot be separated. When all conditions are met, the statute creates a presumption that the worker's injury resulted from his intoxication and that his benefits must be reduced by 50%. The worker can overcome that presumption by clear and convincing evidence that something other than his intoxication caused the injury. But the statute does not contemplate any other means for an employer to secure a 50% reduction in benefits because of a worker's intoxication other than through the articulated presumption (which requires proof of an impermissible level of alcohol evidenced by a blood alcohol test conducted by a qualified

medical facility or laboratory, which in turn requires a second sample be preserved to ensure the test result is accurate). In other words, the statute does not authorize a 50% reduction in benefits if the employer is able to prove, by some means other than the presumption, that the worker's injury resulted from his intoxication.

¶ 43 The Panel's interpretation is entitled to deference. The Panel considered the mandate for a second sample an independent prerequisite to be satisfied before toxicology results could be admitted to justify a 50% penalty against claimants' benefits. Because this interpretation is consistent with the statutory language, we decline to set it aside. *See Sanco Indus.*, 147 P.3d at 8; *Support, Inc.*, 968 P.2d at 175.

¶ 44 We agree with the Panel that because a second sample was not preserved, decedent's toxicology results could not be admitted for the purpose of imposing a 50% reduction in claimants' benefits under section 8-42-112.5.

IV. Conclusion

¶ 45 The Panel's order is affirmed.

JUDGE FOX and JUDGE ROTHENBERG concur.

DATE FILED: August 27, 2020
CASE NUMBER: 2019CA1039

SUMMARY
August 27, 2020

2020COA129

No. 19CA1039, *Morris v. ICAO* — Labor and Industry — Workers' Compensation — Division-Sponsored Independent Medical Evaluation

In this workers' compensation case, the division holds that a DIME's "findings and determinations," as contemplated by section 8-42-107.2(4)(c), do not include a DIME's recommendation to convert a scheduled impairment to a whole person impairment, and that the insurer and employer do not forfeit their right to challenge a claimant's request to convert his impairment even if the insurer and employer do not request a hearing on the issue of conversion within twenty days of the DIME report.

COLORADO COURT OF APPEALS **2020COA129**

Court of Appeals No. 19CA1039
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-980-171

Zachary Morris,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Olson Heating & Plumbing Co., and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division III
Opinion by JUDGE GROVE
Furman and Graham*, JJ., concur

Announced August 27, 2020

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

No Appearance for Respondent Industrial Claim Appeals Office

Harvey Flewelling, Denver, Colorado, for Respondents Pinnacol Assurance and Olson Heating & Plumbing Co.

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

¶ 1 In this workers' compensation action, claimant, Zachary Morris, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed the order of an administrative law judge (ALJ) denying and dismissing his request for whole person permanent partial disability (PPD) benefits. We hold that the "findings and determinations" of a division sponsored independent medical examination (DIME), as contemplated by section 8-42-107.2(4)(c), C.R.S. 2019, do not include a DIME's recommendation to convert a scheduled impairment to a whole person impairment, and that the insurer and employer do not forfeit their right to challenge a claimant's request to convert his impairment even if the insurer and employer do not request a hearing on the issue of conversion within twenty days of the DIME report. Therefore, we affirm.

I. Background

¶ 2 Claimant sustained an admitted work-related injury in April 2015, when he slipped on scaffolding. He was treated for his injuries and diagnosed with a left ankle sprain. Several months after his fall, claimant also reported pain in his lower back. Claimant's treating physician, Dr. Albert Hattem, placed him at

maximum medical improvement (MMI) with no impairment in March 2016. Because he disagreed with the determination that he had no permanent impairment, claimant requested a DIME.

¶ 3 The DIME physician, Dr. J. Stephen Gray, agreed with Dr. Hattem that claimant reached MMI in March 2016, but assigned claimant a 14% impairment rating for his left lower extremity, which Dr. Gray noted could be converted to a 6% impairment of the whole person. Dr. Gray also recommended that claimant receive ongoing maintenance medical care.

¶ 4 In May 2017, claimant's employer, Olson Heating & Plumbing Co., and its insurer, Pinnacol Assurance (collectively, employer), filed a final admission of liability (FAL) based upon Dr. Gray's DIME report. However, employer did not admit to Dr. Gray's converted 6% whole person impairment rating or to his recommendation that claimant receive post-MMI ongoing maintenance medical care. Instead, employer admitted to the scheduled 14% permanent impairment of claimant's left leg. Claimant objected to the FAL, arguing that he was entitled to both maintenance medical care and PPD benefits calculated under Dr. Gray's recommended 6% whole person impairment rating.

¶ 5 In November 2017, the ALJ held a hearing on the issue of future maintenance medical benefits. Although claimant raised the issue of whole person impairment benefits, the ALJ noted that, because claimant had not given employer sufficient notice of his intent to pursue that issue, employer "elected to reserve that issue for future determination."

¶ 6 In a supplemental order issued in March 2018, which superseded a previous order the ALJ had issued, the ALJ concluded that employer was not bound by the DIME physician's recommendation for future maintenance medical benefits and denied claimant's request for ongoing care. The ALJ rejected claimant's contention that a DIME physician's opinions concerning future maintenance medical treatment are part of the "findings or determinations" referenced in section 8-42-107.2(4)(c). Rather, the ALJ held that "the preclusive effect [of a DIME physician's opinion] is limited to determinations regarding MMI or whole person medical impairment." The Panel affirmed the ALJ's supplemental order in early July 2018, but claimant did not seek review of that order in this court.

¶ 7 Less than a week after the Panel issued its order, claimant filed a new application for hearing, endorsing the issues of disfigurement and PPD benefits. Specifically, claimant indicated that he sought a "whole person rating from the DIME doctor J. Stephen Gray, M.D." In a motion for partial summary judgment, claimant argued that employer was bound by Dr. Gray's whole person impairment rating because it had not filed an application for hearing objecting to the whole person rating and had instead filed a FAL admitting to the 14% scheduled impairment.

¶ 8 In a written order denying claimant's motion, the ALJ ruled that because the conversion of a scheduled impairment to a whole person impairment rating is not one of the two areas in which a DIME opinion carries presumptive weight, employer did not have to apply for a hearing to challenge the conversion. In particular, the ALJ ruled that because conversion from a scheduled impairment to a whole person impairment is not within the scope of a DIME's "findings or determinations" under section 8-42-107.2(4)(c), employer was not required to apply for a hearing to challenge any impairment rating conversion. Rather, the ALJ wrote, it was claimant's

> burden to prove, by a preponderance of the evidence, that he suffered permanent functional impairment not listed on the schedule of disabilities. The DIME's opinion on that point is not binding, but is simply one piece of evidence the ALJ will consider in evaluating whether [c]laimant met his burden. If [c]laimant proves whole person impairment, the DIME's 6% whole person rating is binding under *Leprino* [*Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005)]. On the other hand, if [c]laimant fails to prove whole person impairment, the appropriate scheduled rating is a factual matter for determination under the preponderance standard.

¶ 9 The matter proceeded to hearing on three issues: (1) claimant's entitlement to whole person PPD benefits; (2) claimant's request for disfigurement benefits; and (3) employer's contention that the ALJ was precluded from considering the PPD claim. The ALJ rejected employer's issue preclusion argument but found that claimant had not shown by a preponderance of the evidence that his functional impairment extended beyond his left leg. In support of this finding, the ALJ credited the opinions of Dr. Hattem and a physician retained by employer, Dr. Mark Paz. Both physicians opined that claimant's back pain was unrelated to his left ankle sprain. Because the ALJ found that claimant's compensable functional

impairment was limited to the left leg, the ALJ ordered that claimant's benefits be calculated according to the schedule codified in section 8-42-107(2). The ALJ also found that although claimant demonstrated a limp at the hearing, numerous physicians "repeatedly documented normal gait." Based on these findings, the ALJ denied and dismissed claimant's request for whole person PPD and disfigurement benefits.

¶ 10 The Panel upheld the ALJ's decision, holding that it was supported by both the law and substantial evidence in the record. Claimant now appeals the denial of his request for whole person PPD benefits.

II. Issue Preclusion

¶ 11 Before examining the merits of claimant's appeal, we address employer's contention that claimant's argument is barred by the doctrine of issue preclusion. Employer argues that the ALJ's March 2018 supplemental order denying claimant's request for post-MMI maintenance medical benefits precludes claimant's request that his impairment rating be converted from a scheduled impairment to an impairment of the whole person, as the DIME physician recommended. In the March 2018 supplemental order, the ALJ

ruled that employer was not bound by Dr. Gray's recommendation that claimant receive ongoing post-MMI maintenance medical benefits because that recommendation fell outside the scope of "findings or determinations" addressed in section 8-42-107.2(4)(c). The ALJ reasoned that the "findings or determinations" covered by section 8-42-107.2(4)(c) are limited to those DIME opinions given preclusive effect by statute — i.e., whole person impairment and MMI. The Panel agreed, concluding that "the reference in [section] 8-42-107.5(4)(c)[1] to 'findings or determinations' of the DIME report are necessarily limited to findings or determinations of MMI or permanent impairment." Claimant did not appeal this order, and employer now argues that he should be barred from seeking whole person PPD benefits under section 8-42-107.2(4)(c) by the doctrine of issue preclusion. We disagree.

A. Law Governing Issue Preclusion

¶ 12 An issue involving the same parties may only be decided once. Under the doctrine of issue preclusion, "once a court has decided

[1] The Panel's reference to section 8-42-107.*5* appears to be a typographical error. The rest of the Panel's order correctly cites to section 8-42-107.*2*(4)(c), C.R.S. 2019.

an issue necessary to its judgment, the decision will preclude relitigation of that issue in a later action involving a party to the first case." *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007). Issue preclusion applies if

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Sunny Acres Villa, Inc. v. Cooper, 25 P.3d 44, 47 (Colo. 2001). "Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims." *Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 52.

¶ 13 The party seeking to preclude an issue from relitigation bears the burden of establishing the elements of the doctrine. *See Allen v. Martin*, 203 P.3d 546, 560 (Colo. App. 2008).

¶ 14 "Issue preclusion . . . presents a question of law that we review de novo." *Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶ 17.

B. The Issue Is Not Precluded

¶ 15 As employer concedes, "claimant's argument here deviates slightly from the argument he asserted previously." At the November 2017 hearing, claimant argued that employer was bound by the DIME physician's recommendation for post-MMI maintenance medical benefits. In contrast, in his motion for partial summary judgment filed in advance of the November 2018 hearing, claimant maintained that employer was bound by the DIME physician's whole person impairment rating. The issues are similar, as both rely on the ALJ's interpretation of the scope of "findings or determinations" under section 8-42-107.2(4)(c), but they are not identical. The question raised at the November 2017 hearing was whether "findings or determinations" included post-MMI maintenance medical treatment. If so, then employer could have been bound by Dr. Gray's recommendation that claimant receive ongoing post-MMI maintenance medical benefits.

¶ 16 In contrast, in his motion for partial summary judgment, as on appeal, claimant argued that employer was bound by Dr. Gray's conversion of scheduled impairment to a nonscheduled whole person impairment because the conversion recommendation fell

within the section 8-42-107.2(4)(c)'s definition of "findings or determinations." However, "findings or determinations" could have incorporated one of Dr. Gray's recommendations but not the other; the questions necessitated separate discussion and analysis to determine whether either maintenance medical benefits or conversion fell within the purview of "findings or determinations." The issues therefore are not identical for issue preclusion purposes. Employer consequently cannot establish the first prong of the issue preclusion test. *See Sunny Acres Villa*, 25 P.3d at 47.

¶ 17 Moreover, although claimant tried to assert his claim for PPD benefits based on Dr. Gray's conversion of his scheduled impairment into a whole person impairment at the November 2017 hearing, the parties and the ALJ agreed to reserve the question for future consideration. We agree with the ALJ that, under these circumstances, the question is not precluded.

III. DIME's Scheduled Impairment Recommendation Not Binding

¶ 18 Having determined that claimant's primary contention is not precluded, we now turn to the merits of his appeal. As he argued before both the ALJ and the Panel, claimant contends employer is bound by the DIME physician's whole person impairment rating

because employer did not apply for a hearing contesting it. He argues that an employer must respond to "any finding or determination of [a] DIME doctor" within twenty days or the finding or determination becomes binding. He further argues that the ALJ and the Panel misinterpreted section 8-42-107.2(4)(c) when they excluded conversion to a whole person impairment rating from "findings or determinations." We are not persuaded that either the ALJ or the Panel erred.

A. Law Governing Statutory Interpretation

¶ 19 It is the court's function to decide issues of law, including the interpretation of statutes. § 24-4-106(7)(d), C.R.S. 2019 ("In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved."). When we interpret a provision of the Act, if its language is clear "we interpret the statute according to its plain and ordinary meaning." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). In addition, "when examining a statute's language, we give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v.*

Colo. Outdoor Educ. Ctr., Inc., 187 P.3d 565, 571 (Colo. 2008) (quoting *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005)).

B. Panel and ALJ Did Not Misinterpret Statute

¶ 20 Section 8-42-107.2(4)(c) provides as follows:

> Within twenty days after the date of the mailing of the division's notice that it has received the [D]IME's report, the insurer or self-insured employer shall either file its admission of liability pursuant to section 8-43-203[, C.R.S. 2019,] or request a hearing before the division contesting one or more of the [D]IME's findings or determinations contained in such report.

Claimant insists that the "findings or determinations" referenced in this subsection encompass any findings included in a DIME report.

¶ 21 The Panel concluded that the term "findings or determinations" is limited to a DIME physician's findings concerning MMI and whole person permanent impairment. Consequently, the Panel ruled that employer was not bound by the DIME physician's conversion of the 14% scheduled lower extremity impairment to a 6% whole person impairment and could either file a final admission or apply for a hearing.

¶ 22 We conclude that the Panel's interpretation is consistent with the statutory language and legislative intent. First, when we consider the Workers' Compensation Act of Colorado (Act) as a whole, it becomes clear that the legislature did not intend for a DIME physician's "findings or determinations" to be unlimited in scope. In particular, cross-references between section 8-42-107.2, which governs DIMEs, and section 8-42-107, which governs PPD benefits, illuminate the meaning and scope of "findings or determinations." Addressing MMI, section 8-42-107(8)(b)(II) provides that "[i]f either party disputes a *determination* by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI], an independent medical examiner may be selected in accordance with section 8-42-107.2." (Emphasis added.) Likewise, in the subsection pertaining to permanent impairment, the statute instructs that when

> there is a *determination* that permanent medical impairment has resulted from the injury, the authorized treating physician shall determine a medical impairment rating as a percentage of the whole person. . . . If either party disputes the authorized treating physician's finding of medical impairment, . . .

> the parties may select an independent medical examiner in accordance with section 8-42-107.2.

§ 8-42-107(8)(c) (emphasis added). These are the only two "determinations" that the Act expressly permits a DIME physician to evaluate, and the only two references to DIME "determinations" in these two statutory sections. Conversion of a scheduled impairment to a whole person impairment is not so cross-referenced in the statutes.

¶ 23 Second, close analysis confirms that the two areas referred to in these statutes as "determinations" are those in which the Act grants a DIME presumptive effect. As has long been the case, a DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III); *Meza v. Indus. Claim Appeals Office*, 2013 COA 71, ¶ 15. The Act has not granted DIME opinions presumptive weight in any other areas. Instead, the "opinions of a DIME physician have only been given presumptive effect when expressly required by the statute." *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002).

¶ 24 The Act "classifies work-related injuries as either scheduled or non-scheduled injuries. Scheduled injuries are those listed in [section] 8-42-107(2). Non-scheduled injuries are those that are not listed or that are excluded from the statutory schedule." *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

> [A] claimant is limited to a scheduled disability award if he or she suffers an injury or injuries described in the schedule set forth in [section] 8-42-107(2). . . . Where a claimant suffers an injury not enumerated in [section] 8-42-107(2), the claimant is entitled to whole person impairment benefits under [section] 8-42-107(8).

Dillard, 121 P.3d at 304. Nowhere in the Act is a DIME's recommendation to convert a scheduled impairment to a whole person impairment expressly granted any presumptive effect.

¶ 25 Rather, divisions of this court have long entrusted the conversion of a scheduled injury to a whole person impairment to the ALJ's discretionary authority. *See Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366, 368 (Colo. App. 1996). Whether to convert a scheduled impairment to an impairment of the whole person is, thus, a question of fact for the ALJ to decide. *Id.* And even though this has long been the stated standard, the legislature

has never added impairment conversions to the short list of conclusions over which a DIME's opinion carries presumptive weight, despite enacting section 8-42-107.2 two years *after Strauch* and amending the statute at least six times since. The legislature's inaction amounts to tacit approval of the case law imbuing ALJs with the discretionary authority to decide whether an impairment rating should be converted. *See City of Colorado Springs v. Powell*, 156 P.3d 461, 467 (Colo. 2007) ("We regard the General Assembly's decision not to alter the definition of 'sanitation facility' following these cases — even though it made several other amendments . . . after these decisions — as evidence of its acquiescence to the judicial construction of the terms in those opinions."); *Tompkins v. DeLeon*, 197 Colo. 569, 571, 595 P.2d 242, 243-44 (1979) ("When the legislature reenacts or amends a statute and does not change a section previously interpreted by settled judicial construction, it is presumed that it agrees with judicial construction of the statute.").

¶ 26 Nor are we persuaded by claimant's assertion that *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003), counsels a different result. Even if, as claimant notes, there is a dearth of cases addressing the question he raises, *City Market* does

not assist us in our analysis. It is inapposite and factually distinguishable because there, unlike here, the employer took no steps to contest the DIME. Having filed neither an application for hearing nor a FAL, the employer in *City Market* was bound by the "findings or determinations" identified in the DIME opinion. *Id.* at 603 ("When employer received the DIME report, it was required under the Act and the rule to respond and either admit that the DIME report was valid or request a hearing at which it could raise its objections to the report."). Employer here admitted to the scheduled impairment recommended by the DIME; it was not required to do more because claimant bore the burden of proving he had sustained an injury to his whole person. *See Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1392 (Colo. App. 1997).

¶ 27 We agree with the Panel that a DIME's "findings or determinations" under section 8-42-107.2(4)(c) do not include conversion of a scheduled impairment to a nonscheduled impairment of the whole person. Accordingly, employer was not bound by Dr. Gray's suggestion that claimant's impairment rating be converted from 14% of the lower extremity to 6% of the whole person even though it filed a FAL admitting to the scheduled

impairment and did not also file an application for a hearing contesting the conversion recommendation.

C. The Panel Properly Upheld the ALJ's Finding that Claimant's Injury Fell Under the Schedule of Injuries

¶ 28 To the extent that claimant suggests that the Panel erred by affirming the ALJ's finding that his injury was limited to his lower extremity, we perceive no grounds for setting aside the order on this basis.

¶ 29 The Act draws a clear distinction between scheduled and nonscheduled — i.e., whole person — impairment. Injuries either fall within the schedule codified at section 8-42-107(2) and are described as scheduled injuries, or they fall outside the scope of the schedule or are excluded and are considered nonscheduled or whole person injuries. *See Delaney*, 30 P.3d at 693; *Dillard*, 121 P.3d at 304.

¶ 30 When a claimant has sustained a nonscheduled, whole person impairment, the DIME physician's rating of that impairment is granted presumptive weight. *See Meza*, ¶ 15. However, such presumptive weight is not granted a DIME physician's opinion with respect to scheduled injuries. *See Delaney*, 30 P.3d at 693

(recognizing that the requirement that "a DIME finding as to permanent impairment . . . be overcome . . . by clear and convincing evidence . . . appl[ies] only to non-scheduled impairments"). "When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute." *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664, 666 (Colo. App. 1998).

¶ 31 "[W]hether the claimant has suffered a functional impairment that is listed on the schedule of disabilities is a factual question to be resolved by the ALJ." *Strauch*, 917 P.2d at 368. In other words, whether to categorize an injury as limited to one body part enumerated on the schedule set out in section 8-42-107(2) or to rate it as an impairment of the whole person is a question of fact for the ALJ. If an ALJ determines that an injury warrants a whole person rating and should not be limited to the statutory schedule, any whole person rating calculated by the DIME physician would be granted presumptive weight. As explained in *Strauch*,

> the determination whether the claimant has suffered a functional impairment that is listed on the schedule of disabilities is a factual question to be resolved by the ALJ. This determination is distinct from, and should not

> be confused with, the treating physician's rating of physical impairment under the *AMA Guides*.

Id. (citation omitted). The claimant bears the burden of establishing entitlement to a nonscheduled, whole person impairment rating. *See Walker*, 942 P.2d at 1392 (upholding ALJ's finding that the claimant failed to prove entitlement to PPD benefits calculated based on a whole person impairment rating because finding was supported by substantial evidence).

¶ 32 "[T]he situs of the functional impairment, not the situs of the initial harm" determines whether claimant's injury falls under the schedule or should be calculated based upon an impairment of the whole person. *Strauch*, 917 P.2d at 369. Thus, the ALJ had the sole discretion to decide whether claimant met his burden of demonstrating that his injury extended beyond his leg to his back and should be calculated at the 6% whole person impairment rating as converted by the DIME physician, Dr. Gray. The ALJ found, though, that claimant had not met his burden and that his injury was limited to his left leg. Because that determination was factual and fell squarely within the ALJ's purview, the Panel had to uphold it if it was supported by substantial evidence in the record. *See*

Langton v. Rocky Mountain Health Care Corp., 937 P.2d 883, 884 (Colo. App. 1996) (holding that the question whether a claimant's impairment falls within the schedule of benefits is one of fact for the ALJ). And, as set out in his order, the ALJ's finding was supported by the opinions of both Dr. Hattem and Dr. Paz.

¶ 33 Because substantial evidence supports the ALJ's finding that claimant's work-related injury was limited to his left lower extremity and did not extend to his back, the Panel properly upheld the ALJ's determination that claimant sustained a scheduled impairment under section 8-42-107(2). *Id.*

IV. Conclusion

¶ 34 The order is affirmed.

JUDGE FURMAN and JUDGE GRAHAM concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-113-677

IN THE MATTER OF THE CLAIM OF:

JESUS TAPIA,

Claimant,

v.

REMAND ORDER

LOWE ENTERPRISES INC,

Employer,

and

FEDERAL INSURANCE COMPANY,

Insurer,
Respondents.

Claimant seeks review of an order of Administrative Law Judge Mottram (ALJ) dated March 19, 2020, that denied and dismissed claimant's claim for compensation. We set aside the order and remand the matter to the ALJ.

The ALJ conducted two evidentiary hearings on December 17, 2019, and January 24, 2020, on the primary issue of whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment. Other ancillary issues including medical benefits, designation of an authorized treating physician, indemnity benefits, average weekly wage, and late reporting penalties against both parties were also heard. All of the ancillary issues were first dependent on claimant proving a compensable injury.

Claimant worked for the employer as an engineering supervisor. His job duties included performing maintenance on privately owned condominium units located within a building owned by the employer.

Claimant testified that on June 25, 2019, he met with his supervisor in the morning to discuss work, then went to the 3rd floor to check the pool temperature, and then went to his office to eat his lunch. After lunch, claimant testified he heard a strange noise that sounded like water running. He testified that he went to investigate the sound and checked the bathroom of a condominium unit where he suspected the noise was coming from, but

did not find any water. He testified that he set down his dishes from lunch, and then does not remember anything that happened after that. He testified that the next thing he remembers is when he was seated at his desk and was bleeding from the back left side of his head.

Claimant was eventually found by his sons after they received a strange phone call from claimant. He was taken by his family to Vail Valley Medical Center where he was diagnosed with a fractured skull. A CT scan of the head revealed left occipital and temporal bone skull fractures with bifrontal and left cerebellar contusions, subarachnoid hemorrhage and subdural hemorrhage. Claimant was transferred by Flight-For-Life to Denver Health Medical Center. His diagnosis was reported to include a non-traumatic subarachnoid hemorrhage, unspecified, and a fractured skull. The Denver Health intake note indicated that claimant presented with a syncopal episode with head trauma resulting in multifocal intracranial hemorrhages.

Claimant underwent rehabilitation at Howard Head Sports Medicine in Vail with treatment overseen by Dr. Lipton. Claimant suffered a second fall in his shower at home on September 24, 2019. Claimant was diagnosed with an acute on chronic subdural hematoma. Surgery was performed to remediate this condition on September 28, 2019.

The claimant's medical records document a prior history of diabetes, cardiomyopathy, essential hypertension and pulmonary hypertension. Claimant had been seen by Dr. Lipton prior to the initial incident on June 10, 2019. Changes in his diabetes medications were discussed during this visit.

Mr. Adrianson, the property manager for employer, testified that he had discussions with claimant on the day of the incident and then later saw claimant changing locks in the ski room. Adrianson testified that he learned of the incident after the fact when called by claimant's son. He then proceeded to claimant's office where claimant's wife was holding a towel on the back of claimant's head. He noticed claimant had a swollen black eye. Claimant's eyeglasses were missing and Adrianson went to look for them. Adrianson testified that he found the glasses in unit B-11 on the kitchen floor along with a four-inch puddle of blood. Claimant's lunch dishes were on the counter. He testified that he noticed the light was on in the bathroom/laundry area of the condominium, and when he went into the bathroom he found more blood on the bathroom floor. Adrianson testified he did not find any of claimant's tools in the unit. Adrianson could find no evidence to indicate a water leak or other noise coming from the unit.

Dr. Orent performed an independent medical examination (IME) of the claimant on October 22, 2019. Dr. Orent concluded that claimant took a fall for unknown reasons. The doctor opined that claimant was having no cardiac symptoms, no chest pain, no palpitations, no shortness of breath, nothing to suggest a cardiac etiology and no evidence of a stroke. He further opined that there was no evidence of any ischemic change in the brain on the imaging and a stroke almost never causes abrupt loss of consciousness as occurred in this case. Dr. Orent opined that the pericardial effusion was not related and had been present since 2007 and unchanged since that time; nor would it have caused a sudden loss of consciousness. Dr. Orent concluded that he had no idea as to why claimant fell on June 25, 2019.

Respondents obtained a medical records review through Dr. Lesnak on November 15, 2019. Dr. Lesnak opined that claimant suffered an acute change in his mental status on the afternoon of June 25, 2019. Dr. Lesnak noted that prior to this probable "syncopal episode" on June 25, Dr. Lipton had recommended a change in claimant's blood sugar medication because of chronically elevated blood sugars.

Dr. Lesnak opined that claimant sustained a syncopal episode during his work hours on June 25, 2019. He opined that the syncopal episode was unrelated to any work activities. He surmised that it was possible that the episode may have been related to abnormally high or low blood sugars. He also considered the possibility that the episode was caused by a vasovagal episode versus an arrhythmia potentially related to claimant's longstanding cardiomyopathy and pericardial effusion, but did not place any degree of medical probability on the cause of the syncopal episode.

Dr. Orent testified that the syncopal episode was not caused by diabetes or his pericardial effusion. The claimant's glucose levels were "pretty good", and hypoglycemia does not cause a "drop attack." He further testified that the claimant's second fall at his home was related to the brain injury suffered in the first fall. Dr. Orent testified that claimant hit his head on two occasions on June 25, first posteriorly, and second on the two occipitals. He deemed both blows were severe enough to cause brain bleeding and a skull fracture. He testified that no reason for the fall[s] was definitively diagnosed.

Dr. Orent testified that neither he nor Dr. Lesnak could definitively tell why claimant lost consciousness but the injury occurred when claimant lost consciousness and then fell while at work. Dr. Orent opined that claimant likely fell forward, hit the front part of his head on the shelf causing the black eye, then fell backwards and hit his head either on the toilet or the floor. Dr. Orent testified that claimant was unconscious and unprotected when he fell.

Dr. Lesnak testified that claimant sustained a syncopal episode or drop attack while at work. He opined that the syncopal episode could be caused by several pre-existing conditions including chronic cardiomyopathy and pericardial effusion, hypertension, cardiac arrhythmia or claimant's diabetes. Dr. Lesnak concurred that claimant was unconscious and then fell.

The ALJ was not persuaded by respondents' contention that claimant's fall was not compensable because claimant deviated from his employment when he entered the condominium unit. Respondents argued that the presence of the dirty dishes and the lack of evidence of a leak in the condominium unit establish that claimant was using the unit for personal reasons. The ALJ deemed that there was insufficient evidence that claimant was using the condominium unit to perform personal chores at the time he lost consciousness.

The ALJ noted that claimant advocated that the fall was unexplained and therefore compensable as a matter of law. The ALJ disagreed and held that the cause of the fall is known; claimant sustained a syncopal episode at work that caused unconsciousness, leaving him unprotected in the fall, resulting in the fractured skull. While the doctors may disagree as to what might have caused the syncopal episode, they agreed that claimant sustained a syncopal episode which led to his injuries.

The ALJ held that a syncopal episode, or fainting spell, is an inherently private risk to the injured worker in that there was a dysfunction within the claimant's body which caused him to lose consciousness.

The ALJ referenced Dr. Orent's testimony that claimant hit his head two times and also reiterated the doctor's hypothesis that claimant may have fallen forward and hit his head, then fallen backward and hit the toilet or the floor. The ALJ discounts Dr. Orent's analysis on the stated basis that, "the evidence does not establish that there was blood on the toilet." Order ¶25. The ALJ asserted that, "The testimony of Mr. Adrianson establishes that there were two pools of blood. One on the kitchen floor and one on the bathroom floor." Order ¶25.

The ALJ held that evidence does not establish that claimant's employment contributed to claimant's risk or aggravated his injury. The ALJ found and concluded that claimant suffered a fainting spell while at work, fell and hit the floor, and fractured his skull. The evidence of a blood pool in the kitchen and in the bathroom appears to support two separate falls, one in each room. The ALJ held that there was insufficient evidence

that the employment placed claimant at an increased risk of a skull fracture where there is insufficient evidence of claimant striking anything other than the floor.

Based on the ALJ's findings that the injury was not compensable, the ALJ did not address the remaining issues raised by the parties as set forth above.

In his conclusions of law, the ALJ analyzed the facts of this claim in relation to *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). The *City of Brighton* court explains that workplace injuries fall into one of three categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks [or purely idiopathic injuries] which are inherently personal or private to the employee; and (3) neutral risks, which are neither employment related nor personal. *Id*. at 502-503. The ALJ concluded that claimant's injury does not fit into the first risk because the condominium was free from any obstruction that would have caused claimant's fall. The ALJ determined that the claimant's injury fit into the personal risk category because the syncopal episode was not caused by the employment.

The ALJ acknowledged an exception to idiopathic injuries being non-compensable if the "special hazard" doctrine applies. Under this doctrine, an injury is compensable even if the most direct cause of that injury is a pre-existing idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *City of Brighton,* footnote 3, citing *Ramsdell v. Horn,* 781 P.2d 150, 152 (Colo. App. 1989).

The ALJ concluded that claimant satisfied the burden of proof to establish that his injury occurred in the course of employment as the injury occurred in the time and place limits of his employment. However, the ALJ concluded that there is insufficient evidence that the employment contributed to the risk of his fractured skull, as the evidence does not establish that claimant struck anything related to work that would have contributed to the fractured skull, other than the floor. The ALJ concluded that:

> The evidence of blood pools in the kitchen and bathroom likely establish two falls, one in the bathroom and one in the kitchen, but do not establish a risk inherent to claimant's employment that would make the fractured skull a compensable injury when it was caused by a syncopal episode.
> Order ¶13

The ALJ concluded that the claimant lost consciousness which resulted in his fall. He was unconscious and unprotected when he struck the ground. Accordingly the ALJ

held that the cause of the syncopal episode (although not definitively established) was personal to claimant and not related to claimant's work. The ALJ determined that the evidence was insufficient to establish that claimant's work place contributed to the fractured skull. The ALJ believed that the claimant fell and struck his head on the floor in two locations. He was not persuaded that claimant struck his head on anything other than the floor.

The ALJ ruled that claimant failed to establish that his injury arose out of his employment. Accordingly, the ALJ denied and dismissed the claim.

On appeal, claimant raises multiple allegations of error:

1. The ALJ's findings that claimant fell to the floor twice without encountering a 'special hazard' of employment causing serious injuries, are not supported by substantial evidence, and are unreasonable and contrary to the evidence.
2. The ALJ's findings that two pools of blood were found after claimant fell, one in the kitchen and one in the bathroom, upon which facts he relied to formulate his conclusions are erroneous.
3. The ALJ's findings that there is no evidence of blood on the toilet, is not supported by substantial evidence.
4. The ALJ's conclusions of law that no 'special hazard' existed in the bathroom, contributing to the serious injuries claimant sustained, is not supported by the evidence.
5. The ALJ's conclusions of law are not supported by applicable law.

Claimant requests that the Panel reverse the decision and remand the matter to the ALJ for a new order addressing all of the issues that were in dispute before him and finding a compensable injury.

Respondents oppose the claimant's contentions. In the "Background" section of their opposition brief, respondents primarily reiterate facts that were presented at hearing but were not part of the ALJ's findings of fact. After essentially criticizing the adequacy of the ALJ's findings of fact, respondents assert that the ALJ's findings of fact are supported by substantial evidence and the order is supported by applicable law. Respondents also raise the argument that a condition is not considered to be a special hazard of the employment if it is "ubiquitous" in the sense that it is found generally outside of the employment. Respondents cite *Gates Rubber v. Indus. Comm'n*, 705 P.2d 6 (Colo. App.) in support. Respondents further argue that both the toilet and the shelf had rounded edges and thus were not special hazards of employment and did not pose any additional risk than any other toilet or shelf.

We first review claimant's allegations of error.

Attached to claimant's brief are color duplicates of photographs contained in claimant's exhibit R. At hearing, exhibit R was constituted of black/white photocopies of several locations in (presumably) Unit B-11 where blood was found.[1]

Claimant argues that the ALJ's findings of fact that claimant fell to the floor twice without encountering a 'special hazard' of employment are not supported by substantial evidence and are unreasonable and contrary to the evidence.

Claimant highlights Dr. Orent's postulation that claimant "fell forward and hit the front of his head on the shelf and was unconscious when it happened and then fell back and probably cracked his head on the toilet or the floor." To this claimant adds Dr. Lesnak's hypothesis that "… he did have, actually two episodes or not …, where he was, maybe, leaning over a toilet and passed out and got a black eye and then walked out to the kitchen and passed out from a standing position and fell and got a skull fracture? I don't think anyone's ever going to know, because no one was there." Combining Dr. Orent's postulation with Dr. Lesnak's hypothesis, claimant contends: "*This testimony … makes it undisputed that the most probable medical explanation for at least one of claimant's skull injuries occurred in the bathroom, where the shelf and toilet constitute 'special hazards' of claimant's work environment.*" [Emphasis in the original.]

Claimant emphasizes and challenges the ALJ's conclusion that "*the evidence does not establish that there was blood on the toilet*." As phrased by the ALJ, we agree with claimant that this conclusion is not supported by the record. Photographs contained in Ex. R show blood spatters and smears on the floor immediately adjacent to the toilet, on the side of the porcelain bowl, and on the underside of the upraised toilet lid. Some of the smears appear to have either been applied by or changed in appearance by touch.

Based on the afore referenced medical testimony and the visual evidence, claimant asks us to assume as self-evident or at least take for granted, that during claimant's fall his head struck either the shelf or the toilet. The ALJ was not persuaded that these alleged mechanics of the fall occurred. Rather, the ALJ found that the claimant's injuries arose from two separate falls wherein he struck his head on the floor.

[1] By order dated June 29, 2020, the ALJ denied claimant's post-order motion to substitute the color photocopies for the black/white photocopies of Exhibit R. In compliance with the ALJ's order, we have not considered the color photographs for purposes of our review.

Both Dr. Orent and Dr. Lesnak agree that the claimant suffered a syncopal episode which rendered him unconscious prior to the fall. Although the doctors discussed multiple possible underlying causes for the syncopal episode, a medically probable cause was not determined. Claimant was unconscious and unable to protect himself as he fell. Dr. Orent surmised that the claimant "probably cracked his head on the toilet or the floor." 1st hearing tr. at 72. Dr. Lesnak expressly disagreed with Dr. Orent's postulation that claimant fell back and hit his head on the shelf and then fell forward and hit his face on the toilet. 2nd hearing tr. at 60. The ALJ was not persuaded that the claimant struck anything other than the floor.

The ALJ correctly stated, "Workers' compensation law is well established that injuries arising out of risks or conditions personal to the claimant do not arise out of the employer unless the employment contributes to the risk or aggravates the injury." Order ¶24.

The determination of whether an employee's injuries arose out of employment is a question of fact for resolution by the ALJ. *See In re Question Submitted by U.S. Court of Appeals for the Tenth Circuit*, 759 P.2d 17, 20 (Colo. 1988) ("The determination of whether an employee's injuries arose out of an employment relationship depends largely on the facts presented in a particular case."); *see also Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). "The totality of the circumstances must be examined in each case to see whether there is a sufficient nexus between the employment and the injury." *In re Question Submitted by U.S. Court of Appeals for the Tenth Circuit,* supra. The ALJ's factual findings must be upheld if they are supported by substantial evidence. § 8-43-301(8), C.R.S. (2013); *see also Panera Bread, LLC v. ICAO*, 141 P.3d 970, 972 (Colo. App. 2006) (describing the substantial evidence standard).

All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) *employment risks*, which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee him- or herself; and (3) *neutral risks*, which are neither employment related nor personal. 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 4.01-4.03, at 4-1 to -3 (2013); *see also Horodyskyj*, 32 P.3d at 475-77 (dividing assaults by co-employees into these three categories for the purpose of determining whether an assault "arose out of" employment). *City of Brighton v. Rodriguez*, 2014 CO 7 at ¶ 19, 318 P.3d at 502.

The second category contains risks that are entirely personal or private to the employee him- or herself. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475-77 (Colo. 2001); *Larson's Workers' Compensation Law* § 4.02, at 4-2. These risks include, for example, an

employee's preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment, such as fainting spells, heart disease, or epilepsy. *See, e.g., Irwin v. Indus. Comm'n*, 695 P.2d 763, 765-66 (Colo. App. 1985) (holding that an employee who had a medical history of blacking out and who did so at work did not suffer an injury "arising out of" employment); *Gates Rubber Co. v. Indus. Comm'n*, 705 P.2d 6, 7 (Colo. App. 1985) (holding same, regarding an employee who had an epileptic seizure and struck his head on a level, non-slippery concrete floor). *City of Brighton v. Rodriguez*, 2014 CO 7 at ¶ 21, 318 P.3d at 503.

These types of purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. See *Velasquez v. Indus. Comm'n*, 41 Colo. App. 201, 202-03, 581 P.2d 748, 749 (1978); *see also Irwin v. Indus. Comm'n*, 695 P.2d 763, 765-66 (Colo. App. 1985). Here, however, the ALJ specifically found that Tapia's fall was not unexplained but rather resulted from a syncopal episode. We are bound by that factual finding. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (stating that a reviewing court should defer to the ALJ's resolution of conflicts in the evidence, including the medical evidence).

To prove compensability in the personal risk category, employees must also demonstrate that there were specific connections to employment in cases not involving neutral risks. For example, if an employee has epilepsy and is injured after having a seizure at work, the employee must show that he or she was exposed to an additional "special hazard" of employment. *See, e.g., Ramsdell v. Horn*, 781 P.2d 150, 152 (Colo. App. 1989) (holding that a carpenter's injuries from a fall were compensable because even though he fell as a result of an epileptic seizure, he did so while located on a twenty-five-foot-high scaffold, a "special hazard" of employment).

The *City of Brighton* court stated that the requirement that an employee must show a "direct causal relationship between his employment and his injury, applies only to cases involving idiopathic—and thus not unexplained—falls." *City of Brighton v. Rodriguez*, 2014 CO 7, ¶35, 318 P.3d 496, 507

An injury may be connected with the employment, and therefore may arise out of that employment, if the employee's work places him in a position in which he ultimately sustains that injury, even though the direct cause of that injury is not employment related. *Ramsdell v. Horn*, 781 P.2d 150, 152 (Colo. App. 1989); *see also Irwin v. Industrial Commission,* 695 P.2d 763 (Colo. App. 1984).

The ALJ found that the claimant had two falls, one in the bathroom and one in the kitchen. The ALJ found that "the testimony of Adrianson establishes that there were two pools of blood." Secondly, the ALJ discounted Dr. Orent's postulation that the claimant's head may have struck the shelf or the floor on the sole basis "the evidence does not establish that there was blood on the toilet." These findings of fact are not supported by the record.

> Adrianson testified that when he entered the unit, he found:
> … about a four-inch puddle of blood on the kitchen floor.
> * * *
> So I also—I walked down there [to the bathroom], and there was blood on the—in the hallway to there, and –blood on the bathroom floor.
> Tr. at 118.

This was the only testimony adduced regarding the bloody scene in the condominium. This testimony, even if credited by the ALJ, does not support a finding that there were two *pools* of blood. The black/white photographs in claimant's exhibit R show black splotches—which we infer from the testimony to be blood spatters—on a shelf above the toilet; on the floor; on the underside of the toilet; on a toilet paper roll adjacent to the toilet; on the upraised bottom of the toilet lid; a blood smear on a wall; and blood spatters on hardwood flooring. This visual evidence directly contravenes the ALJ's findings that "the evidence does not establish that there was blood on the toilet."

From the existing evidence, it is impossible to definitively know if the blood spatters on the toilet, wall, toilet paper, and shelf were left from an impact with them or were projected onto them when claimant picked himself up, moved around, and left the bathroom, or both.

The medical evidence indicates that the claimant sustained two insults to his body: 1) to the back of the head with a bloody wound and fractured skull and 2) a black eye. The black eye did not result in the emission of blood. The ALJ made no finding as to how or where the black eye occurred or to the extent that this blow to the face may or may not be related to the severe head wound. The presence or lack of presence of blood does not account for the black eye.

The ALJ essentially dismissed the claimant's claim that a special hazard (the toilet or shelf) caused or aggravated the claimant's injuries because no blood was found on either object, only on the floor. However, the evidence is unmistakeable that blood was found on both objects. Accordingly, we hold that the ALJ's determinative findings of fact are not supported by the evidence and conflicts in the evidence are not resolved in this record.

Under our applicable statutory standard of review, we may only correct, set aside, or remand an order if the findings of fact are not sufficient to permit appellate review, if conflicts in the evidence are not resolved, if the findings of fact are not supported by the evidence, if the findings of fact do not support the order, or if the award or denial of benefits is not supported by the applicable law. §8-43-301(8), C.R.S. Here we conclude that the salient findings of fact are not supported by the evidence and conflicts in the evidence are not resolved by the ALJ.

We remand the matter to the ALJ for a new order to include findings of fact that are supported by the evidence and resolve the conflict in the blood evidence. Based on our remand we do not address respondents' arguments at this time.

IT IS THEREFORE ORDERED that the ALJ's order issued March 19, 2020, is set aside and the matter is remanded for a new order in conformity with this order.

INDUSTRIAL CLAIM APPEALS PANEL

John A. Steninger

Kris Sanko

CERTIFICATE OF MAILING

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

8/10/2020 by TT .

THE KITCH LAW FIRM PC, Attn: MARSHA A KITCH ESQ, 31207 KEATS WAY STE 104, EVERGREEN, CO, 80439 (For Claimant)
POLLART MILLER LLC, Attn: CHRISTIN BECHMANN ESQ, 5700 SOUTH QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-065-586

IN THE MATTER OF THE CLAIM OF:

EDITH KEATING,

Claimant,

v.

FINAL ORDER

ROBERT C ADAMS d/b/a BOB ADAMS TRUCKING,

Employer,

and

DELTA COUNTY MEMORIAL HOSPITAL,

Medical Provider,
Respondents.

The claimant and respondent Hospital both seek review of an order of Administrative Law Judge Sidanycz (ALJ) dated May 18, 2020, that ordered the Hospital to pay penalties for 10 instances of billing the claimant for work related medical care. We correct the decision of the ALJ, and as corrected, affirm the decision.

In a previous order of March 13, 2020, we affirmed an October 30, 2019, decision of the ALJ that found the Hospital had acted in violation of § 8-42-101(4) which provides, once an employer is found liable for a claimant's medical costs, that a medical provider "shall under no circumstances seek to recover such costs or fees from the employee." However, the matter was remanded to the ALJ to make new findings as to the specific days that were involved in the misconduct and to assess penalties for each instance accordingly.

In the order now on appeal the ALJ reviewed the evidence submitted at the October 9, 2019, hearing and determined the Hospital was in violation of the statute on eight days when it submitted bills for work related treatment to the claimant including June 18, July 2, July 18, July 31, August 7, August 13, and September 12, 2019. The ALJ also found the Hospital sent two bills to a collection agency on September 20, 2019, representing two additional instances of violation. The ALJ ordered each episode to be assessed a $750 penalty pursuant to § 8-43-304(1) for a total penalty of $7,500.

In this appeal the Hospital contends our earlier decision was in error in allowing the imposition of penalties against the Hospital when it was not adequately joined as a party and that the ALJ's May 18 order was incorrect for finding penalties in regard to the September 20 referral to a collection agency. The claimant separately appeals asserting the previous decision was mistaken in concluding penalties should not be assessed as a violation for each day between June 13, 2019, and October 9, 2019, but, instead, only for the days on which the Hospital sent bills for payment to the claimant. The claimant also maintains the Hospital waived any objection to the ALJ's assessment of penalties on a daily basis.

The claimant was injured in a work accident on July 22, 2017. In an order dated October 11, 2018, the employer was found liable for the claimant's workers' compensation benefits. The employer was penalized for its failure to carry workers' compensation insurance. The employer failed to pay any of the temporary benefits awarded the claimant, failed to pay any medical bills and eventually initiated a bankruptcy proceeding.

The claimant began treating at the Hospital in October, 2017. The Hospital eventually began sending the claimant bills for her care. Her counsel sent correspondence to the Hospital on April 10, 2019, along with a copy of the October 11, 2018, order determining employer liability for the claimant's injury. Counsel's letter advised the Hospital § 8-42-101(4), prohibited attempts to have the claimant pay for her work injury care. The letter further stated that if the Hospital persisted in its collection efforts the claimant would seek penalties of up to $1,000 per day for violation of the statute pursuant to § 8-43-304. The attorney for the hospital responded on June 13, 2019, stating that because the Hospital was unable to collect its charges from either the employer or the Division of Workers' Compensation, its only recourse was to collect its fees from the claimant.

The claimant submitted an application for a hearing seeking penalties against the Hospital. The Hospital objected to the proceeding on the basis it was not a party to the claim and was required to seek charges from the claimant as it was unable to write off the cost of its services. The claimant's attorney stated at the outset of the October 9 hearing the claimant was seeking penalties for every day from June 13, the date of the Hospital's reply letter, to the date of the hearing. The claimant testified she had received bills from the Hospital. Representatives from the Hospital testified that while charges for physician's services were halted in May, 2019, Hospital records showed that on eight dates after the June 13 letter, bills for work related medical care in the form of hospital services had been sent to the claimant. The ALJ ruled the Hospital had violated the billing prohibition in § 8-

42-101(4) and assessed penalties for 119 days between June 13 and October 9 at the rate of $750 per day for a total of $89,250.

On appeal the ALJ's order was affirmed with the exception of the method for calculation of the penalty. Because the alleged violation could not be characterized as a failure to comply, but, rather, as an affirmative action prohibited by the Act, a daily penalty imposed in a serial fashion was not justified. The matter was remanded to the ALJ to make findings as to the dates the Hospital sought to recover costs from the claimant, and thereby violated the statute, and to assess a penalty for each of those dates. The ALJ submitted the revised order on May 18.

I.

On appeal the Hospital asserts the ALJ did not have personal jurisdiction over the Hospital because it was not formally joined as a party. We perceive no error in the ALJ's order due to a failure to adequately join the Hospital as a party.

In the March 13, 2020, order approving and remanding the ALJ's October 30, 2019, decision, we pointed to authority represented by § 8-43-207, *Renaissance Salon v. Industrial Claims Appeals Office*, 994 P.2d 447 (Colo. App. 1999), and *Barnes v. Colorado Dept. of Human Resources,* W.C. No. 4-632-352 (August 17, 2005), to conclude the ALJ had authority to join as a party to a hearing an entity that was not otherwise a party to a claim. While the second employer added as a party in *Renaissance Salon* was added as a party through a motion prior to the hearing, the third party medical provider in *Barnes* was added through an application for a hearing similar to the circumstances here.

Contrary to the Hospital's assertion, the ALJ had personal jurisdiction over the Hospital in this case. Personal jurisdiction is the legal authority to enter orders concerning the parties. *People in the Interest of Clinton*, 762 P.2d at 1386; *In re the Custody of Nugent*, 955 P.2d 584 (Colo. App. 1997). Due process protections provide that the ALJ does not have personal jurisdiction over a party unless the party has been provided fair and adequate notice of proceedings which may result in an order for the payment of benefits. *See Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113 (Colo. 1991); *Colorado State Board of Medical Examiners v. Palmer*, 157 Colo. 40, 400 P.2d 914 (1965). We conclude that the Hospital had fair and adequate notice of the proceedings.

Colorado Rules of Civil Procedure 19 and 20 deal with the topic of the joinder of parties. They indicate that for a party to be joined to a judicial proceeding, service of

process pursuant to CRCP 4 must be achieved. Rule 4 provides for the personal delivery of service of a summons that names the court, the names and designation of the parties, and the time within which the party is required to appear and defend against the claims of the complaint. The Workers' Compensation Act has its own statutory procedure that renders CRCP 4 largely inapplicable. Section 8-43-211(1)(b) provides that any party may request a hearing by filing a request with the Office of Administrative Courts (OAC) on forms provided by the OAC. A copy of the request is to be mailed to all parties at the time of filing. More significantly, to convene a hearing, § 8-43-211(1)(a) specifies that the OAC shall send written notice of a hearing 30 days in advance "by mail, electronic mail or by facsimile" . The notice must include the time, date and place of the hearing and an advisement the party must be prepared to present their evidence and may be represented by an attorney or other person of their choice.

The claimant's exhibits 3 and 4 feature copies of three applications mailed to the Hospital. Two listed the Hospital as a party. At the insistence of the OAC staff, the third application did not list the Hospital in the caption but described the issue to be heard as a penalty against the Hospital for billing the claimant. Importantly, the OAC hearing file includes the Notice of Hearing for the October 9 hearing mailed on July 18. The Notice indicates the Hospital is a party, sets forth the date and place for the hearing and was mailed to both the Hospital and its attorney. These documents comply with the service of process requirements applicable to a workers' compensation hearing specified in § 8-43-211(1). The ALJ therefore had jurisdiction to entertain the penalty claim in this matter.

II.

The claimant takes exception with the ruling in our March 13 order that the activity penalized by the ALJ was not a 'failure' to comply with a statutory requirement. The March 13 decision explained that the acts that subjected the Hospital to sanctions were affirmative actions taken despite a statutory prohibition. Accordingly, § 8-43-305 that authorized continuing daily penalties did not apply. A penalty could only be assessed for a day in which the Hospital actually performed an act that could be characterized as seeking to recover medical fees from the claimant. In *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014, 2012 COA 30 (Colo. App. 2012), the decision pointed out "the difference between a one-time violation and a continuing violation hinges on whether the violation is subject to being cured by subsequent action." Id. at ¶ 13, 14. In *Smith v. A-Reliable Roofing Co*. W.C. No. 4-174-578 (May 8, 2001), the claimant sought a penalty against Ore, a vocational expert, for making false statements in his testimony at a prior hearing in

violation of § 8-43-402. The decision rejected the assertion the penalty should be for each day between the date of the testimony and the date of Ore's later conviction for the false statements.

> Here, unlike the circumstances in *Rogan,* the challenged conduct did not involve the failure to act. Rather, the ALJ found Ore violated § 8-43-402 by the action of giving false testimony. As a result, Ore was convicted of a single count of perjury. … Therefore, we conclude the ALJ's finding of a single violation is not contrary to the applicable law.

In her appeal the claimant here contends the Hospital had to affirmatively halt a collection process. It thereby failed to act as required. The claimant argues the Hospital uses a computerized system that generates invoices, dunning letters, robo calls, voice messages, emails, and reports to credit rating agencies. This "multi-faceted collection process" is described as a continuing violation of the statutory prohibition and should be penalized in that fashion. This argument notwithstanding, the claimant did not testify to receiving dunning letters, robo calls, voice messages or emails after June 13, 2019. The testimony of the Hospital's witnesses were consistent that collection activities other than eight bills mailed to the claimant ceased as of June, 2019. Ex. D at 2, Tr. at 109, 111, 112. The only acts of collection the ALJ identified after June 13, 2019, in either her October 30 or May 18 order were limited to eight bills mailed to the claimant on eight distinct dates and two purported bills sent to a collection agency. Conclusions of Law ¶ 15 (October) Findings of Fact ¶ 23 (May). The ALJ was not obligated by the record to find otherwise.

The claimant asserts that in *Barnes* II, W.C. No. 4-632-352 (October 30, 2006), when a bill sent to the claimant was withdrawn by the medical provider, that act was described as a 'cure'. However, the penalty claim in *Barnes* involved a 'failure' to provide medical records to the claimant on the same basis as they were provided to the respondents. This 'failure' was cured when the records were provided to the claimant without charge. In *Barnes*, no penalty was assessed.

The claimant also argues the determination that a daily penalty applies is a finding of fact by the ALJ and should not be disturbed. The Court of Appeals in *Crowell v. Industrial Claims Appeals Office*, 298 P.3d 1014, 2012 COA 30 (Colo. App. 2012) disagreed.

> The purpose of § 8-43-305 is to address "ongoing conduct." *Spracklin*, 66 P.3d at 178. And when conduct is ongoing, imposition of a daily penalty is required. … Thus, we must decide whether the

> failure to provide medical review under Rule 16-10(B) is, as a matter of law, the type of ongoing conduct that triggers application of this continuing violation provision. *Id*. at ¶ 13.

Accordingly, the Court reversed the ALJ's holding that § 8-43-305 did not apply and directed the ALJ to impose a penalty on the basis of a daily rate. *Crowell*, *supr*a, at ¶ 20-21. We also review the findings in this matter as to the application of § 8-43-305, and determine as a matter of law that the findings do not support the daily assessment of a penalty as provided in that section. We reiterate our holding on March 13 and affirm the ALJ's assessment of discreet single day penalties.

Finally, the claimant contends the Hospital waived any objection to a daily penalty by not raising the issue at any point. However, the issue is a response to dates the claimant is required to prove qualified as a violation of the statute and justified a penalty. Counsel's letter to the Hospital of April 10 did not specify any dates the claimant had received a billing. This absence was mitigated by indicating to the ALJ the claimant was only seeking penalties for activities after June 13, 2019. However, the claimant did not specify in her testimony that she received any billings after that date. Tr. at 58, 60. In its post hearing position statement the Hospital argued the claimant did not prove violations on any date after June 13. In the Hospital's Brief in Support of its Petition to Review it was specifically asserted the ALJ was in error as "Even if it could be assumed that at some point DCMH billed claimant in violation of the statue, a continuing daily penalty cannot be supported by merely assuming when the wrongful billing occurred." Pursuant to § 8-43-301(4) the ALJ reviewed these briefs prior to sending the matter to the Panel for review. Accordingly, the record shows the argument that a daily penalty had not been proven was raised by the Hospital both before the ALJ and before the Panel.

III.

The Hospital maintains the ALJ's conclusion of law in ¶ 17 that: "In addition, two bills were sent to collections on September 20, 2019, resulting in two additional instances of the respondent hospital attempting to collect from the claimant", is not supported by the evidence The Hospital also argues the activities involved do not describe activities for which the claimant sought penalties. The ALJ found these attempts at collections justified two separate penalties of $750 apiece.

The Hospital indicates the ALJ relied on the claimant's exhibit 7, an Equifax and a TransUnion credit report for the claimant. Under the section of the reports titled 'collections', two collection agencies are listed as reporting to Equifax or TransUnion that

they have open debt accounts for the claimant regarding medical bills. Ex. 7 at 100-101, 107-08. One of the collection agencies is A-1 Collections. A-1 is indicated to have two open accounts originating with the Hospital and both were opened with A-1 on December 27, 2018. These accounts, one for $977 and the other for $547, were also shown to have been "last reported" to Equifax and TransUnion on September 20, 2019. The exhibit also includes instructions from both credit reports on "How to Read Your Credit Report." In regard to 'collections' the reader is advised "This section contains information about any accounts reported as in collections." Ex. 7 at 101-102. No mention of the exhibit was made in either testimony or argument before the ALJ. The one reference to exhibit 7 by the claimant was a statement in its proposed order that the credit reports verified the Hospital had turned over some accounts to the A-1 Collection company.

The Hospital maintains neither a finding nor the exhibit 7 shows the accounts at A-1 were for work related medical treatment. It argues the exhibit states the accounts were turned over to A-1 on December 27, 2018, which was prior to the date the claimant sought penalties. It is also asserted the 'last reported' date does not represent collection activity by the Hospital, and the claimant did not state it was seeking penalties for placing accounts with collection agencies.

In its response brief, the claimant indicates it reads the information in a similar fashion: "Exhibit 7 shows that, on September 20, 2019, A-1 took action to recover DCMS's costs and fees from claimant by separately reporting two individual bills to TransUnion for inclusion in Claimant's credit report."

In its April 10, 2019, letter to the Hospital's attorney, counsel for the claimant asserted the Hospital could be penalized for "the billing of an injured worker for services rendered for a Workers Compensation Injury. Please cease and desist from an further billing of the injured worker …". The claimant's application for a hearing described the penalty claim solely by copying the text of § 8-42-101(4). At the outset of the hearing, the claimant's counsel stated:

> So we're asking for a penalty against Delta Memorial Hospital for unlawfully billing the claimant for a medical bill that's worker' comp related under the Court's order. … And so, claimant alleges that the penalty begins on 13 June 2019 and continuing." Tr. at 6.

Section 8-43-304(4) provides that in any application for hearing for any penalty pursuant to § 8-43-304(1) "the applicant shall state with specificity the grounds on which

the penalty is being asserted." More importantly, Office of Administrative Courts Procedural Rules for Workers' Compensation Hearings, Rule 8(A), specifies the application for a hearing "shall be on a form provided by the OAC, …" The OAC Application form contains the direction to the parties that if penalties are sought from an ALJ the party must check the box opposite "Penalties" and then must "Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended." A statement of the particular activities, or failure to act, is a critical element of the grounds for the penalty claim.

We previously have determined that the requirement for specificity serves two functions. It is related to any ability to cure a violation and the specificity requirement also ensures the alleged violator will receive notice of the legal and factual basis for the penalty claim so that their rights to present evidence, confront adverse evidence, and present argument in support of their position are protected. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Jakel v. Northern Colorado Paper Inc.*, W.C. No. 4-524-991 (October 6, 2003); *Gonzales v. Denver Public School District No. 1*, W.C. No. 4-437-328 (December 27, 2001); *Stilwell v. B & B Excavating Inc.*, W.C. No. 4-337-321 (July 28, 1999); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Jordan v. Rio Blanco Water Conservancy Dist.*, W.C. No. 4-937-000-01 (June 23, 2015).

Here, the ALJ's imposition of a penalty for the A-1 Collection agencies' most recent reporting of bills, sent to A-1 on December 27, 2018 by the Hospital, is penalizing the Hospital for actions not described as the subject of the claimant's penalty claim. The assessment is also sanctioning actions taken by the Hospital months before the beginning of the period for which a penalty is being sought. The bill was sent to A-1 for collection prior to June 13, 2019. The act whereby A-1 reported to TransUnion it still had an open account for the claimant does not represent the billing of the claimant by the Hospital. The Hospital was not provided adequate notice of the penalty claim insofar as it pertains to the September 20 reporting of open collection accounts to Equifax or TransUnion.

The standard for review of a penalty imposed pursuant to a statutory provision is abuse of discretion. *Crowell v. Industrial Claim Appeals Office*, *supra*, 298 P.3d at 1018, ¶ 19; *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323, 325 (Colo. App. 2005). An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Id*, at 325. The assessment of a penalty for activity not properly noticed is prohibited by the statute, § 8-43-304(4), the OAC rules, 8(A), and standards of procedural due process. We therefore

modify the ALJ's order by limiting the assessment of penalties to the eight days on which bills were sent to the claimant by the hospital, in the amount of $750 per day, for the eight separate instances.

IT IS THEREFORE ORDERED that the ALJ's order issued May 18, 2020, as corrected to apply a daily penalty to eight instances of violations, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

8/21/2020 by TT .

LAW OFFICE OF DONALD KAUFMAN, Attn: DONALD J KAUFMAN ESQ, 2520 SOUTH GRAND AVENUE SUITE 110, GLENWOOD SPRINGS, CO, 81601 (For Claimant)
RITSEMA & LYON PC, Attn: DOUGLAS L STRATTON ESQ, 2629 REDWING ROAD SUITE 330, FORT COLLINS, CO, 80526 (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. 5-111-049

IN THE MATTER OF THE CLAIM OF:

JASON FAHLER,

Claimant,

v.

FINAL ORDER

REDBOX,

Employer,

and

CASUALTY COMPANY OF AMERICA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated April 17, 2020, that determined the claimant's claim was compensable, denied the respondents' request for recovery of the no show fee associated with the claimant's missed independent medical examination (IME), and ordered the respondents liable for medical and temporary total disability (TTD) benefits. We affirm.

This matter went to hearing on whether the claimant established he sustained a compensable injury to his right shoulder on June 28, 2019, whether he is entitled to medical benefits, including a total shoulder replacement surgery recommended by Dr. Pak, whether the claimant is entitled to TTD benefits beginning on July 2, 2019, and whether the claimant must reimburse the respondents for the cost of missing a properly scheduled IME appointment with Dr. Rockicki. After the hearing, the ALJ made the following pertinent factual findings summarized below.

During June 2019, the claimant was employed by the respondent employer as a Field Technician II. His job duties involved maintaining the employer's movie box kiosks within his assigned geographic territory. This consisted of stocking, repairing, and painting the kiosks. Around May 1, 2019, the claimant was tasked with installing new credit card readers, or EMV units on the employer's movie boxes. This required removal of the old reader and installation of a new one. Installation of the new card reader required the claimant to drill several one inch holes through the metal kiosk to accommodate the new

EMV unit. The claimant typically serviced six to eight kiosks per day, but occasionally replaced as many as three EMV units per work shift.

The claimant testified that on June 10, 2019, he installed three new card readers on the employer's kiosks. After completing these change outs, the claimant reported that he had some pain in his right shoulder. He informed his manager, Sue Lynn, the next day, who reportedly sent him home early. The claimant was purportedly not having right shoulder pain before the EMV project began.

On June 28, 2019, the claimant was replacing an EMV unit when he claimed he injured his right shoulder. According to the claimant, he was in the process of drilling a one inch hole into a kiosk when the drill bit suddenly punched through the metal causing the drill to recoil, and sending pain and a sensation- as though he had hit his funny bone- into his right shoulder. The claimant testified that he did not fall into the kiosk. Rather, he only felt the drill recoil which in turn caused pain and the funny bone sensation into the right shoulder.

The claimant's pain subsided sufficiently to permit continued work so he proceeded on to the next kiosk. The claimant testified that he was unable to move his right shoulder the following morning due to severe pain. Consequently, he called his manager, Denise, the following day to report his injury.

The claimant ultimately selected Centura Centers for Occupational Medicine (CCOM) as the authorized provider for his work incident. The claimant reported that he injured his right shoulder after drilling through metal and the drill recoiled and jarred his right shoulder. Medical causation was assessed and it was determined the claimant sustained a work-related injury. He was assigned modified work restrictions of no use of the right arm, minimal stairs, and no ladders. The claimant was referred to physical therapy.

The claimant underwent an MRI of the right shoulder on August 12, 2019. The MRI revealed the following: patchy marrow edema within the lateral aspect of the acromion which could reflect marrow contusion related to blunt trauma or stress changes; no fractures; mild feathery edema within the proximal infraspinatus muscle which could reflect strain versus low-grade tear; partial-thickness articular surface tearing involving the anterior distal supraspinatus tendon; no full thickness rotator cuff tear; end stage osteoarthritis of the right glenohumeral joint with full thickness chondral loss; glenohumeral joint effusion; long head biceps tendinitis; and degenerative tearing of the

superior labrum. Dr. Centi at CCOM noted the claimant had mild tears of the right rotator cuff. Consequently, he referred the claimant to an orthopedic surgeon for a consultation.

The claimant subsequently underwent an orthopedic consultation with Dr. Pak and nurse practitioner Trisha Finnegan. The claimant reported that he injured his right shoulder "secondary to constant impact" from the use of a drill while changing card readers on the metal kiosks. NP Finnegan opined that the claimant "certainly [had] chronic changes within the shoulder [that had] been aggravated by [the] most recent work injury." She further opined that given the claimant's significant end-stage degenerative joint disease, he would benefit from a total shoulder arthroplasty.

On January 23, 2020, the employer sent a letter to claimant notifying him that his FMLA had ended on September 23, 2019. He was not eligible for additional FMLA. Because the claimant had exhausted his leave and because the employer was not able to offer additional leave time for a prolonged or indefinite period, the claimant's employment was terminated.

The claimant has not been able to return to any work due to his injury and work restrictions.

The claimant has a prior history of pain and dysfunction in the right shoulder dating back many years after he was thrown from a car and broke his clavicle. Following this injury, the clamant developed an unstable shoulder which would dislocate with trivial maneuvers. As a result, the claimant testified he underwent an arthroscopic right shoulder stabilization surgery in August 2001. In 2004, the claimant testified he injured his right shoulder and underwent physical therapy.

Additionally, on October 24, 2013, the claimant sought treatment with Dr. Waskow for right shoulder pain. The claimant stated he suffered an injury six weeks prior to this appointment. However, he reported experiencing pain in his right shoulder for the past two years. He also reported he experienced clicking and limited range of motion in the right shoulder since the late 1990's. Dr. Waskow obtained x-rays of the right shoulder, which he interpreted as demonstrating osteoarthritis of the glenohumeral joint with significant narrowing of the joint space. He assessed the claimant with localized osteoarthritis of the right shoulder glenohumeral joint.

Further, the claimant saw Dr. Wall on July 3, 2014, for a thoracic sprain. Dr. Wall noted the claimant's active problems included pain in the joint of the right shoulder and osteoarthrosis primarily localized to the right shoulder.

Dr. Hall completed an IME on December 10, 2019, at the request of the claimant. Dr. Hall opined that the claimant's need for a total joint arthroplasty is necessitated by the work injury that occurred on June 28, 2019. He reasoned that even though the claimant had progressive degeneration, he was asymptomatic before taking on the new task at work, which culminated in the June 28, 2019, work injury. According to Dr. Hall, if the claimant had not been involved in the drilling related activity at work, he would not need a total shoulder replacement at this time. Dr. Hall further reasoned that "[t]he activity at work with this higher drilling angle would put abnormal stress on the joint which is obviously already compromised. This led to acute trauma involving the joint, which has markedly exacerbated/permanently aggravated these underlying degenerative changes."

Dr. Hall testified that the claimant's MRI findings demonstrated patchy marrow edema, which could be related to blunt trauma or stress changes. According to Dr. Hall, marrow edema is an indication that there either has been some sort of blunt trauma or some stressful loading on the bone that is not tolerated well. Dr. Hall went on to explain that either the abnormally stressful loading of the bone while drilling over time or the acute trauma associated with the drilling the metal kiosks on June 28, 2019, sufficiently aggravated the claimant's underlying disease process to accelerate his need for the total shoulder arthroplasty. Dr. Hall further testified that the total shoulder arthroplasty is the only remaining option to treat the claimant's ongoing shoulder pain and dysfunction.

The claimant underwent an IME with Dr. Burris at the request of the respondents. Dr. Burris opined that the claimant's "current symptoms are, more likely than not, directly associated with the end-stage osteoarthritis of the right glenohumeral joint identified on the MRI, which is a pre-existing condition." Dr. Burris further noted that the claimant's medical records demonstrated inconsistent reports concerning the cause of his shoulder pain. Dr. Burris noted that the claimant attributed his shoulder pain to repetitive drill activities and also to a specific event on June 28, 2019, or some combination of the two. Dr. Burris opined that the claimant's description of activity did not meet the criteria established by the Colorado Division of Workers' Compensation for a cumulative occupational exposure contributing to his shoulder pathology. Dr. Burris also noted that during his examination, the claimant described the injury on June 28, 2019, in a different manner than he reported to his other medical providers. Dr. Burris testified that the claimant stated his injury occurred when the drill bit he was using punched through the metal and he fell forward into the kiosk with his right shoulder. Although Dr. Burris admitted that the claimant's drilling activity may have resulted in a minor sprain/strain and pain, he nevertheless testified that the claimant's current symptoms and conditions were not related to his employment. He further reasoned that because the claimant's MRI

findings were described as "end-stage osteoarthritis," that his condition was at an end point and by definition it could not be made worse by a minor soft tissue strain or contusion.

The respondents also scheduled the claimant for an IME on December 12, 2019, with Dr. Rokicki. The claimant testified that he was verbally made aware of the IME on this date. However, he claimed that he later received written correspondence indicating that the appointment was set for December 11, 2019. The claimant failed to appear for the December 12, 2019, appointment. While the claimant contended he was given short notice of the IME and was confused as to the actual date for the IME, the ALJ was persuaded that the claimant probably was aware of it and chose not to attend the appointment without justification. At 9:17 a.m. on December 12, 2019, the actual date of the IME, a staff member for the claimant's counsel notified a staff member for the respondents' counsel that the claimant would not be able to make it to the IME that day. As a result, the respondents incurred a no show fee in the amount of $917.50 for the claimant's failure to attend the IME.

Crediting the opinions of Dr. Hall over those of Dr. Burris, the ALJ held that the claimant's right shoulder injury was compensable. The ALJ determined that the claimant's drilling activities on June 28, 2019, aggravated his underlying, glenohumeral arthritis giving rise to his symptoms, which included increased pain, and the need for treatment. The ALJ reasoned that the positioning that was required for the claimant to drill the kiosk and replace the EMV unit likely placed the claimant's diseased shoulder in a compromised position aggravating his pre-existing osteoarthritis and giving rise to his symptoms and need for treatment. The ALJ further held that after 2014 and prior to June 28, 2019, the claimant's functional capacity did not appear limited by the condition of his right shoulder. While the ALJ recognized that the claimant had significant pre-existing degenerative changes in his right shoulder, he nevertheless held that there was no persuasive evidence establishing that his pre-existing condition was symptomatic or disabling immediately prior to June 28, 2019. Instead, the ALJ held that prior to June 28, 2019, the claimant was working full time in a position that routinely required the use of his upper extremities. He held that it was only after the claimant experienced increased pain with drilling activities on June 28, 2019, did his baseline level of function change. Thus, the ALJ determined that the respondents were liable for all future reasonable, necessary, and related medical benefits, including the total shoulder arthroplasty recommended by Dr. Pak. The ALJ also determined that the medical records demonstrated that the claimant was suffering from a painful shoulder, which resulted in the imposition of physical restrictions which precluded the claimant from performing his usual job beginning on June 30, 2019, and continuing. He ordered the respondents liable for TTD benefits beginning June 30, 2019, and ongoing.

With regard to the respondents' contention that pursuant to §8-43-404(1)(b)(II), C.R.S., the claimant was required to reimburse them $917.50 for the costs of the missed IME appointment fee with Dr. Rokicki, the ALJ denied their request. The ALJ held that §8-43-404(1)(b)(II), C.R.S. is silent on recovering the physician fee charged for a missed IME appointment. He further ruled that he was unaware of any rule of procedure which granted him the authority to order the claimant to reimburse the respondents for the $917.50 cost of the missed IME appointment.

The respondents have petitioned to review the ALJ's order, raising several arguments of error.

I.

On appeal, the respondents first argue that substantial evidence does not support the ALJ's determination that the claimant sustained a compensable injury to his right shoulder on June 28, 2019. They instead argue that the evidence shows the claimant suffered from consistent chronic right shoulder pain and end stage arthritis. In support of their argument, the respondents assert as follows: (1) Dr. Burris opined that the claimant's mechanism of injury was sufficient to cause a soft tissue strain or contusion at most, which would have resolved within a matter of weeks; (2) Dr. Burris opined that since the claimant's condition was at "end stage" osteoarthritis, it could not have been made worse by his activities on June 28, 2019; (3) the claimant's description of the incident evolved over time; (4) the ALJ failed to address the claimant's reported "substantially different mechanisms of injury throughout this claim"; and (5) Dr. Burris opined that the claimant's condition does not meet the Colorado Division of Workers' Compensation Medical Treatment Guidelines for Cumulative Trauma Conditions, 7 CCR 1101-3 Rule 17, Exhibit 5. We are not persuaded the ALJ erred.

The claimant bears the burden of establishing that his injury is compensable. Section 8-43-201, C.R.S. Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). Additionally, a claimant suffers a compensable injury if employment related activities aggravate, accelerate, or combine with a preexisting condition to cause a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Whether the claimant has proven a causal relationship between the employment and the alleged injury is one of fact for determination by the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Because the issue is factual in nature, we must uphold the ALJ's

order if supported by substantial evidence in the record. Section 8-43-301 (8), C.R.S.; *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

"Substantial evidence is that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Under the substantial evidence test, we must defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Id*. at 415. We may not interfere with the ALJ's decision to credit the testimony of a witness unless, in extreme circumstances, the testimony is overwhelmingly rebutted by such hard, certain evidence the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000).

Here, contrary to the respondents' argument, the ALJ's determination that the claimant sustained a compensable right shoulder injury on June 28, 2019, is supported by substantial evidence in the record. As detailed above, the ALJ was not persuaded by the opinions of Dr. Burris that the claimant's current symptoms are directly associated with the end-stage osteoarthritis and that the work incident did not cause a permanent aggravation of his pre-existing condition. The ALJ expressly ruled that the medical opinions of Dr. Hall regarding the cause of the claimant's symptoms and need for surgery were more persuasive than the contrary opinions of Dr. Burris. Order at 11 ¶B. During the hearing, Dr. Hall testified that the claimant had a permanent aggravation of his underlying osteoarthritic condition. Dr. Hall explained that the claimant suffered an injury to the acromion and then exacerbated his underlying synovitis and bone pain due to the events that occurred on June 28, 2019. Tr. at 40-41. Further, as detailed above, in his IME report, Dr. Hall specifically opined, in pertinent part, as follows: "The activity at work with this higher drilling angle would put abnormal stress on the joint which is obviously already compromised. This led to acute trauma involving the joint, which has markedly exacerbated/permanently aggravated these underlying degenerative changes." Ex. 9 at 82. Dr. Hall testified that he agreed with Dr. Pak's recommendation that the claimant undergo total shoulder replacement surgery. He explained that that is all there is to treat the claimant's condition. Tr. at 40-41. In his report, Dr. Hall opined that the total joint arthroplasty was necessitated by the claimant's work injury of June 28, 2019. Ex. 9 at 82. Further, during the hearing, the claimant described that he was in the process of drilling the one-inch hole in the metal kiosk when he injured himself on June 28, 2019. He testified that he went through the metal, it recoiled, and he felt it right up into his shoulder. The claimant explained that it was like a feeling in his funny bone and it was very painful. Tr. at 15. Section 8-43-301(8), C.R.S.

Throughout their brief in support, the respondents cite to a number of Dr. Burris' opinions in support of their contention that the claimant did not sustain a compensable injury. However, the respondents essentially are asking us to reweigh the evidence in their favor and to credit the opinions of Dr. Burris. It is well settled that it is the ALJ's province to assess the weight and credibility of the conflicting expert medical opinion. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). We may not substitute our judgment by reweighing the evidence in an attempt to reach a result that is different from that of the ALJ. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990)(reviewing court bound by resolution of conflicting evidence regardless of existence of evidence which may support contrary result).

To the extent the respondents argue that the ALJ failed to address the claimant's inconsistent mechanism of injury, we again perceive no error. Here, the ALJ did, in fact, reference Dr. Burris' opinion that the claimant's medical records demonstrated inconsistent reports concerning the cause of his shoulder pain. The ALJ further referenced the claimant's different mechanism of injury reported to Dr. Burris. Order at 7 ¶¶30, 31. Regardless, it is apparent from the ALJ's order that he implicitly rejected this evidence as unpersuasive. *See Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)(ALJ is not required to explicitly cite to certain evidence before rejecting it as unpersuasive.). The ALJ is not required to mention or discuss all the evidence in the record, but may refer only to the evidence he found persuasive and determinative of the disputed issues. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

Additionally, to the extent the respondents argue that Dr. Hall's causation opinion and the ALJ's compensability determination are not consistent with the Guidelines for Cumulative Trauma Conditions under Rule 17, Exhibit 5, we perceive no error. 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). While it is appropriate for the ALJ to consider the Guidelines on the question of diagnosis and cause of the claimant's condition, the compensable nature of the claimant's industrial injury is not controlled by the application of the Guidelines. *See Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003)(Guidelines are not definitive). Rather, the determination of the compensable nature of an injury remains controlled by the Workers' Compensation Act (Act) and by relevant case law. The claimant sustains a compensable injury when, at the time of the injury, he is performing a service arising out of and in the course of her employment. Section 8-43-301, C.R.S. Here, the ALJ did, in fact, consider Dr. Burris' opinion regarding the Guidelines for cumulative occupational exposure. Order at 7 ¶30. However, it is apparent that the ALJ was not

persuaded by Dr. Burris' opinion that the claimant suffered a cumulative trauma condition. Instead, the ALJ determined that the claimant's drilling activities on June 28, 2019, aggravated the pre-existing arthritis in his right shoulder resulting in increased pain and the need for treatment. Order at 12 ¶F. Since substantial evidence supports the ALJ's determination that the claimant sustained a compensable injury to his right shoulder on June 28, 2019, we have no basis to disturb his order on this ground. Section 8-43-301(8), C.R.S.; *see also Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993)("accidental injury" is traceable to a particular time, place, and cause whereas an "occupational disease" results from the conditions under which the work is performed").

Based on the ALJ's compensability determination, the ALJ correctly awarded medical benefits, including the total shoulder replacement surgery recommended by Dr. Pak. Section 8-42-101, C.R.S. Similarly, the ALJ correctly awarded the claimant TTD benefits beginning on June 30, 2019, and continuing until such benefits are terminated in accordance with §8-42-105(3), C.R.S.

II.

The respondents also argue the ALJ erred in ruling that §8-43-404(1)(b)(II), C.R.S. does not allow for reimbursement from the claimant for the no show fee when he missed the IME appointment. According to the respondents, this statute does not limit the definition of "estimated expenses" to only those enumerated as evidenced by the word "including" in the language. The respondents argue that had the legislature wished to limit the list to only those enumerated examples, they would have, but did not, explicitly provide a limiting qualification in the statute. We are not persuaded the ALJ erred.

Section 8-43-404(1)(b), C.R.S. provides as follows regarding independent medical examinations:

> (1)(a) If in case of injury the right to compensation under articles 40 to 47 of this title exists in favor of an employee, upon the written request of the employee's employer or the insurer carrying such risk, the employee shall from time to time submit to examination by a physician or surgeon . . . which shall be provided and paid for by the employer or insurer. . .
>
> (b)(I) At least three business days in advance of an examination under paragraph (a) of this subsection (1), if requested by the claimant, the employer or insurer shall pay to the claimant the claimant's estimated expenses of attending the examination, including transportation, mileage, food, and hotel costs. In addition, if the claimant verifies that

> he or she will incur uncompensated wage losses as a result of attending the examination, the employer or insurer shall reimburse the claimant at the rate of seventy-five dollars per day. Failure to provide payment in accordance with this subparagraph (I) constitutes grounds for the claimant to refuse to attend the examination.
> (II) If an employer pays estimated expenses under this paragraph (b) and the claimant does not attend the examination, the employer or insurer may recover the costs paid for the employee's expenses from future indemnity benefits.

We review the construction of statutes de novo. When interpreting a statute, we must determine and give effect to the General Assembly's intent. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004); *Winter v. Industrial Claim Appeals Office*, 321 P.3d 609, 612 (Colo. App. 2013). If the statutory language is clear, we interpret the statute according to its plain and ordinary meaning. *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010).

Here, we agree with the ALJ that §8-43-404(1)(b)(II), C.R.S. does not require the claimant to reimburse the respondents for the $917.50 cancellation fee associated with a missed IME appointment. To interpret §8-43-404(1)(b)(II), C.R.S. as the respondents are proposing, would require us to read words into the statute. However, we are precluded from reading nonexistent provisions into the Act. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App. 2016). The clear intent of §8-43-404(1)(b)(II), C.R.S. is to allow the employer or insurer to recover the advanced expenses made specifically to the claimant for his or her lodging, travel, and hotel costs associated with attending an IME, when the claimant misses such IME. Additionally, as found by the ALJ, we too are unaware of any Workers' Compensation Rule of Procedure that requires the claimant to reimburse the respondents for the costs of the missed IME. *See* W.C. Rule of Procedure 8-8, 7 CCR 1101-3 (addressing IMEs); *see also* W.C. Rule of Procedure 18-7(B), 7 CCR 1101-3 (addressing cancellation fees for payer-made appointments); *see also Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103, 105 (Colo. App. 2008)(when construing administrative rule or regulation, same rules of construction are applied when interpreting a statute). The respondents did not seek relief under any other statute or subsection of the Act or under any rule of procedure for the claimant's missed IME appointment. Since we perceive no error in the ALJ's ruling that §8-43-404(1)(b)(II), C.R.S. does not provide the relief the respondents seek for the cost of the missed IME, we have no basis to disturb his order on this ground. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued April 17, 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

8/17/2020 by TT .

MCDIVITT LAW FIRM, Attn: NICOLE B GALLERANI ESQ, 19 EAST CIMMARON STREET, COLORADO SPRINGS, CO, 80903 (For Claimant)
HALL & EVANS, Attn: DOUGLAS J KOTAREK ESQ, C/O: KENDRA G GARSTKA ESQ, 1001 SEVENTEENTH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-009-761-007

IN THE MATTER OF THE CLAIM OF:

LARRY E WEBSTER,

Claimant,

v.

FINAL ORDER

CZARNOWSKI DISPLAY SERVICE INC,

Employer,

and

TRUMBULL INS CO,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated March 17, 2020, that denied permanent total disability benefits and maintenance medical benefits. We affirm the ALJ's order.

This matter went to hearing on the issue of the ALJ's recusal, permanent total disability benefits, maintenance medical benefits and the respondents' request for sanctions for alleged violation of a Pre-hearing ALJ (PALJ) order. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant worked for this employer as a warehouse worker. The claimant sustained a work-related injury on March 9, 2016, when he tripped and fell while carrying a metal table. The authorized treating physician (ATP), Dr. Duren, placed the claimant at maximum medical improvement (MMI) on September 12, 2016. Dr. Duren determined the claimant sustained a lumbar strain, left knee contusion and right wrist sprain and released the claimant to return to regular duty. The claimant was then referred to Dr. Burris for an impairment rating. Dr. Burris stated that the claimant reached MMI on October 21, 2016, with no permanent impairment, no permanent work restrictions and no need for maintenance medical treatment.

The claimant underwent a Division Independent Medical Examination (DIME) with Dr. Sacha, the DIME physician agreed with the MMI date and assigned the claimant a seven percent whole person rating for the lumbar spine and a one percent mental

impairment for difficulty with adjustment and stress. The claimant went to hearing to overcome the DIME. In an order dated November 13, 2017, ALJ Cayce determined that the claimant failed to overcome the DIME. The ALJ's order was affirmed by the Panel and the Colorado Court of Appeals and certiorari was denied by the Supreme Court. Consequently, the order became final.

The claimant filed another application for hearing on September 15, 2019, listing numerous issues including compensability, medical benefits, petition to reopen, disfigurement, permanent total disability and penalties. The matter went to hearing on December 10, 2019, and concluded on March 2, 2020, before ALJ Felter. The claimant submitted a motion for the ALJ to recuse himself. The ALJ determined the claimant did not make any assertions of fact for the recusal and the claimant instead hurled disrespectful and scandalous allegations about the judge's integrity. The ALJ concluded there was no reason for disqualification of the ALJ here.

The claimant testified at hearing and did not present any other witness testimony. The ALJ's order indicates that the claimant argued that the DIME physician's opinions are invalid based on allegations of fraud, malfeasance and misrepresentations. The claimant also alleged that he had been placed at modified duty at different times by Dr. Cava and Dr. Solomon and diagnosed with other injuries. The claimant further alleged that the opinions of these doctors were intentionally overlooked by the respondents and ALJ Cayce. The ALJ did not find the claimant's testimony credible or persuasive.

The ALJ credited the opinions of Dr. Duren, Dr. Burris and the DIME physician that the claimant did not have permanent work restrictions and did not need maintenance medical treatment. The ALJ was not persuaded that there were other human factors that contributed to the claimant being considered permanently and totally disabled. The ALJ noted that the contrary was true and that the claimant was fluent in English, can write well, work on a computer, and produce detailed and complex documents. The claimant can drive a car and he lives in a large commutable labor market.

The ALJ also credited the opinion of the respondents' vocational expert, Kris Harris. Harris stated that she was not able to identify any medical evidence suggesting that the claimant was unable to work in any capacity and the claimant remains qualified and able to perform within his commutable labor market. Although the claimant was directed by PALJ Sandberg to participate in a telephone interview with Harris and the claimant failed to do so, the ALJ found that Harris was able to complete her report and the respondents were not prejudiced.

The ALJ was also not persuaded that the medical evidence supported an award of maintenance medical benefits. The ALJ noted the claimant's unwillingness to reasonably cooperate with his treatment and the clear evidence of symptom magnification in denying the claimant's request for maintenance medical benefits.

The respondents moved for a "judgement in the nature of a directed verdict" at the conclusion of the claimant's case-in-chief. Based on the opinions of Dr. Duren, Dr. Burris, the DIME physician and vocational expert Harris, the ALJ concluded that the claimant failed to prove he was permanently and totally disabled or that he was entitled to ongoing maintenance medical benefits. The ALJ granted the respondents' motion and denied and dismissed the claimant's request for permanent total disability, ongoing medical benefits, and the respondents' request for sanctions.

On appeal the claimant submitted a lengthy petition to review and brief in support setting forth numerous allegations of error. We have reviewed the record and are not persuaded that the ALJ committed reversible error. We affirm the ALJ's order.

We note initially that the claimant's appeal documents do not comply with the pertinent rule governing briefs in support. OAC Rule of Procedure 26(E) sets forth a 20 page limit for briefs in support to a petition to review. The claimant's brief and subsequent motions to amend briefs far exceed this limit. We nevertheless will not take any action at this time and will accept the claimant's brief in support. *See People v. Rodriguez*, 914 P.2d 230 (Colo. 1996)(court has discretion to grant permission to file oversized brief).

I. Claimant's Challenges to the Hearing Process

The claimant renews his allegations against the ALJ stating that he was biased and prejudiced, erred in not reviewing the entire claim file and states that the ALJ did not give the claimant a fair and equal hearing. We are not persuaded by the claimant's arguments that there is any error in the ALJ's order. An ALJ is presumed to be competent and unbiased unless the contrary is shown. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995). A party may be entitled to have an ALJ recuse himself if sufficient facts are alleged from which it may be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased against a party. *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988). Mere opinions and conclusions regarding the judge's alleged bias are insufficient. *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992).

We review the ALJ's resolution of these questions under an abuse of discretion standard. *Hammons v. Birket*, 759 P.2d 783 (Colo. App. 1988). Consequently, we must

uphold the decision unless it is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). From our review of the record, the claimant's bare assertions of violations and the appearance of impropriety do not, in our view, provide an adequate basis for requiring the ALJ's recusal. *See Nesbit v. Industrial Commission*, 43 Colo. App. 398, 607 P.2d 1024 (1979) (substantial showing of bias necessary to support conclusion that hearing was unfair). It is well established that adverse rulings, even if numerous and continuous, do not in themselves show bias. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.*, 745 P.2d 1034 (Colo. App. 1987); *In Re Marriage of Johnson*, 40 Colo. App. 250, 576 P.2d 188 (Colo. App. 1977) (adverse ruling alone does not support conclusion that hearing officer biased). It follows that the claimant made no showing of facts to overcome the presumption of competency and fairness, which resides with the ALJ. *Wecker v. TBL Excavating, Inc., supra.*

Nor are we persuaded by the claimant's general assertions that his constitutional rights have been violated. The claimant has not directed our attention to anything specific in the record to support this assertion. A party's right to procedural due process is met if the party is provided with notice and an opportunity to be heard. *Pub. Utils. Comm'n v. Colo. Motorway, Inc.*, 165 Colo. 1, 10, 437 P.2d 44, 48 (1968). The essence of procedural due process is fundamental fairness. *City & County of Denver v. Eggert*, 647 P.2d 216, 224 (Colo. 1982). In our view, the record demonstrates that the ALJ made a significant effort to ensure that the claimant was afforded a fair opportunity to present evidence, challenge adverse evidence, and was afforded an opportunity to make argument. As noted in the ALJ's order, the claimant failed to appear for hearing. The ALJ, however, contacted the claimant by telephone and allowed him to proceed. The ALJ allowed the claimant significant additional hearing time to present his case and, on his own initiative, inquired of the claimant whether he desired additional time to respond to the respondents' vocational expert. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990) (where administrative adjudication turns on issues of fact, parties must be apprised of all evidence to be considered and afforded opportunity to present evidence, confront adverse evidence and present argument). Insofar as the claimant makes other general allegations of error, we find them to be without merit.

The claimant asserts that the ALJ erred in failing to address all of the issues raised in the application for hearing. In addition to claimant's application for hearing, the claimant submitted a 65 page document listing "issues" to be heard at hearing. These issues included, but were not limited to, retaliation, the foreseeability law, reopening, fraud on the court, negligence of a stranger and bad faith allegations. After reviewing the prior orders in the case, the ALJ determined that the only issues proceeding to hearing were the

claimant's motion for recusal, permanent total disability, ongoing maintenance medical benefits, and the respondents' request for sanctions. The ALJ's order states that all other issues endorsed by the claimant were either not ripe for adjudication, outside the jurisdiction of the OAC and the Workers' Compensation Act, or were subject to the doctrines of res judicata, issue preclusion, or law of the case.

The claimant did not request a transcript of the hearing. In the absence of a transcript, we must assume the record supports that ALJ's statement and that the parties proceeded to hearing only on the issues listed in the ALJ's order. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Without a hearing transcript we have no basis for determining what evidence, if any, was presented on the other issues the claimant now argues on appeal. *See Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995)(issue may be waived if not raised before ALJ). Moreover, to the extent the claimant has made several factual assertions in his appeal documents, our review is restricted to the record developed before the ALJ and we are not authorized to consider factual assertions raised by a party for the first time on review. *City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995); *Voisinet v. Industrial Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988).

The claimant also takes issue with discussion of hearing exhibits in the ALJ's order. The ALJ stated that the claimant failed to produce any hearing submissions at hearing. The ALJ, however, took administrative notice of the voluminous documents the claimant had previously filed with OAC and the Division of Workers' Compensation and admitted claimant's exhibits 1 through 46. (ALJ Order at 1). As noted above, the claimant failed to provide a transcript of the hearing. Under these circumstances, we presume the regularity of the ALJ's order and the proceedings leading up to it. *Nova v. Industrial Claim Appeals Office, supra.*

As a procedural matter, we find no error in the ALJ's decision to grant a motion for directed verdict. A motion for a directed verdict is an appropriate procedural step to test the sufficiency of a party's case in a workers' compensation proceeding. C.R.C.P. 41(b)(1) provides that, after a plaintiff in a civil action tried without a jury has completed the presentation of the evidence, the defendant may move for a dismissal on the grounds and law that the plaintiff has shown no right to relief. In determining whether to grant a motion for a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff. *Rowe v. Bowers,* 160 Colo. 379, 417 P.2d 503 (1966); *Blea v. Deluxe/Current, Inc.,* W.C. Nos. 3-940-062 (June 18, 1997) (applying these principles to workers' compensation proceedings). *See also* Office of Administrative Courts Procedural Rules for Workers' Compensation Hearings, OAC R ule 2.B (Colorado rules of civil

procedure apply to workers' compensation hearings unless inconsistent). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the plaintiff. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *American National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970); *Bruce v. Moffat County Youth Care Center,* W. C. No. 4-311-203 (March 23, 1998). We agree with the ALJ in this case the judgment for the respondents was justified based on the claimant's failure to prove that he was entitled to permanent total disability benefits or ongoing maintenance medical care.

To the extent that the claimant contends the ALJ erred in adopting the respondents' proposed findings, we find no error. Parties routinely submit proposed orders to the ALJs at OAC and Colorado's appellate courts have declined to reverse orders because they originally were drafted by one of the parties. Under Rule 25(B) of the Office of Administrative Courts Rules of Procedure, OACRP-1 Code Colo. Reg., 104-3 at 7, a party has specific permission to file a proposed order when a request for a full order is filed. The fact that the ALJ may have adopted the respondents' proposed order as his own is not a basis for disturbing the order on review. *See Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982); *Uptime Corp. v. Colorado Research Corp.,* 161 Colo. 87, 93, 420 P.2d 232, 235 (1966)("[I]f, [a]fter careful study, the trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own.").

Merely because a party's proposed order was adopted by the ALJ does not dictate the conclusion that the ALJ abdicated his discretionary authority. Rather, it is presumed that the ALJ examined the proposed order and agreed that it correctly stated the facts as he found them to be. As explained by the Colorado Supreme Court in *Ficor*, otherwise, the ALJ would not have adopted them as his own. We further note that the ALJ did not adopt the respondent's proposed order verbatim. Thus, it is presumed that the order correctly reflects the independent determinations of the ALJ and, therefore, we will not disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

II. ALJ Cayce's 2017 Order

The claimant's appeal documents contain vague descriptions of numerous sections of the Workers' Compensation Act without explanation as to how they applied to the claim or to the issues set for hearing. *Raygor v. Board of County Commissioners*, 21 P.3d 432, 439 (Colo. App. 2000)(An appellate tribunal need not search the record for evidence to support a factual proposition, nor search out legal authorities to support vague assertions that an error was committed). As we understand the claimant's appeal documents,

however, the main focus of the claimant's dispute concerns ALJ Cayce's 2017 order that ruled the claimant failed to overcome the DIME physician's opinions on MMI and permanent disability. Review of this order, however, was not before ALJ Felter and, consequently, is not before us now on appeal.

The claimant cites to *Allison v. Industrial Claim Appeals Office*, 884 P.2d 1113 (1994), as support for his contention that ALJ Felter should have reviewed ALJ Cayce's order. *Allison* is not applicable to the facts of this case. In *Allison*, the Supreme Court vacated the Court of Appeals decision denying certiorari and remanded the matter for further proceedings. The 1994 version of §8-43-307 C.R.S., (1994), the applicable appeals process at the time of the *Allison* decision, limited judicial review of workers' compensation cases to only those cases where the court of appeals granted certiorari. The Supreme Court held that this unconstitutionally denied a claimant access to the courts and the right to an appeal of a workers' compensation award. The Supreme Court, therefore, remanded the matter to the Court of Appeals to consider the case on the merits.

The current version of the appeal process in §8-43-307, C.R.S., now provides for review by the Court of Appeals upon a petition to review. Here, the claimant was not denied access to the courts and went through the entire appeal process in the Workers' Compensation Act. The Panel affirmed in the *Webster v. Czarnowski Display Service, Inc.*, W.C. No. 5-009-761-08 (April 2, 2018). The Court of Appeals dismissed the appeal in *Webster v. Industrial Claim Appeals Office*, 18CA0714 (Feb. 14, 2019)(NSOP). The claimant petitioned for certiorari, and the Colorado Supreme Court denied his petition. *Webster v. Czarnowski Display Service, Inc.*, 2019SC148 (April 22, 2019). The claimant exhausted the appeals process. The 2017 order from ALJ Cayce is final and not subject to further review.

III. Permanent Total Disability and Maintenance Medical Benefits

Insofar as the claimant challenges the ALJ's conclusions on permanent total disability and on ongoing maintenance medical benefits, we perceive no error.

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant carries the burden of proof to establish permanent total disability. The claimant must establish a direct causal relationship between the industrial injury and the permanent total disability. Under this test, the ALJ must determine the residual impairment caused by the industrial injury, and determine whether it was sufficient to result in

permanent total disability without regard to the effects of subsequent intervening events. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

We have reviewed the voluminous record and the ALJ's order and perceive no reversible error. Our review reveals that the findings of fact are sufficient to permit appellate review, the conflicts in the evidence are resolved, the findings of fact and conclusions of law are supported by the evidence in the record, the findings of fact support the order, and the order is supported by applicable law. The ALJ rejected the claimant's testimony and credited the opinions of Dr. Duren, Dr. Burris, Dr. Sacha and vocational expert Harris that the claimant has no medically imposed work restrictions and is capable of working. We therefore conclude that the ALJ's order regarding permanent total disability benefits is supported by substantial evidence. Consequently, we may not disturb the ALJ's order in this regard. Section 8-43-301(8), C.R.S.

We similarly perceive no error in the ALJ's determination to deny ongoing maintenance medical benefits. The burden of proof was on the claimant to establish entitlement to ongoing maintenance medical benefits. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In order to be entitled to receive ongoing maintenance medical benefits the claimant must present, at the time permanent disability benefits are determined, substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999).

Here, the ALJ found, with record support, that the claimant did not meet his burden of proof to establish that ongoing maintenance medical benefits were reasonable, necessary or related. There is substantial evidence supporting the ALJ's order in this regard. Respondents' Exhibit I at 70. As such, we may not disturb the ALJ's order regarding ongoing maintenance medical benefits. Section 8-43-301(8), C.R.S.

The ALJ's factual findings are supported by the evidence. Those findings, in turn, support the ALJ's conclusion to deny permanent total disability and ongoing maintenance medical benefits. We find no merit in the claimant's remaining arguments and conclude that the claimant was afforded a fair hearing on the merits of his claim, and there has been no denial of due process or abuse of the ALJ's discretion in issuing an order based on the existing record.

IT IS THEREFORE ORDERED that the ALJ's order dated March 17, 2020, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

John A. Steninger

CERTIFICATE OF MAILING

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

8/26/2020 by TT .

LARRY E WEBSTER, 437 N 60TH, WACO, TX, 76710 (Claimant)
RITSEMA & LYON PC, Attn: PAUL D FIELD ESQ, 999 18TH STREET SUITE 3100, DENVER, CO, 80202 (For Respondents)
DIVISION OF WORKERS COMPENSATION, 633 17TH STREET SUITE 400, DENVER, CO, 80202 (Other Party)

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

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

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

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

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-026-699

IN THE MATTER OF THE CLAIM OF:

DAIRI Y ARDON GALLEGO,

Claimant,

v.

ORDER

WIZBANG SOLUTIONS,

Employer,

and

NON-INSURED,

Respondent.

The respondent seeks review of a supplemental order on remand of the Director of the Division of Workers' Compensation (Director) dated June 23, 2020, that ordered the respondent to pay a daily penalty of $71.94 from October 31, 2018, and continuing for its failure to comply with a previous order entered by the Director. We set aside the order and remand for further proceedings as set forth herein and a new order.

This matter previously was before us. We recite only those facts that are relevant to understanding the procedural stance of the case and the current issues that have been raised on appeal.

The claimant and the uninsured employer previously entered into a settlement agreement for injuries the claimant suffered on August 31, 2016, arising out of and in the course and scope of her employment. The settlement agreement included a set penalty schedule for the respondent's failure to comply with its terms.

The respondent ultimately failed to comply with the terms of the settlement agreement. As a result, the claimant filed with the Division of Workers' Compensation (Division) a motion seeking enforcement of the settlement agreement and a request for penalties. The claimant requested penalties totaling $60,285.55, as of June 29, 2018, and payment of $28,000 pursuant to the terms of the settlement agreement.

On September 10, 2018, the Director entered an order, imposing penalties in accordance with the terms of the settlement agreement entered into by the claimant and respondent. The penalties the Director imposed totaled $71,940.00, which was apportioned 75% to the claimant and 25% to the Colorado Uninsured Employers' (CUE) Fund. With regard to the respondent's contention that the penalty was excessive, the Director ruled that such an argument did not apply because the respondent had voluntarily entered into the settlement agreement. Regardless, the Director ruled that to the extent the Colorado Court of Appeals' holding in *Dami v. Industrial Claim Appeals Office*, 457 P.3d 621 (Colo. App. 2017)[1] applied, it was waived by the respondent since the respondent voluntarily agreed to be subject to the penalties at issue. In any event, the Director ruled that even if the Colorado Court of Appeals' holding in *Dami* applied, it would not prevent issuance of the penalties sought by the claimant. No petition to review was filed with the Division, and the Director's September 10, 2018, order became final on September 30, 2018.

However, on October 1, 2018, the respondent filed a petition to review the Director's September 10, 2018, order with the Office of Administrative Courts (OAC). The respondent argued that the Director erred in entering a fine since "uncontroverted evidence" showed payments were submitted timely and correctly to the claimant's counsel for several of the months. The respondent also argued the fine violated the Excessive Fines clause of the United States Constitution.

Then, on November 7, 2018, the Director entered another order, on his own motion, finding that payment of the penalty was due on October 30, 2018, but as of the date of his order, the respondent had made no payment. The Director ruled that pursuant to §8-43-304(1), C.R.S., the failure to comply with a Director's order was punishable by penalties of up to $1,000 per day. The Director found that the respondent had failed to comply with his September 10, 2018, order regarding that portion of the penalty payable to the CUE Fund. Nevertheless, the Director provided the respondent with an opportunity to respond and show cause why additional penalties for its failure to comply with the September 10, 2018, order should not be imposed.

In response, the respondent argued that good cause existed for why penalties should not be imposed. The respondent argued that it timely filed a petition to review with the OAC so the Director's September 10, 2018, order was not final. Alternatively, the respondent requested permission to file the petition out of time since any error in filing the petition was solely that of its counsel and should not be held against the respondent. So,

[1] The Colorado Court of Appeals opinion in *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 457 P.3d 621 (Colo. App. 2017) subsequently was reversed by the Colorado Supreme Court in *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019).

the respondent argued that no penalties should be entered against it for not paying penalties as directed by the Director's prior order.

Thereafter, on December 10, 2018, the Director issued his order, rejecting the respondent's argument that its petition to review was timely filed. The Director ruled that pursuant to §8-43-301(2), C.R.S., a petition to review an order entered by the Director is required to be filed with the Division of Workers' Compensation. Since it was filed with the Office of Administrative Courts and not the Division, the Director ruled it was not timely filed, and his September 10, 2018, order became final and was no longer subject to appeal. The Director also rejected the respondent's request for an extension of time to file the petition. The Director held that the statutory requirements for filing a petition to review are jurisdictional and he had no authority to extend the time limit. Last, the Director held that the respondent failed to comply with his prior order imposing total penalties of $71,940.00 and had not established a reasonable basis for its action. He therefore ruled that pursuant to §8-43-304(1), C.R.S., a daily penalty of $71.94 was appropriate from October 31, 2018, and continuing until the respondent complies with his September 10, 2018, order.

The respondent then timely petitioned to review the Director's December 10, 2018, order. In its petition, the respondent argued it was unable to pay the original fine, its failure to pay the prior fine was due to its belief the Director's prior order was not yet final, and the amount of the current fine was "unconstitutionally excessive" under the Excessive Fines Clause of the United States Constitution. In its brief in support, the respondent argued the Director erred in holding he lacked the authority to retroactively extend the deadline to file a petition to review for his earlier order dated September 10, 2018. The respondent also argued that the fine imposed on December 10, 2018, was "unconstitutionally excessive." The respondent contended that the Director failed to consider the factors enunciated in the Colorado Court of Appeals' decision in *Dami* when imposing the fine. The respondent argued that the Director failed to consider that it is unable to pay the fine, that the failure to pay the fine was not its fault, and that there was a large disparity between the potential harm to the claimant and the fine imposed.

The Director then issued his supplemental order on March 8, 2019, rejecting the respondent's arguments. The Director held that he could not ignore binding precedent that a party that misses the 20-day statutory time limit for filing a petition for review is jurisdictionally barred from obtaining further review. Thus, he held the respondent's argument failed as a matter of law. The Director then addressed the factors enunciated in the Colorado Court of Appeals' decision in *Dami*. The Director also held that to the extent the respondent previously had raised its inability to pay the fine, it had failed to provide

documentation to support this allegation other than a conclusory statement in an affidavit made by its president.

The respondent petitioned to review the Director's supplemental order dated March 8, 2019, that imposed a daily penalty of $71.94 from October 31, 2018, and continuing for its failure to comply with a previous order entered by the Director. The Panel affirmed in part, set aside in part, and remanded in part for additional findings and a new order regarding the respondent's argument that the penalty imposed is "unconstitutionally excessive." The Panel specifically affirmed the Director's supplemental order that since the respondent's petition to review of the Director's September 10, 2018, order was filed incorrectly with OAC instead of with the Division, as is required under §8-43-301(2), C.R.S., this order became final and was no longer subject to review. However, the Panel set aside the Director's supplemental order, in part, and remanded for additional findings and a new order for the Director to apply the new "gross disproportionality" test set forth by the Colorado Supreme Court in *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019) when determining whether the penalty imposed under §8-43-304(1), C.R.S. violated the Excessive Fines Clause.

Thereafter, the Director issued an order on remand dated February 6, 2020, which stated that it was providing the respondent with an opportunity to be heard regarding consideration of the factors set forth in the Colorado Supreme Court's opinion in *Dami.* The respondent was directed to identify with specificity any issues of material fact which would require a hearing to resolve. The respondent also was directed to supply all information it wanted the Director to consider.

In response to the Director's February 6, 2020, order on remand, the respondent specifically requested that an evidentiary hearing be held so that it could present testimony, evidence, and argument about its ability to pay and about excessiveness of the penalty based on its ability to pay. The respondent further argued that Justice Samour's partial dissent in *Dami* was more persuasive than the majority opinion and, therefore, the aggregate amount of the penalty, rather than the daily amount, should be used to analyze the excessiveness of the penalty after an evidentiary hearing is held. Additionally, the respondent argued that the penalty was excessive in light of another decision issued by the Panel in *In the Matter of the Claim Of Gilligan d/b/a Eagle Electric* (Jan. 28, 2020). The respondent contended that its conduct was much less "grave and serious" than the conduct involved in *Gilligan* so it proposed that a daily penalty of, at most, 10% of the penalty imposed in *Gilligan.*

On April 8, 2020, the Director issued a second order on remand. The Director held that the respondent had been provided substantial notice of the basis for the penalties and also had been provided an opportunity to be heard. The Director explained that he had requested the respondent to submit information for consideration but it had failed to supply any documentation or evidence in support of its contention that it could not afford to pay a daily penalty of $71.94. The Director further rejected the respondent's argument that the validity of the penalty should be considered based on the aggregate rather than the daily amount. He held that he was bound by the Colorado Supreme Court majority's opinion in *Dami* regarding consideration of the daily amount. With regard to the respondent's argument that the penalty was excessive, the Director held that the penalties imposed are for a second offense. He held that the respondent's repeated failure to comply with lawful orders warrants imposition of a significant penalty. The Director explained that the daily penalty at issue is $71.94, a mere .1% of the total balance due under the September 10, 2018, order. The Director further explained that while the respondent instead was arguing for a penalty of, at most, $8.20 per day, which represented one-hundredth of one percent of the initial penalty, such a *di minimis* penalty was not appropriate for repeated failures to comply with lawful orders. The Director held that the $71.94 daily penalty was not excessive under *Dami.*

Thereafter, the respondent filed a petition to review of the Director's April 8, 2020, second order on remand. The respondent argued that pursuant to §8-43-207(1), C.R.S., it was entitled to an evidentiary hearing on its ability to pay the penalty. The respondent also argued that under the Colorado Supreme Court's opinion in *Dami* it was entitled to an evidentiary hearing.

On June 23, 2020, the Director issued his supplemental order on remand. In his supplemental order on remand, the Director held that the respondent had been provided with an opportunity to be heard regarding its contention that it could not afford to pay the penalty imposed. However, the Director determined that the respondent had not presented any evidence to support this contention. He further rejected the respondent's contention that the validity of the penalty should be considered based on the aggregate rather than the daily amount, as proposed by Justice Samour's partial dissent in *Dami*. The Director reaffirmed the $71.94 daily penalty.

The respondent has petitioned to review the Director's June 23, 2020, supplemental order on remand.

I.

The respondent contends that pursuant to §8-43-207(1), C.R.S. and the Colorado Supreme Court's opinion in *Dami*, the Director erred in failing to hold an evidentiary hearing on its ability to pay the penalty and on the excessiveness of the penalty given its ability to pay. We agree.

Section 8-43-207(1), C.R.S., provides that "[h]earings shall be held to determine any controversy concerning any issue arising under articles 40 to 47 of this title." This provision reflects the due process requirement that where an administrative adjudication turns on issues of fact, then the affected parties are entitled to a hearing where they may present evidence, confront adverse evidence, and make argument in support of their positions. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1195 (Colo. App. 2002)("Due process is a flexible standard that calls for no specific procedure as long as the basic opportunity for a hearing and judicial review is present."); *see also Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990)("If...an administrative adjudication turns on questions of fact, due process requires that the parties be apprised of all the evidence to be submitted and considered, and that they be afforded a reasonable opportunity in which to confront adverse witnesses and to present evidence and argument in support of their position.").

The imposition of penalties constitutes a deprivation of property and, therefore, implicates employer's due process rights. *Kuhndog, Inc. v. Industrial Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009). It is true that some matters may be adjudicated without the benefit of a hearing. For example, an evidentiary hearing is not required where there is no disputed issue of material fact and the issue is a matter of law. C.R.C.P. 56(e); *Kuhndog Inc. v. Industrial Claim Appeals Office*, 207 P.3d at 951 ("[N]o hearing is necessary absent disputed issues of material fact, and, in that event, a party is entitled to judgment as a matter of law."); *Feeley v. Industrial Claim Appeals Office*, 195 P.3d 1154, 1156 (Colo. App. 2008)(affirming administrative law judge's grant of summary judgment to employer and the striking of claimant's application for hearing); *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848 (Colo. App. 1995). Further, an evidentiary hearing is not required where the fact-finder determines that the alleged facts, even if true, would not present a basis for granting the requested relief. *Service Supply Co. v. Vallejos*, 169 Colo. 14, 19, 452 P.2d 387, 389 (1969)("The Commission need not conduct a hearing, however, to determine the validity of the facts alleged in the petition, if in its opinion the facts, even if true, would not present a basis for reopening a final award."). It also is true, as is argued by the claimant, that the Director is empowered under §8-43-207(1)(g), C.R.S. to dispose of procedural requests upon written motion or on written briefs as determined appropriate. However, as explained above, where an administrative adjudication turns on

questions of fact, then due process requires that a hearing be held where the parties may present evidence, confront adverse evidence, and make argument in support of their positions. Section 8-43-207(1), C.R.S.; *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d at 1077.

Applying these principles here, we conclude the Director erred in imposing penalties under §8-43-304(1), C.R.S. without affording the respondent a hearing. The respondent's contentions that it is unable to pay the penalty and that the penalty is grossly disproportionate based on its ability to pay, turns upon questions of fact, and due process affords the respondent a right to a hearing on such issues. *Hendricks v. Industrial Claim Appeals Office*, *supra.* It is true that the Director did, in fact, give the respondent the opportunity to submit written evidence to support its contention that it was unable to pay the penalty and that the penalty was grossly disproportionate. However, we are not persuaded that this was sufficient to satisfy the due process requirements. That is, no evidentiary forum was provided where the respondent could present witnesses or evidence regarding its ability to pay the penalty and regarding the gross disproportionality of the penalty based on its ability to pay, cross-examine the Division's evidence, or present oral arguments regarding the assessment of penalties in the first place from the Director's November 7, 2018, order. We recognize and agree with the claimant's argument that the Colorado Supreme Court's opinion in *Dami* did not mandate that a hearing be held. Nevertheless, the *Dami* Court did note that "[a]ssuming it is appropriate or necessary to conduct an evidentiary hearing at this stage, the [Division] should permit the parties to develop a record that permits a complete evaluation of whether the $250-$500 fine imposed on Dami each day that it violated the workers' compensation laws was constitutionally excessive. . . ." *Id.* at 103 ¶37.

Section 8-43-304(1), C.R.S. permits the Director to assess a minimum fine of one cent per day and a maximum fine of $1,000 per day for each day the employer "fails, neglects, or refuses to obey any lawful order made by the director. . . ." However, the employer is not held to a strict liability standard. Rather, the imposition of penalties under this statute is governed by an objective standard. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429, 435 (Colo. App. 2010). An employer fails to obey an order if it fails to take the action that a reasonable employer would take to comply with the order. The conduct of an employer is "measured by an objective standard of reasonableness." *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965, 967 (Colo. App. 2003). The reasonableness of an employer's action depends on whether it was predicated on a rational argument based on law or fact. *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997). Further, whether an employer's conduct was reasonable is

a question of fact. *Pioneers Hosp. v. Industrial Claim Appeals Office*, 114 P.3d 97, 99 (Colo. App. 2005).

Here, we do not consider the right to a hearing to be an insignificant or inconsequential procedural requirement. Because the Director has discretion to determine the amount of the penalty, provided that the daily amount does not exceed the legislatively enacted penalty range, and the respondent objected to the daily penalty of $71.94, we conclude the respondent is entitled to a hearing concerning the amount of the penalty to be imposed. More specifically, even if the respondent repeatedly failed to comply with the Director's prior order, the respondent nevertheless must be given the opportunity to present evidence at a hearing on whether its actions were objectively reasonable and, if a penalty is imposed, to present mitigating evidence in an effort to reduce the daily amount of the penalty. *See Lewis v. J.C. Penney Co., Inc.*, 841 P.2d 385 (Colo. App. 1992)(in reconsidering defendant's motion to dismiss, the trial court shall, if necessary to resolve any credibility issues, conduct an evidentiary hearing upon the question); *Division of Workers' Compensation v. Silva Floor Solutions,* W.C. No. 2002-50381 (Jan. 9, 2004)(ALJ erred in vacating evidentiary hearing and determining the amount of the penalty by summary judgment; Panel set aside penalty order and remanded matter to afford parties evidentiary hearing). The respondent provided an explanation of why it failed to comply with the Director's prior order, but the Director did not address the reasonableness of its actions. Further, the respondent made a specific allegation regarding its inability to pay the fine which, if true, might have reduced the amount of the penalty. However, the respondent was not permitted an opportunity to present any additional evidence, testimony, or argument in this regard at a hearing. Since there clearly is a controversy concerning the imposition of a penalty in this case, a hearing is required pursuant to §8-43-207(1), C.R.S. to determine "any controversy concerning any issue arising" under the Act.

While there is no record of the respondent applying for a hearing with the Director pursuant to §8-43-207(1), C.R.S., as is argued by the claimant, there nevertheless is a record of the respondent requesting a hearing before the Director after we remanded the matter for the Director to apply the new "gross disproportionality" test set forth by the Colorado Supreme Court in *Dami.* See Employer's Response to Director's Order on Remand and Request for Evidentiary Hearing. Further, despite the claimant's argument to the contrary, the respondent was precluded from filing an application for hearing with the OAC because the matter instead was pending before the Director. *See* W.C. Rule of Procedure 9-3(B), 7 CCR 1101-3. Accordingly, we necessarily remand the matter for purposes of allowing the respondent the right to a hearing at the Division pursuant to §8-43-207(1), C.R.S., or the right to a hearing at the Office of Administrative Courts to the

extent the Director transfers the matter there. *See* Office of Administrative Courts' Rules of Procedure 7 and 8, 1 Code Colo. Reg. 104-3.

II.

Last, the respondent contends that in conducting the gross disproportionality test, the Director erred in failing to consider the aggregate penalty, rather than the daily amount, as proposed by Justice Samour's partial dissent in *Dami.* However, as determined by the Director, and conceded by the respondent, we are bound by the Colorado Supreme Court's majority resolution of this issue. The majority specifically held that "[w]hen a fine is imposed on a per diem basis, with each day constituting an independent violation, the evaluation of whether a fine is excessive must be done with reference to each individual daily fine." *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d at 103; *see also In re Estate of Ramstetter*, 411 P.3d 1043, 1050 (Colo. App. 2016)(appellate courts are bound to follow supreme court precedent). As noted above, §8-43-304(1), C.R.S. establishes a minimum penalty of one cent per day and a maximum penalty of $1,000 per day for each day the employer fails, neglects, or refuses to obey any lawful order made by the Director. Here, the Director imposed a daily penalty of $71.94 pursuant to §8-43-304(1), C.R.S. for the respondent's failure to comply with a prior order he had entered. Consequently, pursuant to the Colorado Supreme Court's majority opinion in *Dami*, the evaluation of whether the fine is excessive must be done with reference to each individual daily fine. Thus, the respondent's argument here provides no basis for disturbing the Director's order. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the Director's supplemental order on remand issued June 23, 2020, is set aside and the matter is remanded for further proceedings, as set forth herein, and a new order.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

9/11/2020 by TT .

ADAN CERDA & ASSOCIATES LLC, Attn: ADAN CERDA ESQ, 6000 E EVANS AVE SUITE 3-400, DENVER, CO, 80222 (For Claimant)
SPENCER FANE LLP, Attn: JACOB F HOLLARS ESQ, 1700 LINCOLN ST SUITE 2000, DENVER, CO, 80203 (For Respondents)
DIVISION OF WORKERS COMPENSATION, 633 17TH STREET SUITE 400, DENVER, CO, 80202 (Other Party)

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

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

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

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