COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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March Case Law Update

Presented by Judge Laura Broniak and Judge Elsa Martinez-Tenreiro

This update covers ICAO and COA decisions issued from February 5, 2019 to March 8, 2019

Court of Appeals

Industrial Claim Appeals Office

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DATE FILED: March 7, 2019
CASE NUMBER: 2018CA565

SUMMARY
March 7, 2019

2019COA37

No. 18CA0565, *Burren v. Industrial Claims Appeals Office* — Labor and Industry — Workers' Compensation — Determination of Maximum Medical Improvement

In this workers' compensation case, a division of the court of appeals addresses whether a claimant can be placed at maximum medical improvement (MMI) by an administrative law judge (ALJ) despite the lack of an MMI finding from any treating physician or the physician conducting the division-sponsored independent medical examination (DIME). The division concludes that an ALJ cannot determine MMI when neither a treating physician nor a DIME physician has placed the injured worker at MMI. Consequence, the division sets aside the order of the Industrial Claim Appeals Office (Panel) upholding the ALJ's order and

remands the matter to the Panel to return the case to the ALJ to enter an order consistent with this opinion.

COLORADO COURT OF APPEALS **2019COA37**

Court of Appeals No. 18CA0565
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-962-740

Susan Burren,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Destination Maternity, and Liberty Mutual Insurance Company,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE WELLING
Webb and Harris, JJ., concur

Announced March 7, 2019

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

No Appearance for Respondent Industrial Claim Appeals Office

Ruegsegger Simons Smith & Stern, Michele Stark Carey, Denver, Colorado, for Respondents Destination Maternity and Liberty Mutual Insurance Company

¶ 1 This workers' compensation action requires us to address whether a claimant can be placed at maximum medical improvement (MMI) by an administrative law judge (ALJ) despite the lack of an MMI finding from any treating physician or the physician conducting the division-sponsored independent medical examination (DIME). We conclude that an ALJ cannot determine MMI when neither a treating physician nor a DIME physician has placed the injured worker at MMI. We therefore set aside the order of the Industrial Claim Appeals Office (Panel) upholding the ALJ's order, and we remand the matter to the Panel to return the case to the ALJ to enter an order consistent with this opinion.

I. Background

¶ 2 Claimant, Susan Burren, worked for employer, Destination Maternity, in a store called A Pea in the Pod. On September 25 and 26, 2014, she sustained admitted work-related injuries to her arm and shoulder. Several physicians treated her for her injuries well into 2017. Despite several years of treatment, claimant complained that her pain continued to worsen. She testified that none of the treatment she received improved her condition. None of claimant's treating physicians placed her at MMI.

¶ 3 In June 2015, employer retained Dr. Allison Fall to perform a medical examination of claimant. Dr. Fall opined that claimant was not at MMI at that time, but anticipated that claimant would reach MMI "in three to six months."

¶ 4 Dr. Fall examined claimant a second time in August 2016. In her ensuing report, Dr. Fall set forth her impressions of claimant's condition as follows:

1. Work-related right ulnar neuritis without current complaints, essentially resolved.
2. Right upper trapezius and levator scapular myofascial pain with subjective complaints outweighing objective findings.
3. Somatoform or conversion disorder, ruled out as work-related.

She also opined that claimant had reached MMI with "no permanent impairment for subjective complaints of upper quadrant myofascial pain."

¶ 5 Several weeks after receiving Dr. Fall's opinion, employer requested a twenty-four-month DIME pursuant to section 8-42-107(8)(b)(II), C.R.S. 2018, because no treating physician had placed

claimant at MMI in the two years that had elapsed since her work-related injury. Dr. Clarence Henke was selected to perform the DIME. He examined claimant and opined that claimant suffered from right ulnar nerve compression, right median nerve compression at wrist level, right rotator cuff tendinitis, and cervical myalgia. As now pertinent, he also determined claimant was *not* at MMI.

¶ 6 Not satisfied with this result, employer applied for a hearing to overcome Dr. Henke's DIME opinion. Dr. Fall testified at the hearing that the mechanism of claimant's injury could not have injured her cervical spine. Dr. Fall also criticized Dr. Henke's DIME report, pointing out that Dr. Henke did not rate claimant's impairment as required, failed to explain why he concluded claimant was not at MMI, and recommended follow-up treatment without specifying the treatment needed. Hearing this and claimant's testimony, the ALJ ruled that employer clearly and convincingly overcame the DIME. The ALJ expressly found Dr. Fall's opinions and testimony to be more "well-informed, thorough, credible and persuasive than those of DIME Dr. Henke." The ALJ also noted:

> The DIME doctor reviewed only a portion of Claimant's medical records and failed to consider Dr. Fall's second [independent medical exam] report. He did not rate any impairment as required. Dr. Henke failed to provide any details or analysis as to why Claimant is not at MMI, or what needs to be done for Claimant to reach MMI. Dr. Henke failed to state what body part Claimant should follow up with, what type of orthopedic evaluation Claimant needs, or why further orthopedic evaluation is necessary, despite nearly three years of treatment without any perceived benefit.

She therefore concluded that the evidence employer presented to overcome the DIME "is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect." Having found that employer overcame the DIME, the ALJ determined that claimant reached MMI on June 28, 2016, the date on which one of her treating physicians placed her cervical spine at MMI.

¶ 7 On review, the Panel upheld the ALJ's order, concluding that substantial evidence supported the decision. The Panel also rejected claimant's contention that the ALJ misapplied the statute when she found claimant at MMI as of June 28, 2016. The Panel disagreed with claimant's position that an ALJ cannot find a

claimant to be at MMI unless a treating physician or the DIME has placed the claimant at MMI. In the Panel's view, once an ALJ determines that a DIME physician's MMI opinion has been clearly and convincingly overcome, "the ALJ [is] required to determine the claimant's MMI date as a matter of fact."

II. Statutory Interpretation

¶ 8 On appeal, claimant contends that the Panel and the ALJ have misinterpreted section 8-42-107(8)(b). In claimant's view, by permitting the ALJ to determine a claimant's MMI date as a matter of fact, the Panel disregards the requirement of section 8-42-107(8)(b)(I) that "[a]n authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5)[, C.R.S. 2018]." According to claimant, once the ALJ determined employer overcame the DIME, the ALJ should have ordered her treatment resumed until her authorized treating physician (ATP) placed her at MMI. We agree that the ALJ and the Panel have misapplied the statute, but not for the reason argued by claimant.

A. Relevant Statute

¶ 9 Section 8-42-107 provides, in relevant part, as follows:

(8)(b)(I) An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5).

(II) If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2[, C.R.S. 2018]; except that, if an authorized treating physician has not determined that the employee has reached maximum medical improvement, the employer or insurer may only request the selection of an independent medical examiner if all of the following conditions are met:

(A) At least twenty-four months have passed since the date of injury;

(B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;

(C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and

(D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

(III) Notwithstanding paragraph (c) of this subsection (8), if the independent medical examiner selected pursuant to subparagraph

> (II) of this paragraph (b) finds that the injured worker has reached maximum medical improvement, the independent medical examiner shall also determine the injured worker's permanent medical impairment rating. The finding regarding maximum medical improvement and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

B. Rules of Statutory Construction and Standard of Review

¶ 10 When we interpret a provision of the Workers' Compensation Act (Act), "we interpret the statute according to its plain and ordinary meaning" if its language is clear. *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)).

¶ 11 We review an issue of 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); *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App. 2005), *aff'd*, 134 P.3d 407 (Colo. 2006), we are not bound by the Panel's interpretation or its earlier decisions. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). "The Panel's interpretation will . . . be set aside 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" *Town of Castle Rock v. Indus. Claim Appeals Office*, 2013 COA 109, ¶ 11 (quoting *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998)), *aff'd*, 2016 CO 26.

C. MMI Finding Must Be Made by Either ATP or DIME Physician

¶ 12 Claimant contends that if neither a DIME physician nor an ATP has found a claimant to be at MMI, section 8-42-107(8)(b)(I) mandates that the claimant continue treating with the ATP until the ATP places the claimant at MMI. In other words, under claimant's interpretation of section 8-42-107(8)(b), if a DIME conducted under

section 8-42-107(8)(b)(II) finds a claimant is *not* at MMI, treatment should then proceed until an MMI determination is made under section 8-42-107(8)(b)(I). To do otherwise, according to claimant, would be to "ignore" the requirements of section 8-42-107(8)(b)(I).

¶ 13 Claimant's interpretation is overly broad and consequently flawed. The legislature intended subparagraphs (I) and (II) of section 8-42-107(8)(b) to serve as alternative paths by which a determination of MMI can be reached. As the Panel noted, subparagraph (II) was added to the Act in 1996 to provide employers an avenue to seek an MMI finding if an ATP's treatment continued despite an independent physician's determination that the claimant had reached MMI. *See* Ch. 112, sec. 1, § 8-42-107(8)(b)(II), 1996 Colo. Sess. Laws 456-57; *see also Clark v. Mac-Make-Up Art Cosmetics*, W.C. No. 4-858-859-06, 2016 WL 4361576, at *2 (Colo. I.C.A.O. Aug. 3, 2016) ("The General Assembly first added to the statute a provision to allow a DIME review prior to a finding of MMI by an ATP in 1996. The purpose was to allow an employer and its insurer a mechanism to challenge an over-treating or inattentive physician, or an injured employee persisting in unreasonable complaints of disability."). The legislative goal of

providing employers with an alternative path toward MMI would be thwarted and the alternative statutory avenue closed if, as claimant suggests, *every* case required an ATP to make an MMI finding. Indeed, this is the very scenario the legislature sought to remedy when it added subparagraph (II).

¶ 14 But the Panel also erred in its interpretation. It is true that the Panel has "long held that once the ALJ determined the DIME physician's MMI opinion was overcome by clear and convincing evidence, then the ALJ was required to determine the claimant's MMI date as a matter of fact," as it observed in its decision below. And numerous Panel decisions follow this reasoning or espouse this interpretation. *See, e.g.*, *York v. Manpower Int'l, Inc.*, W.C. No. 4-837-612-04, 2016 WL 2619516, at *3 (Colo. I.C.A.O. May 4, 2016) (Once an ALJ determines that a DIME MMI opinion has been overcome, "the question of the claimant's correct MMI date becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by substantial evidence in the record.") (citations omitted), *aff'd sub nom. York v. Indus. Claim Appeals Office*, (Colo. App. No. 16CA0877, Jan. 26, 2017) (not published pursuant to C.A.R. 35(e)); *Nixon v. City & Cty. of Denver*, W.C. No.

4-770-139, 2011 WL 5234800, at *2 (Colo. I.C.A.O. Oct. 24, 2011) (after finding DIME physician's opinion of no MMI had been overcome, ALJ properly determined claimant's MMI date based on opinion of one treating physician); *Solis v. Sunshine Bldg. Maint.*, W.C. No. 4-726-043, 2009 WL 1674886, at *2-6 (Colo. I.C.A.O. June 12, 2009) (after finding DIME physician's determination of no MMI had been overcome, ALJ properly determined claimant's MMI date based on ATP's opinion). These Panel decisions are distinguishable, however. As claimant points out, in those cases, even though a DIME had found the claimant not at MMI, the ALJ turned to the opinion of a treating physician when determining an MMI date for the claimant. For example, in both *Solis* and *Nixon*, a treating physician had placed the claimant at MMI; the claimant challenged that finding by requesting a DIME; the DIME determined the claimant was not at MMI; but the ALJ ruled the DIME had been overcome and adopted the MMI date originally recommended by the ATP. *See Nixon*, 2011 WL 5234800, at *1; *Solis*, 2009 WL 1674886, at *1. *York* followed a different procedural path, but ultimately in that case, too, the ALJ adopted an MMI date that was precisely six weeks post-surgery, which adhered to the treating surgeon's

opinion that claimant should reach MMI by that date. *York*, 2016 WL 2619516, at *1-2.

¶ 15 These scenarios highlight a factor common to cases in which MMI could be decided as a matter of fact: in each instance, a conflict existed between the DIME and the ATP, which required resolution by the finder of fact. Indeed, the rule authorizing ALJs to decide MMI as a matter of fact grew out of a case of conflicting MMI determinations by different ATPs. *See, e.g.*, *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996) ("[R]etraction of the authorized treating physician's first opinion merely presents a question of fact for the ALJ concerning whether claimant was at MMI on March 9 or December 1, 1994."); *see also Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 39 (MMI determination was within ALJ's discretion where ATP had signed statement retracting his earlier MMI decision). In *Blue Mesa* and *Kilpatrick*, as in those Panel cases in which the DIME and the ATP disagreed on MMI, there was a conflict in medical opinions between treaters or between a treater and a DIME physician that the ALJ had to resolve as a matter of fact. But in this case, there is no conflict between the ATP's and DIME physician's opinions; both agree that claimant

had not reached MMI. Consequently, there was no conflict for the ALJ to resolve.

¶ 16 We know of no case, and employer has not pointed us to any, in which the only physician placing the claimant at MMI was a doctor selected by the employer pursuant to section 8-42-107(8)(b)(II)(D). To the contrary, in all the cases we have reviewed, as well as each case cited by the parties, either an ATP or the DIME had placed the claimant at MMI. But those circumstances are absent here, distinguishing this case from those in which MMI became a fact question for the ALJ to decide.

¶ 17 In our view, the situation resembles the supreme court case of *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006), which traveled a different procedural path but evoked concerns similar to those claimant expresses. In *Williams*, a DIME physician disagreed with an ATP's opinion that the claimant had reached MMI. Because the DIME physician opined that the claimant had not yet reached MMI, the DIME procedure remained open. The claimant received more treatment, and was eventually placed at MMI a second time by the ATP. *Id.* at 34-35. Based on the ATP's second MMI determination, the employer filed a final admission of liability (FAL). *Id.* The

supreme court held that the employer prematurely filed its FAL;, the employer could not file an FAL until the DIME physician had re-examined the claimant and made an independent determination that the claimant had reached MMI. Citing a Panel interpretive bulletin, the supreme court observed that "[h]istorically, the Division's policy has been that, after an independent medical examiner determines the employee not to be at MMI, the independent medical examiner must make the final determination of MMI following additional care from the treating physician." *Id.* at 38 (citing Colo. Dep't of Labor & Emp't, Interpretive Bulletin 11A: Follow Up Division Independent Medical Examinations (Mar. 6, 2006), https://perma.cc/H247-YG4D). Having taken the Panel's practice into consideration, the supreme court summarized its new rule as follows:

> We hold that, once a claimant has successfully challenged a finding of MMI through the DIME process, the DIME process remains open and, when the treating physician makes a second finding of MMI, the employer or insurer may not file an FAL to close the case prior to returning the claimant to the independent medical examiner for a follow-up examination and determination of MMI.

Id. at 36.

¶ 18 Similarly, in this case, the DIME did not find claimant to be at MMI. Unlike in *Williams*, though, the ALJ did not return claimant for additional treatment and a follow-up DIME. Instead, the ALJ was persuaded by the opinions of employer's retained physician to place claimant at MMI. In our view, this course runs counter to the statute and the Panel's historical practice of having the DIME physician who found a claimant was not at MMI later make the MMI determination. We therefore conclude claimant should have been returned to the ATP for continued treatment after the DIME physician found she was not at MMI.

¶ 19 We recognize that our interpretation of the statute effectively precludes an employer's ability to challenge a twenty-four-month DIME when the DIME agrees with the ATP that a claimant is not at MMI. However, we note that, prior to the addition of section 8-42-107(8)(b)(II) in 1996, employers were at the mercy of ATPs and had no recourse to challenge perpetual care; treatment simply continued until an ATP placed the claimant at MMI. *See* 1996 Colo. Sess. Laws at 456-57. We conclude simply that where the DIME and the ATP agree that a claimant is not at MMI, treatment should continue until either the DIME or the ATP places the claimant at

MMI, which comports with the statute and the Panel's historical practices. We note, too, that nothing in our opinion prohibits an employer from re-invoking the twenty-four-month DIME process at an appropriate time in the future. Thus, our decision will leave employers avenues to challenge treatment that seems interminable.

III. Substantial Evidence

¶ 20 Having concluded that the ALJ and the Panel misinterpreted section 8-42-107(8)(b)(II), we need not address whether substantial evidence supported the ALJ's findings of fact.

IV. Conclusion

¶ 21 The order is set aside and the case remanded to the Panel with directions to return it to the ALJ to enter an order consistent with this opinion.

JUDGE WEBB and JUDGE HARRIS concur.

COLORADO COURT OF APPEALS

DATE FILED: February 14, 2019
CASE NUMBER: 2018CA1523

Court of Appeals No. 18CA1523
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-054-125

Alex Willhoit,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Maggie's Farm, and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE LIPINSKY
Dailey and Furman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 14, 2019

Michael W. Seckar, P.C., Lawrence D. Saunders, Pueblo, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Maggie's Farm and Pinnacol Assurance

¶ 1 In this workers' compensation action, claimant, Alex Willhoit, 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 claim for temporary total disability (TTD) benefits. We affirm.

I. Background

¶ 2 Claimant worked as a cultivation tech for employer, Maggie's Farm, a marijuana farm, from July 24 through 31, 2017. His job duties included pulling weeds, shoveling, pushing wheelbarrows, and dragging hoses. When he was hired, claimant signed and acknowledged receipt of both employer's handbook and its attendance policy. Under the attendance policy, an employee absent from work for "three consecutive shifts without notifying his or her Supervisor or Manager may generally be deemed to have voluntarily resigned his or her position."

¶ 3 On July 31, 2017, claimant sustained an admitted injury to his knee when his knee "gave out" while he was leaf blowing. Because the knee injury prevented him from performing his essential job functions, claimant stopped working and employer began paying him TTD benefits.

¶ 4 Claimant saw an authorized treating physician, Dr. J. Douglas Bradley, the day of his injury. Dr. Bradley assessed claimant with a sprain of the collateral ligament of the right knee. He assigned claimant work restrictions that limited claimant to 5 pounds lifting, repetitive lifting, carrying, and pushing/pulling. In addition, Dr. Bradley limited claimant to standing or walking for 5-10 minutes per hour, and mandated that claimant sit for 7 hours per day (55 minutes per hour).

¶ 5 The discharge instructions claimant signed that day were nearly identical. Dr. Bradley's instructions limited claimant to lifting, carrying, and pushing/pulling of no more than 5 pounds, and stated claimant could walk or stand for only 10 minutes every hour and should sit for 50 minutes per hour. Under the Assessment/Plan section of the medical record for that day, Dr. Bradley recommended claimant

> Drink plenty of fluids.
>
> Get plenty of rest.
>
> Apply warm compresses to the area for 15-20 minutes 4 times a day.
>
> Rest, ice and elevate the affected area, and keep ace warp on for compression.

Keep in splint. No use of extremity in splint.

¶ 6 Claimant saw Dr. Bradley for several follow up visits. The discharge instructions Dr. Bradley issued on August 21, 2017, August 29, 2017, and September 11, 2017, were unchanged from the instructions Dr. Bradley had based on his initial examination of claimant. On September 18, 2017, Dr. Bradley modified claimant's discharge instructions to permit him to stand or walk for 50 minutes per hour, and only required him to sit for 10 minutes per hour. On November 17, 2017, Dr. Bradley further decreased claimant's work restrictions, permitting him to lift, carry, and push/pull up to 15 pounds.

¶ 7 On August 30, 2017, employer's human resources director, Sharon Northern, sent claimant an offer of modified employment intended to comply with claimant's work restrictions. The modified job was that of bud trimmer, which, according to the written offer of modified employment, required "sitting in a room trimming the leaves off of plants using scissors. Involves sitting, reaching, handling and no lifting/carrying/push/pulling over 5 lbs." Ms. Northern further described the job as follows:

> The job is really trimming the bud from our plant. So, the buds are about the size of a quarter; you sit at a trimming station; you're given a – basically a Tupperware dish full of buds; and then you – the trimmers will trim the leaves off of those buds to prepare them for shipment to the dispensaries.

Dr. Bradley signed the modified offer of employment, which confirmed that the job duties were within claimant's work restrictions. Ms. Northern told claimant to report for the trimmer job on September 11, 2017, at 7:30 a.m.

¶ 8 Claimant did not show up for work as scheduled, however. Ms. Northern testified that claimant neither called nor appeared for the next three days. In accordance with employer's attendance policy, employer terminated claimant's employment three days later. Because claimant did not commence the modified job as scheduled, employer discontinued his TTD benefits pursuant to section 8-42-105(3)(d)(I), C.R.S. 2018.

¶ 9 Claimant applied for a hearing seeking the reinstatement of his TTD benefits. He argued that employer had wrongfully discontinued his benefits because employer's modified job offer did not comply with all the restrictions Dr. Bradley imposed. In particular, claimant cited to the general instructions under "Sprain

of other specified parts of right knee" that Dr. Bradley incorporated into his September 11, 2017, discharge instructions. These included instructions to

> Apply warm compresses to the area for 15-20 minutes every 3-4 hours throughout the day.
>
> * * * * *
>
> Do home exercises as instructed and stretches hourly while awake. This is essential for your recovery.
>
> Rest, ice and elevate the affected area, and keep ace wrap on for compression (but not too tight).

¶ 10 Claimant also relied upon a physical therapist's recommendation that claimant lie "[s]upine [with his] LE [lower extremity] elevat[ed] above the heart." Claimant argued that, because the modified position employer offered did not expressly accommodate these restrictions, he was not obliged to commence the modified job.

¶ 11 The ALJ disagreed. After considering claimant's evidence, including claimant's testimony, and Ms. Northern's testimony, the ALJ found claimant's interpretation of his work restrictions unpersuasive. The ALJ explicitly rejected claimant's position that the instructions to place warm compresses on his knee, stretch

frequently, and lie supine and elevate his knee constituted work restrictions or medical requirements, finding claimant's explanation neither credible nor persuasive. Rather, the ALJ characterized these instructions as "treatment recommendations."

¶ 12 The ALJ instead credited Ms. Northern's testimony that the modified position offered was within claimant's work restrictions and that, as a trimmer, he "could have applied warm compresses and an ice pack or heating pad while sitting, could have rested on a firm surface, and could have stood up while at the trim station," thereby also accommodating Dr. Bradley's additional instructions. Finally, the ALJ did not believe claimant's testimony that he left a voice mail for Ms. Northern telling her he could not start the modified job, instead crediting Ms. Northern's testimony that claimant never called her.

¶ 13 Based on this evidence, the ALJ concluded that the modified job offer to work as a trimmer would have accommodated claimant's work restrictions. The ALJ noted that, "[b]ased on the nearly effortless physical requirements of the trim station and Ms. Northern's testimony, even the additional treatment recommendations [c]laimant believes he had could have been

accommodated. It was patently unreasonable for [c]laimant to refuse to accept this position." The ALJ consequently denied and dismissed claimant's claim for TTD benefits.

¶ 14 On review, the Panel affirmed, expressly rejecting all of claimant's contentions. As pertinent here, claimant argued below that: (1) the ALJ misapplied the law by characterizing some "restrictions" as "treatment recommendations"; and (2) the ALJ improperly permitted Ms. Northern to testify about additional accommodations that the trimmer job allowed, such as stretching, standing, periodically lying down, and applying warm compresses to the knee. The Panel held that, because substantial evidence supported the ALJ's factual findings, the Panel was bound to uphold them.

¶ 15 Likewise, the Panel rejected claimant's evidentiary challenge to Ms. Northern's testimony, holding that, because the ALJ found the modified job offer complied with claimant's work restrictions, any reliance the ALJ placed on this particular testimony "was not dispositive."

¶ 16 Claimant now appeals.

II. Analysis

¶ 17 Claimant raises these same two arguments on appeal:

(1) He contends that the Panel should have remanded the case to the ALJ to find whether he "had a good-faith basis for believing that the modified job offer was insufficient to accommodate his medical restrictions." He argues it is "undisputed" that the modified job offer failed to accommodate his medical restrictions, and that he could not have known the trimming position met his needs. Under the circumstances, he reasons, it was improper for employer to discontinue his TTD benefits.

(2) He contends that the Panel "erred by not addressing" the ALJ's alleged improper admission of and reliance on Ms. Northern's testimony that employer could have accommodated his additional restrictions. Claimant argues that he "is not a mind-reader" and should not have been required to assume or surmise that the trimmer position employer offered would be sufficiently flexible to allow him to stretch, place warm compresses or ice on his knee, and periodically lie supine with his

knee elevated when the written modified job offer did not so specify.

We are not persuaded by either of these arguments.

A. Modified Job Offer

¶ 18 We first address claimant's contention that he should not have been terminated because he had a "good faith basis" for believing that the offered modified job did not meet his medical restrictions.

1. Law Governing Termination of TTD Benefits and Standard of Review

¶ 19 The Workers' Compensation Act (Act) enumerates events that trigger the automatic cessation of TTD benefits without an order. § 8-42-105(3). "The termination of TTD benefits under any one of the enumerated conditions is mandatory." *Laurel Manor Care Ctr. v. Indus. Claim Appeals Office*, 964 P.2d 589, 590 (Colo. App. 1998). When one of these enumerated events arises, an employer need only file an admission of liability form notifying the injured worker that his or her TTD benefits will cease. *See* Dep't of Labor & Emp't Rule 6-1(A), 7 Code Colo. Regs. 1101-3 (permitting an employer to terminate TTD benefits under certain circumstances "without a hearing by filing an admission of liability form").

¶ 20 The provision pertinent here provides that an injured worker's TTD benefits may be discontinued if "[1] [t]he attending physician gives the employee a written release to return to modified employment, [2] such employment is offered to the employee in writing, and [3] the employee fails to begin such employment." § 8-42-105(3)(d)(I). A division of this court defined a "failure to begin" employment as "a failure to start the modified employment in the first instance." *Liberty Heights at Northgate v. Indus. Claim Appeals Office*, 30 P.3d 872, 874 (Colo. App. 2001).

¶ 21 An employee who refuses to accept an offer of modified employment may not be responsible for the resulting termination of his or her employment if he or she shows that the failure to start the employment "was reasonable considering the totality of the claimant's circumstances." § 8-42-105(4)(b)(II). But an employee's subjective opinion about his or her ability to perform the job is "irrelevant and properly disregarded by the ALJ" where the attending physician has released the claimant to modified duty. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 663 (Colo. App. 1995).

¶ 22 Contrary to claimant's assertion, we do not review this matter de novo, as we are not interpreting a statute. Rather, "[t]he

determination of whether a claimant has been released to return to work by the attending physician is a question of fact." *Imperial Headware, Inc. v. Indus. Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000). Therefore, an ALJ's factual findings regarding a release to work are binding on review if substantial evidence in the record supports them. *Id.*

¶ 23 However, "[i]n cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." § 8-42-105(4)(a). This statutory provision bars recovery of TTD benefits "when the voluntary or for-cause termination of the modified employment causes the wage loss." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004).

¶ 24 "Whether an injured worker 'is at fault for causing a separation of employment is a factual issue for determination by the ALJ. . . . A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination.'" *Apex Transp., Inc. v. Indus. Claim Appeals Office*, 2014 COA 25, ¶ 12 (quoting *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008)).

> Under . . . [section] 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. The termination statutes cannot be applied to cease payment of TTD benefits unless and until the ALJ makes a factual determination that a claimant was responsible for the termination of employment.

Gilmore, 187 P.3d at 1132 (citations omitted).

2. Substantial Evidence Supports the ALJ's Finding That Claimant Was at Fault for His Separation from Employment

¶ 25 The ALJ found that: (1) Dr. Bradley released claimant to modified duty; (2) employer sent claimant a letter offering him a modified position that accommodated his work restrictions and would also have accommodated Dr. Bradley's "treatment recommendations"; and (3) claimant failed to commence the modified job and therefore was responsible for his separation from employment. The ALJ accordingly found that employer met all three criteria of section 8-42-105(3)(d)(I) and therefore was statutorily allowed to discontinue claimant's TTD benefits.

¶ 26 These findings are well supported by substantial evidence in the record. Dr. Bradley gave his written approval of the modified job offered to claimant. Claimant does not dispute that the trimmer

job required no lifting or carrying over five pounds, and would have enabled claimant to sit for as long as necessary to alleviate his pain. Further, the ALJ found credible Ms. Northern's unequivocal testimony that claimant never informed employer he would not be starting the modified job. Because the ALJ's factual findings are at least partly based on this credibility determination, we cannot disturb them in the absence of evidence overwhelmingly rebutting them. *See Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000) ("[W]e may not interfere with the ALJ's credibility determinations" unless the evidence is "overwhelmingly rebutted by hard, certain evidence" to the contrary.).

¶ 27 Given that substantial evidence amply supports the ALJ's finding that all three prongs of section 8-42-105(3)(d)(I) had been met, we cannot set aside the ALJ's decision. *See Apex Transp.*, ¶ 12; *Gilmore*, 187 P.3d at 1132; *Imperial Headware*, 15 P.3d at 296.

¶ 28 Despite the existence of ample evidence supporting the ALJ's findings, claimant contends that he had a "good-faith basis for believing that that the modified job offer was insufficient to accommodate his medical restrictions." But the ALJ expressly discredited and rejected claimant's contention that his belief was

reasonable or held in good faith. Contrary to claimant's description of the trimmer position, the ALJ found that the job had "nearly effortless physical requirements" and concluded it was "patently unreasonable for [c]laimant to refuse to accept this position." To accept claimant's contention, we would have to reject the ALJ's credibility determinations and supported factual findings, which, as we note above, we cannot do. *See Arenas*, 8 P.3d at 561.

¶ 29 Nor are we persuaded to reach a different outcome by the two cases claimant cites. In the first case, *Safeway Stores, Inc. v. Hussan*, 732 P.2d 1244 (Colo. App. 1986), a division of this court *set aside* the commission's grant of TTD benefits upon determining that the claimant's "subsequent wage loss flowed not from her injury but from her rejection of the offered employment." *Id.* at 1245. *Hussan* therefore does not support claimant's position.

¶ 30 The other case is equally unhelpful to claimant. In *Lennon v. South Valley Drywall*, W.C. No. 4-357-330, 1999 WL 1186799, at *2 (Colo. I.C.A.O. Nov. 26, 1999), the Panel upheld the ALJ's findings because they were supported by substantial evidence in the record. Likewise, here, we cannot set aside the Panel's order affirming the ALJ's decision that claimant was responsible for his separation

from employment because the decision is supported by ample evidence in the record. *See Apex Transp.*, ¶ 12; *Gilmore*, 187 P.3d at 1132; *Imperial Headware*, 15 P.3d at 296.

B. Witness Testimony

¶ 31 Next, claimant contends that the ALJ improperly relied on Ms. Northern's testimony regarding employer's flexible accommodations. At the hearing, claimant objected when Ms. Northern was asked whether employer could have "accommodate[d] these treatments within the modified position approved by Dr. Bradley." Claimant argued that any response to the question would be irrelevant because "the only thing that counts is what was actually put in writing." More specifically, he reasoned that any testimony discussing employer's ability to accommodate claimant beyond the modifications set forth in the written offer was inadmissible because "only the written description of the job . . . legally counts." The ALJ permitted the questioning over claimant's objection, however, and promised to "give it the weight to be accorded."

1. Standard of Review

¶ 32 Claimant asserts that the applicable standard of review is de novo because our analysis requires statutory interpretation. This is

incorrect. Contrary to claimant's characterization, this issue does *not* involve statutory interpretation. Indeed, claimant does not even cite to a statute in this section of his opening brief. Rather, the issue before us is the admissibility of witness testimony.

¶ 33 In matters of evidence, the Act imbues ALJs with a great deal of latitude. § 8-43-207(1)(c), C.R.S. 2018 (ALJ is "empowered to . . . [m]ake evidentiary rulings"). "Under section 8-43-207(1) . . . the ALJ is vested with wide discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009); *see also IPMC Transp. Co. v. Indus. Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (same). Because "[e]videntiary decisions are firmly within an ALJ's discretion, [such decisions] will not be disturbed absent a showing of abuse of that discretion." *Youngs v. Indus. Claim Appeals Office*, 2013 COA 54, ¶ 40; *see also Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 54. "An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law." *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). Thus, claimant must establish that the ALJ abused his discretion when

he permitted Ms. Northern to testify how the trimmer position could accommodate claimant's medical restrictions.

2. The ALJ Did Not Abuse His Discretion

¶ 34 Ms. Northern opined that a trimmer could apply an ice pack or a heating pad while sitting at the job; could "rest on a surface flat on his back with a pillow underneath his knees"; could take medications as prescribed; could apply warm compresses to his knee for 15 to 20 minutes at a time; and could keep scheduled physical therapy appointments. The ALJ found this testimony "credible and persuasive." Given that the job's physical demands were directly at issue, we cannot say that the ALJ abused his discretion by permitting Ms. Northern to address the requirements for the trimmer job and how employer could modify those requirements to accommodate claimant's medical restrictions.

¶ 35 Moreover, this finding did not bear on the ALJ's conclusion that the modified position complied with claimant's work restrictions, even considering the additional restrictions about which claimant testified. Thus, even if we were to assume that the ALJ should have excluded Ms. Northern's testimony, the testimony did not alter the outcome. For this reason, too, we perceive no

abuse of discretion in the ALJ's decision to admit Ms. Northern's testimony.

¶ 36 Claimant nevertheless contends that the ALJ erred in permitting the testimony because claimant relied on the written modified job offer in concluding that the trimmer job would not accommodate his restrictions. Claimant asserts that the modified offer did not indicate whether the trimmer job could accommodate claimant's additional restrictions. He could not have known, he insists, that the job would have accommodated the additional restrictions that Dr. Bradley recommended.

¶ 37 Yet, as the ALJ found with record support, claimant never made an effort to determine whether the trimmer job could accommodate his restrictions. Claimant never contacted employer; he simply failed to show up for work. Although claimant maintains that he called Ms. Northern, the ALJ did not believe him, instead crediting Ms. Northern's testimony that claimant did not leave her a message. We cannot disturb this credibility finding. *See Arenas*, 8 P.3d at 561 ("[W]e may not interfere with the ALJ's credibility determinations" unless the evidence is "overwhelmingly rebutted by hard, certain evidence" to the contrary.). We must therefore

assume that claimant took no steps to inquire whether employer could accommodate any additional restrictions that Dr. Bradley imposed.

¶ 38 More importantly, claimant's premise is not supported by legal authority. Claimant has not pointed us to any authority — nor do we know of any — supporting his assertion that every facet of a modified job must be included in the written offer. The Act requires only that the "attending physician give[s] the employee a written release to return to modified employment, [and] such employment is offered to the employee in writing." § 8-42-105(3)(d)(I). More broadly, the applicable workers' compensation rule of procedure specifies that an employer's offer of modified employment must include "both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions." W.C. Rule 6-1(A)(4). The rule then mandates that

> (a) A written offer of modified duty may only be used to terminate benefits pursuant to this subsection if:

> (i) A copy of the written inquiry to the treating physician is provided to the claimant by the insurer or the insured at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty.

W.C. Rule 6-1(A)(4)(a)(i). Nowhere does the rule even insinuate that every potential modification must be spelled out in the written offer.

¶ 39 Employer's written offer of modified employment complied with these statutory and regulatory requirements. Dr. Bradley signed the letter confirming his approval of the modified offer. Claimant admittedly received the offer. The letter included a start date, hours, and wages, as well as Dr. Bradley's written consent. No more was required by statute or rule. Claimant's assertion that the written offer needed to enumerate every modification thus similarly finds no support in either the Act or the implementing rules.

¶ 40 Accordingly, we conclude that the ALJ did not abuse his discretion when he permitted Ms. Northern to testify about the additional modifications and that the Panel properly affirmed the ALJ's order. *See Kilpatrick*, ¶ 54; *Youngs*, ¶ 40.

III. Conclusion

¶ 41 The order is affirmed.

JUDGE DAILEY and JUDGE FURMAN concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-782-175

IN THE MATTER OF THE CLAIM OF:

JANUSZ KONDRACKI,

Claimant,

v.

FINAL ORDER

MKBS LLC AND TLPQC SERVICES LLC,

Employer,

and

NON-INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 9, 2018, that imposed penalties for the employer's failure to report the claimant's claim in violation of §8-43-103(1), C.R.S., penalties for the respondent's failure to timely admit or deny liability in violation of §8-43-203, C.R.S., penalties for the respondent's failure to provide benefits that were "at least comparable" to the benefits available under Colorado's Workers' Compensation system as required under §40-11.5-102(5), C.R.S., and calculation of the appropriate trust deposit or bond amount. We affirm in part and reverse in part.

This matter has a protracted history. We will summarize only the history and findings necessary to resolve the issues on appeal.

This matter previously went to hearing on September 17, 2010, before the ALJ on a number of issues, including whether the claimant is an employee of the respondent or an independent contractor, compensability, medical and temporary benefits, average weekly wage, and penalties. On November 10, 2010, the ALJ issued his corrected order concluding the claimant was an employee of the uninsured respondent employer. The ALJ further determined the claimant suffered compensable injuries on May 30, 2007, and was entitled to receive reasonable and necessary medical benefits, temporary total disability benefits, and disfigurement benefits. The ALJ increased the claimant's benefits

by 50 percent under the version of §8-43-408(1), C.R.S.[1] existent at the time, because the respondent was uninsured on the date of his injury. The ALJ, however, did not address the various other penalty issues sought by the claimant as well as the deposit or bond amount.

The claimant and the respondent both appealed the ALJ's corrected order. On March 23, 2011, the Panel affirmed the ALJ's corrected order but remanded the matter for consideration of the claimant's remaining claims for penalties and calculation of the deposit or bond amount. *See Kondracki v. MKBS, LLC d/b/a Metro Taxi*, W.C. No. 4-782-175 (March 23, 2011). The respondent again appealed and on January 12, 2012, the Colorado Court of Appeals affirmed in an unpublished decision. *MKBS, LLC d/b/a Metro Taxi v. Industrial Claim Appeals Office*, 11CA0765 (Jan. 12, 2012) (NSOP).

After significant administrative delays in the transfer of the file, the ALJ finally received the file on May 31, 2018, to address the following issues: (1) penalties under §8-43-304(1), C.R.S. for the respondent's failure to report the claimant's workers' compensation claim in violation of §8-43-103(1), C.R.S.; (2) penalties under §8-43-203(2)(a), C.R.S. for the employer's failure to timely admit or deny the claimant's workers' compensation claim; (3) penalties under §8-43-304(1), C.R.S. for the employer's violation of §40-11.5-102, C.R.S. by failing to provide benefits that were "at least comparable" to the benefits available under the Workers' Compensation system; and (4) a calculation of the appropriate trust deposit or bond amount.

On July 9, 2018, the ALJ issued his order, making the following findings and determinations regarding the outstanding penalty issues and calculation of the deposit or bond amount.

The claimant executed a Taxicab Operation Agreement (Agreement) with the respondent to work as a taxi cab driver. Under the terms of the Agreement, the claimant leased a specially equipped vehicle from the respondent and agreed to pay scheduled lease amounts. The Agreement also provided the claimant was an independent contractor, and that the claimant was not entitled to Workers' Compensation benefits from the respondent. Instead, the claimant was required to obtain workers' compensation insurance coverage at his own expense.

The claimant purchased insurance coverage under a Blanket Accident Insurance Policy issued through AIG. However, the AIG policy did not provide benefits that were

[1] Section 8-43-408(1), C.R.S. was amended effective July 1, 2017.

"at least comparable" to the benefits available under Colorado's Workers' Compensation system. The AIG policy provided an accidental death benefit of $50,000 and an accidental dismemberment benefit of $50,000 for a period of one year. The AIG policy also permitted a weekly accident indemnity benefit of up to $200.00 for a maximum of one year. The AIG policy had an aggregate limit of $250,000.00. No benefits were paid for permanent impairment or disability.

On May 30, 2007, the claimant was injured while driving a taxicab for the respondent employer. On that date, an unknown assailant entered the rear driver's side door of the claimant's cab, pulled a gun, and shot the claimant in the back of the head and neck. Following the injury, the claimant received extensive medical treatment, including being hospitalized from May 30, 2007, through August 2007. When the claimant was discharged from the hospital, he was unable to care for himself and required additional medical treatment. The claimant received 24-hour nursing care, therapy, and medications.

The claimant currently is disabled and resides in an assisted-living facility. He has not returned to work since he was injured on May 30, 2007.

With regard to the penalties under §8-43-304(1), C.R.S. for the respondent's failure to report the claimant's workers' compensation claim in violation of §8-43-103(1), C.R.S., the ALJ held the respondent knew of the claimant's injury on the date it occurred or on May 30, 2007. The ALJ found, however, that the respondent failed to report the claimant's claim as required under §8-43-103(1), C.R.S. within 10 days after the injury, or by June 9, 2007. He found that the injury was not reported until the claimant filed a workers' claim for compensation on January 16, 2009, or 587 days later. Finding that the respondent's conduct delayed the claimant's claim and left the claimant with little income and limited medical treatment through public assistance, the ALJ determined the respondent's conduct not only constituted a violation of §8-43-103(1), C.R.S. but also was objectively unreasonable. Considering the factors listed in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), the ALJ imposed a daily penalty of $300 pursuant to §8-43-304(1), C.R.S. for 587 days, which totaled $176,100.

With regard to the respondent's failure to timely admit or deny liability under §8-43-203(1)(a), C.R.S., the ALJ found that the respondent did not file a notice of contest until March 2, 2009. The ALJ ruled, however, that pursuant to §8-43-203(1)(a), C.R.S., the notice was due on or before June 29, 2007, or 20 days after the report of injury should have been filed with the Division. The ALJ further found that the respondent's general

manager, Kyle Brown, testified that he was familiar with the decision issued in *Gebrekidan v. MKBS, LLC, d/b/a Metro Taxi*, W.C. No. 4-678-723 (May 10, 2007). In *Gebrekidan*, the Panel determined the claimant in that case, a taxi cab driver, was an employee of the respondent Metro Taxi due to insufficient insurance coverage and an invalid independent contractor agreement. Mr. Brown testified the insurance policies and independent contractor agreement in *Gebrekidan* were identical to those involved in this case. The ALJ imposed a daily penalty under §8-43-203(1)(a), C.R.S. of $52.38, the claimant's daily compensation, for the maximum of 365 days, yielding a total penalty of $19,118.70.

With regard to penalties under §8-43-304(1), C.R.S. for the respondent's violation of §40-11.5-102, C.R.S. by failing to provide benefits that were "at least comparable" to the benefits available under the Workers' Compensation system, the ALJ imposed a daily penalty of $100 for 587 days yielding a total penalty of $58,700.

The ALJ further ordered the respondent to deposit or file a bond in the amount of $112,685.11 with the Division.

I.

Regarding the penalty imposed under §8-43-304(1), C.R.S. for the respondent's failure to report the claimant's injury, the respondent contends that Mr. Brown was advised by his prior counsel that the *Gebrekidan* decision was wrongly decided and that the respondent was in compliance with the law. The respondent therefore argues it had no duty to report the claimant's injury since he was not an employee. The respondent further argues that the advice of counsel should at least be a mitigating factor when imposing a penalty under §8-43-304(1), C.R.S. for its failure to report the claimant's injury. The respondent also contends the penalty is excessive. We perceive no error.

Section 8-43-103(1), C.R.S. provides the following time limits for notice of an injury:

> (1) Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury. . . .

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been

specifically provided" for the violation.[2] Thus, §8-43-304(1), C.R.S. is a residual penalty clause which subjects a party to penalties when it violates a specific statutory duty, and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, *supra*; *see also Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001).

The determination of whether an employer is subject to penalties under §8-43-304(1), C.R.S., requires a two-step analysis. First, the ALJ must find a violation of the Act or an order. Second, the ALJ must determine whether the challenged conduct was unreasonable as measured by an objective standard. *See Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The reasonableness of the employer's conduct depends on whether it was predicated on a rational argument based on law or fact. *Id.*; *see also Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997). Whether an employer's conduct was reasonable is a question of fact for the ALJ. *See Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

Further, in *Associated Business Products*, the Court set forth three factors to be considered when determining whether a penalty is excessive: (1) the reprehensibility of the conduct, (2) the disparity between the harm to the claimant and the penalty, and (3) the difference between the penalty and civil damages that could be imposed in comparable cases. *Id.* at 324.

We consider the assessment of the statutory penalty under an abuse of discretion standard of review. *Associated Business Products v. Industrial Clam Appeals Office*, *supra*. Under this standard, we must determine whether, under the totality of the factual circumstances at the time of the ALJ's determination, the ALJ's order "exceeds the bounds of reason." *Rosenberg v. Board of Education of School Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985). Because the ALJ's authority is discretionary, we may not disturb his determination of the amount of the penalty to be imposed in the absence of fraud or an abuse of discretion. *Id.*; *see also Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986).

Here, the respondent's argument notwithstanding, we are not persuaded the ALJ abused his discretion in imposing a daily penalty of $300 for the respondent's failure to

[2] At the time the respondent engaged in conduct that violated §8-43-103(1), C.R.S., the maximum penalty under §8-43-304(1), C.R.S. was five hundred dollars per day. However, §8-43-304(1), C.R.S. subsequently was amended and the maximum daily penalty was increased to one thousand dollars. Section 3 of chapter 287, Session Laws of Colorado 2010, specifically provides that the act amending subsection §8-43-304(1), C.R.S. applies to conduct occurring on or after the applicable effective date of the act.

report the claimant's injury in violation of §8-43-103(1), C.R.S. The ALJ found, with record support, that the respondent's general manager, Mr. Brown, learned of the claimant's injury on the date it occurred. Mr. Brown testified that the respondent's employee who was responsible for handling insurance claims, Annette Marsett, completed a written report of the claimant's injury on May 31, 2007. However, the respondent did not report the claimant's injury to the Division. Additionally, during the hearing, Mr. Brown testified that he was familiar with the holding in *Gebrekidan*, which was announced 20 days prior to the claimant's injury in this case. Mr. Brown testified that he understood that the Panel held in that case that an identical "AIG policy was determined to be insufficient" and that the claimant's independent contractor agreement was invalid and, therefore, the claimant was an employee of Metro Taxi. Tr. at 109-110. *See Associated Business Products v. Industrial Claim Appeals Office, supra*; *see also Pueblo School District No. 70 v. Toth, supra*. The ALJ further determined that a $300 daily penalty was reasonable because the respondent's conduct delayed the claim and left the claimant with little income and limited medical treatment through public assistance. The ALJ's order makes clear that he weighed the pertinent factors and was persuaded the $300 daily penalty was reasonable. The $300 daily penalty was below the permissible amount provided for under §8-43-103(1), C.R.S. Under these circumstances, therefore, we are unable to conclude the ALJ's abused his discretion in imposing the $300 daily penalty or that the daily penalty was excessive for the respondent's violation of §8-43-103(1), C.R.S. Accordingly, we have no basis to disturb the ALJ's penalty order on these grounds. Section 8-43-301(8), C.R.S.

II.

The respondent also argues the ALJ erred in penalizing it with a daily penalty of $52.38 for the maximum of 365 days for its failure to timely admit or deny liability for the claimant's claim in violation of §8-43-203(1)(a), C.R.S. The respondent again contends the penalty is excessive. We disagree.

Section 8-43-203(1)(a), C.R.S. provides that the employer shall notify in writing the Division and the injured employee within twenty days after a report is, or should have been, filed with the division pursuant to §8-43-101, C.R.S. whether liability is admitted or contested. If such notice is not timely filed, the employer "may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify. . . ." Further, the employer shall not be liable for more than the aggregate amount of 365 days' compensation for failing to timely admit or deny liability. Section 8-43-203(2)(a), C.R.S.

Here, the ALJ found, with record support, that the respondent failed to supply notice admitting or denying liability in this matter within 20 days after the employer was notified of the claimant's disabling injury. The ALJ further found that the respondent did not admit or deny liability until it filed a notice of contest on January 28, 2009, or over 365 days late. The ALJ determined that the appropriate penalty was $52.38 per day, which amounts to one day's compensation. He further determined that because the penalty authorized under §8-43-203(2)(a), C.R.S. is limited to no more than 365 days, this yielded a total penalty of $19,118.70. The ALJ's penalty was based on the respondent's knowledge of the *Gebrekidan* order previously entered against it for the same misconduct and the resulting damage for failing to abide by its reporting requirements. We conclude the ALJ's determination is permissible under, and consistent with, the penalty authorized under §8-43-203(2)(a), C.R.S. Accordingly, we have no basis to disturb the ALJ's order. *See Associated Business Products v. Industrial Claim Appeals Office, supra*; §8-43-301(8), C.R.S.

Additionally, to the extent the respondent is arguing in its brief in support that the AIG policy is comparable coverage, this issue already has been appealed and decided against the respondent. *See Kondracki v. MKBS, LLC d/b/a Metro Taxi, supra* ("because the policy limits compensation and benefits and has no benefits for permanent impairment or disability, it [the employer] was not in compliance with §40-11.5-102(5)(b), which requires that the benefits offered by the policy 'shall be at least comparable to the benefits offered under the workers' compensation system'"), *aff'd* 11CA0765 (Jan. 12, 2012)(NSOP).

Further, to the extent the respondent is arguing in its brief in support that the ineffectiveness of its prior legal representation warrants reversal or mitigation of the penalty, this also does not afford grounds for relief on appeal. *See Hereford v. Mr. Steak*, W.C. No. 3-589-581 (October 3, 1996); *see also McGinley v. Mariner Post Acute Network*, W.C. No. 4-535-097 (April 7, 2003). Our authority to review the ALJ's order is defined in § 8-43-301(8), C.R.S. This statute does not authorize us to consider the adequacy of the representation provided by a party's attorney and we cannot alter an ALJ's order on this basis.

III.

The respondent also argues that the ALJ erred in imposing penalties of $100 per day under §8-43-304(1), C.R.S. for its violation of §40-11.5-102, C.R.S., or for failing to provide coverage "at least comparable" to that provided under Colorado's Workers' Compensation system. The respondent contends the ALJ previously had increased the claimant's benefits by fifty percent under §8-43-408(1), C.R.S. for its failure to be

insured so another penalty is not permitted. We conclude the ALJ erred in imposing penalties of $100 per day under §8-43-304(1), C.R.S. for the respondent's violation of §40-11.5-102, C.R.S.

As detailed above, §8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer that violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Consequently, the penalty set forth in §8-43-304(1), C.R.S. applies only when the act does not create a specific penalty for the violation.

Additionally, at the time of the conduct at issue, §40-11.5-102(5)(a), C.R.S. required that a lease agreement must provide for coverage under workers' compensation or a private insurance policy that provides similar coverage. Section 40-11.5-102(5)(b)(I), C.R.S. defined the term "similar coverage" as insurance which must be "at least comparable" to the benefits offered under the workers' compensation system.[3]

The Colorado Court of Appeals' decision in *USF Distribution Services v. Industrial Claim Appeals Office*, 111 P.3d 529(Colo. App. 2004), is instructive here. In that case, the claimant worked as a truck driver for USF and entered into an independent contractor agreement (agreement) with USF, under which he leased the tractor truck that he owned and was to provide services as a delivery driver. The agreement required the claimant to obtain and keep in force a "work accident and/or workers' compensation insurance policy." The agreement stated the claimant could "satisfy this obligation by seeking [USF's] assistance in obtaining a policy negotiated by USF Distribution, or [claimant] may secure a policy through an applicable state sponsored program, or through a policy providing comparable benefits and issued by an insurance company qualified to write such coverage." The claimant obtained an occupational accident insurance policy negotiated by USF.

The claimant subsequently sustained severe injuries when he was involved in a motor vehicle accident during a delivery to one of USF's clients. The claimant requested medical and compensation benefits pursuant to USF's workers' compensation insurance policy. The ALJ ultimately determined the claimant's occupational accident insurance program pursuant to the agreement was substantially more limited than comparable coverage under the Workers' Compensation Act, §8-40-101,et seq., C.R.S. and, therefore, failed to satisfy the requirements of §40-11.5-102(5), C.R.S. The ALJ also made findings regarding the extent of control USF exercised over the claimant and ultimately

[3] Section 40-11.5-102(5)(a) and (b), C.R.S. were amended in 2018.

determined the claimant had overcome the statutory presumption he was an independent contractor and that his injury was compensable. The ALJ awarded both medical and temporary total disability benefits.

On review, the Panel upheld both the determination of claimant's status and the award of benefits. The Colorado Court of Appeals affirmed, holding in pertinent part as follows:

> We recognize that §8-40-301(5) evidences a clear legislative intent to exclude leased drivers from the definition of "employee.". . . (citations omitted). However, when that statute is viewed in combination with both §8-40-301(6) and §40-11.5-102(5), *see Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., supra* (§40-11.5-102 applies to the Act), it becomes clear that the exclusion takes effect only when the lease agreement includes complying coverage. The scheme created by these statutes shares the same purpose underlying the statutory employer provision, *see* §8-41-401(1)(a), C.R.S. 2004, which is to prevent an employer from evading compensation coverage by contracting out work instead of directly hiring the workers. *Curtiss v. GSX Corp*., 774 P.2d 873 (Colo. 1989); *see also FFE Transp. Servs., Inc. v. Indus. Claim Appeals Office, supra* (upholding application of exception, but only where complying insurance coverage was provided).
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> * * *
>
> Accordingly, we conclude that claimant could establish his status as an "employee" of respondent for purposes of the Act either by overcoming the presumption created under §40-11.5-102(4) with clear and convincing proof or by showing that he was not offered coverage that satisfied the requirements set forth in §40-11.5-102(5). Because claimant established that the policy negotiated through respondent did not comply with those requirements, we need not reach the issue of whether he otherwise established the existence of an employment relationship.

Id. at 533-534.

Here, we conclude the ALJ erred in imposing a daily penalty under §8-43-304(1), C.R.S. for the respondent's violation of §40-11.5-102, C.R.S. As detailed above, the Panel and the Court previously held that the AIG policy did not provide coverage "at least comparable" to the benefits offered under the workers' compensation system. *Kondracki v. MKBS, LLC d/b/a Metro Taxi*, W.C. No. 4-782-175 (March 23, 2011), *aff'd MKBS, LLC d/b/a Metro Taxi v. Industrial Claim Appeals Office*, 11CA0765 (Jan. 12,

2012)(NSOP). As a result, the claimant was declared to be an employee of the respondent, and the respondent is therefore liable for benefits. As such, the provisions or requirements of §40-11.5-102, C.R.S. no longer apply, and a penalty under §8-43-304(1), C.R.S. for violating §40-11.5-102, C.R.S. is not available. Thus, we necessarily reverse the ALJ's order awarding penalties under §8-43-304, C.R.S. for the respondent's violation of §40-11.5-102, C.R.S. for failing to provide "at least comparable coverage."

IT IS THEREFORE ORDERED that the ALJ's order dated July 9, 2018, is reversed to the extent penalties were awarded under §8-43-304(1), C.R.S. for the respondent's violation of §40-11.5-102, C.R.S. and in all other respects the order is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

David G. Kroll

CERTIFICATE OF MAILING

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

2/12/19 by TT .

THE BABCOCK LAW FIRM LLC, Attn: R MACK BABCOCK ESQ, 4600 SOUTH ULSTER STREET SUITE 800, DENVER, CO, 80237 (For Claimant)
SCOTT A. MEIKLEJOHN LLC, Attn: SCOTT A. MEIKLEJOHN ESQ, 1626 WASHINGTON STREET, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-782-175-001

IN THE MATTER OF THE CLAIM OF:

JANUSZ KONDRACKI,

Claimant,

v.

FINAL ORDER

MKBS LLC AND TLPQC SERVICES LLC,

Employer,

and

NON INSURED,

Respondent.

The respondent seeks review of an order of Administrative Law Judge Michelle E. Jones (ALJ) dated July 27, 2018, that awarded medical benefits and imposed a penalty under §8-43-304(1), C.R.S. for failing to timely pay or deny medical bills in violation of Workers' Compensation Rule of Procedure 16-12(A)(3), 7 Code Colo. Reg. 1101-3 (Rule 16-12(A)(3))[1]. We affirm.

This matter went to hearing on whether the respondent is responsible for payment of medical bills from Golden Autumn Care Home (Golden Autumn), the nursing home where the claimant resides and receives medical treatment in Gdansk, Poland, and whether the respondent is subject to penalties under §8-43-304(1), C.R.S. for failing to timely pay or deny medical bills from Golden Autumn in violation of Rule 16-12.

After the hearing, the ALJ made the following pertinent findings. The claimant sustained a work related injury on May 30, 2007, while operating a taxi cab for the respondent. On that date, an unknown individual entered the rear driver's side door of the claimant's cab, pulled a gun, and shot the claimant in the back of the head and neck. The claimant sustained extensive injuries in the shooting. Following the industrial injury,

[1] When imposing a penalty, ALJ Jones referred to Rule 16-11(A)(3) in her order. In his application for hearing, the claimant sought penalties under §8-43-304(1), C.R.S. for the respondent's violation of Rule 16-11. However, at the time of the conduct at issue, or at the time the respondent failed to pay medical benefits, the applicable Rule was set forth in Rule 16-12(A)(3). Consequently, we will refer to Rule 16-12 rather than Rule 16-11 throughout this order. As of January 1, 2019, the applicable sections of Rule 16 are again designated as part of Rule 16-11.

the claimant remained in the United States for several years residing in and being cared for at two separate nursing homes.

In July 2014, the claimant moved back to Gdansk, Poland. On July 2, 2014, the claimant became a resident and patient of Golden Autumn. The respondent paid for invoices and care from Golden Autumn from the beginning of the claimant's residence in July 2014 through April 2017.

On March 14, 2017, the respondent's counsel sent a letter to the claimant's counsel notifying him that Golden Autumn should direct invoices to the respondent's new billing address:

> Metro Taxi
> Attention: Mr. Kyle Brown, General Manager
> 5909 East 38th Ave.
> Denver, CO 80207 USA

The March 2017 and April 2017 invoices from Golden Autumn were paid for by the respondent in June 2017.

On July 5, 2017, the respondent's counsel sent an email to the claimant's counsel stating that the respondent was having difficulty receiving invoices from Golden Autumn which led to corresponding difficulty in paying. The respondent requested the claimant's counsel assistance in facilitating Golden Autumn getting invoices to the proper person or the respondent's general manager, Mr. Brown, so that the invoices could be paid.

On August 18, 2017, the claimant filed an application for hearing endorsing medical benefits and penalties as issues to be heard. The application stated that penalties were being sought pursuant to §8-43-304(1), C.R.S. for the respondent's failure to timely pay or deny medical treatment from the claimant's nursing home and medical providers in violation of Rule 16-12.

That same day, Mr. Brown sent an email to the claimant's counsel apologizing for any inconveniences that may have been caused to the claimant. Mr. Brown indicated that the respondent had been "in a low side" of its business for quite some time and had been juggling expenses just to keep the doors open. Mr. Brown indicated disruption in their industry by Lyft and Uber along with market saturation of three new taxi companies. Mr. Brown also indicated that one of the owners had suddenly passed away and that the deceased owner had been the one who took on the responsibility at the company for the

management of the claimant's case. Mr. Brown further explained that the respondent had been responsible for the claimant's care for many years and had met all of its requirements. He expressed that the respondent desired an opportunity to rectify the issue without adding expense.

Counsel for the claimant responded on August 21, 2017, stating that Golden Autumn was threatening to evict the claimant and asked Mr. Brown and the respondent's counsel for a timeframe within which the situation could be rectified. Counsel also inquired whether the respondent had contacted Golden Autumn to let them know what was going on and asked whether the respondent had an English speaking contact there in order to explain the situation. Counsel indicated that if the respondent did not have an English speaking contact, he would see if he could find one.

On August 21, 2017, Mr. Brown responded by email message, thanking counsel and informing him that the respondent did not have an English speaking contact and would accept counsel's offer of help to find one. Mr. Brown also stated he would make it his personal responsibility to work with that person to get the situation back on track. Mr. Brown later emailed counsel asking if he had found an English speaking contact at the nursing home, and counsel responded he had emailed the claimant's brother but had not heard back.

Then, on September 5, 2017, Mr. Brown emailed counsel, stating that he was prepared to send payment to Golden Autumn on that day or the next.

Subsequently, on September 18, 2017, the respondent filed a response to the claimant's application for hearing, stating that it was not denying treatment of the claimant by Golden Autumn.

In late fall of 2017, Mr. Brown left the respondent's employment. Employer records showed that as of the May 2018 hearing, the respondent had not made payment to Golden Autumn for the claimant's treatment bills since June 5, 2017.

The parties subsequently engaged in discovery. In response to the claimant's discovery, the respondent claimed it had not received bills from Golden Autumn since February 2017. The respondent acknowledged that medical bills from March 2017 to the present likely existed, but contended it was not in possession of them.

On November 15, 2017, a paralegal for the claimant's counsel sent an email to the respondent's counsel forwarding invoices from Golden Autumn for June, July, August,

September, and October 2017. These bills to the respondent all had the following address listed on the front of the invoice:

Metro Taxi-CaseNet MC
2224 S. Fraser St, Suite 5
Aurora, CO 80014

Thereafter, on March 20, 2018, a paralegal for the claimant's counsel sent a letter to the respondent's counsel forwarding the invoices from Golden Autumn for June, July, August, September, October, November, and December 2017, as well as for January and February 2018. All of these invoices from Golden Autumn had the following address on the front of the invoice:

Metro Taxi-CaseNet MC
2224 S. Fraser St, Suite 5
Aurora, CO 80014

Then, on April 6, 2018, a paralegal for the claimant's counsel sent an email to the respondent's counsel. Attached to the email was a copy of an envelope sent from Golden Autumn with billing for the month of February 2018 that was stamped "not known" and "unable to forward." The paralegal asked the respondent's counsel to explain what happened and asked if the address changed. The envelope showed the billing was mailed to:

Metro Taxi
Attention: Mr. Kyle Brown, General Manager
5909 East 38th Ave.
Denver, CO 80207 USA

On May 15, 2018, the respondent supplemented discovery responses. The respondent again indicated it had not received bills from Golden Autumn since February 2017. The respondent also indicated its counsel had been provided a few additional medical bills by the claimant's counsel and had forwarded them to the respondent.

During the ensuing hearing, the respondent's current vice present, Sean McBride, testified. He explained that no payment had been issued to Golden Autumn based on the records he had since June 2017. He also indicated that the respondent was still in business, still paying employees, and still paying its general business expenses.

The ALJ ultimately concluded the respondent continues to be responsible for the claimant's treatment provided by Golden Autumn and is liable for the invoices and bills issued by Golden Autumn on a monthly basis pursuant to §8-42-101(1)(a), C.R.S. She found that the last payment the respondent had made to Golden Autumn was June 2017 and this payment covered treatment provided in April 2017. She further found that as of the date of the hearing, the respondent had not made any payments to Golden Autumn for the claimant's treatment and the bills for treatment covering June, July, August, September, October, November, and December 2017, and January and February 2018. She further found that while in February 2018 Golden Autumn had mailed an invoice to the respondent's new and correct address, all the other bills in question listed an outdated or incorrect address for the respondent. Nevertheless, the ALJ found that an email message was sent and received by the respondent's counsel on November 15, 2017, with unpaid invoices attached from Golden Autumn for June, July, August, September, and October 2017. The ALJ therefore concluded the respondent had actual receipt of the Golden Autumn bills on November 15, 2017. She determined that under Rule 16-12, payment was due by December 15, 2017. The ALJ concluded the respondent's inaction in failing to pay invoices by December 15, 2017, was objectively unreasonable. The ALJ determined the violation period was 151 days, or from December 15, 2017, to the day before the hearing on May 15, 2018, and she assessed a penalty under §8-43-304(1), C.R.S. of $250 per day, for a total penalty of $37,750.

The respondent raises only one issue on appeal. The respondent argues the penalty imposed by the ALJ is excessive. The respondent reasons that its disruption in payments for Golden Autumn began after February 13, 2017, and this was during a time where one of the owners suddenly passed away, and soon thereafter Mr. Brown resigned his employment. According to the respondent, Mr. Brown was the employee who assumed the duties of paying the Golden Autumn bills. The respondent therefore argues these facts combined with its difficult financial circumstances show facts mitigating against the imposition of a penalty. We are not persuaded by the respondent's argument.

Rule 16-12(A)(3) provides that all bills submitted by a provider are due and payable in accordance with the Medical Fee Schedule within 30 days after receipt by the payer. Rule 16-12(A)(5) further provides that the date of receipt of the bill may be established by the payer's date stamp or electronic acknowledgement date.

The general penalty provision in §8-43-304(1), C.R.S. provides in pertinent part that any employer who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided,

or fails, neglects, or refuses to obey any lawful order made by the director or panel shall be punished by a fine of not more than one thousand dollars per day for each offense.

Thus, the general penalty provision contained in § 8-43-304(1), C.R.S. sets forth four categories of conduct and authorizes the imposition of the described penalties when an employer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. *See Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001). The limiting phrase contained in § 8-43-304(1), C.R.S. "for which no penalty has been specifically provided" modifies the first three categories, but does not modify the fourth category, which is disobeying a lawful order. *Holliday v. Bestop, Inc., supra*; *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004). The term "order" as used in § 8-43-304(1), C.R.S. includes a rule or regulation. *See* §8-40-201(15), C.R.S.; *Holliday v. Bestop, Inc., supra*; *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010)(failure to comply with a procedural rule is a failure to obey an "order" within the meaning of § 8-43-304(1), C.R.S.); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002).

Once the ALJ determines the disputed conduct constitutes a violation of the Act, of a duty lawfully enjoined, or of an order, the ALJ may impose penalties if she also finds that the party's actions were objectively unreasonable. *See Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The reasonableness of the employer's conduct depends on whether it was predicated on a rational argument based on law or fact. *Id.*; *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997). Whether an employer's conduct was reasonable is a question of fact for the ALJ. *See Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

Additionally, in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323, 324 (Colo. App. 2005), the Court of Appeals set forth three factors to be considered when determining whether a penalty is excessive: (1) the reprehensibility of the conduct; (2) the disparity between the harm to the claimant and the penalty; and (3) the difference between the penalty and civil damages that could be imposed in comparable cases.

We consider the assessment of the statutory penalty under an abuse of discretion standard of review. *Associated Business Products v. Industrial Claim Appeals Office*, *supra*. Under this standard, we must determine whether, under the totality of the factual circumstances at the time of the ALJ's determination, the ALJ's order "exceeds the bounds of reason." *Rosenberg v. Board of Education of School Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985). Because the ALJ's authority is discretionary, we may not disturb her determination of the amount of the penalty to be imposed in the absence of fraud or an abuse of discretion. *Id*.

Here, we are unable to conclude the ALJ's imposition of a $250 daily penalty under §8-43-304(1), C.R.S. for the respondent's violation of Rule 16-12(A)(3) is excessive. Initially, the ALJ's assessment of a penalty was within the statutory parameters established by §8-43-304(1), C.R.S. and is well below the permissible amount of one thousand dollars per day. Also, the record supports the ALJ's determination that while it did not appear the claimant had been evicted from Golden Autumn, the claimant nevertheless was harmed since he requires care in a nursing home and he has unpaid bills with no timeframe on when such bills will be paid. Ex. 24-2. Additionally, the record further supports the ALJ's determination that the respondent's motivation for failing to pay the invoices from Golden Autumn is related to the downturn in its business and to its poor record keeping/management skills when employees left employment and did not transmit important information about the claimant's bills. Ex. 23-1; Tr. at 41-42, 58. Further, as the ALJ found, the record does not disclose that the respondent made significant attempts at mitigation. Tr. at 57-58; Exs. 23-1, 24-1, 25-1. *See Grant v. Professional Contract Services*, W.C. No. 4-531-613(Sept. 16, 2005). Thus, we have no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated July 27, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

David G. Kroll

CERTIFICATE OF MAILING

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

2/11/19 by TT .

THE BABCOCK LAW FIRM LLC, Attn: R MACK BABCOCK ESQ, 4600 SOUTH ULSTER STREET SUITE 800, DENVER, CO, 80237 (For Claimant)
SCOTT A. MEIKLEJOHN LLC, Attn: SCOTT A. MEIKLEJOHN ESQ, 1626 WASHINGTON STREET, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-052-934

IN THE MATTER OF THE CLAIM OF:

CINDY MCROBBIE,

Claimant,

v.

ORDER

ESTATE OF MARY E WALES, DECEASED, and CAROLYN COOKIE CARGILE,

Employer,

and

NON INSURED,

Insurer,
Respondents.

The respondents (Estate of Mary E. Wales and Carolyn Cargile) seek review of two orders of Administrative Law Judge Sidanycz (ALJ) dated December 12 and December 20 , 2018, that ordered the respondents' Petition to Review of a November 9, 2018, Corrected Order be dismissed and that denied the respondents' motion for reconsideration of the dismissal. We set aside the orders of the ALJ and remand the matter for further proceedings.

A hearing was held in the matter on August 2 and 20, 2018. In a Corrected Order of November 9, 2018, the ALJ found the claimant worked as a personal caregiver for Mary Wales, a 93 year old in poor health. The ALJ ruled the claimant was hired and supervised by the claimant's daughter, Carolyn Cargile, and both Ms. Wales and Ms. Cargile were joint employers. The ALJ's order determined the claimant was injured at work on July 7, 2017. The claimant was determined to have required medical treatment and was entitled to temporary disability benefits. The respondents were adjudged to be uninsured for workers' compensation benefits. Several months subsequent to the hearing Ms. Wales passed away. The ALJ calculated the claimant's average weekly wage (AWW) and awarded the claimant $40,896 in temporary benefits up to the date of the August 2 hearing. The respondents were also directed to pay $73,576 in medical bills. Penalties due to non-insurance were ordered to be paid to the Uninsured Employer Fund in the amount of $28,618 as required by § 8-43-408(5). The respondents were then required to pay to the trustee with the Division of Workers' Compensation the amount of

$144,000 within 10 days to secure the payment of all unpaid compensation and benefits awarded pursuant to § 8-43-408(2) C.R.S. The respondents sent the trustee a check for this amount on December 7, 2018.

The respondents filed a petition to review the November 9 Corrected Order on November 29. A briefing schedule was sent to the parties stating the respondents were to file a brief in support of the petition to review by December 20. On December 4 the claimant submitted a Motion to Strike the Petition to Review asserting that because the respondents had not made their deposit with the trustee or submitted a bond for the ordered amount of benefits within ten days, "the respondents cannot appeal, or file a petition to review.…" The ALJ agreed and issued an order on December 12 striking the Petition to Review. The respondents filed a motion to reconsider the dismissal of their petition to review on December 18. The ALJ denied the motion in an order of December 20. The respondents submitted a second petition to review on January 8, 2019, appealing the two orders striking the original petition to review.[1]

The claimant cites as authority the terms of § 8-43-408(2):

> (2) In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge … The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge.

[1] While the respondents have filed two Petitions to Review, dated November 29 and January 8, we also construe the respondents' December 18 motion as yet a third Petition to Review the ALJ's dismissal of their original Petition to Review. In *Lassiter v. Trojan Labor*, W.C. No. 4-741-836 (June 23, 2010) we held that a petition to review need not assume any particular form as long as it features specific objections to a particular order and contains a detailed statement of errors or objections. The respondents' motion fulfills this criteria. *See also Miller v. Industrial Commission*, 474 P.2d 177, 178 (Colo. App. 1970; *Ward v. Azotea Contractors*, 748 P.2d 338, 340 note 3 (Colo. 1987).

The claimant then points to paragraphs 11 and 13 of the ALJ's Corrected Order. In those sections the ALJ provided:

> 11. In lieu of payment of the above compensation and benefits to the claimant, the respondents shall:
>
> a. Within ten (10) days of the date of service of this order, deposit the sum of $144,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded…
>
> * * *
>
> 13. The filing of any appeal, including a petition to review, shall not relieve the respondents of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2).

The claimant asserted in her brief opposing the January 8 petition to review that "where the statutory requirement set forth in § 8-43-408(2), C.R.S. mandating the payment of the deposit or bond 10 days prior to the deadline for the Petition for Review is ignored, the defect is jurisdictional, and a review of the claim on the merits is barred." Brief In Opposition at 9.

Conversely, the respondents contend: "Nothing within § 8-43-408(2) or [in] any other section of the Workers' Compensation Act … or any procedural rule prohibits the filing of a petition to review based on the sums in a Corrected Order not yet having been paid as of the date the Petition to Review is due...."

The respondents' argument is compelling. The plain language of § 8-43-408(2) does not state that the deposit with the trustee is a prerequisite to the ability to file a petition to review. The statement in the statute "The filing of any appeal … shall not relieve the employer of the obligation … to pay the designated sum to a trustee..." states nothing about the filing being a condition for the pursuit of an appeal.

The purpose of the deposit is in relation to the opportunity given the claimant in §8-43-408(3) to immediately take steps to collect the award of benefits through a filing in the district court. That paragraph (3) vacates those proceedings in the event the respondent submits to the trustee a deposit or a bond.

The terms of subparagraph (3) indicates an appeal may be initiated without the necessity of a deposit or bond. One of the two circumstances described in that subsection as a condition requiring that a judgment enrolled by the claimant with the district court be vacated is stated to occur "upon the reversal, setting aside, modification or vacation of said order or award.…" Since the posting of a deposit or bond would obviate the ability of the claimant to even file the award with the district court, the "reversal, modification or setting aside" necessarily refers to an appeal allowed to proceed in the absence of such a deposit or bond.

Conditioning an appeal by requiring the deposit of the award of benefits is contrary to the scheme of the Act which allows a party "dissatisfied with an order that requires a party to pay a penalty or benefits…" to "file a petition to review … within twenty days…." Section 8-43-301(2). There is no reference to any other obligation preceding the filing of the petition.

In both *Hanley v. Timberline Roofing*, W.C. No.4 -010-508 (January 26, 1993), and in *Anderson v. Merchants Oil Co*., W.C. No. 4-114-075 (October 26, 1994) and (November 28, 1995), *aff'd*, *Merchants Oil v. Anderson*, 897 P.2d 895 (Colo. App. 1995), the failure of the respondent to make a deposit with the trustee did not preclude the respondent from pursuing an appeal to either the Industrial Claim Appeals Office or to the Court of Appeals.

Accordingly, we set aside the December 12 and December 20 , 2018, orders of the ALJ that dismissed the respondents' Petition to Review and remand the matter to the ALJ to establish a new briefing schedule and to complete the appeal process outlined in § 8-43-301(3) through (7).

IT IS THEREFORE ORDERED that the ALJ's orders issued on December 12 and 20, 2018, are set aside and the case is remanded for further proceedings as discussed above.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

CERTIFICATE OF MAILING

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

2/19/19 by TT .

WITHERS SEIDMAN RICE MUELLER GOODBODY PC, Attn: DAVD B MUELLER ESQ, 101 SOUTH THIRD ST SUITE 265, GRAND JUNCTION, CO, 81502 (For Claimant)
WILLOW ARNOLD ESQ, 1850 BASSETT ST APT #827, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-962-098-001

IN THE MATTER OF THE CLAIM OF:

MICHAEL ROMEY,

Claimant,

v.

FINAL ORDER

GOLDEN CORRAL LITTLETON ENGLEWOOD INC,

Employer,

and

REPUBLICAN INDEMNITY COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated October 1, 2018, that denied the claimant's request to reopen his claim and award additional temporary disability benefits. We affirm the decision of the ALJ.

The claimant sustained an injury to his low back at work on September 19, 2014. He treated at the Concentra Clinic and was then referred to Dr. Sacha. The doctor reviewed an MRI of the claimant's low back and diagnosed lumbosacral radiculopathy, degenerative disc disease with facet spondylosis and bulging at L4-5 and L5-S1. The claimant underwent physical therapy and Dr. Sacha administered epidural steroid injections and spinal nerve blocks. He referred the claimant to Dr. Castro for a surgical evaluation. Dr. Castro concluded surgery was justified and performed a laminectomy and discectomy at L4-5 and at L5-S1 in April, 2015. The claimant underwent additional physical therapy and psychological counseling. Nonetheless, the claimant continued to complain of widely vacillating pain in his back and into his legs from one day to the next. Dr. Sacha resolved that the claimant reached maximum medical improvement (MMI) on September 28, 2015. He assigned the claimant a 13% spinal permanent impairment rating and a 2% mental impairment. Permanent work restrictions featuring 25 pounds lifting and occasional bending and lifting were recommended. The respondents submitted a corresponding Final Admission of Liability on November 13, 2015, allowing for medical maintenance benefits subsequent to the date of MMI.

In May, 2017, the claimant applied for a hearing to reopen his claim. The issues were resolved by the parties through a stipulation which provided, among other items, that the claimant was still at MMI as of the September 19, 2017, date of the stipulation.

The claimant left his modified duty job with the employer in July, 2017 and moved from Colorado to a town near Modesto, California. The claimant was referred for treatment in California to Dr. Mirza. Dr. Mirza prescribed continued physical therapy, additional epidural steroid injections and repeat use of a TENS unit. The doctor also prescribed high doses of Fentanyl opioid pain control patches. These patches initially were at a dosage of 25 mcg that was then increased by the doctor to 100 mcg. Dr. Mirza maintained the same activity restrictions and noted a variation in pain complaints similar to those reported by the claimant to Dr. Sacha.

The claimant filed an application for a hearing on May 2, 2018, to reopen his claim and to obtain temporary disability benefits as of September 20, 2017. A hearing was scheduled for August 28, 2018. The claimant testified that his back condition gradually worsened after MMI and after September, 2017, such that he could no longer work due to his pain. He indicated that some of his symptoms have improved after using the medications prescribed by Dr. Mirza.

Dr. Sacha testified at the hearing in regard to his review of Dr. Mirza's records and his own recent examination of the claimant on July 5, 2018. Dr. Sacha explained the condition of the claimant's work injury had not changed since the date of MMI. He observed the claimant continued to complain of pain levels that ranged from 5 out of 10 on some days and 9 of 10 on others. The claimant's condition featured the same limitations and pain issues as it did before the claimant moved to California. Dr. Sacha did note that Dr. Mirza's prescription of very high doses of opioid medication was leading to a deterioration of the claimant's overall health. It was causing the claimant to complain of pain occurring in many other locations in his body. The doctor described how the high dosages of Fentanyl posed a risk to the claimant for respiratory depression, generalized increases in pain, gastro-intestinal disorders, dehydration, cardiac dysfunction and weight loss. He pointed to Colorado rules prohibiting the prescription of Fentanyl in this case and the Medical Treatment Guidelines for Chronic Pain Disorders which provide: "Fentanyl … is ***not recommended*** for use with musculoskeletal chronic pain patients." Dr. Sacha advised the claimant should find a new doctor in California and should undergo treatment to wean him off the opioid medication. He indicated this would be considered maintenance medical treatment.

The ALJ ruled in his decision of October 1, 2018, that the claimant had failed to demonstrate a change in his condition that would justify a reopening of the claim. The claimant was noted to have a long history of chronic low back and radiating leg pain that was consistent with his condition at the point of MMI and also as it was on September 19, 2017. The ALJ credited the testimony of Dr. Sacha to the effect that the condition of the claimant's back injury had not substantially changed since MMI. The ALJ ruled the claimant had not established he had experienced a worsened condition that posed a greater impact on his work capacity as compared to his status at the time of MMI. No medical treatment had been denied by the respondents. The claimant's condition was adjudged to remain at MMI and the claimant's request to reopen and for temporary benefits was denied.

The ALJ compared the matter to the case of *Richards v. Industrial Claim Appeals Office*, 996 P.2d 408 (Colo. App. 2000). In *Richards*, a narcotic medication prescribed for the claimant had lost its effectiveness and the claimant's pain increased for a period until a replacement narcotic was found. His physician testified the claimant's condition had deteriorated during that time but that the claimant remained at MMI and the pain treatment was within the category of maintenance medical care. The claimant requested his claim be reopened due to the change in condition and that he be awarded temporary disability benefits. However, the Court affirmed the ALJ's conclusion the claimant remained at MMI. Due to the continuing integrity of his MMI status, the claimant was deemed ineligible for temporary benefits. Here, the ALJ similarly resolved that because the claimant's condition also remained at MMI, the claimant was therefore disqualified from the receipt of additional temporary benefits. There being no additional benefits to be awarded, the reopening of the claim was not warranted.

Pursuant to § 8-43-303, "any award" may be reopened on the grounds of error, mistake, or change in condition. The intent of this statute is to provide a remedy to claimants who are entitled to awards of any type of benefits, whether medical or disability. *Cordova v. Indus.Claim Appeals Office, supra.* The claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office, supra.* The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo.App.1996).

On appeal the claimant pursues two arguments. First, the claimant asserts the ALJ erred in applying an incorrect standard to judge the nature of the change in condition necessary to reopen a claim. Second, the claimant argues that the adoption by the ALJ of Dr. Sacha's testimony that the claimant needs treatment to wean himself from Fentanyl

indicates the claimant's condition has worsened post his MMI status such that he now needs curative medical treatment and has additional work restrictions.

I.

Insofar as the initial argument is concerned, the claimant complains the ALJ held the claimant was required to establish his condition had 'substantially' changed in order to justify reopening. Instead, it is contended reopening may be supported by 'any' change in condition. The Supreme Court indicated in *Anderson v. Longmont Toyota*, 102 P.3d 323, 330 (Colo. 2004), that "Change of condition refers to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury." However, a reading of the ALJ's decision reveals a holding that "… the ALJ concludes that there is insufficient objective evidence of a worsening of condition and/or an entitlement to additional temporary disability benefits to warrant reopening." Conclusions of Law ¶ H. The ALJ also concluded: "As found, claimant failed to prove a change of his medical condition to justify reopening his claim …" The ALJ only applied the term 'substantially' when referring to the opinion of Dr. Sacha because that was the term the doctor used in his testimony. Nonetheless, the quoted conclusions of law decidedly do not use that qualifier as part of the reopening standard.

The claimant also seeks to distinguish his claim from that in *Richards*, *supra*, on the basis that in *Richards,* the Court only required the claimant to demonstrate reopening justified by the need for temporary disability benefits, while in the claimant's case, he states his case for reopening involves "both medical and temporary benefits." However, the claimant is not seeking additional medical benefits in this matter as the respondents have always provided payment for the treatments proposed. Accordingly, the *Richards* situation is significantly similar. That decision supports the ruling of the ALJ here.

In *City of Colorado Springs v. Industrial Claims Appeals Office*, 954 P.2d 637 (Colo. App. 1997), the Court addressed a claim for reopening premised on a change of condition caused by the treatment related to the original work injury. The Court noted the claimant would not be entitled to additional temporary benefits in that case for the reason that the "new injury, caused no greater impact upon claimant's temporary work capability than he had originally sustained as the result of the injury to his back." *Id*. at 640. The circumstance in *City of Colorado Springs* is parallel to that in this case insofar as it is the treatment for the injury that led to the alleged change in condition. We have read *City of Colorado Springs* to require a showing by the claimant, "that it is the impact of the claimant's work 'capacity', not proof of an actual wage loss, which determines

whether the claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI." *Friesz v. Wal-Mart Stores*, W.C. No. 4-823-944-01 (December 21, 2012). Dr. Sacha testified the claimant's condition in 2018 was not more disabling or work restricted since he last treated the claimant in July, 2017. Dr. Mirza has not recommended any modifications of the prior work limitations. Premised on the dearth of evidence of any change in the claimant's work capacity, we do not find error in the ALJ's reluctance to reopen the claim.

II.

The claimant's second argument contends that medical care subsequent to MMI is appropriate if it is designed to 'maintain' the claimant's condition but that treatment meant to 'cure' the condition is not allowed post MMI. The claimant notes that Dr. Sacha has identified the claimant's overuse of Fentanyl as a condition for which the claimant requires medical treatment to achieve a cure, i.e. the claimant must be rendered Fentanyl free. As a result, the claimant reasons his condition has necessarily worsened. The claimant, in addition, points to references in Dr. Mirza's reports stating he recommends the claimant is not to drive under the influence of the medications. The claimant characterizes this recommendation as a new and further limitation on his work capacity.

This argument does not take into account several pieces of evidence in the record. Dr. Sacha testified the efforts involved in weaning the claimant off Fentanyl more appropriately fall into the category of maintenance medical treatment. In addition, because denial of medical benefits was not an issue at the hearing, the ALJ made no finding that the claimant was engaged in the overuse of narcotic medication nor did he order that any weaning treatment be authorized or even that the claimant should be treated by any doctor other than Dr. Mirza. The claimant withdrew any request for medical treatment at the outset of the August 28 hearing. Tr. at 4-5. The reference to driving limitations in Dr. Mirza's reports appears to refer to another prescription he provided for Soma. The paragraph in his report following the advisement to avoid driving ("while taking the medication"), describes the prescription for Soma that is aimed at insomnia and muscle relaxation. Accordingly, the claimant would be taking that medication in the evening when he was attempting to sleep and not while attempting to drive. The claimant, in fact, testified that in July, 2018, while making his trip to Denver to attend his appointment with Dr. Sacha, he drove for three hours to arrive at the Modesto airport. Tr. at 24. The record is not clear that Dr. Mirza has effectively modified the claimant's work capacity by limiting driving while certain medication is being used.

As noted, the claimant is asserting that the side effects of a treatment for his work injury (the use of Fentanyl narcotics) have caused a change in his condition that justifies reopening and an award of temporary disability benefits. However, the claimant has not requested the medical treatment designed to mitigate these side effects (necessary to wean him from Fentanyl use). He testified he did not agree with Dr. Sacha that he should abstain from Fentanyl. Tr. at 44. The claimant stated he felt Dr. Mirza's treatment was superior to that of Dr. Sacha's for the sole reason that Dr. Mirza prescribed high doses of Fentanyl. Tr. at 45. He also indicated he was not interested in switching his care to any physician other than Dr. Mirza.

Dr. Sacha had set forth in his July 5, 2018, report prior to the hearing that the basis for many of the claimant's current complaints are caused by his use of Fentanyl narcotics, that his dosage is beyond that allowed by either Colorado or California regulations and that these circumstances are caused entirely by his current physician. Despite these admonitions, the claimant testified he was unwilling to cease Fentanyl use. The Act provides a claimant is entitled to benefits for any personal injury arising out of and in the course of employment "not intentionally self-afflicted". § 8-301(1)(c). In addition, the director or an ALJ has the authority to reduce or suspend compensation where a claimant "persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refused to submit to such medical … treatment … as is reasonably essential to promote recovery…." § 8-43-404(3). Through his argument on appeal, the claimant is proposing instead, that his claim be reopened and he be *provided* compensation for engaging in the very injurious practice that has caused a worsening of his condition to justify that reopening. We do not find this contention a basis to set aside the ruling of the ALJ.

An ALJ's decision to grant or deny a petition to reopen may "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal."). Here, the decision of the ALJ is supported by substantial evidence in the record. The ALJ relied on the testimony of Dr. Sacha to conclude the claimant's condition was unchanged following the date of MMI. He noted that at the point of MMI the claimant was experiencing swings in the degree of pain he encountered from one week to the next. This variability was found to continue subsequent to MMI and it did not represent a change, or at least not a change in condition adequate to justify reopening the claim. The ALJ's ruling the claimant had not established he had experienced a worsened condition that posed a greater impact on his work capacity as compared to his status at the time of MMI is supported by the

restrictions recommended by Dr. Sacha and the absence of any later modifications by Dr. Mirza. We therefore find no reason to attribute error to the decision of the ALJ.

IT IS THEREFORE ORDERED that the ALJ's order issued October 1, 2018, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

John A. Steninger

CERTIFICATE OF MAILING

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

2/20/19 by TT .

IRWIN CARMICKLE FRALEY LLP, Attn: ROGER FRAYLEY JR ESQ, 6377 S REVERE PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
RUEGSEGGER SIMONS & STERN LLC, Attn: THOMAS M STERN ESQ, C/O: MICHELE STARK CAREY ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-048-431-001

IN THE MATTER OF THE CLAIM OF:

EFRAIN MADERA,

Claimant,

v.

GCA SERVICES GROUP INC,

Employer,

and

ACE AMERICAN INSURANCE CO,

Insurer,
Respondents.

REMAND ORDER

The claimant seeks review of two orders of Administrative Law Judge Cayce (ALJ) dated May 9, 2018, and July 6, 2018. The May 9 order denied and dismissed the claimant's claim for compensation and the July 6 order denied the claimant's motion to reopen the proceeding to receive additional evidence. We reverse the July 6 order and set aside the May 9 order.

The ALJ conducted the merits hearing on April 5, 2018, on several issues; but the pertinent issue before the ALJ was whether the claimant sustained an injury arising out of and in the course of his employment. The ALJ established findings of fact that are summarized below.

The claimant had a prior workers' compensation injury on March 7, 2014, wherein he sustained cervical and lumbar strains. He was placed at maximum medical improvement (MMI) on November 24, 2014, with a 5% permanent impairment rating for the lumbar spine. Claimant requested a Division sponsored independent medical examination (DIME) which was held on March 24, 2015. Dr. Pham upheld the MMI determination and assigned 13% whole person impairment for the lumbar spine. There was no rating provided for the cervical spine. Claimant was provided with permanent restrictions of no lifting, pushing or pulling over 20 pounds, and limited bending or twisting at the waist.

Here, claimant alleged that he sustained a work injury on May 25, 2017, while emptying a recycling bin. Claimant is a 62-year-old man who had been employed by this employer as an office cleaner since 2011. Claimant worked this job Monday through Friday 4:00 p.m. to 11:00 p.m., and occasionally on the weekends. Claimant is also concurrently employed as a day porter for a separate employer, ICS, performing cleaning services. Claimant worked for ICS Monday through Friday from 7:00 a.m. to 3:30 p.m. and three to four hour shifts on Saturdays.

Claimant alleges that his work injury occurred on Thursday, May 25, 2017, at approximately 6:00 or 7:00 p.m. Claimant testified that while lifting the bottom of a recycling container, he felt pain in his left ribcage, left shoulder, and along the left side of his neck. He did not report the injury to his employer on the date of the injury because he believed his symptoms would resolve. Further, the claimant testified that his supervisor, Mr. Perez, was not at work on May 25 as he was on vacation. Claimant worked on May 26 and did not report the injury on that date because he continued to think his symptoms would resolve and because his supervisor was not at work. Claimant testified that he mentioned the injury to one or two of his co-workers that he believed he had injured himself the day prior. The claimant also worked for his concurrent employer on May 26.

Claimant was not scheduled to work on Saturday, May 27 through Monday, May 29 as a result of the Memorial Day holiday. The claimant worked Tuesday, May 30, and reported the alleged work injury on that day to his supervisor who had returned from vacation.

The ALJ found that the claimant selected Concentra for his medical care. Claimant was first seen by Concentra on May 31. He complained of left shoulder pain that radiated up his neck and down his left arm to his mid-back. He denied prior problems with his left arm, shoulder, neck or upper back. On June 2, the claimant was taken off work due to increased spasms. On June 6, the claimant returned to Concentra with increasing symptoms. Dr. Cava diagnosed claimant with cervical radicular pain, cervical strain, muscle spasm, and thoracic myofascial strain. Claimant returned to Concentra on June 9 with ongoing problems. The restriction of no work continued while awaiting authorization for an MRI and EMG.

Respondents filed a Notice of Contest on June 9.

On June 20, the claimant returned to Concentra and reported that he had continued working for his concurrent employer but not the job with this employer. Dr. Cava noted that his request for the MRI referral had been denied as a result of the claim denial. Dr.

Cava released the claimant with modified duty restrictions. The claimant was allowed to work his entire shift but was instructed not to reach above the shoulders and no use of the left upper extremity. No further treatment was provided. Claimant testified that he was not able to perform his full job for the employer when released to work on June 20, but Mr. Perez permitted him to perform lighter work duties.

Dr. Mason evaluated the claimant on November 14, 2017. Claimant denied previous neck problems and did not report having concurrent employment. Dr. Mason diagnosed a cervical sprain/strain with findings suggestive of C5 radiculopathy on the left, with no indication of a shoulder injury. Dr. Mason recommended an MRI and flexion extension x-rays.

Claimant also saw Dr. Lesnak on November 14, 2017, at the request of the respondents. Dr. Lesnak found no clinical evidence of symptomatic left shoulder joint pathology, or cervical or thoracic symptomatic spine pathology. He opined that claimant did not sustain any injurious event while working on May 25, 2017. In support of his opinion, the doctor noted that claimant delayed reporting the injury, despite having at least three or four prior work injuries and being familiar with how to report work injuries. Dr. Lesnak opined that regardless of causality, Claimant does not require any diagnostic testing or specific treatments.

Dr. Lesnak testified at hearing consistent with his IME report. He opined that the claimant's subjective complaints are not supported by any objective findings and that the mechanism of injury described by the claimant does not correlate with a shoulder or neck injury. Dr. Lesnak acknowledged that a cervical strain can cause referred pain into the shoulder, but continued to opine that claimant did not sustain an injurious event. Dr. Lesnak testified that claimant had chronic, pre-existing neck symptoms.

Claimant testified that he continues to have problems with the left side of his neck and shoulder, and he has difficulty lifting overhead and feels pain when lifting certain weight, and feels pain when he has to use force with his hand/arm.

Per the employer's time records, claimant did not work any hours for the employer on Thursday, May 25, 2017. The records also show that claimant did not work any hours for the employer the entire week of Monday, May 22 through Friday, May 26, 2017. The time records show the claimant worked 32.5 hours for the employer for the week of May 15 through May 19; and 35 hours the week of May 29 through June 2, 2017. The employer's pay records coincide with the time records.

Claimant testified that he did not use a time clock or any other timekeeping system, but reported his time to his supervisor, Mr. Perez, who was responsible for entering his time. Claimant testified that he did, in fact, work for the employer during the week of May 22 through May 26, 2017. He believed that the timecards were not accurate or there was some error on the part of his supervisor in inputting his time. He surmised that this error had occurred because of Mr. Perez's vacation that week. He was unaware that he had not been paid for that time, and had not addressed the pay discrepancy with the employer. The pay records do not reflect that the employer ever retroactively paid the claimant for any time from May 22 through May 26, 2017.

The ALJ found that the claimant's testimony was not credible or persuasive. The ALJ credited the opinion of Dr. Lesnak, and found that the claimant did not sustain an injury arising out of and in the course of his employment for the employer on May 25, 2017.

In the ALJ's conclusions of law, she addressed the compensability issue. The ALJ prefaced her reasoning by stating that the claimant had not, in fact, worked any hours for the employer from May 22 through May 26, 2017, nor had the claimant been paid for any hours allegedly worked during that time frame. The ALJ stated,

> While claimant contends the time records are in error, there is no evidence claimant attempted to address the alleged discrepancy with employer or was subsequently paid for time he contends he worked. The lack of explanation on claimant's part as to what would be a significant discrepancy in pay supports the employer's contention that claimant did not actually perform any work for employer on the alleged date of injury.
>
> * * *
>
> Finally, Dr. Lesnak credibly opined no injurious event occurred. Based on the totality of the evidence, claimant failed to prove that it is more likely than not he sustained an injury arising out of and in the course of his employment for employer, and that his condition was proximately caused by the performance of services for employer.

The ALJ denied and dismissed the claimant's claim for compensation. As a result of this denial, the ALJ held that the remaining issues of medical benefits, temporary partial disability, authorized treating physician, penalties and offsets were moot.

The claimant timely filed a petition to review on May 29, 2018. The claimant simultaneously filed a motion entitled, "Motion to Reopen Proceedings to Receive Additional Evidence." In this motion, the claimant requested to reopen the order for additional reconsideration based on newly discovered evidence. Specifically the claimant sought to add daily sign-in sheets from the security records of the building where claimant worked for the employer. The claimant asserted that he is required to sign these sheets when reporting to work at the building where GCA Services Group performs cleaning services. The sheets, attached to the motion, purportedly show that the claimant signed into the building on each of the days from May 22 and May 26, 2017 and specifically signed in at 4:40 p.m. on May 25, 2017 and was provided with badge #3 and key set #3 on that date.

In his motion, the claimant reiterated that although he signed in with building security every day, he did not punch a time card for the employer. Rather, his supervisor Francisco Perez submitted the claimant's time to the office for payment.

Claimant's asserted basis of good cause for the late submission of documentary evidence is that he did not have any reason to think that the respondents would allege that the claimant did not actually work on May 25, 2017, until the hearing. During the discovery phase, the claimant contends that the respondents never raised or asserted that defense. Further, the claimant argues that in response to an interrogatory related to expected witnesses and their expected testimony, the respondents did not assert that any witness would testify that the claimant did not work on the date of the claimant injury. Rather, at least one of the witnesses endorsed by the respondents was expected to testify that he saw the claimant at work on May 25, 2017.

Claimant's counsel received the building security evidence on May 24, 2018, subsequent to the hearing and the order of the ALJ. Claimant requested an order allowing the submission of this newly discovered evidence, while also allowing respondents additional time, evidence, or testimony to rebut this evidence if necessary. The claimant requested a revised order from the ALJ taking this evidence into consideration.

The ALJ denied the claimant's motion by order of July 6, 2018. The ALJ determined that the respondents provided the claimant with the timesheets of the

employer on February 26, 2018 (which showed no time entered for the week of May 22 through May 26, 2017). In addition, the respondents disclosed wage records on March 5, 2018, that showed the claimant was not paid for the week of May 22 through May 26, 2017. The ALJ found that the claimant was not aware that he had not been paid for the weeks' worth of work. The ALJ faulted the claimant for not moving to hold the record open for additional evidence or moving for a post-hearing deposition of his supervisor, Mr. Perez, or co-workers Maria Diaz and Ruben Roman. At the conclusion of the hearing, the parties were ordered to submit proposed Findings of Fact, Conclusions of Law, and Order by April 19, 2018, and the claimant did not file a motion requesting leave to submit additional evidence during that process.

The ALJ concluded that the building sign-in sheets were not newly discovered evidence in this claim and, with due diligence, claimant could have offered them either at hearing or in a post-hearing setting. The ALJ found that the respondents had provided the claimant with the paystubs and time sheets at least one month prior to the hearing. Thus, the ALJ determined that the claimant had sufficient time to review these discovery materials and recognize that the claimant did not have any recorded time or corresponding wages for the claimed date of injury. If claimant did not have sufficient time to review the disclosed documents, the claimant could have sought an extension of time to complete a review of the file materials and obtain any necessary evidence or testimony for presentation at hearing, but he did not.

To the extent that the claimant maintains he was unprepared to address the conflicting evidence contained in timesheet and wage records at hearing because the respondents did not highlight the conflicting evidence prior to hearing, the ALJ stated the claimant could have requested leave to submit additional evidence or take the deposition of Mr. Perez, Mr. Roman and/or Ms. Diaz to rebut the conflicting evidence at the conclusion of the hearing, but he did not.

The ALJ did not deem the additional evidence outcome determinative, as the ALJ did not rely solely on whether claimant was or was not working for the employer on May 25, 2017. The ALJ reiterated that she credited Dr. Lesnak's medical opinions that the described mechanism of injury did not correlate with a shoulder or neck injury. The ALJ further credited Dr. Lesnak's opinions that claimant's subjective complaints were not supported by the objective findings. The ALJ found Dr. Lesnak's opinion persuasive that claimant did not sustain any injurious event while working for the employer on May 25, 2017. Based on a totality of the evidence, the ALJ concluded that the claimant did not sustain a work-related injury with the employer on May 25, 2017.

The claimant appeals both the May 9 and July 6, 2018 orders.

I. July 6, 2018 order

The issues raised by the claimant regarding this order are:

1) Whether the ALJ erred in denying his motion to reopen the proceedings to receive additional evidence; and
2) Whether the additional grounds provided by the ALJ in the denial order were sufficient to permit appellate review.

Claimant asserts that he did not have any reason to think that respondents were going to allege that he did not actually work on May 25, 2017, until the hearing. Claimant argues that the respondents' discovery responses never raised or asserted that claimant did not work on the day he said he was injured. Rather, the respondents responded to an interrogatory as to the expected testimony of its witnesses by stating, "Mr. [Ruben] Roman recalled that claimant worked his shift on the date of the alleged injury." Another witness for the respondents, Ms. Maria Diaz, was expected to testify that "she worked the same shift as claimant. Ms. Diaz did not see the claimant on Thursday and he did not report any injury to her. She saw claimant around 6:00 p.m. on Friday…" (The respondents' time sheet and wage records are void as to the claimant working on Friday, May 26, exactly as they were void as to the date of injury.) Respondents did not end up presenting this testimony at hearing. Essentially, claimant argues that the respondents did not plead or raise the defense and this constitutes good cause for the introduction of additional evidence. Thus, the claimant advocates, the ALJ's refusal to reopen the proceedings and consider the additional evidence is an abuse of discretion. We agree.

A party has the right to procedural due process, which generally requires that the party be provided with notice and an opportunity to be heard. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990). Thus, the essence of procedural due process is that the proceedings be fundamentally fair. Due process also requires that a party have advance notice of the issues to be adjudicated at the hearing. Due process contemplates that the parties will be apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *Id*.

The record shows that the respondents did not plead in its response to the application for hearing that the claimant was not working on May 25, 2017. In discovery responses, respondents informed that at least one of its witnesses would testify claimant worked on May 25, 2017. The respondents gave no notice in its pre-hearing case information sheet that this defense would be raised. At the commencement of the hearing during preliminary discussions, counsel for the respondents reminded the court that respondents had endorsed the defenses of late reporting and "8-41-112(1)(d)" [sic] (a non-existent provision) as an offset; but did not raise the "not-at-work" defense. Tr. at 5. Later, in respondents' opening statement, counsel stated: "He [claimant] does not report this injury to his employer until the following week, *after he has worked several shifts*, and still doesn't report it and then finally reports it to his supervisor Mr. Perez." (Emphasis added). Tr. at 10. The issue was not raised until the final few questions on cross-examination of the claimant. Tr. at 46-50. The claimant contends that this issue took him by surprise. At one point, counsel for the claimant asked the court, "Can I say something?" There is no indication in the transcript that the ALJ acknowledged this request; rather the cross-examination on this issue continued on unabated. Tr. at 47-48.

We are led to our conclusion regarding the lack of due process because the respondents did not plead the defense and followed this omission but not disclosing it during discovery. Further, the respondents' opening statement at hearing continued the silence regarding the defense that was soon to be wielded. Further, the respondents' stated in its response to the motion to reopen, "Respondents need not identify in discovery each and every … legal theory in which Respondents may rely to defend the claim." Whether or not claimant worked on the day of the alleged injury is a cardinal fact regarding the credibility of the claimant and the compensability of the claim. When faced with what purports to be evidence that renders its defense false, the respondents—rather than reassessing their advocacy of the defense—argues for exclusion of the evidence by attempting to shift blame to the claimant for his lack of prescience in not having identified the issue prior to the hearing and for not earlier seeking post-hearing relief. However, the wage records and time sheets could reasonably have been viewed as information for calculating an average weekly wage or period of lost time for the purpose of establishing temporary disability benefits. Because the respondents failed to plead the defense, the claimant would not have reasonably suspected that the wage information related to an unraised defense.

The new evidence, if believed, purportedly shows that the claimant showed up for work on May 25, 2018, buttressing his testimony that the employer's time sheets and wage records were mistaken and incorrect. It would also potentially remove questions regarding the claimant's credibility from the compensability analysis.

It is clear from the ALJ's order that she fundamentally relied on the respondents' defense in reaching a determination of the claimant's credibility. If the facts were what the ALJ believed them to be, the claim was fraudulent. This could not but have colored the ALJ's credibility determination as to all aspects of the claim, including medical determinations.

We conclude that ordinary prudence on the claimant's part could not have guarded against the respondents non-pleaded, non-disclosed, and unraised defense. Rather, it is patently obvious that the respondents silence in that regard would serve to lull the claimant into a false sense of security. Even as late as the opening statement at hearing, respondents do not indicate that the claimant did not work on the date of injury but rather indicated that the claimant worked several shifts after the date of injury—that also were unrecorded on the time sheets and wage records. After the ALJ's decision relied so heavily on the defense, the claimant discovered and produced the building security records which, if believed, refute the defense. And, in turn, casts the credibility of the respondents into question. Parenthetically, the respondents had the claimant's supervisor present at the hearing—whose shift was covered by the claimant on May 25, 2017 (tr. 53-54)—but chose not to call him for testimony. Instead they sprung the issue during cross-examination of the claimant.

We hold that the claimant showed good cause to reopen the proceedings to receive additional evidence. The claimant did not have advance notice that the "not-at-work" issue was to be adjudicated at the hearing. The claimant was not apprised of the evidence to be considered, and was not afforded a reasonable opportunity to present evidence and argument in support of his position. The respondents did not provide adequate notice of both the factual and legal bases of the defenses to be adjudicated. *Hendricks, supra.* Thus, the ALJ abused her discretion by denying the claimant's motion. The July 6 order is reversed.

II. May 9 order

As a result of our reversal of the July 6 order and our direction to consider the additional evidence submitted to the court in claimant's motion, we set aside the May 9 order as premature.

IT IS THEREFORE ORDERED that the ALJ's order issued July 6, 2018, is reversed. It is further ordered that the ALJ's order of May 9, 2018, is set aside. The

matter is remanded to the ALJ to consider the claimant's evidence as submitted in his February 26, 2018, Motion to Reopen. Thereafter, the ALJ shall issue a new order. In her sole discretion, the ALJ may conduct another hearing to permit the parties to present additional evidence.

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

3/8/19 by TT .

THE FRICKEY LAW FIRM, Attn: JANET FRICKEY ESQ, 940 WADSWORTH BLVD 4TH FLOOR, LAKEWOOD, CO, 80214 (For Claimant)
POLLART MILLER LLC, Attn: AMANDA J BRANSON ESQ, C/O: ERIC J POLLART ESQ, 5700 SOUTH QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-007-181-002

IN THE MATTER OF THE CLAIM OF:

BARBARA WOJCIUK,

Claimant,

v.

FINAL ORDER

PUBLIC PARTNERSHIPS COLORADO,

Employer,

and

COMMERCE AND INDUSTRY INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Edie (ALJ) dated November 1, 2018, that found the claimant's right knee injury compensable and ordered the respondents to pay the cost of emergency room treatment. We affirm the decision of the hearing officer.

The claimant was employed as an in-home caregiver for her elderly mother. At an August 30, 2018, hearing the claimant testified that on November 19, 2015, she was pulling her mother to the side of her bed to transfer her to a wheel chair. When she lifted her mother, who weighed 230 pounds, the claimant stated she felt immediate pain in her right knee. After completing the transfer, the claimant's husband put the claimant in a wheel chair and took her to the emergency room.

The notation in the emergency room medical record stated: "The patient's pain occurred at 11 A.M. while walking." X-rays at the emergency room revealed swelling and effusion in the knee. The claimant obtained an MRI study on December 29 and had the report read by Dr. Duffey, an orthopedic specialist. The MRI showed a right knee stress fracture of the tibial plateau, severe osteoarthritis and joint effusion.

Dr. Duffey prescribed conservative treatment with anti-inflammatories. However, by January 27, 2016, the doctor found the claimant's condition had not improved and she still suffered with considerable knee pain. He concluded the claimant was a candidate for

a total knee arthroplasty surgery. This surgery was performed on February 8. The pre and post-operative diagnosis was osteoarthritis.

The claimant reported the injury to the employer on February 16, 2018. The respondents filed a notice of contest on February 24 stating investigation of the claim was necessary. Due to a lack of activity, the respondents submitted a motion to close the claim and a show cause order was issued on December 15, 2017. The claimant filed an application for a hearing on February 24, 2018. At the outset of the August 30 hearing, the parties agreed to limit the issues to compensability of the knee injury and liability for the costs of emergency room treatment on November 19, 2015.

The respondents presented at hearing the testimony of Dr. Wallace Larson. Dr. Larson took the position the claimant was suffering pain symptoms that were the result of her long-standing osteoarthritis. He did not believe the claimant had sustained an actual injury in November 2015. She was said to have only developed a symptom of the osteoarthritis, which consisted of knee pain. Dr. Larson concluded the arthritis was not caused or aggravated by any work activities. He relied on the Director's Medical Treatment Guidelines for Lower Extremity Injury, section (E), part 2, (a), titled "Aggravated Osteoarthritis". The doctor testified that according to the Guidelines, osteoarthritis could not be considered to have been aggravated by occupationally related trauma unless the trauma had occurred at least two years prior to the onset of new arthritis pain complaints. Here, he maintained there was no record of any traumatic work injury two years before November 2015. Dr. Larson also pointed to the list of non-occupational risk factors such as the patient's weight and age. He stated the claimant was 66 years old and had a Body Mass Index (BMI) of 35, which is class 2 obesity. Dr. Larson testified that when he examined the claimant she did not report to him any activity involving repeat heavy lifting on or around November 2015. Nor, he said, did any medical records record heavy lifting near the time of her injury complaint. The doctor felt the claimant would have required the arthroplasty surgery to her knee regardless of any work episode in November 2015.

The ALJ cited to case law holding that even in the case of a preexisting disease, if a work incident "accelerates, aggravates or combines" to produce a disability for the claimant, that disability represents a compensable injury. *H & H Warehouse v. Vicory*, 805 P2d 1167 (Colo. App. 1990). The ALJ held the claimant must show symptoms (pain here) are proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition.

The ALJ took issue with the interpretation of the Treatment Guidelines given by Dr. Larson. The ALJ stated the doctor's reliance on the paragraph in the Guidelines titled 'Non-occupational Risk Factors' was misapplied to this case. It was pointed out that paragraph only pertains to situations where there is a prior injury that then aggravates the preexisting osteoarthritis to produce additional pain complaints. In that case, the work injury would have occurred two years previously. However, the ALJ concluded this was not a case of a work incident aggravating preexisting osteoarthritis. Instead, it involved a work incident that caused the arthritic knee to become symptomatic. Relying on the claimant's testimony describing her activity on November 19, the ALJ determined the claimant was injured while performing a lift of her mother from a bed and into a wheel chair. This lift led to immediate knee pain. The pain was so significant the claimant went to the emergency room and used a walker to ambulate for at least another month. The ALJ also referred to the MRI study in December 2015 that indicated effusion, swelling and a stress fracture. Accordingly, the ALJ concluded the claimant's condition became symptomatic while performing a heavy lift. The injury was not a matter of a natural progression of a preexisting condition. Instead, it was found to be a direct result of her job duties.

The presentation of Dr. Larson's testimony at the hearing found the doctor addressing two types of medical treatment provided in the claimant's case. The first was the treatment in the emergency room. The second involved the subsequent total knee arthroplasty surgery. However, at the outset of the August 30 hearing, both parties stipulated the only issues to be presented to the ALJ were "compensability and reasonable necessity of the medical benefit specifically on the ER visit on November 19, 2015." Tr. at 9-10. The respondents argued in their post hearing submission the surgery was not work related. They reiterate this argument in their brief on appeal. The claimant limited its post hearing argument to the issue of compensability and the necessity of emergency room treatment. The claimant's argument on appeal is similarly limited. However, the ALJ proceeded in his decision to make findings that the arthroplasty surgery was reasonable and necessary. The ALJ then referred to the circumstance that the surgery was performed before the claimant ever notified the employer of an injury. As a result, the respondents had no opportunity to designate a physician to provide treatment as allowed by § 8-43-404(5)(a)(I)(A) (and § 8-42-101(6)(a) that requires receipt of such notice). The ALJ then acknowledged he "has not been asked by the parties to issue a ruling on this issue, and declines to do so now, despite the facts found above." Accordingly, we review the ALJ's findings pertinent to the arthroplasty surgery only to the extent they explain his determination of compensability and the necessity for emergency room treatment.

On appeal, the respondents contend Dr. Larson correctly concluded there was no injury in this case. He found no reference in the medical records to actual trauma. However, it is argued that even if the ALJ found there was an 'injury' pursuant to the Guidelines, that injury necessarily had to occur two years previously, either in order to have caused osteoarthritis or to have caused an aggravation of the osteoarthritis.

The respondents also assert the ALJ did not resolve factual contradictions apparent in the ALJ's order. These involve the statement the claimant was injured while 'pulling' her mother as compared to another paragraph where it is stated the claimant felt new pain simply while 'walking'. The respondents complain the claimant said she went to the emergency room at 11:00 a.m. while the emergency room records show the time as 3:17 p.m. Finally, the respondents argue that Dr. Duffey informed the claimant she required surgery on January 22, 2016, but the claimant did not report her injury to the employer for another three weeks. These inconsistencies, the respondents contend, show the claimant's testimony is not credible and the ALJ was in error to rely on it. We are not persuaded the ALJ erred in his determination and affirm the order on appeal.

The question of whether the claimant has met her burden to prove compensability is factual in nature. Thus, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in the 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. *Panera Bread, LLC v. Industrial Claims Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Industrial Claim Appeals Office, 107* P.3d 999, 1001 (Colo. App. 2004). In order to impose liability for medical treatment, the ALJ must find the need for treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1) (b), C.R.S. The determination of whether the claimant proved causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc.*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). Thus, if the industrial injury aggravates, accelerates or combines with a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866

(Colo. App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986) ("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

Here, the ALJ credited the claimant's testimony that the claimant's pre-existing arthritis became symptomatic while she was doing a heavy lift and as a direct result of her job duties. The ALJ, therefore, determined that this was a compensable aggravation of her knee condition and pre-existing osteoarthritis. The ALJ's findings are supported by substantial evidence in the record and we have no basis for disturbing them on review. §8-43-301(8), C.R.S.

Moreover, we are not persuaded by the respondents' contention that the Medical Treatment Guidelines (Guidelines) mandate a different result. 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). However, the compensable nature of the claimant's industrial injury is not definitively controlled by application of the Guidelines. In determining the compensability of a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); *Industrial Commission v. Riley*, 165 Colo. 586, 591, 441 P.2d 3, 5 (1968). Rather, the determination of the compensable nature of an injury remains controlled by the Workers' Compensation Act and by relevant case law. The claimant sustains a compensable injury when, at the time of the injury, she is performing a service arising out of and in the course of her employment. Section 8-41-301(1)(b), C.R.S. Consequently, while it is appropriate for the ALJ to consider the Guidelines on the question of diagnosis and cause of the claimant's condition, it does not compel the ALJ to adopt the opinion of a medical expert on the issue of the causal connection between a work related injury and a particular medical condition. *See Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998); *see also Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006)(the Guidelines are not definitive); *cf.* § 8-43-201(3), C.R.S. ("The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis" for determining whether certain medical treatment is reasonable, necessary, and related.").

In any event, the ALJ determined that the claim was compensable under the Guidelines. The ALJ disagreed with the analysis of the Guidelines provided by Dr. Larson insofar as the ALJ relied on paragraph (a)(ii) of the Aggravated Osteoarthritis section instead of paragraph (a)(iii) upon which Dr. Larson relied. Paragraph (ii) is titled

"Occupational Relationship". It requires "establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to … repetitive kneeling … squatting and climbing, or heavy lifting." The ALJ found the claimant was engaged in a heavy lift of her mother during the transfer on November 19. He also noted the MRI of the knee revealed joint effusion and a stress fracture. He found the baseline involved was the condition of the claimant's knee the moment prior to the lift. Her condition then changed as evidenced by the swelling, effusion and fracture. The ALJ pointed out the condition of the claimant's knee, in addition to her preexisting osteoarthritis, became symptomatic, that is disabling, at the point of the transfer lift. He concluded treatment at the emergency room was made necessary by the change in the knee's condition represented by new joint effusion and a stress fracture. *See, Archuleta v. Concrete Frame Associates*, W.C. No. 4-951-597-03 (June 24, 2016).

We further conclude that the ALJ sufficiently resolved conflicts presented by the record. While the emergency room record did state only that the claimant was walking when her injury occurred, the ALJ found the claimant's testimony credible. The claimant stated she felt immediate pain when she lifted her 230-pound mother from the bed to the wheel chair. Tr. pg. 20, lines 14-25, pg. 21, lines 1-12). In Conclusion of Law ¶(I) the ALJ found it was the description that most accurately described the circumstances of the injury. The claimant also stated she and her husband proceeded to the emergency room after the injury. She described how they then were required to wait there before she was seen. The notation in the emergency room record that one of the medical providers saw her at 3:17 p.m. is not significantly inconsistent. The circumstance that the claimant did not inform her employer she sustained a work injury until several weeks later was not disputed by either party or the ALJ. However, that detail alone did not require the ALJ to find the injury did not occur as the claimant described.

Consequently, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In this regard, it was the prerogative of the ALJ to assess the weight and credibility of the medical records and testimony offered on the issue of causation. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The ALJ relied on the medical diagnostic tests in the record as well as the testimony of the claimant and the Treatment Guidelines. Accordingly, we find no error in the ALJ's decision.

IT IS THEREFORE ORDERED that the ALJ's order issued November 1, 2018, that found the claimant's right knee injury compensable and ordered the respondents liable for the cost of emergency room treatment 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

3/4/19 by TT .

HASSLER LAW FIRM LLC, Attn: STEPHEN M JOHNSON ESQ, 616 W ABRIENDO AVE, PUEBLO, CO, 81004 (For Claimant)
LEE & BROWN LLC, Attn: BRADLEY J HANSEN ESQ, 3801 E FLORIDA AVE SUITE 210, DENVER, CO, 80210 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-033-005-01

IN THE MATTER OF THE CLAIM OF:

FREDERICK BROWN,

Claimant,

v.

ORDER

PROGRESS RAIL SERVICES,

Employer,

and

LIBERTY INSURANCE COMPANY,

Insurer,
Respondents.

The respondents seek review of the supplemental order of Administrative Law Judge Spencer (ALJ) dated October 26, 2018, that determined the claimant's workers' compensation claim was not closed by a November 15, 2017, final admission of liability. We dismiss the respondents' appeal without prejudice for lack of a final order.

This matter went to hearing on the sole issue of whether the claim was closed by final admission dated November 15, 2017. After hearing, the ALJ entered an order dated July 12, 2018, that determined the claimant's claim was closed as to all issues in the November 15, 2017, final admission of ability. The claimant appealed and the ALJ issued a supplemental order vacating the July 12, 2018, and convening a supplemental hearing to address wither the claimant actually received a copy of the final admission of liability. After hearing, the ALJ entered factual findings that for purposes of review can be summarized as follows.

The claimant sustained an admitted industrial injury on December 6, 2016. The claimant was placed at maximum medical improvement by his authorized treating physician on August 28, 2017, and given a 10 percent scheduled permanent impairment rating. The respondents filed a final admission of liability on November 15, 2017, based on the authorized treating physician's report. The final admission was addressed to all parties and the Division of Workers' Compensation. The certificate of service indicates that the final admission was sent to the claimant at his home address and to the claimant's

counsel listed as; Wes Hassler, 616 West Abriendo Ave, Pueblo, CO 81004. The claimant was represented by Stephen Johnston, Esq., with the same mailing address as Mr. Hassler. Both parties stipulated that the claimant never received the final admission. The ALJ further found that the claimant's counsel did not receive a copy of the final admission mailed to his office.

On January 8, 2018, the claimant's counsel's office contacted the claims adjuster and was told that the respondents had filed a final admission on November 15, 2017. The respondents' counsel emailed the claimant's counsel a copy of the final admission on January 8, 2018. The ALJ found that the time to object to the November 15, 2017, final admission has not started to run because the claimant never received a copy of the final admission. Relying on *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999), the ALJ held that an uncontested final admission of liability is not sufficient to close a claim unless the final admission is actually mailed to and received by the claimant. The ALJ, therefore, ordered that the claimant's claim is not closed by the November 15, 2017, final admission. The ALJ further stated that all issues not decided were reserved for future determination.

The respondents filed a petition to review the ALJ's supplemental order contending that the ALJ erred in his conclusion. We dismiss the respondents' petition to review the supplemental order without prejudice for lack of a final order.

Section 8-43-301(2), C.R.S. provides that any dissatisfied party may file a petition to review "an order which requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty." An order which does not satisfy one of the finality criteria of this statute is interlocutory and not subject to immediate review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989). Here, the ALJ's order only determines that the claim is not closed. Benefits were not at issue and, therefore, none were awarded or denied. Under these circumstances, the ALJ's supplemental order is interlocutory and not currently subject to review.

IT IS THEREFORE ORDERED that the respondents' petition to review the ALJ's October 26, 2018, supplemental order is dismissed without prejudice.

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

2/12/19 by TT .

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LAW OFFICES OF SUZANA SKRABO, Attn: MAUREEN A HARRINGTON ESQ, 5670 GREENWOOD VILLAGE PLAZA BOULEVARD, GREENWOOD VILLAGE, CO, 80111 (For Respondents)
LEE & BROWN LLC, Attn: EVAN M THOMPSON ESQ, 3801 EAST FLORIDA AVE SUITE 210, DENVER, CO, 80210 (Other Party)