

BROWN BAG SEMINAR

Thursday, February 18, 2016

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

**2nd Floor Conference Room
(use elevator near Starbucks)**

1 CLE (including .4 ethics)

Presented by

Craig Eley

Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued through
February 12, 2016

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-905-547-03

IN THE MATTER OF THE CLAIM OF

ELAINE BROWN,

Claimant,

v.

FINAL ORDER

APOLLO GROUP, INC.,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated September 11, 2015, that determined her L3-L5 fusion surgery was not reasonable, necessary, or causally related to her admitted industrial injury. We affirm.

This matter went to hearing on whether the claimant demonstrated that the L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015, was reasonable, necessary, and causally related to her November 12, 2012, admitted industrial injury.

After the hearing, the ALJ found that the claimant sustained admitted industrial injuries as a result of a motor vehicle accident on November 12, 2012. The claimant injured her lower back in the accident, as well as sustaining other injuries.

On November 16, 2012, the claimant underwent an x-ray of her lumbar spine. The x-ray reflected a minimal grade 1 anterolisthesis at L4-L5. There also was mild facet arthropathy and mild age-related spondylosis. The x-ray revealed degenerative changes but no evidence of a traumatic injury to the claimant's lumbar spine.

The claimant received conservative treatment for her injuries from Dr. Quick, including physical therapy, home exercises, and injections. The claimant also underwent a lumbar spine MRI on January 22, 2013. Dr. Quick placed the claimant at maximum medical improvement (MMI) on June 28, 2013, with a 30% whole person impairment

rating for the physical and psychiatric aspects of her injuries. Dr. Quick noted that the claimant required medical maintenance treatment.

The claimant, however, continued to experience lower back symptoms. Dr. Quick referred the claimant for a neurological consultation with Dr. Guiot. Dr. Guiot examined the claimant on March 5, 2014. Dr. Guiot remarked that the MRI confirmed disc-based injuries at L3-L4 and L4-L5. There also was evidence of significant stenosis producing compression of the traversing L5 nerve root. Dr. Guiot concluded that the site of the claimant's pain generator was localized to L3-L4 and L4-L5 levels. He recommended a two level TLIF fusion.

Dr. Quick also referred the claimant for a neurological consultation with Dr. Prusmack. Dr. Prusmack recommended a discography to determine whether the L4-L5 level was the claimant's pain generator. After undergoing the discography, Dr. Prusmack noted it revealed a positive concordant pain response with a grade 4 annular tear at L5-S1 in the absence of any other positive concordant pain responses. He remarked that the claimant had significant right-sided anterior thigh pain and a right sided L3-L4 far lateral disc protrusion. Dr. Prusmack eventually recommended a L5-S1 fusion, as well as a right disc compression at L3 and possibly L4.

At the request of the respondents, Dr. Reiss performed a records review of the claimant's case on May 27, 2014. He commented that imaging studies revealed multiple levels of degenerative changes from L2-S1 and that all of the discs could be pain generators. He thus concluded that the recurrence of the claimant's lower back pain was the natural course of her pre-existing condition.

The claimant underwent an independent medical examination with Dr. Rauzzino on July 21, 2014. Dr. Rauzzino diagnosed right-sided L3-L4 disc herniation, right-sided L4-L5 disc herniation and degenerative changes, and a concordant disc protrusion at L5-S1. Dr. Rauzzino recommended a L3-L4 microdiscectomy. He remarked, however, that if the claimant underwent an L5-S1 fusion, there was a reasonable chance she ultimately would require a three level fusion.

On August 20, 2014, the claimant underwent an independent medical examination with Dr. Reiss. Relying on the Medical Treatment Guidelines (Guidelines), Dr. Reiss stated that the claimant's pain generator had not been clearly identified, that the claimant's MRI revealed abnormalities at the L3-S1 levels, and that the Guidelines reflect that a fusion should be limited to two or fewer levels. He diagnosed the claimant with

degenerative disc disease and back pain. Dr. Reiss concluded that the surgeries recommended by Dr. Guiot and Dr. Prusmack were not warranted.

The respondents eventually approved a L3-L4 decompression. On November 20, 2014, the claimant underwent a L3-L4 decompression of the nerve root with resection of a L3-L4 far lateral herniated disc.

The claimant, however, subsequently was admitted to the SkyRidge Medical Center on April 7, 2015, for an increase of lower back pain. The impressions were acute on chronic intractable back pain with a history of degenerative joint disease and recent microdiscectomy. The claimant subsequently underwent a lower back MRI.

Based on the claimant's pain complaints, the MRI results, and his concern about the possibility of potential diskitis as a result of the November 20, 2014, discectomy surgery, Dr. Prusmack performed emergency back surgery on the claimant on April 10, 2015. He performed an anterior lumbar interbody fusion at L3-L4 and L4-L5. Dr. Prusmack, however, did not have authorization for the procedure from the respondent insurer.

During the hearing, Dr. Reiss testified that the claimant suffered from pre-existing, recurring back problems. He remarked that the November 16, 2012, x-ray of the claimant's lumbar spine revealed no acute injuries. However, the MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss stated that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He further remarked that there was no finding on the claimant's MRI reflecting an acute injury. Dr. Reiss also testified that he reviewed the January 22, 2013, MRI report in which there was a paracentral disc extrusion at L3-L4. The disc was protruding within the spinal canal but not outside of the canal. Dr. Reiss expressed concern that Dr. Prusmack performed a far lateral L3-L4 discectomy on the right, because from all of the medical records and MRI reports, there was nothing to suggest surgery in the far lateral location. He testified that all of the claimant's problems were in the spinal canal. Dr. Reiss explained that he would have performed a discectomy at L3-L4 within the spinal canal to relieve pressure from the claimant's L4 nerve root. He therefore opined that the L3-L4 and L4-L5 fusion surgery that Dr. Prusmack performed on April 10, 2015, was not reasonable or necessary, and it was not causally related to the claimant's November 12, 2012, work-related motor vehicle accident.

Conversely, Dr. Prusmack testified that the additional pain the claimant was experiencing was caused by instability in the spine because of the November 20, 2014,

surgical procedure or the discectomy he previously performed. He stated that the claimant may have been headed toward additional surgery because of the motor vehicle accident, but the discectomy “got her there faster.” He concluded that the claimant’s mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015, surgery.

The ALJ subsequently entered his order, finding that the claimant failed to demonstrate that the L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015, was reasonable, necessary, and causally related to her November 12, 2012, admitted industrial injuries. The ALJ instead found that the claimant suffered from pre-existing, degenerative lower back problems, and that the November 16, 2012, x-ray revealed degenerative changes but no evidence of a traumatic injury to the lumbar spine. Crediting the opinions of Dr. Reiss over those of Dr. Prusmack, the ALJ found that the claimant’s MRI reflected degenerative changes at L4-L5, that degenerative disc disease occurs over a long period of time, and degeneration is not caused by a specific incident. The ALJ determined, therefore, that the respondents were not liable for payment of the L3-L4 and L4-L5 fusion surgery.

I.

On appeal, the claimant contends that the ALJ erred in not permitting her to cross-examine Dr. Reiss “about his forensic practice and what amount of money he receives from doing IMEs and testifying on behalf of Respondents.” We perceive no reversible error.

The ALJ has wide discretion to control the course of a hearing and make evidentiary rulings. Section 8-43-207(1)(c), C.R.S.; *IPMC Transportation Co. v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). We may not interfere with the ALJ’s evidentiary rulings in the absence of an abuse of discretion. *Denver Symphony Ass’n v. Industrial Commission*, 34 Colo. App. 343, 526 P.2d 685 (1974). The standard on review of an alleged abuse of discretion is whether, under the totality of the circumstances, the ALJ’s ruling exceeds the bounds of reason. *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985). Further, the party challenging the exclusion of evidence as an abuse of discretion must show sufficient prejudice before it is reversible error. CRE 103(a); *Williamson v. School District No. 2*, 695 P.2d 1173 (Colo. App. 1984).

The Colorado Supreme Court’s holding in *Bonser v. Shainholtz*, 3 P.3d 422 (Colo. 2000), is instructive here. In *Bonser*, the Court upheld a trial court’s ruling admitting evidence that an expert witness and the defendant belonged to the same insurance trust.

In that case, the Court adopted the "substantial connection test" which permits a party to show a substantial connection between a witness and an insurance carrier as evidence of the potential bias of the witness. This test can be met by showing an expert witness's economic relationship with a specific insurer. The Court concluded that the expert witness had a substantial connection to the defendant's insurance trust because the expert witness had co-founded the trust and had a financial stake in it. The Court upheld the trial court's finding that the probative value of the evidence substantially outweighed any risk of prejudice to the defendant. The Court stated that after the trial court determines that a substantial connection exists, it must employ CRE 403 to weigh whether the probative value of the evidence substantially outweighs any risk of unfair prejudice or confusion of the issues. *Id.* at 426. The Court added that evidence must be afforded the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected. *Id.* at 426-27.

Moreover, the Colorado Court of Appeals previously has noted that courts employing the substantial connection test have permitted the cross-examination of an expert witness regarding the amount of money paid to that expert in a prior case, and the expert's employment relationship with the insurer. *See Garcia v. Mekonnen*, 156 P.3d 1171 (Colo. App. 2007)(citing to *Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002); *Yoho v. Thompson*, 345 S.C. 361, 366, 548 S.E.2d 584 (2001)(evidence of defense expert's medical consulting work for insurance carrier was admissible); and *Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d 349 (2001)(trial court did not err in permitting the cross-examination of the defendant's expert witness to show the witness had received over \$100,000 in compensation per year, for two years, from the defendant's insurer)).

Here, during cross-examination of Dr. Reiss, the claimant inquired about what portion of his practice is forensic. Dr. Reiss responded that 30 to 40 percent was forensic, and that almost all of that was done on behalf of respondents or defendants. When the claimant attempted to ask Dr. Reiss about a particular Arapahoe County District Court case wherein he testified he earned in excess of \$100,000 doing IMEs and performing testimony on behalf of defendants, the ALJ sustained the respondents' relevancy objection. The ALJ ruled that while the other case was not relevant, he would nevertheless allow the claimant to inquire about what percentage of Dr. Reiss's practice is related to forensics. The claimant then continued to inquire about the percentage of Dr. Reiss's income was generated from forensic work. Tr. at 59-61. While we conclude the ALJ erred in preventing the claimant from cross-examining Dr. Reiss regarding the income he has earned performing IMEs and giving testimony on behalf of defendants in other cases, the ALJ nevertheless allowed the claimant to elicit testimony from Dr. Reiss on the percentage of his income derived from forensics and the number of times he

testified on behalf of respondents and defendants. Dr. Reiss admitted that he has testified almost all the time on behalf of the defendants, and that 30 to 40 percent of his income is derived from forensics. *Compare Garcia v. Mekonnen, supra*. Thus, given the testimony that ultimately was elicited from Dr. Reiss, and the fact that the ALJ is the fact-finder in this matter as opposed to a jury, we are unable to conclude that the ALJ's evidentiary ruling resulted in sufficient prejudice thereby constituting reversible error. CRE 103(a).

We further add that while the ALJ relied on Dr. Reiss's opinion that the claimant's fusion surgery was not related to her industrial accident, he also considered and relied on a number of medical records, which showed the claimant suffered degenerative changes in her low back. Ex. D at 14; Ex. 11 at 185; Ex. F at 28; Ex. D at 18-19; Ex. D at 21-22; Ex. D at 23-24; Ex. F at 28-29. Given the totality of the circumstances, therefore, we will not disturb the ALJ's order on this ground.

II.

The claimant next argues that the ALJ's order is not supported by substantial evidence and fails to resolve conflicts in the record. The claimant specifically contends that conflicts in the record exist regarding Dr. Reiss's opinion and his testimony on whether the claimant's injury was inside of or outside of her spinal canal. The claimant also contends the ALJ erred in adopting Dr. Reiss's theory. The claimant reasons that Dr. Reiss always was of the opinion that no surgery was causally related and therefore he could not testify that it was reasonably necessary or not. We are not persuaded by the claimant's arguments.

The ALJ is free to credit one medical opinion to the exclusion of a contrary medical opinion. *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992). We may not interfere with the ALJ's credibility determinations unless the testimony he credited is rebutted by such hard, certain evidence that it would be error as a matter of law to believe the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Further, the assessment of the credibility and sufficiency of the expert witnesses are matters within the sole discretion of the ALJ as the fact finder and we have no authority to substitute our judgment for that of the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Initially, to the extent the claimant argues that the ALJ failed to resolve conflicts regarding Dr. Reiss's opinion and his testimony, we do not agree. It is well settled that the ALJ is not obligated to cite or discuss every piece of evidence in his order. *Crandall v. Watson-Wilson Transportation System, Inc.*, 171 Colo. 329, 467 P.2d 48 (1970). Rather, the ALJ is only required to enter findings concerning the evidence which is found

to be dispositive of the issues involved. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Nevertheless, in his order, the ALJ specifically cited to and credited Dr. Reiss's testimony and opinion that the claimant's problems were within the spinal canal. Findings of Fact at 5 ¶22. Further, the fact that the ALJ credited Dr. Reiss's opinion that the fusion surgery was not causally related to the November 12, 2012, industrial injuries, disposes of the need to address whether the fusion surgery was reasonable or necessary. The respondents are only liable for medical benefits that are causally related to the industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Additionally, the claimant cites to evidence in the record which could support a different result. However, the fact that the record may contain evidence which, if credited, might support a contrary result is immaterial on review. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The claimant is obviously dissatisfied with the ALJ's credibility determinations. Based upon this record, however, we cannot say, as a matter of law, that the ALJ erroneously credited Dr. Reiss's testimony and opinions. The ALJ's findings and conclusion regarding the fusion surgery are amply supported by the evidence. Section 8-43-301(8), C.R.S. Thus, we will not disturb the ALJ's order on these grounds.

III.

Last, the claimant contends that by agreeing that the November 20, 2014, surgery was reasonably necessary and causally related, the respondents are thereafter liable for the medical treatment flowing out of that surgical intervention. According to the claimant, since the additional surgery of April 10, 2015, was the logical sequelae of the November 20, 2014, surgery, the respondents are liable to pay for it. Under the circumstances presented here, we do not agree.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office, supra*. Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Id.* Whether the claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses, and we may not

reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

Here, during the hearing, Dr. Reiss testified that while the claimant's x-ray and MRI report showed a paracentral disc extrusion at L3-L4 or a disc protrusion within the spinal canal, there were no acute injuries indicated in the reports. Dr. Reiss testified that the reports showed that the claimant suffered from degenerative changes. Dr. Reiss explained that the claimant's degenerative disc disease occurred over a long period of time as opposed to occurring due to any one particular accident. Tr. at 36, 39, 41-42, 45, 46-48. Dr. Reiss further testified that he did not believe that the surgical fusion at L3-L4 and L4-L5 is causally related to the November 2012 industrial accident and injuries. Tr. at 49-50. He also testified that he did not believe the first surgery Dr. Prusmack performed created instability in the claimant's spine thereby causing the need for the subsequent fusion surgery. Tr. at 56-57. The ALJ's findings are supported by substantial, albeit conflicting, evidence in the record. Consequently, we are bound by the ALJ's factual determinations that the claimant failed to sustain her burden to prove entitlement to the fusion surgery. Section 8-43-401(8), C.R.S

To the extent the claimant argues that by approving the discectomy, the respondents are liable for the fusion surgery, we disagree. It is well settled that insurers retain the right to dispute whether the need for medical treatment was caused by the compensable injury. *See Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity); *Snyder v. Industrial Claim Appeals Office*, *supra* (concerning a general admission for medical benefits); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). This principle recognizes that even though an admission is filed the claimant bears the burden of proof to establish entitlement to specific medical benefits. The mere admission that an injury occurred and that treatment is needed cannot be construed as a concession that all conditions and treatment that occur after the injury were caused by the injury. *Id.*

Moreover, in her Brief In Support, the claimant cites to various pieces of evidence that the ALJ did not address or find persuasive. The claimant specifically contends that the ALJ ignored the significance of the pain she endured and the treatments she underwent. The claimant also argues that the ALJ ignored the fact that she sustained a disc herniation at L3-L4, and ignored Dr. Prusmack's opinion that the discectomy caused instability and the need for the fusion surgery on April 10, 2015. In the absence of specific evidence to the contrary, the ALJ is presumed to have considered all relevant evidence, including the evidence which showed that the claimant suffered a herniated

disc at L3-L4. *Dravo Corp. v. Industrial Commission*, 40 Colo. App. 57, 569 P.2d 345 (1977); *Ski Depot Rentals, Inc. v. Lynch*, 714 P.2d 516 (Colo. App. 1985). However, as noted above, the ALJ is not required to make specific findings of fact concerning every piece of evidence, but only the evidence he found determinative of the issues, which the ALJ did here. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994); *Jefferson County Public Schools v. Drago*, 765 P.2d 636 (Colo. App. 1988). We further add that during the hearing, Dr. Reiss testified that the claimant's medical records reflected a L3-L4 disc herniation. The ALJ, however, instead was persuaded that the claimant's pain and need for fusion surgery was due to the significant degenerative condition of her lumbar back. Moreover, in his order, the ALJ expressly found Dr. Prusmack's opinions and testimony not persuasive. Findings of Fact at 6 ¶26. We also note that while the evidence in the record and the opinions from the different treating physicians clearly could have supported a contrary conclusion, we have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses, and we may not reweigh the evidence on appeal. *Delta Drywall v. Industrial Claim Appeals Office, supra*.

IT IS THEREFORE ORDERED that the ALJ's order dated September 11, 2015, is affirmed.

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

_____ 1/21/2016 _____ by _____ RP _____ .

ROBERT W. TURNER, LLC, Attn: ROBERT W. TURNER, ESQ., 8400 EAST CRESCENT
PARKWAY, SUITE 600, GREENWOOD VILLAGE, CO, 80111 (For Claimant)
THOMAS, POLLART MILLER, LLC, Attn: EMILY F. AHNELL, ESQ., 5600 SOUTH
QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

FEIN 84-1545878

IN THE MATTER OF THE CLAIM OF
DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

v.

DAMI HOSPITALITY, LLC,

Respondent Employer,

**CORRECTED
FINAL ORDER**

Pursuant to §8-43-302(1)(b), C.R.S., the following Corrected Final Order is issued to correct an error made in the original Order that the Panel issued on January 11, 2016, which was incorrectly noted to have been sent in 2015. The ICAO order dated January 11, 2015, is hereby amended pursuant to §8-43-302(a), C.R.S. to reflect the correct year as that of 2016. We otherwise reenter the order without change to its original text as set forth below.

In our original Order, we stated that the respondents did not file a brief in support of their petition to review in this matter. This is incorrect. The respondents did, in fact, timely file their brief in support.

The respondent seeks review of an order of the Director of the Division of Workers' Compensation (Director) dated August 27, 2015, that assessed and ordered the respondent to pay a fine totaling \$841,200 for failing to meet its statutory obligation to maintain workers' compensation insurance. We affirm.

This matter is before us for the second time. In order to understand the respondent's arguments on appeal and our analysis, it is necessary to recite the procedural history of this case.

DAMI HOSPITALITY

FEIN 84-1545878

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On February 19, 2014, the Director issued a Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice also directed the respondent to complete and return a compliance questionnaire. The record does not disclose that the respondent submitted a response to the Director's Notice.

Thereafter, on June 25, 2014, the Director issued another Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice also directed the respondent to complete and return a compliance questionnaire. The respondent was given 20 days to respond to the Director's Notice. The Director notified the respondent that if it was in default of its insurance obligations, fines would be assessed from a minimum of \$250 per day up to \$500 per day for its second or subsequent violation. The respondent also was advised of and afforded the opportunity to request a prehearing conference regarding the issue of default. The record does not disclose that the respondent requested a prehearing conference.

On October 30, 2014, the Director issued his order, finding that the respondent had employed one or more persons on or after July 1, 2005, and that the respondent failed to provide satisfactory proof of workers' compensation insurance coverage and failed to satisfactorily demonstrate why it was exempt from the insurance requirements for the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014. Finding the respondent in default of its insurance obligations, the Director imposed a fine totaling \$841,200.00 pursuant to §8-43-409, C.R.S. and Workers' Compensation Rule of Procedure 3-6. Fines were assessed in various amounts from August 10, 2006, through June 8, 2007, and from September 12, 2010, through July 9, 2014. Moreover, in an order dated May 24, 2006, the Director previously had found the respondent in default of its insurance obligations. The Director found that the respondent's previous period of default ended on June 9, 2006, when the respondent obtained a workers' compensation insurance policy.

The respondent appealed the Director's order, arguing, in part, that it was unaware its workers' compensation insurance coverage had lapsed because it had relied on its insurance broker to follow its instructions to obtain the required insurance coverage. In support of this argument, the respondent relied upon a letter of its insurance agent, which stated as follows:

I think I feel part of responsibility for this matter that I did not tell about Worker's Compensation and I will be managing my client in the future. Actually, she confused Property Insurance and Worker's Compensation.

The respondent also argued that the Division of Workers' Compensation (Division) had failed to notify the respondent in a timely manner that its insurance coverage had been cancelled. The respondent further contended that the Director imposed an "absurd fine," essentially arguing that the Director had not exercised any discretion regarding the amount of the fine, and that the fine is unconstitutional.

The Director subsequently issued his supplemental order on April 21, 2015. The Director assumed the allegations contained in the respondent's appeal were true. After weighing the evidence presented by the respondent, the Director determined that it was the responsibility of the insurance carrier, not the Division, to notify the respondent that its policy had lapsed, and in any event, it is the respondent's responsibility to maintain its insurance coverage. Section 8-44-110, C.R.S. The Director also noted that pursuant to the National Council on Compensation Insurance, Inc., the respondent's 2006 workers' compensation insurance policy was cancelled for nonpayment of premium, and its 2010 policy was cancelled for "failure to comply with the terms & conditions or audit failure." Thus, the Director concluded that both of these circumstances were within the respondent's control. The Director further determined that the letter from the insurance agent failed to indicate that the respondent was unaware of the absence of a policy of workers' compensation insurance, and it did not indicate the agent failed to secure the insurance despite the request of the respondent. Also, the Director found that there is no indication in the letter that the respondent continued to pay for workers' compensation insurance even though no policy was in place. The Director further held that even if the respondent's reliance on the agent was reasonable, it still was not relieved of its obligation to maintain workers' compensation insurance under the Workers' Compensation Act (Act). The Director also decided he had no basis for addressing the constitutionality of §8-43-409, C.R.S. The Director, therefore, concluded that the respondent was in default of its insurance obligation during the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014, and ordered the respondent to pay a fine totaling \$841,200.00. Section 8-43-409, C.R.S.; WCRP 3-6.

The respondent again appealed the Director's order, arguing, in part, that under §8-43-304(4), C.R.S. the Director failed to prove by clear and convincing evidence the respondent knew or reasonably should have known it was in violation of the Act, that its reliance on the advice of its insurance agent demonstrated it did not have reasonable

knowledge of the lack of insurance, and that the penalty assessed by the Director was “absurd,” and the amount of the fine assessed was unconstitutional.

On July 30, 2015, we issued our order of remand. Initially, we rejected the respondent’s argument that the clear and convincing standard set forth in §8-43-304(4), C.R.S. was applicable. We held that the clear and convincing standard set forth in §8-43-304(4), C.R.S. does not set forth the burden of proof governing a case involving an employer’s default of its mandatory workers’ compensation insurance obligations under §8-43-409, C.R.S. However, based on the respondent’s allegation that the fine, as applied, was excessive and unconstitutional, we remanded the matter for the Director to consider the three factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323, 326 (Colo. App. 2005) when determining the constitutionally permissible fine to be imposed against the respondent for defaulting on its statutory obligation to maintain workers’ compensation insurance. These three factors are as follows: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases.

On August 27, 2015, the Director issued his order on remand. In his order, the Director stated that the factors in *Associated Business Products* were incorporated in Rule 3-6. The Director held that the first prong of the *Associated Business Products* test, or the degree of reprehensibility of the defendant’s misconduct, is contained in Rule 3-6 because it reflects the degree of reprehensibility of a second lapse of workers’ compensation insurance coverage since the fine is substantially greater than that of an initial default. The Director held that Rule 3-6(D) also incorporates the second prong of the *Associated Business Products* test, or the disparity between the harm or potential harm suffered and the fine to be assessed, because it recognizes that the longer the employer is without insurance, the greater the risk that a non-insured injury will occur. According to the Director, because Colorado has no state monetary fund to pay for injuries sustained by workers whose employers lack insurance, the employee must rely solely on the limited financial resources of the uninsured employer. The Director thus held that for this reason, an employer that obtains insurance quickly in the event of a lapse of coverage minimizes the chance of having a non-insured injury, and the employer will receive a relatively low fine per day under the schedule of fines set forth in Rule 3-6(D). As to the third prong of the test under *Associated Business Products*, or the difference between the fine imposed and the penalties authorized or imposed in comparable cases, the Director held that Rule 3-6(D) creates a system by which any employer that has committed a subsequent violation is subject to the same table of fines.

The Director recognized that while the total amount of the fine can differ between employers, such difference is dependent on the length of time the employer fails to carry insurance. Importantly, in his order, the Director also incorporated the findings of fact made in his prior supplemental order dated April 21, 2015.

The respondent again has appealed. On appeal, the respondent raises many of the arguments that it previously made, and that we already addressed and rejected in our prior order on July 30, 2015. These arguments include the following: (1) pursuant to §8-43-304(4), C.R.S., the Director must prove by clear and convincing evidence that the respondent violated §8-43-409, C.R.S.; (2) the respondent did not have reasonable knowledge of its default; and (3) its offer of \$3,750 is an adequate penalty assessment. Accordingly, we will not address these issues again in this order. The respondent also argues on appeal, however, that the fine imposed by the Director is a clear violation of the United States Constitution and the Colorado State Constitution, the fine imposed by the Director is not constitutionally sound because it is excessive, the General Assembly never intended to impose a fine in violation of the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution, and the Director has failed to consider the factors set forth in *Associated Business Products* when reaffirming the imposition of the \$841,200 fine. With regard to its argument about the factors enunciated in *Associated Business Products*, the respondent contends that by assessing a fine under Rule 3-6(D) as written, the Director has failed to consider the facts of this case, the character of the respondent, and any harm that the default has caused. Rather, the respondent argues that Rule 3-6(D) only considers the amount of time of the default. The respondent further contends that the Director's approach with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes.

The Attorney General has not filed a Petition to Review, but instead has filed a Brief In Opposition on behalf of the Director. In the Brief In Opposition, the Attorney General argues that the Panel has erred in requiring the Director to apply the factors set forth in *Associated Business Products* when determining a constitutionally permissible fine. The Attorney General contends that the constitutional analysis set forth in *Associated Business Products* is inapplicable to §8-43-409, C.R.S. and to this case because that case instead addressed the discretionary application of penalties under §8-43-304, C.R.S., which applies to a violation for which no penalty has been specifically provided elsewhere in the Act. The Attorney General goes on to argue that since this case instead involves §8-43-409, C.R.S., and that statute mandates that the Director impose a fine on the respondent for its subsequent violation of failing to meet its statutory obligation to maintain workers' compensation insurance, the Director has no discretion to determine the amount of the fine to be imposed. Brief In Opposition at 13. The Attorney

General concedes, however, that the fine the Director is required to impose against the respondent must range between a minimum of \$250 per day and a maximum of up to \$500 per day. The Attorney General then contends that requiring the Director to apply the *Associated Business Products* factors would require compliance with nonexistent statutory provisions.

We disagree with the Attorney General's argument that the constitutional analysis set forth in *Associated Business Products* is inapplicable to §8-43-409, C.R.S. or to the facts here. In *Austin v. U.S.*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the United States Supreme Court ruled that the excessive fines clause is not limited in application to criminal cases. Rather, it applies in civil cases where the government seeks, at least in part, to punish a party. See *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1099-1100 (Colo. App. 1996). Thus, the Colorado appellate courts have held that a discretionary fine, such as the one applied here by the Director under §8-43-409(4), C.R.S., must pass constitutional muster. See *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014, 1017-1018 (Colo. App. 2012) (while the ALJ is required to impose a penalty under §8-43-305, C.R.S., the ALJ has discretion to determine the amount of the penalty, provided that the amount does not exceed the legislatively enacted penalty range); cf. *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d at 1100 (where it was mandatory to impose a penalty at a "daily rate" for insurer's continuing violation up to amount of \$100 per day, the Director's fine of \$10 per day did not violate excessive fine clause of Eighth Amendment).

In numerous contexts, Colorado appellate courts have identified factors a court should consider when exercising its discretionary authority. See *Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 570 (Colo. 2009); *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 125-26 (Colo. 2007); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 948 (Colo. App. 2009); *Dubray v. Intertribal Bison Cooperative*, 192 P.3d 604, 608 (Colo. App. 2008)(reasonable amount of attorney fees); *RMB Services, Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo. App. 2006); *Kennedy v. King Soopers Inc.*, 148 P.3d 385, 389 (Colo. App. 2006)(concerning an award of certain costs); *Clark v. Farmers Ins. Exchange*, 117 P.3d 26, 29-30 (Colo. App. 2004). As we stated in our prior order, while the opinion in *Associated Business Products* addressed a fine under §8-43-304, C.R.S., we nevertheless view the factors enunciated in that case as most applicable to the facts and circumstances presented here.

In *Associated Business Products*, the Colorado Court of Appeals discussed the considerations necessary to the exercise of the ALJ's discretion to prevent any fine so imposed from violating the excessive fines prohibition. The Court relied on the decision

in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). That case required three criteria to be considered when fashioning a constitutionally appropriate level for a fine. These include the following: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d at 326. Because the General Assembly has charged the Director with exercising similar authority and discretion in regard to fines pertinent to §8-43-409, C.R.S., these factors must also be applied by the Director when assessing a fine here. See *In the Matter of El Nuevo Time Out Corp.*, FEIN No. 01-0801734 (March 20, 2008)(recognizing consideration of three criteria announced in *Associated Business Products v. Industrial Claim Appeals Office*, *supra* when determining constitutionally appropriate level of a fine). Consequently, the Attorney General's argument notwithstanding, the excessive fines prohibition of the Eighth Amendment and of Article II, section 20, of the federal and state constitutions require the factors in *Associated Business Products* to be applied to determine whether the fine imposed by the Director is excessive. We also note that our July 30, 2015, order was not the first time we have remanded a penalty assessment of the Director for the reason that the assessment did not include reference to the criteria designed to avoid a constitutionally excessive fine. See, *Division of Worker's Compensation v. Silva Floor Solutions*, W.C. No. 2002-50381 (January 8, 2004) and *Division of Workers' Compensation v. Sundance Equestrian Center*, W.C. No. 2002-110238 (January 13, 2004). Accordingly, in our first order we were required to remand this matter for the Director to apply the factors in *Associated Business Products*. On remand, the Director determined that Rule 3-6 does, in fact, incorporate the applicable factors enunciated in *Associated Business Products*.

The Rules of Procedure adopted by the Director of the Division of Workers' Compensation pursuant to his authority under §8-47-107, C.R.S., may not expand, enlarge, or modify the underlying statute the rule is intended to enforce, and any rule which is contrary to or inconsistent with the statute it is enacted to enforce is void. *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). Because Rules are invalid if inconsistent with the underlying statute the Rule is designed to enforce, we must, where possible, construe the Rule consistent with the enabling statute. *Id.*; *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

The Director's Rule 3-6(D) provides in pertinent part as follows:

For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from \$250/day up to \$500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or *until further order of the Director. . . .* (emphasis added)

Here, based on the plain language of Rule 3-6(D), the Director's order on remand, and the Director's findings of fact from his supplemental order dated April 21, 2015, we conclude that the Director has, in fact, considered the facts of this case and exercised his discretion when imposing the fine on the respondent. As noted above, in his order on remand, the Director stated that the factors in *Associated Business Products* already have been incorporated in Rule 3-6. He held that Rule 3-6 requires a greater fine for the second violation, which reflects the degree of reprehensibility of the defendant's misconduct. The disparity between the harm or potential harm suffered and the fine to be assessed is shown in Rule 3-6(D) because the fine increases the longer the employer is without insurance, which corresponds with the greater the risk that a non-insured injury will occur. The difference between the fine imposed and the penalties authorized or imposed in comparable cases is shown in Rule 3-6(D) because the fine increases depending on the length of time each employer fails to carry insurance. Further, pursuant to Rule 3-6(D) and the Director's supplemental order dated April 21, 2015, which is incorporated in his order on remand, it is clear that the Director considered and weighed the evidence submitted by the respondent in its appeal. The Director accepted, as true¹, the allegations presented by the respondent, he weighed this evidence, considered the mitigating and aggravating factors which reflected the degree of reprehensibility, the potential harm suffered, and the differences between the fines imposed in comparable cases. The Director then issued his supplemental order or "further order" which determined that the evidence presented by the respondent in its

¹ We note that §8-43-409(1), C.R.S. was amended in 2005 to allow the Director, in his discretion, to hold an evidentiary hearing. However, that change applied only to the determination of the employer's default. It does not apply to the issue of the amount of a penalty. As we pointed out in *Division of Workers' Compensation v. Silva Floor Solutions, supra*, §8-43-207(1), C.R.S. provides that hearings are required to determine "any controversy concerning any issue arising" under the Act. This would preclude the Director from proceeding to determine the amount of the penalty in a summary judgment fashion in the face of disputed issues of fact. However, where, as here, the Director accepts the respondent's factual assertions as accurate, a hearing may not be required.

appeal did not provide him with sufficient grounds to modify the amount of the fine imposed.

For example, the Director assumed, as true, the respondent's contention that it had relied on its insurance broker to follow its instructions to obtain the required insurance coverage. Nevertheless, the Director determined that such evidence did not demonstrate that the respondent was unaware of the absence of a policy of workers' compensation insurance, and did not demonstrate the respondent continued to pay for workers' compensation insurance despite no policy being in place. Also, the Director's supplemental order determined that the respondent employed more than one person for its motel. The greater the number of employees increases the potential harm that could be suffered at the respondent's motel. It also is implicit that many of the jobs at the respondent's motel are not sedentary but, rather, involve heavier lifting, such as housekeeping and maintenance, which increases the potential of industrial injuries. These are aggravating factors that were considered by the Director when determining the appropriate amount of the fine to be imposed against the respondent. Consequently, the respondent's argument notwithstanding, we are convinced that the Director exercised his discretion under §8-43-409, C.R.S. and Rule 3-6(D) to determine a constitutionally permissible fine to be imposed.

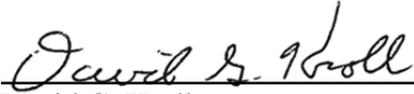
Moreover, the respondent argues, on appeal, that Rule 3-6(D) is unconstitutional because it only considers the amount of time of the default. According to the respondent, such an approach by the Director with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes. Section 8-43-409, C.R.S. was amended in several respects in 2005 by House Bill 05-1139. Those amendments added a minimum \$250 per day fine for a repeat violation of an employer's duty to maintain workers' compensation insurance. It also added to §8-43-304(1.5), C.R.S. That subsection instructed the Director to promulgate rules setting forth the circumstances pursuant to which the Director may impose a fine and "criteria for determining the amount of the fine." The Director thereupon drafted and implemented Rule 3-6. As noted above, we interpret this rule as one setting forth criteria. The Rule discusses primarily the effect the number of days in which an employer goes without insurance has on the amount of the penalty. However, the Rule also provides that a fine calculated solely on the basis of the number of days involved is made subject to modification through "further order of the Director." The Director then, may consider other mitigating and aggravating factors in the record in addition to the number of days specified in the Rule when assessing the final penalty. As discussed above, we note the Director has considered several other specific details of the respondent's case. After reviewing the impact of those factors, the Director determined the penalty calculated through reference to the number of days listed in Rule 3-6

remained an appropriate assessment. Consequently, we conclude that the respondent is mistaken in characterizing Rule 3-6 to be dependent solely on the amount of time represented by the default in coverage.

Otherwise, the respondent's remaining arguments raise a facial constitutional challenge to Rule 3.6 and to whether the Rule sufficiently addresses the constitutional requirements. We lack jurisdiction, however, to address a facial constitutional challenge to a statute or to a Rule of the Director. *See Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721 (1971); *Zarlingo v. Safeway*, W.C. No. 4-427-756 (Nov. 16, 2000) (insofar as Dr. Janssen argues the Rule is unconstitutional, we lack jurisdiction to consider the issue). The respondent's arguments are matters left for the judicial branch of government.

IT IS THEREFORE ORDERED that the Director's order dated August 27, 2015, is affirmed.

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

_____ 1/20/2016 _____ by _____ KG _____ .

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(Employer)

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RALPH L. CARR COLO JUDICIAL CTR, 1300 BROADWAY, 6TH FLOOR, DENVER, CO,
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THE LAW OFFICES OF DANIEL T. GOODWIN, Attn: DANIEL T. GOODWIN, ESQ., 8001
ARISTA PLACE, SUITE 400, BROOMFIELD, CO, 80021 (For Respondents)

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PAUL TAURIELLO, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, 633 17TH
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NIKKI GWIN, DIVISION OF WORKERS' COMPENSATION, COVERAGE
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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-679-322-05

IN THE MATTER OF THE CLAIM OF

MANUEL GARCIA,

Claimant,

v.

ORDER OF REMAND

SWIFT FOODS COMPANY,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurer,

Respondents.

The claimant seeks review of an amended order of Administrative Law Judge Nemechek (ALJ) dated October 19, 2015, that granted the respondents' motion for summary judgment to deny and dismiss the claimant's petition to reopen and the request for additional permanent partial disability (PPD) benefits. We set aside the order and remand for further proceedings.

The following facts are not disputed according to the ALJ's order. The claimant sustained an admitted injury to his back on April 5, 2005. The respondents filed a final admission of liability on July 7, 2006, admitting for permanent partial disability benefits based upon a five percent whole person rating and denying liability for maintenance medical benefits.

On December 7, 2007, the parties entered into a written stipulation to reopen the claim. The stipulation was approved by ALJ order dated December 7, 2007. The claimant underwent additional medical treatment and was again placed at MMI with no additional impairment. The respondents filed an amended final admission of liability on March 27, 2008, admitting for maintenance medical benefits. The claimant did not file an objection.

The claimant filed a petition to reopen on March 28, 2011, alleging a "[c]hange in medical condition." The claimant also filed an application for hearing listing the issue of

petition to reopen the claim. On December 22, 2011, the parties entered into a signed stipulation. Paragraph one of the stipulation stated that the claimant filed a petition to reopen the claim for the April 8, 2005, injury as well as a new claim listing the date of injury as July 27, 2010, and that these claims had been consolidated for the purposes of a hearing. Paragraph two of the stipulation stated that the claimant filed a timely petition to reopen the 2005 claim and that the parties stipulate and agree that the claimant will continue to receive reasonable and necessary and related medical care to maintain maximum medical improvement (MMI) from the authorized treating physician. Paragraph three of the stipulation specified that the parties stipulated and agreed that the evidence does not support a new injury to the lumbar spine on July 27, 2010, and the claimant agreed to withdraw the claim for that alleged injury. The stipulation also provided that, “[a]ll other issues are hereby reserved.” The stipulation was approved by order dated January 5, 2012.

The claimant filed an application for hearing and notice to set on July 23, 2012, listing the issue of PPD. The respondents alleged that the issue was closed and the claimant had to establish a right to reopen before the court could address PPD. ALJ Broniak conducted a hearing and by order dated February 8, 2013, concluded that she lacked authority to resolve the issue of PPD because the claimant had not obtained a DIME to challenge the impairment rating. The claimant subsequently filed an application for a DIME. The respondents filed a motion to strike contending that the claim was closed by the March 27, 2008, final admission of liability. The claimant responded citing to ALJ Broniak’s Order arguing that the claim had been reopened. A pre-hearing administrative law judge (PALJ) granted the respondents’ motion to strike and noted in her July 10, 2013, order that the December 22, 2011, stipulation affirmed that the claimant was at MMI as of that date and was receiving maintenance benefits but that the claim was closed. The PALJ order also concluded that the claimant abandoned the petition to reopen by canceling the hearing.

Despite the PALJ order striking the application for the DIME, the DIME was conducted and the DIME physician concluded that the claimant reached MMI on February 28, 2006, and that he sustained a 19 percent whole person impairment.

The respondents filed an application for hearing endorsing the issues of PPD, petition to reopen and overcoming the DIME. The claimant filed a response endorsing the issues of PPD, issue preclusion and appeal of the PALJ July 10, 2013, order. Another PALJ issued an order on October 24, 2013, concluding that the issues should be bifurcated and the first issue to be determined was whether the December 22, 2011, stipulation of the parties included an agreement to reopen the claim and, (2) whether ALJ

Broniak's order confirmed that the matter was reopened as opposed to only ruling that a DIME would be jurisdictionally required if the matter had been reopened.

The case was submitted to ALJ Cain on stipulated facts and position statements. In an order dated December 12, 2013, ALJ Cain determined that the stipulation was ambiguous as to whether the parties agreed to reopen the claim and did not unequivocally establish that they intended to do so. ALJ Cain ultimately concluded that the claim was not reopened by the stipulation dated December 22, 2011, nor did ALJ Broniak's February 8, 2013, order reopen the claim. Thus, the claim remained closed pursuant to the March 27, 2008, final admission of liability.¹

The claimant then filed an application for hearing on April 23, 2015, listing as the issues to be determined: medical benefits, petition to reopen claim and permanent partial benefits and Grover medicals. The respondents filed a response to the application for hearing listing the statute of limitations, waiver, estoppel and res judicata.

The respondents filed a motion for summary judgment contending that there were no issues of material disputed fact with regard to the claimant's petition to reopen. The respondents stated that the claim remained closed by the March 27, 2008, final admission of liability as determined by ALJ Cain's order and indemnity benefits had not been paid for more than seven years. In response, the claimant asserted that the petition to reopen filed on March 28, 2011, was timely filed and that the issue of whether the claimant sustained a worsening of condition has never been litigated so the claimant is entitled to a hearing on that issue.

The ALJ granted the motion for summary judgment citing to three reasons. First, the ALJ stated that the prior orders addressed whether the claim was closed and concluded it was. Specifically pointing to ALJ Cain's prior order, the ALJ stated that ALJ Cain implicitly concluded that the claim was not reopened by the March 28, 2011, petition to reopen and the claimant failed to present any evidence to show that the claim was actually reopened. Second, the ALJ found that ALJ Cain's order constituted the law of the case. Finally, the ALJ held that the doctrine of issue preclusion applied here because the parties had already litigated the issue and ALJ Cain had concluded that the

¹ The parties and the ALJ premise their arguments and findings on several documents which are not in the record. These include the order of ALJ Cain, the 2011 stipulation of the parties and the March 28, 2011, and petition to reopen. Unlike the Division of Workers' Compensation, the Office of Administrative Courts (OAC) does not maintain a continuous file of all documents filed pertinent to a claim. The OAC file is pertinent to each discreet application for a hearing. Because we are remanding this matter, and because there does not appear to be much dispute in the pleadings in regard to the content of the missing documents, we have rendered this decision.

claim remained closed by the March 27, 2008, final admission of liability. The ALJ therefore, denied and dismissed the claimant's petition to reopen and the claim for additional permanent partial disability benefits.

On appeal the claimant contends that the ALJ misconstrued the issue before him. The claimant reasserts the argument made in his response to the motion for summary judgment that the March 28, 2011, petition to reopen was timely filed and preserved the right to litigate a worsening of condition and because no order has addressed whether the claimant's condition worsened, the claimant is entitled to a hearing on this issue. We agree that there is a dispute of material fact and, therefore, remand the matter to the ALJ for further proceedings.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. See OACRP 17, 1 Code Colo. Reg. 104- 3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). We review the ALJ's legal conclusions de novo in the context of summary judgment. See *A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). Pursuant to §8-43-301(8), C.R.S., we have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

Here, the claimant maintains that he did not argue in the response to motion for summary judgment that filing the petition to reopen actually reopened the claim. Rather, the claimant argues that the March 28, 2011, petition to reopen was timely filed and *preserved the right to litigate* a worsening of condition. Relying on *McElwain v. Federal*

Express W.C. No. 4-207-196, (December 13, 2011) *aff'd Federal Express v. Industrial Claim Appeals Office*, 51 P.3d 1107 (Colo. App. 2002), the claimant points to the fact that the March 28, 2011, petition to reopen was filed within six years of the date of injury and satisfies the statute even if not adjudicated. *See also, Mascitelli v. Giuliano and Sons Coal Co.*, 157 Colo. 240, 402 P.2d 192 (1965). The respondents assert in contrast that the petition to reopen was withdrawn “by operation of law” when the claimant withdrew his application for hearing after the approval of the December 22, 2011, stipulation. Although the respondents contend that this is an operation of law, the effect of the stipulation and the withdrawal of the application for hearing are unclear.

Thus, the issue presented to the ALJ in this matter turned upon whether the December 22, 2011, stipulation and cancellation of the hearing constituted a withdrawal of the claimant’s petition to reopen. Whether the terms of the stipulation operated to preserve the claimant’s petition to reopen is a factual determination for the ALJ. This is a factual issue that remains in dispute.

Also in dispute is a February 5, 2015, order from ALJ Broniak. Both parties discuss a February 5, 2015, order from ALJ Broniak in their briefs and pleadings on summary judgment but the order was not addressed by the ALJ’s summary judgment order. It is not clear whether the petition to reopen was actually at issue for that hearing or whether the order awards or denies benefits. The respondents filed an application for hearing on PPD and penalties, the remaining issues from the hearing that was previously bifurcated by the PALJ. The claimant endorsed the issues of medical benefits authorized provider, petition to reopen, PPD, worsening of condition and maintenance medical care. In the first part of the order ALJ Broniak discusses the issues for hearing and states that the issues presented for determination are “whether this workers’ compensation claim has remained open, closed or whether it has been reopened, whether the claimant is entitled to additional permanent partial disability and whether penalties should be imposed against the claimant.” ALJ Broniak determined that the claim was not open and had never been reopened. ALJ Broniak mentions the fact that the claimant had not properly filed a petition to reopen and that no petition to reopen was pending. (ALJ Broniak Order February 5, 2015, findings of fact 26 at 6 and 30 at 6 and conclusions of law 5 at 7). ALJ Broniak, therefore, determined that the claim is closed and stated “an increase in his PPD award cannot be determined at this time.” ALJ Broniak’s February 5, 2015, order was not appealed. The parties dispute the finality of the order and its effect on this issue.

These factual questions should be determined following an evidentiary hearing at which the parties have had a full opportunity to adduce the evidence of the stipulation and the February 5, 2015, order from ALJ Broniak and their effect on the claimant’s

March 28, 2011, petition to reopen. *See Hoff v. Industrial Claim Appeals Office*, 2014 COA 137, (Colo. App. 2014) (when more than one inference could be drawn from evidence adduced at a hearing, the issue must be determined by the trier of fact and cannot be determined as a matter of law). Given the claimant's arguments and resolving all doubts regarding the existence of disputed facts against the moving party, we cannot state as a matter of law that the respondents are entitled to judgment. Therefore, summary judgment was not appropriate and we set aside the order insofar as it denied and dismissed the claimant's petition to reopen and denied the claim for permanent disability benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated October 19, 2015, is set aside and the matter is remanded for further proceedings.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 2/11/2016 _____ by _____ RP _____ .

KAPLAN MORRELL, LLC, Attn: BRITTON MORRELL, ESQ., P O BOX 1568, GREELEY, CO, 80632 (For Claimant)

RITSEMA & LYON, P.C., Attn: J. P. MOON, ESQ., 999 18TH STREET, SUITE 3100, DENVER, CO, 80202 (For Respondents)

ALJ NEMECHEK, % OFFICE OF ADMINSTRATIVE COURTS, ATTN: RONDA MCGOVERN, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-951-860-03

IN THE MATTER OF THE CLAIM OF

ISMAEL MOHAMMED,

Claimant,

v.

FINAL ORDER

CARGILL MEAT SOLUTIONS,

Employer,

and

AMERICAN INSURANCE GROUP
PLAN,

Insurer,
Respondents.

The claimant and respondents separately seek review of an order of Administrative Law Judge Felter (ALJ) dated July 22, 2015, that determined the claimant's authorized treating physician, denied temporary disability benefits and found that the claimant reached maximum medical improvement (MMI). We reverse the ALJ's order.

This matter went to hearing on the issues of compensability, authorized treating physician, medical treatment, and temporary total disability benefits. At the beginning of the hearing the parties stipulated that the claimant sustained a compensable injury on September 11, 2013, and that the claim had been admitted as a "medical only claim." Tr. at 10. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. On September 11, 2013, the claimant sustained an injury to his low back. The claimant received treatment from Dr. Cebrian, the onsite medical director at the employer's medical clinic. Dr. Cebrian recommended conservative treatment in the form of ice, stretches and home exercise. X-rays of the claimant's low back were normal. Dr. Cebrian placed the claimant at maximum medical improvement (MMI) on December 10, 2013. (Although the ALJ's order at page three indicates that the claimant was placed at MMI on December 17, 2013, this appears to be a typographical error).

The claimant continued to experience pain and returned to Dr. Cebrian in February of 2014, May of 2014, and finally on December 8, 2014. In his report dated December 8,

2014, Dr. Cebrian noted that the claimant remained at MMI as of December 10, 2013, and that his pain was not related to the September 2013, injury and recommended that the claimant seek care outside of the workers' compensation system.

The claimant sought treatment at King Chiropractic in April of 2014, and again in May of 2014. The claimant also saw a Dr. Lloyd in May, June and November of 2014, for an FMLA office visit. On May 19, 2014, the claimant complained to his employer that he was in pain while working. The employer denied further treatment relying on Dr. Cebrian's opinion that the claimant's current symptoms were not related to the 2013 injury.

The claimant then sought treatment from Dr. Kristin Mason on June 5, 2013. According to Dr. Mason, the claimant's current complaints of low back pain and pain down the claimant's right leg were consistent with the symptoms the claimant reported from the September 11, 2013, injury. Dr. Mason ordered an MRI and x-rays which showed central disc bulges at L4-5 and L5-S1 impinging on the bilateral L5 and S1 nerve roots. In Dr. Mason's opinion, the claimant's condition of discogenic back and right sided L5-S1 radicular pain was aggravated and accelerated by the work related incident on September 11, 2013. Dr. Mason eventually recommended steroid injections and placed the claimant at MMI on October 23, 2014.

At the conclusion of the hearing the ALJ weighed the credibility of Dr. Mason against Dr. Cebrian and found the opinion of Dr. Mason more credible and persuasive than the opinion of Dr. Cebrian. The ALJ further determined that the respondents refused to provide medical treatment for non-medical reasons and, therefore, the right of selection passed to the claimant who ultimately selected Dr. Mason as the authorized treating physician. The ALJ determined that the chiropractor and Dr. Lloyd were not selected by the claimant to be the authorized treating physician because the chiropractor was ancillary treatment and Dr. Lloyd only addressed the claimant's FMLA status. The ALJ therefore determined that Dr. Mason was the authorized treating physician and the respondents were liable for her medical treatment. The ALJ also found that the claimant continued to work for the employer at full wages until November 18, 2014, when he was terminated and, because this was after the determination of MMI, the ALJ denied temporary disability benefits.

On appeal, the respondents contend that the ALJ erred in determining that the claimant's condition was related to the industrial accident and in determining that Dr. Mason was the authorized treating physician. The claimant also appeals arguing that the ALJ erred in his determination that he continued working until November 18, 2014. We

conclude that these issues were not properly before the ALJ in the absence of a Division Independent Medical Examination (DIME) and the ALJ's decision, therefore, is in error.

Initial determinations of compensability are not subject to the DIME procedure. Rather, the question of whether the claimant sustained a compensable injury in the first instance, and proved disability and the need for treatment, are questions of fact for determination by the ALJ. *See Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). However, pursuant to §8-42-107(8)(b), C.R.S., when an authorized treating physician makes the initial determination of when the claimant has reached MMI, a party which disputes that determination must request a DIME. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Section 8-42-107(8)(b) also provides that if either party disputes the accuracy of the authorized treating physician's determination of MMI, a hearing on the issue shall not take place until the claimant has undergone a DIME. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

Moreover, the authorized treating physician's determination of MMI inherently reflects the physician's opinion that all of the compensable components of the industrial injury have become stable and are not expected to improve with additional treatment. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (determining causation is inherent in treating physician's determination of MMI); *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) (physician's opinion concerning the cause of the claimant's permanent impairment was an inherent part of the medical impairment rating).

It is well settled that where the claimant disputes the validity of the primary treating physician's determination of MMI, the ALJ lacks jurisdiction to resolve the issue without a DIME. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). In *Story* the claimant objected to the final admission but did not request a DIME. Rather, the claimant requested additional medical benefits for purposes of achieving MMI and a change of provider. The court concluded that the claimant's request for additional medical benefits for purposes of achieving MMI was a constructive challenge to the primary treating physician's opinion of MMI. Because a DIME had not taken place, the *Story* court held that the ALJ exceeded her jurisdiction in granting additional medical benefits for the purpose of attaining MMI.

In this case the claimant's request for additional benefits was based upon his dispute with Dr. Cebrian's determination that he reached MMI and was discharged from

care. Under these circumstances, we perceive no appreciable difference between the relevant circumstances in this claim and the facts in *Story*. The issue of compensability was not before the ALJ in this case due to the stipulation that a compensable injury occurred on September 11, 2013. Tr. at 10. The issue before the ALJ in this case, therefore, was the extent of the claimant's injury sustained on September 11, 2013. The ALJ found, and the parties do not dispute that Dr. Cebrian provided treatment and placed the claimant at MMI on December 10, 2013. Even assuming that Dr. Mason became an authorized treating physician, this does not "deauthorize" Dr. Cebrian. See *Montoya v. Sun Healthcare*, W.C. No. 4-622-266 (change of physician merely adds another physician to the list of physicians who are legally authorized to treat the injury at the insurer's expense and does not "deauthorize" current physician); *Chapman v. The Spectranetics Corporation*, W.C. No. 4-162-568 (May 30, 1997); *Matthews v. United Parcel Service*, W.C. No. 4-325-652 (December 15, 1997). If one authorized treating physician places the claimant at MMI, the issue is then subjected to the DIME process. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002). In the absence of a DIME, Dr. Cebrian's MMI finding was binding on the parties and the DIME. Section 8-42-107(8)(b), C.R.S.

We recognize the supreme court's holding in *Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), that MMI has no significance if it is prior to the claimant initiating a claim for disability. The present case, however, is factually distinct from *Loofbourrow*. In *Loofbourrow* the claimant did not file a claim for compensation until her condition worsened and the issue of compensability was before the ALJ at the hearing. The court held in those circumstances, the prior MMI opinion was not applicable because the claimant had not yet initiated a disability claim. In the present case, the claimant filed a claim for benefits in June of 2014 and alleged lost time from June 2014 through October of 2014. After the claimant filed the claim for benefits, the claimant again saw Dr. Cebrian in December of 2014 when this was no longer a "medical only claim" and Dr. Cebrian stated that the claimant remained at MMI and has been at MMI since December of 2013. Moreover, compensability of the claim was not before the ALJ in this case.

Consequently, *Story* compels a conclusion that the claimant's request for additional temporary disability and medical benefits constituted a constructive challenge to Dr. Cebrian's determination of MMI. Therefore, in the absence of a DIME, the ALJ exceeded his jurisdiction in conducting a hearing on the claimant's request for temporary disability and medical benefits after Dr. Cebrian's determination of MMI. *Neoplan USA Corp. v. Industrial Commission*, 778 P.2d 312 (Colo. App. 1989); *Hasbrouck v.*

Industrial Commission, 685 P.2d 780 (Colo. App. 1984)(subject matter jurisdiction cannot be conferred by consent or waiver, and a jurisdictional challenge may be raised for the first time on appeal.); *See also, Guyn–Smart v. Arapahoe Library District*, W.C. No. 4-268-374 (October 29, 1998); *Christine Trujillo v. United Medical Group*, W.C. No. 4-537-815 (March 12, 2004); Section 8-42-107.2(2)(c), C.R.S., (allows the insurer to request a DIME even where compensability is denied). Consequently, we must reverse the ALJ's award of benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated July 22, 2015, is reversed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 1/27/2016 _____ by _____ KG _____ .

AMERICAN INSURANCE GROUP PLAN, Attn: JONATHAN WATSON, P O BOX 14493,
LEXINGTON, KY, 40512 (Insurer)

THE LAW OFFICE OF FURUTANI & MERKEL, Attn: JOSEPH A. MERKEL, ESQ., 1732
RACE STREET, DENVER, CO, 80206 (For Claimant)

RITSEMA & LYON, P.C., Attn: TAMA L. LEVINE, ESQ., 999 18TH ST., SUITE 3100,
DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-911-673-01

IN THE MATTER OF THE CLAIM OF

MARY RODRIGUEZ,

Claimant,

v.

Order of Remand

PUEBLO COUNTY,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated September 3, 2015, that determined the claim not compensable and denied and dismissed the claim for medical benefits. We reverse and remand the matter for such further proceedings as are necessary to determine the benefits, if any, to which the claimant is entitled.

This matter went to hearing on the issues of compensability and medical benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as a warehouse worker for the respondent. The claimant was also the president of the union local 2496, an elected position that she voluntarily ran for with no encouragement from the respondent. Although employees have a nominal monthly amount deducted from their paycheck for union dues, employees are not required to attend union meetings or run for an elected union office. Union meetings are not allowed to be held during work hours and employees are not paid to participate in union meetings, unless the meeting involves negotiations with the employer. The respondent did not encourage employees' participation and there were no adverse repercussions to any employee who did not participate in the union.

On December 11, 2012, the claimant began working at 7:00 a.m. and clocked out at approximately 3:30 p.m. Immediately after she clocked out, she participated in a

union meeting with the vice president of the union and the AFSCME Director. The meeting was held in the first floor conference room of the building where the claimant worked. Other employee union members were allowed to participate in the meeting, but the employer was not allowed to participate in this particular meeting. At the meeting the claimant was given copies of contracts to take home. The claimant also made arrangements with the AFSCME Director to come to the claimant's home after the meeting to pick up some additional union documents.

The claimant left the meeting at approximately 4:05 pm and walked directly to her vehicle carrying her keys, wallet and the union contracts. Once she arrived at her car she opened the car door and put her things down on the seat of her car. After putting her things down, the claimant slipped and fell and her body hit her car door.

The ALJ summarily concluded that the claimant was not in the course and scope of her employment when she sustained the injury in the parking lot. The ALJ went on to state that even if the claimant was within the course and scope of her employment, the claim should be denied because the claimant's injury did not arise out of her employment duties. The ALJ reasoned that the claimant clocked out of work with no intention of returning to her job and continuously participated in union activities from the time she clocked out until she arrived home and afterwards. The ALJ concluded that the claimant was not performing duties that benefitted the respondent and that she had engaged in personal matters beyond the scope of her employment. The ALJ, therefore, denied and dismissed the claim.

On appeal the claimant argues that the ALJ erred in concluding that the claimant's attendance at the union meeting was a personal deviation. The claimant argues that the ALJ misread the case law cited in his order and that because the union meeting involved employment negotiations, it necessarily was a benefit to the employer under the law cited by the ALJ. The claimant argues alternatively that even if the union meeting was a personal deviation, the incident is still compensable because the claimant fell in a parking lot owned by the employer only 35 minutes after clocking out for the day. We agree with the claimant that the ALJ's factual findings compel the determination that any personal deviation that had occurred ended when the claimant exited the building to return to her car.

In Colorado, only those injuries "arising out of" and "in the course of employment," are compensable under the Workers' Compensation Act. Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). The course of employment requirement is satisfied when the claimant shows that the injury

occurred within the time and place limits of the employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). The "time" limits of the employment include a reasonable interval before and after official working hours when the employee is on the employer's property. See *Industrial Commission v. Hayden Coal Co.*, 113 Colo. 62, 155 P.2d 158 (1944) (interval up to 35 minutes has been allowed for arrival and departure from work); *Ventura v. Albertson's Inc.*, 856 P.2d 35 (Colo. App. 1992) (altercation occurred 15 minutes after conclusion of claimant's work shift, on employer's premises while waiting to leave work site; injury held compensable).

Further, an injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994). It is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

In reaching his conclusion to deny the claim, the ALJ here relied on a Connecticut Supreme Court case, *Spatafore v. Yale University*, 684 A.2d 1155 (Conn. 1996). This case involves a similar fact pattern where the claimant was injured returning from a union meeting during an unpaid lunch break. The ALJ in this case noted in his order that Spatafore's injury occurred on the employer's premises. However, as the claimant points out, the *Spatafore* opinion notes that it is "undisputed that the injury occurred on property that was owned by someone other than her employer while she was returning to work." The *Spatafore* opinion went on to conclude that the employee's attendance at a union meeting in that case did not demonstrate a mutual benefit to the employer and employee, and therefore, the claim was not compensable. The ALJ here made the same determination to find that the claimant's attendance at the union meeting did not demonstrate a benefit to the employer.

However, neither the *Spatafore* case, nor the ALJ's order in this case, address whether the claimant's participation in the union meeting was incidental to her employment duties. The respondent contends that because the claimant's fall did not occur during work hours and she was not paid to attend the union meeting, the claimant was required to prove that her participation in the union activity was somehow beneficial to her employer and not just incidental. We disagree with this interpretation of the relevant case law.

In Colorado there is no requirement that the activity giving rise to the injury be a strict duty or obligation of employment for the injury to arise out of the employment. *City of Boulder v. Streeb, supra*. Rather, it is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee which are devoid of any duty component, and are unrelated to any specific benefit to the employer. *City of Boulder v. Streeb, supra*; *L.E.L. Construction v. Goode*, 849 P.2d 876 (Colo. App. 1992), rev'd on other grounds 867 P.2d 875 (Colo. 1994) (claimant sustained fatal compensable injuries while traveling between the job site and the employer's main office to pick up a paycheck); *See also Price v. Industrial Claim Appeal Office, supra*, (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment").

When, as here, a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Roache v. Industrial Commission*, 729 P.2d 991 (Colo. App. 1986). This is true regardless of whether the theoretical framework applied is "arising out of" or "course and scope." *Panera Bread LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). The issue remains whether the claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from her job. *Id.*

In *Panera Bread, LLC v. Industrial Claim Appeals Office, supra*, the court in discussing horseplay, noted that:

it was analyzed under general principles that govern whether a claimant has deviated from employment so substantially as to remove him or her from the course of employment. When, as here, a particular act of horseplay, as opposed to the employment environment in general, is at issue, the act is to be judged according to the same standards of extent and duration of deviation that are accepted in other fields, such as resting, seeking personal comfort, or indulging in incidental personal errands.

Similarly in *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995), the court stated that horseplay may constitute an insubstantial deviation from employment and might, therefore, not preclude an award of

compensation to a participant who is injured during that conduct. The court, in announcing a four-part test to be applied to analyze whether horseplay is a deviation, noted that the first two parts of the test were: "(1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was commingled with the performance of a duty or involved an abandonment of duty."

The question of whether there has been a "personal deviation" depends on the facts and circumstances of each case. *Roache v. Industrial Commission, supra; Highland Stone Hall Management, Ltd. v. Industrial Claim Appeals Office*, Colo. App. No. 92CA1053, May 20, 1993 (not selected for publication) (question of personal deviation must be determined "based on the facts and circumstances of each case."). Whether a particular activity has sufficient connection with the circumstances under which the employee usually performs his job so as to be "incidental" to the employment is dependent on whether the activity is a common, customary, and accepted part of the employment as opposed to an isolated incident. *University of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (Colo. 1953); *Panera Bread, LLC v. Industrial Claim Appeals Office, supra; Lori's Family Dining, Inc., v. Industrial Claim Appeals Office, supra; Northwest Conejo Fire Protection District v. Industrial Commission*, 39 Colo. App. 367, 566 P.2d 717 (Colo. App. 1977).

In our view, the ALJ's findings indicate that the claimant's participation in the union meetings on the employer's premises, while voluntary, was nonetheless a common, customary and accepted part of the claimant's employment as opposed to an isolated incident. See also Tr. 35, 45. Under these circumstances the claimant's participation in the union meeting did not constitute significant a personal deviation so substantial so as to remove it from the employment relationship. See *Panera Bread, LLC v. Industrial Claim Appeals Office, supra*.

Even assuming that the claimant had been engaged in a substantial personal deviation by participating in the union meeting, the deviation ended when the claimant returned to her car in the parking lot. *Wilson v. Dillon Companies*, W.C. No. 4-937-322 (March 16, 2015). Colorado appellate courts have treated injuries sustained while an employee is leaving work and walking through the employer's parking lot to arise out of the employment because the employer is required to furnish safe means of ingress and egress to and from the working place. See *State Compensation Insurance Fund v. Walter*, 143 Colo. 549, 354 P.2d 591 (1960); *Woodruff World Travel, Inc. v. Industrial Commission*, 38 Colo. App. 92, 554 P.2d 705 (Colo. App. 1976); *Seltzer v. Foley's Department Store*, W.C. No. 4-432-260 (September 21, 2000). Additionally, injuries sustained in parking lots which are owned, maintained, or provided by the employer for

the benefit of employees arise out of the employment because they are a normal incident to the employment relationship. *E.g., Woodruff World Travel, Inc. v. Industrial Commission, supra.* (causal connection between injury and employment established where claimant fell in parking lot provided by the employer's landlord, and was provided as an "obvious fringe benefit" for employees). In fact, this doctrine has been extended to apply to injuries sustained when the claimant was crossing a public way in order to reach a parking lot provided or maintained by the employer. *See State Compensation Insurance Fund v. Walter, supra.*

Here, it is undisputed that the parking lot where the claimant fell was situated adjacent to the building where the claimant worked. Further, it was undisputed that the employer owned this parking lot and the employees used this parking lot and that the employer knew its employees used such parking lot. Tr. 12-14. Thus, the evidence establishes that the claimant's parking lot injury occurred on the respondent's "premises," and the claimant was in the parking lot for reasons related to the respondent's business. *Ventura v. Albertson's, Inc., supra* (it is not the character of the premises, but rather the nexus between the employment conditions and the injury that is determinative.) Moreover, while the claimant had clocked out from work, it is well settled that the "course of employment" embraces a reasonable interval before and after official working hours when the employee is on the employer's property. *Larson, Workers' Compensation Law § 21.06(1); Industrial Commission v. Hayden Coal Co., supra* (interval of up to 35 minutes has been allowed for arrival and departure from work); *Ventura v. Albertson's Inc.*, 856 P.2d 35 (Colo. App. 1992); *Koskie v. May D & F Stores*, W.C. 3-899-641 (September 19, 1989) (benefits properly awarded where claimant slipped in respondent's parking lot while en route to her car as she was departing work for day); *Brannan v. F. W. Woolworth Co.*, W.C. 3-832-257 (March 24, 1988) (claimant injured when walking to her car and traveling between two parts of employer's premises after learning she would not be working that day; claimant's claim properly held compensable).

Further, the fact that claimant was going to drive to her home to meet someone about union business does not sever the nexus between his employment and the injuries. Driving from the job site at the end of the work day usually is done for personal reasons. Therefore, the claimant's plan to meet a union colleague at her home does not compel a finding that her injuries are not compensable.

The ALJ's order misapplies the law and the findings do not support a denial of compensability. We, therefore, reverse the ALJ's order and conclude that the claimant sustained an injury in the course and scope and arising out of her employment duties. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated September 3, 2015, is reversed. The matter is remanded for such further proceedings as are necessary to determine the benefits to which the claimant is entitled.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 1/21/2016 _____ by _____ RP _____ .

MICHAEL W. SECKAR, P.C., Attn: LAWRENCE D. SAUNDERS, ESQ., 402 W. 12TH STREET, PUEBLO, CO, 81003 (For Claimant)

DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: MARY B. PUCELIK, ESQ., 3900 EAST MEXICO AVENUE, #1300, DENVER, CO, 80210 (For Respondents)

ALJ WALSH, % OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA MCGOVERN, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-937-085-03

IN THE MATTER OF THE CLAIM OF

DAVID STOEWER,

Claimant,

v.

FINAL ORDER

DOUGLAS COLONY GROUP, INC.,

Employer,

and

GALLAGHER BASSETT SERVICES,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Turnbow (ALJ) dated September 1, 2015, that ordered the claimant's request for a Division Independent Medical Examination (DIME) be denied for the reason that the issue of permanent benefits was closed. We reverse the decision of the ALJ.

The ALJ noted the claimant had a date of injury for November 15, 2013. The respondents had disputed compensability of the injury. Following a September 17, 2014, hearing, ALJ Felter found the claim compensable and ordered the payment of temporary disability and medical benefits.

The claimant's counsel submitted an entry of appearance on behalf of the claimant with the Division and the respondent insurance carrier on February 7, 2014. At that time the claimant's counsel maintained an office on East Mississippi Avenue in Denver. However, the counsel's law firm was in the process of a slow motion break up. The claimant's counsel and other members of the firm were planning to move in July, 2014, to an address on Revere Parkway in Centennial. Another portion of the former law firm intended to remain at the Mississippi Avenue address. Claimant's counsel included on an application for hearing filed on April 17, 2014, the Mississippi Avenue address. However, when counsel sent a copy to the insurance carrier on April 17, he included a cover letter displaying the new Revere Parkway address. The counsel's office manager testified that in the months prior to the office move to Revere Parkway, she would travel

to that address and pick up the new firm's mail. She also explained that even after the move to Revere Parkway in July, she would occasionally return to the Mississippi Avenue office to pick up mail because that firm did not always forward the mail to the new address on Revere Parkway.

After respondents' counsel entered their appearance on behalf of the employer and insurer, that counsel's firm sent pleadings and discovery to claimant's counsel at the Revere Parkway address. On September 29, 2014, following the September 17 hearing, ALJ Felter sent copies of his order to the parties. The mailing address for the claimant's counsel noted on that order featured the Revere Parkway location. On November 18, the claimant's counsel sent a letter to the respondents' counsel inquiring as to whether the respondents were intending to file an admission consistent with the order of ALJ Felter and pay the temporary benefits ordered. The respondents' attorney replied on November 26 stating the insurance carrier had that day mailed a Final Admission of Liability (FAL) and had sent a check to claimant's counsel's office. This correspondence was addressed to the Revere Parkway office.

The respondent insurance carrier did file a FAL on November 26, but sent it to the Mississippi Street address. The claimant's attorney never received this FAL. On January 2, 2015, claimant's counsel again wrote to the respondents' attorney asking when he could expect a FAL to be filed. A copy of the FAL was then sent to the Revere Parkway address. A copy had been sent to the claimant on November 26. The claimant's counsel received the copy of the FAL on January 5, 2015. On January 8, the claimant's attorney filed an objection and a Notice and Proposal for a DIME review. The respondents moved to strike the request for a DIME as being untimely. It was argued the claimant was required by § 8-43-203(2)(b)(II) C.R.S. to file a request for a DIME within 30 days of the mailing of the FAL. Because the FAL was mailed on November 26, the respondents noted the January 8 request was tardy and the claim had closed. This motion became the subject of a July 30, 2015, hearing. At the hearing, the claimant asserted the November 26 date of service of the FAL was not valid because it had not been sent to the claimant's attorney, the insurance carrier had notice of the claimant's attorney's address change because its attorney had acknowledged and applied the Revere Parkway address, the attorney had sent the carrier a copy of the previous order of ALJ Felter using that address which the claims adjuster had attached to the FAL, and because the November 26 FAL identified the date of injury as November 25, 2014, instead of 2013.

Following the hearing, the ALJ concluded the request for a DIME review was untimely. The request was stricken and the issue of permanent disability benefits was deemed to be closed. The ALJ resolved that claimant's counsel was at fault for his failure

to receive the FAL prior to January 5. The ALJ noted the attorney did not file a document advising of an address change with either the Division of Workers' Compensation or with the insurance carrier. The ALJ determined the attorney received actual notice of the filing through the respondents' attorney's November 26 letter and through the FAL sent to his client. The ALJ observed that if the carrier had not sent the FAL to the Mississippi Street address, it would not have complied with the Division's W.C. Rule of Procedure, 1-4 (A), 7 Code Colo. Reg. 1101-3. The ALJ ruled the use of the wrong year on the November 26 FAL was a typographical error and was of no practical consequence.

We agree with the ALJ's conclusion that the reference to a date of injury in 2014 instead of 2013 provides the claimant no cause for relief. The claimant would not have been misled by the use of the wrong year. He only had the one claim pending with the insurance carrier. He was aware he was not injured the day before the FAL was mailed. The FAL also stated it paid temporary disability benefits as of November 15, 2013. The fact that a second FAL was filed on June 9, 2015, to correct this date of injury did not serve to reopen the issue of permanent disability benefits. In *Chavez v. Cargill, Inc.*, W.C. No. 4-421-748 (November 1, 2002), we noted that the filing of a second FAL to reflect a Social Security offset, but which did not alter the admission for the average weekly wage, "did not purport to reopen any issue previously closed. Thus the AWW issue remained closed." The same result would apply in this matter.

The more difficult issue in this claim is the application of the decision in *Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986). In *Hall*, a FAL was sent to the claimant but not to his attorney of record. Several years later he requested a hearing on further disability and medical benefits. The ALJ found the FAL flawed because it had not been copied to the attorney and held the claim was not closed. The Court of Appeals agreed. The decision in *Hall* explained:

Due process is violated when an attorney of record, through no fault of his own, is denied notice of a critical determination in his client's case and by reason thereof fails to take the procedural steps necessary to preserve his client's rights. ... This rule applies here. Claimant's due process rights were violated by claimant's attorney not being furnished with a copy of the admission of liability. ... Under these circumstances, time limitations did not

commence to run until claimant's attorney first received notification, following his request for a hearing in January 1984, that the admission of liability had been filed. *Id.* at 96.

The ALJ here determined the claimant's attorney was at fault for his failure to receive notice of the FAL. The ALJ determined the claimant's counsel had received actual notice of the filing of the November 26 FAL for the reason that it was sent to his client and because he received a letter from the respondents' attorney stating it had been sent. However, in *Hall* the claimant had also received the FAL. That fact was held to be insufficient to remedy the denial of due process since the advice of legal counsel was required simply to advise the claimant of the significance of the FAL. Similarly, the letter stating a FAL was mailed did not provide the claimant's attorney with the information necessary to determine whether further litigation was appropriate. In *Henriquez v. K.R. Swerdfeger Constuction*, W.C. No. 4-439-720 (May 5, 2003), we pointed out that in a situation the obverse of that in *Hall*, where a copy of a FAL was provided to the attorney, but not to the claimant, the obligation to file an objection to the FAL would begin to run as of the date of delivery to the attorney. The reason being that the information in the FAL was of more significance to the attorney in the protection of rights than it would be to the claimant. W.C. Rule of Procedure 1-4(A) requires that a copy of any document filed with the Division be sent "to each party to the claim and attorneys of record." Pursuant to *Hall*, and to Rule 1-4, the claimant's counsel did not have notice of the FAL because his client received a copy or because he had been informed by letter that a FAL was to be filed with the Division.

We also note that the failure of the claimant's attorney to file a change of address notice with the Division of Workers' Compensation did not have significance in this matter. The claimant was not affected by any misdirected document sent out by the Division. As we held in *Davies v. Kindred Healthcare*, W.C. No. 4-727-298 (June 3, 2013), a claimant who provides notice of his or her correct address to the insurance carrier is not at fault for an incorrect address on a FAL due to their failure to submit an address correction notice to the Division:

The fact that the claimant failed to provide the Division notice of her new home address does not alter the fact that the respondents had notice of the correct home address and the respondents were responsible for sending out the FAL. Had the claimant failed to receive a document from

the Division, the non-receipt would arguably have been attributable to the claimant's failure to provide the Division with the correct address. ... In this case we cannot say that the non-receipt of the FAL from the respondents was attributable to the claimant.

The question of whether the claimant's counsel is at fault for the failure to receive a copy of the FAL turns instead, on the adequacy of any notice of an address change received by the insurance carrier. The rules of procedure adopted by the Office of Administrative Courts, in OAC Rule 6, specifies that the service of pleadings or other papers on a party may be made by mail "to the address given in the pleadings" The September 29, 2014, order of ALJ Felter bears a certificate of mailing, apparently attached by the OAC staff, which notes the claimant's counsel's address to be on Revere Parkway. A reasonable assumption then, is that the pleadings in the OAC file confirmed Revere Parkway to be the official address. The record shows the respondents' attorney used that address as early as August, 2014, to serve litigation documents on the claimant's counsel. In regard to proceedings before the OAC, the claimant's attorney is shown by the record to have registered his address as being on Revere Parkway¹.

The ALJ found the claimant's counsel was at fault for the misdirection of the FAL because he never "formally changed his address of record with ... Gallagher Bassett Services." The respondents argue that regardless of whether they become aware of the claimant's counsel's address and used it to successfully complete communication and correspondence, they are prohibited by a rule of the Division from using that address when mailing a FAL. Instead, they assert they are to use an address recorded with the Division as an official address regardless of their knowledge of the correct address. They contend the only way to change an attorney's address is through the use of an "official change of address." They also argue that the insurance carrier's attorney has no obligation or responsibility to inform its carrier client of the claimant's attorney's change of address whether or not the carrier's attorney received an official change of address.

As the claimant points out, the Division has no particular procedure or form to report a change of address. In fact, the Entry of Appearance form published by the

¹ We note that subsequent to the remand in the *Davies v. Kindred Healthcare* case, an additional hearing was conducted and the ALJ found the claimant did eventually receive a copy of the FAL several months after it was sent. Because the claimant did not then object within 30 days of the date she actually received the FAL, the ALJ found the claim was closed. We affirmed this subsequent ruling in *Davies v. Kindred Healthcare*, W.C. No. 4-727-298-3 (July 30, 2014).

Division does not even ask for a street address or a mailing address, nor for a fax or email address. It only requests an attorney's phone number (and oddly enough, the attorney's zip code). The reference in W.C.R.P. 1-4 (A) to the attorney "of record" does not necessarily mean the Division's record. As we held in *Davies v. Kindred Healthcare, supra*, the 'record' of significance is that of the party responsible for initiating the mailing. In the case of a FAL, that party is normally the insurance carrier.

The respondents' support for their contention that their attorney had no responsibility to provide them the correct address of the claimant's attorney is limited. They cite to the case of *Jehly v. Brown*, 327 P.3d 351 (Colo. App. 2014). However, *Jehly* dealt with a claim of fraudulent concealment. The decision held that a house seller was not complicit in a fraud when his agent, a building contractor, did not inform him the house he was selling was located in a flood plain. However, a charge of fraud requires a determination of the perpetrator's state of mind. That is not an issue in this matter.

Rule 4.2 of the Colorado Rules of Professional Conduct provides an attorney shall not communicate with a person he knows is represented by another lawyer. The respondents assert the claimant's attorney was required to contact the carrier's claims adjuster regarding his new address. The carrier, of course, was represented. Comment 4 to the Rule allows that an attorney may contact an agent for such a party concerning matters outside the representation, such as a representative of a government agency, or possibly an insurance company. However, Comment 7 advises the Rule does not allow "in the case of a represented organization" contact by the attorney with a constituent of the organization who regularly consults with the organization's lawyer concerning the matter "or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." The respondents' contention that the claimant's attorney should communicate with the claims adjuster for the insurance carrier in respect to address changes to appear on documents implicating the carrier's liability for compensation benefits, penalties, or other claims, places the claimant's attorney in a difficult position. Such contact would appear to be in violation of Rule 4.2. He may assume the subject of an address change is sufficiently benign to take the risk, but that is not clear. In any event, it is reasonable that the claimant's counsel would find Rule 4.2 to require that he provide address information to the insurance carrier's lawyer rather than to the carrier directly. The assertion that it is not the responsibility of the carrier's lawyer to pass along this address information is belied by the plain language of Rule 4.2.

In this matter, the claimant's attorney had dealt with the insurance carrier through its lawyer for an extended period of time. This included prehearing pleadings, discovery,

and the completion of an evidentiary hearing. Communication pertinent to all of these proceedings had been received by the claimant's counsel at the Revere Parkway address. An order from ALJ Felter using the Revere Parkway address was sent not only to the carrier's attorney, but the carrier's claims adjuster attached a copy provided by that attorney to the FAL filed on November 26. The respondents contend that regardless of this history, they are obligated to ignore the Revere Parkway address, and use instead, a completely different address they are able to locate in their file. Such a procedure is not one that would be likely to provide notice to the claimant's counsel of the contents of the FAL. It would be more likely to ensure that he would not get that notice. The respondents' argument that the claims adjuster is too busy to note that the address in his files is out of date is not compelling. The claimant's attorney would not be aware that after months of use of the Revere Parkway address, that address had not been communicated by the carrier's attorney to the carrier. He would also not be aware the claims adjuster was too busy to check the accuracy of his file information, or even know what information was missing from his files.

We read W.C. Rule of Procedure 1-4(A) to mean that a FAL must be served on the attorney of record. The 'record' is that of the insurance carrier responsible for filing the FAL. The circumstances in this matter involving litigation and the protracted use of a current address for claimant's counsel by the insurance carrier's counsel does not justify the carrier's use of an out dated address on the FAL. The FAL was not sent to the claimant's attorney as required by Rule 1-4 (A) and by the decision in *Hall*. The statutory period for objection to the FAL and to request a DIME review therefore began to run as of January 5, 2015, the date the attorney somehow received a copy of the FAL. Accordingly, the claimant's notice and proposal for a DIME was timely filed. The ALJ's order to the contrary is reversed and the claim shall proceed accordingly.

IT IS THEREFORE ORDERED that the ALJ's order issued September 1, 2015, is reversed.

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

_____ 1/21/2016 _____ by _____ RP _____ .

ROGER FRALEY, Attn: ROGER FRALEY, JR., ESQ., 1601 BLAKE STREET, SUITE 500,
DENVER, CO, 80202 (For Claimant)

DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: MARY B.
PUCELIK, ESQ., 3900 EAST MEXICO AVENUE, #1300, DENVER, CO, 80210 (For
Respondents)

ROGER FRALEY, JR., Attn: ROGER FRALEY, JR., ESQ., 6377 S. REVERE PKWY, STE
400, CENTENNIAL, CO, 80111 (Other Party)

15CA0231 Restaurant Tech v ICAO 02-04-2016

COLORADO COURT OF APPEALS

DATE FILED: February 4, 2016
CASE NUMBER: 2015CA231

Court of Appeals No. 15CA0231
Industrial Claim Appeals Office of the State of Colorado
WC No. 491-542-001

Restaurant Technologies, Inc. and Hartford Fire Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Timothy Fortune,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE NAVARRO
Terry and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced February 4, 2016

Hall & Evans, LLC, Megan E. Coulter, Alyssa L. Levy, Denver, Colorado, for
Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

Levine Law, LLC, Patrick A. Barnes, Denver, Colorado, for Respondent Timothy
Fortune

In this workers' compensation action, Restaurant Technologies, Inc., and its insurer, Hartford Fire Insurance Company c/o York Risk Services Group (collectively employer), seek review of a final order of the Industrial Claim Appeals Office (Panel) affirming the order of an administrative law judge (ALJ) increasing the average weekly wage (AWW) of claimant, Timothy Fortune. The ALJ increased claimant's AWW to include the cost of health insurance. We affirm.

I. Background

Claimant sustained an admitted, work-related injury in March 2013, and became eligible for temporary total disability benefits. Unable to accommodate claimant's work restrictions, employer terminated claimant's employment in August 2013.

Before his termination, employer had been paying approximately two-thirds of claimant's health insurance premium. After terminating claimant's employment, employer sent him information about continuing coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1166 (2012). Under the offered COBRA plan, employer would continue paying about two-thirds of claimant's premium; claimant would pay

the balance. Because claimant could not afford to pay any portion of the premium, however, he did not elect COBRA coverage.

At the hearing and in its subsequent position statement, employer maintained that claimant was not entitled to an increase in his AWW because he had not elected any coverage. Although the ALJ initially agreed with employer, upon reviewing claimant's petition to review, the ALJ ruled that claimant was entitled to an increase in his AWW equivalent to the full cost of covering his health insurance premium under COBRA. The Panel affirmed, and this appeal followed.

II. Analysis

Employer contends that, because claimant failed to elect a particular health insurance plan, he should not receive the equivalent cost of continuing health insurance provided through employer under COBRA. Employer argues that, in the absence of claimant's election of a specific plan, the actual cost of claimant's health insurance premium is unknown and could be less than the cost of COBRA, leaving claimant with a potential windfall. In addition, employer points out that, unless a specific plan has been elected, claimant "may use that increase in any way he pleases"

rather than toward a health insurance plan as the legislature intended. Therefore, employer suggests that claimant should seek to increase his AWW only after he has secured coverage and the cost is known. We are not persuaded by these arguments to set aside the Panel's order.

As pertinent here, the Workers' Compensation Act (Act) defines wages as follows:

(a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. . . . If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

§ 8-40-201(19), C.R.S. 2015. Employer argues that, under this provision, the cost of health insurance should not be included in

claimant's AWW because employer had been paying a portion of claimant's cost before his termination and would have continued to do so had claimant elected a plan.¹

Employer relies on the narrow, and still valid, holding in *Midboe v. Indus. Claim Appeals Office*, 88 P.3d 643, 644 (Colo. App. 2003), *overruled on other grounds by Indus. Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), that “the amount a claimant pays as his share of the premium for group health and dental insurance coverage [is not] included in the calculation of his average weekly wage *when the employer continues to pay its share of the premium.*” *Indus. Claim Appeals Office v. Ray*, 145 P.3d at 667. As the supreme court observed in *Ray*, section 8-40-201(19)(b) “expressly” provides that, when an employer pays a portion of a claimant's health insurance premium, the amount paid by the claimant shall not be included in the AWW. *Ray*, 145 P.3d at 667. Citing this

¹ In its Opening Brief, employer also asserts that it “continued to pay Claimant's health insurance premiums, including his portion of the insurance premiums, even after Claimant's termination.” However, the record does not support this assertion. To the contrary, the evidence cited by employer, a letter it sent to claimant in June 2013, states that while claimant was “on leave” employer was “covering the cost of [claimant's] benefits for the missed payrolls so that [his] benefits remain[ed] active.” This letter predates the termination of claimant's employment.

language, employer essentially argues that, because it *intended* to continue paying a portion of claimant's premium, the amount of the premium should not be included in claimant's AWW.

But *Midboe* is factually distinguishable from the case before us because employer here was *not* paying any portion of a health insurance premium for claimant after his termination. The COBRA policy lapsed because claimant was unable to pay his share and did not elect a plan. Employer downplays this distinction by focusing on claimant's failure to *elect* a plan as the precipitating event which bars inclusion of the cost of premiums in AWW. As we read *Ray*, however, it is the *actual payment* of premiums by an employer that may alleviate its obligation to include health care premiums in AWW. To read the statute otherwise — to exclude those costs from AWW if a claimant fails to elect a coverage plan — incorporates a non-existent provision into the statute, which we are not permitted to do. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (“We have uniformly held that a court should not read nonexistent provisions into the Colorado Work[er]’s Compensation Act.”).

Indeed, a careful reading of *Ray* reveals that the supreme court considered the very scenario posed in this case. Like claimant here, one of the claimants in *Ray*, Jodie Marsh, “chose not to continue her coverage under COBRA or to purchase substitute health insurance.” *Ray*, 145 P.3d at 663. The supreme court rejected the employers’ request “to include the value of an employee’s health insurance as part of the average weekly wage only when an employee *elects* and continues coverage according to the method defined by . . . COBRA, and the equivalent Colorado statute.” *Id.* at 667 (emphasis added). Thus, we disagree that *Ray* is distinguishable from or inapplicable to this case.

Employer also articulates policy reasons for the exclusion of health care insurance costs from AWW if a claimant fails to elect a plan. It argues that, because claimant did not elect a plan, the cost is uncertain and will likely vary from the known cost of the COBRA policy. It points out that, if and when claimant obtains a health insurance policy, the cost could be significantly less than the COBRA premium calculated into AWW, giving claimant a potential windfall. Employer also worries that claimant could use the

increased AWW funds in any manner he chooses, not necessarily for health insurance coverage.

In our view, though, claimant's failure to elect coverage is inconsequential. The policy concerns employer highlights have, in fact, already been rejected. As employer concedes, the statute "does not require proof that the claimant actually purchased the coverage." *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff'd*, 145 P.3d 661 (Colo. 2006). "When and where to purchase coverage is a decision for the claimant. The statute merely seeks to ensure that the claimant will have funds available to make the purchase." *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546, 549 (Colo. App. 2001). Thus, there is a risk in every case in which a claimant's AWW is increased to cover the cost of health insurance that the claimant might not use the increased AWW funds to purchase a health insurance policy. That risk, however, does not permit us to disregard the statute's directives.

In addition, the purpose of the statute is to enable a claimant, who may not otherwise have the means, to obtain health insurance coverage. *See id.* ("[T]he General Assembly enacted

§ 8-40-201(19)(b) to ensure that the claimant has sufficient funds available to purchase health insurance, regardless of whether the cost is more or less than the employer's cost of providing similar insurance.”) Claimant here testified that he could not afford his portion of the premium with the funds he was receiving. Thus, the increased AWW could accomplish the statute's goal of providing him the means to purchase necessary insurance. In the event that the policy chosen by claimant costs more or less than the calculated cost of insurance under COBRA, either party may seek a readjustment of the AWW. See § 8-43-303, C.R.S. 2015; *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 152 (Colo. App. 2007) (permitting recalculation of AWW in conjunction with reopening for a change in condition), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *Schelly v. Indus. Claim Appeals Office*, 961P.2d 547, 548 (Colo. App. 1997).

Finally, employer's concern that a claimant's failure to purchase coverage could run afoul of the Affordable Care Act is an issue beyond the scope of this appeal. See 26 U.S.C. § 5000A (2012).

Accordingly, we agree with the Panel that claimant's failure to elect coverage is inconsequential to the determination of AWW. The ALJ correctly increased claimant's AWW to include the cost of obtaining health insurance coverage as calculated under COBRA. To the extent employer asserts that the ALJ also improperly ordered it to pay interest, we necessarily reject this contention because we have concluded that the ALJ properly increased claimant's AWW.

III. Conclusion

The order is affirmed.

JUDGE TERRY and JUDGE FREYRE concur.

ISSUES

➤ Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for his termination of employment, and are therefore excused from paying temporary total disability ("TTD") benefits (for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015) or temporary partial disability ("TPD") benefits (for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law)?

STIPULATIONS

1. Claimant's average weekly wage ("AWW") at the time of injury was \$1,101.84. The parties stipulated that the total AWW was made up of \$925.88 in weekly wages and \$175.96 in the value of housing benefits provided to Claimant by Employer.
2. Should the ALJ find that Claimant was not responsible for his termination, the parties agreed that Respondents will pay TTD and TPD benefits as follows: TTD benefits for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015, and TPD benefits for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 43-year-old male who was employed by Employer as a ditch rider between August 2006 and May 2015. Claimant testified at hearing that Employer is an irrigation utility that delivers water to farms and other users in the Montrose, Delta, and Olathe areas. Claimant testified that in the summer, the job involved being sure water was delivered properly to customers. He testified that in the winter months the job involved cleaning out drained ditches, including burning brush that accumulated, and performing maintenance on ditches and equipment. Claimant testified he also worked as a mechanic, and that at times he would spend time working in the shop repairing equipment and vehicles after his water route was done for the day.

2. Claimant sustained an admitted work injury to his low back on February 14, 2015.

3. Claimant testified that he had a prior work injury to his low back that was never formalized into a claim. Claimant testified that when he reported the prior low

back injury to his supervisor, Aaron English, he was ridiculed and told to take a few days off. Claimant testified that Mr. English told him he was "hung like a horse," and that "your d*** is too big, it threw your back out, that's all your problem is. Take a few days off, we will see what happens."

4. Mr. English, water master for Employer, testified at hearing. He testified he has worked as water master for four years. He testified that working as water master involves overseeing nine ditch riders and ensuring proper repairs take place, adequate water is in canals, and that water reaches customers in the correct amounts. Mr. English testified that ditch riders are responsible for their own sections of ditches, including opening and closing head gates, cleaning trash and debris out of the ditches, and taking phone calls and orders from customers.

5. Mr. English testified that he had been employed with Employer for 16 years. Mr. English testified that he liked a workplace to be fun. He testified that this involved "messing around," "horsing around," and "cracking jokes" with coworkers. He testified that this included engaging in pranks, and that he himself performed pranks on his coworkers during his time working for Employer. He testified that he performed pranks on coworkers for at least his first 10 years on the job, but that he did not perform pranks anymore.

6. Claimant testified that he had problems with Mr. English since before 2009, stemming from a series of incidents that Mr. English called "pranks." Claimant testified that he disagreed with Employer's promotion of Mr. English to water master. Claimant testified that he originally applied for the water master position, but withdrew his application. Claimant testified that it was "unbelievable" that Mr. English was promoted to water master given his history of pranks.

7. Mr. English testified that his pranks included using a "potato gun" made out of PVC pipe on work time. Mr. English testified that he shot golf balls and bottles of caulking out of the potato gun. He testified that he never shot the gun toward coworkers, and he did not believe that he shot the gun toward areas where coworkers were working.

8. However, Claimant testified that on one occasion he and a co-worker, Pat McWilliams, were working on a structure in a ditch when he saw Mr. English first shooting golf balls with the potato gun. Claimant testified that later Mr. English was shooting other items, including tubes of caulking or tubes of chalk, toward him and Mr. McWilliams as they worked.

9. Mr. English testified that he brought an Airsoft gun to use on work time. He testified that he fired plastic bee bees at coworkers. He testified that he did not recall shooting Claimant with the Airsoft gun. However, Claimant testified that Mr. English had shot him with a bee bee with the Airsoft gun at work.

10. Mr. English testified that he built bombs on company time and with company materials that were set to detonate when his co-workers got into the truck and

turned the ignition switch on. When asked how many times he had done that, he testified, "A couple, that I recall." He testified that he had wired a bomb to explode when a coworker started a truck on more than one occasion.

11. Claimant testified about a specific incident when a bomb constructed by Mr. English detonated when another employee, Josh Guard, started a company truck. Claimant testified that the truck was perhaps five feet from his right ear when the bomb exploded. He testified that the bomb exploded with enough force to buckle the hood of the truck, and Claimant testified that the explosion damaged his right ear. Claimant testified that he has had right ear problems since that explosion.

12. Mr. English testified the bombs he built were generally milk jugs full of acetylene. He testified they would explode when hooked to a spark plug ignition system. After testifying about the manner in which the bombs he built would explode, the ALJ advised Mr. English of his Fifth Amendment rights.

13. Claimant testified that Mr. English built bombs out of four-inch PVC pipe using welding gas, gluing the caps on the ends, and using silicone to put wires into the inside of the bomb. Claimant testified that Mr. English would detonate those bombs with a battery charger. He testified that Mr. English would put pipe bombs out in the shop's driveway, bring the leads across the driveway, and then detonate the bomb using the battery charger when coworkers drove by.

14. Claimant testified that he witnessed a pipe bomb explode while Mr. English was building it on a welding bench at work. Claimant testified that the bomb went off with enough force to put shrapnel from the PVC pipe into the shop's ceiling. Claimant testified he recalled Mr. English laughed because he was "glad it didn't blow his arms off."

15. Mr. English testified that he had filled milk jugs with an accelerant and that he would hide them in ditch banks so that when coworkers were clearing brush from the ditch banks using blowtorches, the jugs would explode into flame. Claimant testified that this happened to him when he was burning a ditch that was covered in weeds. He testified that he was fortunate that the "whoosh" of flames after the explosion moved away from him. Claimant testified that Mr. English laughed about the incident, but that Claimant took the event very personally because the flames could have moved toward him.

16. Claimant testified that in the winter it was not uncommon to have a fire on the ditch bank so that employees could stay warm while they worked. Claimant testified that he saw Mr. English put several flammable and explosive items into the fire, including cans of spray foam and 55-gallon barrels of tar.

17. Mr. English testified that spray foam is sometimes used in the workplace, and that spray foam is flammable. He testified that, although he did not remember specifically, he "was sure" he had taped together tubes of spray foam and put them into

a fire at work. He also testified that, although he did not remember specifically, he “was sure” he had also thrown gallons of gas into fires at work.

18. Mr. English testified that he has put his own feces in a bag and put the bag into a coworker’s lunch. Mr. English testified that he has sat on a catwalk above a ditch and defecated toward a coworker in the ditch below him.

19. Mr. English testified that his and Claimant’s personalities clashed. He testified Claimant did not like his pranks. Mr. English testified he did not know whether Claimant was nearby during any of the incidents when a truck bomb detonated.

20. Mr. English testified that in approximately 2009, when he was working as a ditch rider, Steve Fletcher had spoken to him about building bombs on company time. Mr. English testified that Mr. Fletcher asked him to stop building bombs because there had been complaints. When asked whether he built an additional bomb after Mr. Fletcher spoke to him, Mr. English testified: “I don’t think I did.”

21. Mr. English testified that he supervised Claimant beginning November 2011 when he was promoted to foreman. Mr. English first testified that he stopped performing pranks once he was promoted to a supervisory position in 2009. He later testified that as a crew foreman, he might have “play[ed] with [his] crew a little bit.” He testified that he would continue to “shoot the potato gun, something like that.” He testified he “did not recall” performing other pranks as a crew foreman. He testified that the pranks “all stopped” when he became water master in 2011.

22. Claimant testified that just after Mr. English was promoted to crew foreman, Mr. English told Claimant that he did not have any agricultural background. Mr. English told Claimant that Employer was hiring employees who did not know anything about farming, and that it appeared that Employer was hiring on “the buddy system.” Claimant testified that Mr. English told him that Claimant got his job through Steve Martinez, and “that s*** is going to stop right now.” Claimant testified Mr. English told him that he would do everything he could to get ditch riders with farming experience. Claimant testified he interpreted that conversation as “intimidation.”

23. Steve Fletcher, general manager of Employer for four years, testified at hearing. He testified he supervised both Mr. English and Claimant. Mr. Fletcher testified that prior to Mr. English becoming water master in 2011; he had information that Mr. English and Claimant had some prior issues. Mr. Fletcher testified he knew about some of Mr. English’s “pranks” and promoted him anyway.

24. Mr. Fletcher disagreed with the use of the word “bomb” with regard to the explosives Mr. English built. He first testified that, to him, a “bomb” is a life-threatening explosive, including a pipe bomb. He testified that what Mr. English was doing was putting acetylene into soda cans or milk jugs so that they would explode and make a loud “bang,” not a massive explosion.

25. However, Mr. Fletcher later testified that he was not aware that one of the explosions set off by Mr. English dented a company truck. He testified he was not

aware that Mr. English built and detonated pipe bombs made out of PVC pipe. Mr. Fletcher was asked about Mr. English's practice of hiding jugs of acetylene in ditch banks so that they would explode when coworkers used blowtorches to clear ditches. He testified that an employee could have been injured or killed by such explosions.

26. Mr. Fletcher acknowledged that Mr. English was not an explosives or pyrotechnics expert. Mr. Fletcher testified that he was aware that Mr. English was creating dangerous situations involving fire in the workplace. Mr. Fletcher first characterized the "bombs" Mr. Fletcher built and detonated as only creating "loud bangs," but testified that for a "loud bang" to occur, there had to have been an explosion. Mr. Fletcher testified that Mr. English intentionally creating explosions and intentionally setting flammable substances on fire was dangerous conduct. He testified that that kind of conduct is unacceptable "in the position [Mr. English] was in."

27. Mr. Fletcher first testified that he knew that the kind of conduct Mr. English engaged in "goes on in the workplace in a lot of different areas." Mr. Fletcher testified that he had worked in mines previously where some of this type of conduct took place. He testified that explosions also took place in his mining job. However, he acknowledged that in a mine, explosions are for work purposes and are performed by explosives experts. He testified that explosives set off in the workplace by non-experts generally do not happen in the workplace, because they are unsafe.

28. Mr. Fletcher also testified that he had worked other jobs where employees shot coworkers with bee bee guns. He testified that employees shooting bee bee guns at each other is not acceptable behavior.

29. Mr. English testified that once he became water master, Claimant was required to report to him, which included calling in readings from Claimant's canals and giving clearance to supply water after a customer paid a late account. Mr. English testified that Claimant was required to call the office every day and speak either with Mr. English or Dennis Veo, the other water master.

30. When asked whether he was less concerned about Mr. English once he became a supervisor and was not out in the field, Claimant testified that "there was still plenty of game-playing" after Mr. English was promoted. Claimant testified that Mr. English would go out into the field and alter Claimant's water route. Claimant testified this included turning head gates on and off, and altering the proper flow of water to customers. Claimant testified that this at times affected the level of water that was delivered to customers, including to some members of Employer's board of directors, and made it look as if he was not performing his job correctly.

31. The ALJ discredits Mr. English's testimony that all of his "pranks" stopped in 2011, and credits Claimant's testimony about Mr. English's post-2011 conduct. Mr. English was only told to stop building bombs and admitted to still shooting his potato gun at work after his promotion to crew chief. In addition, Mr. English had no incentive to stop his "pranks" because Mr. Fletcher did not find his other conduct to be fireable offences, and in fact promoted Mr. English with awareness of such conduct.

32. Mr. Fletcher testified that in January 2013, Claimant approached him with complaints about Mr. English. Mr. Fletcher testified that Claimant asked that Mr. Fletcher terminate Mr. English, or in the alternative to allow Claimant to not have any contact with Mr. English.

33. Claimant testified he accumulated and brought information to Mr. Fletcher and other managers in January 2013 about Mr. English's conduct. Claimant testified that he did this after speaking with other ditch riders who wanted to come forward to management with issues they were having with Mr. English. Claimant testified that the other ditch riders agreed that if Claimant would come forward with complaints, then the other ditch riders would. Claimant testified that he went forward with his complaints because he could not see his job getting any easier. He testified that Mr. English was then his direct supervisor and could control his water route, and was making his job more difficult.

34. Claimant testified that after he brought his complaints to managers and the board, Mr. Veo, the other water master, asked him what could be done to rectify the situation. Claimant testified he told Mr. Veo: "[I]f it were me, I would fire him." Claimant testified he asked for Mr. English to be fired because he was afraid for his life and the lives of his coworkers. When asked why he did not bring these complaints to his superiors earlier if he was afraid for his life, Claimant testified that he had in fact been bringing complaints to his superiors for approximately eight years, but nothing had ever been done about his complaints.

35. Mr. Fletcher testified he reviewed Claimant's complaints, but told Claimant that those incidents occurred prior to Mr. English becoming a supervisor, and that type of conduct by Mr. English would no longer happen. Mr. Fletcher testified he told Claimant that he would not terminate Mr. English, and told Claimant that he would continue having contact with Mr. English.

36. Mr. English testified about Claimant's phone calls with him over time. Mr. English testified from his notes about a phone call with Claimant on June 13, 2014. Mr. English recalled that Claimant told him he did not want to speak with him anymore. Mr. English recalled that Claimant told him he might need to "go outside the company to get some satisfaction." Mr. English testified from his notes about a phone call on July 19, 2014, and recalled that Claimant again told him he did not want to speak with him, and gave Mr. English a phone number to call for the Colorado Department of Labor. Mr. English testified from his notes he did not know whether Claimant referenced the Department of Labor because of the explosions that Mr. English set off at work. Mr. English testified from his notes about a phone call on July 22, 2014, wherein he recalled Claimant again stating he did not want to speak with Mr. English, and asked for another person in the office to call him.

37. Claimant testified that he sent an email dated August 23, 2014 to Mr. Fletcher and George Etchart, the president of Employer's board of directors, with information about Mr. English's conduct. Claimant testified that he sent the email because he had come forward to management with complaints about Mr. English, and

that nothing happened. He testified that he believed management took his complaints lightly, and would not help him. He testified that as 2014 went on, he had a lot of things happen to his water route that he believed Mr. English was involved in. He testified that he believed it was an effort to force him to quit. Claimant testified that he was reaching a point where he was mentally unable to handle the things that had happened with Mr. English. He testified that he felt physically ill when he had contact with Mr. English. Claimant testified that he believed making a written complaint to the board and requesting for no contact with Mr. English was his last chance to ask for help.

38. Claimant testified that per Employer's personnel policies, if an employee could not rectify a problem with management, the employee should approach the board of directors. He testified that he believed that employees were encouraged to notify the board of directors in writing, which is why he wrote the email. Employer's Personnel Policies state as follows: "The Board of Directors will serve as the appropriate individuals for the purpose of hearing any complaint and/or grievance that cannot be resolved with the Manager. The employee is asked to provide the Board with a written summary of his or her complaint or grievance." Claimant's Exhibits, p. 62.

39. Claimant testified that he initially wrote the contents of the email by hand, and showed the draft to Zack Ahlberg, a member of Employer's board of directors. Claimant testified he asked Mr. Ahlberg if he thought it would cause Claimant to lose his job. Claimant testified that Mr. Ahlberg advised him to send the email, because the board needed to know what was going on. The August 23, 2014 email was entered into evidence. Claimant's Exhibit 4, p. 35.

40. Mr. Fletcher testified that in response to Claimant's August 23, 2014 email he and assistant manager Ed Suppes went to Claimant's residence in September 2014. Mr. Fletcher testified that he told Claimant that Mr. English was his immediate supervisor, and that he needed to communicate with Mr. English on a professional level. Mr. Fletcher testified that that "pranks" that Mr. English had engaged in were "in the past." Mr. Fletcher testified he told Claimant that he could either communicate with Mr. English or find a different job. Mr. Fletcher testified that Claimant said he would "look forward" to his communications with Mr. English.

41. Mr. Fletcher testified that he knew in September 2014 that there was a rift between Claimant and Mr. English. He testified that Claimant had asked on separate occasions to not have to speak to Mr. English anymore. He testified that one of these requests was in writing. He testified that Claimant told him that he felt unsafe at work because of Mr. English's conduct. Mr. Fletcher testified that Claimant told him that he was seeking counseling because of the stress he experienced dealing with Mr. English. Mr. Fletcher testified that, notwithstanding all of these factors, he still required Claimant to have contact with Mr. English.

42. Claimant testified that typically he would try to call into the office early enough to speak with and relay information with Mr. Veo so that he would not have to speak with Mr. English. He testified that this happened a majority of workdays. Claimant testified that prior to his meeting with Mr. Fletcher and Mr. Suppes in

September 2014, he had been exclusively communicating with Mr. Veo instead of Mr. English. Claimant testified that Mr. Veo knew that Claimant did not want to speak with Mr. English, so Mr. Veo came to work earlier to receive Claimant's calls.

43. Mr. Fletcher testified that after his discussion with Claimant in September 2014, for a time he stopped receiving reports from Mr. English about his and Claimant's communications.

44. Mr. English testified from his notes that Claimant called into the office the morning of October 13, 2014, and hung up when he heard Mr. English's voice. Mr. English testified from his notes that the same thing happened on October 14, 2014. Claimant testified that these few times, he would hear Mr. English's voice, "chicken out," and hang up. Claimant testified that he was not being confrontational, but was trying to deal with the problem, and to deal with Mr. English being his supervisor and get on with his job. Claimant testified that if he did not speak with Mr. English, he still called in his readings to another coworker, and did not fail to perform his job duties.

45. Mr. English testified that beginning approximately November 1, 2014, the ditch riding activity decreased for the winter season, so Claimant was not required to call into the office every day.

46. Mr. English testified that Claimant drove by his residence on March 14, 2015, and "flipped [him] the bird." Mr. English testified that Claimant took the same road later that afternoon, and "flipped [him] the bird once more."

47. Mr. English testified that Claimant would drive on Highway 348, approximately one block from Mr. English's home, on his way home. Mr. English testified that Highway 348 was "the main drag," and that lots of cars use Highway 348. Mr. English testified that Claimant was driving a white Chevy Tahoe.

48. Claimant testified that he did not drive by Mr. English's house and "flip him the bird." Claimant testified that, contrary to Mr. English's testimony, that during that time period he was not driving his Chevy Tahoe because it was parked for several months because of poor performance. He testified that during that time period he was driving his company truck.

49. Claimant also testified that he was seeing a counselor at the time to deal with his anxiety surrounding Mr. English. He testified that the counselor advised him to avoid Mr. English completely as much as possible, and so often Claimant would take a different route that would not go past Mr. English's house on Highway 348.

50. The ALJ finds Claimant's account of these incidents more probably true than that of Mr. English.

51. Claimant testified that he purchased an audio recorder in January 2015. He testified that the recorder was of poor quality, because he purchased the cheapest recorder he could find. He testified that he was unhappy with the recorder's

performance. He testified that he did not alter or delete any recordings, and would not have the expertise to know how to alter any recordings.

52. He testified that he did tell Mr. English ahead of time that he would be recording phone conversations between the two of them, but did not recall telling Mr. English that conversations were recorded prior to January 2015. He testified he did not record every phone conversation. He testified that he did not record phone conversations prior to April 2015.

53. Mr. English testified that he believed phone conversations between Claimant and him were being recorded "all the time," because Claimant had indicated to him on one occasion that he was recording phone conversations. Mr. English testified he had not reviewed any recordings other than the recordings entered into evidence at hearing.

54. Mr. English testified from his notes about a phone call with Claimant on April 18, 2015. Mr. English recalled calling Claimant with readings, and that Claimant asked him how many bombs he built while working for Employer, and how many bombs he had detonated close to other coworkers. Claimant agreed at hearing that he asked Mr. English those questions. Mr. English recalled Claimant also asking him whether he had killed somebody "in the hills with a shovel." Mr. English recalled saying he did not recall, and told Claimant he "would not do this with [Claimant] this morning."

55. Mr. English first testified that he did not know why Claimant asked those questions. Later though he testified that he had in fact built bombs on company time. When asked to clarify, Mr. English testified he was surprised by the question about killing another person, not about building bombs on company time.

56. Claimant testified that a farmer came to him and reported that Mr. English had told the farmer that he had killed a man in the mountains with a shovel. Claimant testified that he asked Mr. English about that incident, because if it were true, he would not want to work with an individual who had killed someone.

57. Mr. English testified from his notes about a phone call with Claimant on April 25, 2015. Mr. English recalled that the two discussed a clearance, and at the end of the conversation, Claimant said: "F*** you, mother*****," just before Claimant hung up. However, the recording in evidence from that conversation does not contain any expletives. The recording in evidence contains dialogue as follows:

Mr. English: "Got some work in a subdivision. And that's it."

Claimant: "What else?"

Mr. English: "That's all we got, man."

Claimant: "Seeya."

Mr. English: "Have a good one."

Claimant's Exhibit 9(c). Respondents' attorney stipulated on the record that the recording did not contain any expletives. Mr. English testified that, although the recording did not contain the language, that after Claimant said, "Seeya," and Mr. English said, "Have a good one," Claimant used the word "f***." Claimant testified that he did not use foul language with Mr. English on April 25, 2015. The ALJ finds Claimant's account more probably true than that of Mr. English.

58. Mr. English testified from his notes about a phone call with Claimant on April 28, 2015. Mr. English recalled Claimant asked him "how to get a promotion around here." When Mr. English answered that he didn't know, Mr. English testified that Claimant asked him whether "blowing s*** up" would help with a promotion. Claimant testified he also asked Mr. English whether "terrorizing other employees" would help with a promotion.

59. Mr. English testified that Claimant asked him about a sick day he took the day before, because Claimant saw Mr. English walking out of a convenience store. Mr. English testified that Claimant asked him whether he was aware that there was a policy against abusing sick leave. Mr. English testified he answered that he was aware of the policy.

60. Mr. English testified that he took Claimant's questions during these conversations to be "insubordination" by Claimant, and reported them to Steve Fletcher.

61. Mr. Fletcher testified, given the actions of Mr. English, he could understand why Claimant would be upset with Mr. English. Mr. Fletcher testified that Claimant was "obviously...dwelling in the past."

62. Claimant testified that he began professional counseling after his request to the board in August 2014 to stop contact with Mr. English was denied. Claimant testified that he sought outside help to learn how to cope with having contact with Mr. English. Claimant testified that he also wanted to tell someone his story and all the things that had happened with Mr. English.

63. Claimant testified that his counselor suggested that he first try to avoid Mr. English completely, because even speaking with Mr. English caused him a great deal of anxiety. Claimant testified that he felt physically ill when he was around Mr. English or had contact with Mr. English. Claimant testified that his counselor also recommended that Claimant ask Mr. English why he did the things he did.

64. Claimant testified that he had been instructed by Mr. Fletcher to speak with Mr. English and to deal with him professionally. Claimant testified that he had never been told that he could not ask Mr. English questions about his conduct.

65. Claimant testified that he asked Mr. English about bomb building because he wanted to know why Mr. English would want to build bombs at work and around other employees. Claimant testified that he asked Mr. English about potentially killing another person because if it were true then he would not want to work with Mr. English. Claimant testified it was important to know the extent of Mr. English's activities because

it was therapeutic. He testified that he was acting on the advice of his counselor, who advised him that if he had to work with Mr. English, he should ask Mr. English why he had acted the way he did.

66. Claimant testified he did not feel that the conversations and interactions he had with Mr. English were inappropriate. Claimant testified that asking someone about potential criminal acts, or about violation of company policies, were not acts of aggression. Claimant testified that he was not fearful of losing his job due to the questions he asked Mr. English. He testified that because Mr. English “got away with” doing so many inappropriate things, he thought that he could ask Mr. English questions about things he had done without any fear of losing his job. He testified that he did not feel he was out of line. He testified that he asked the questions he did because he was trying to “better [him]self” and make things work.

67. Claimant testified that although he could have spoken with Mr. English without asking him questions about things that he had done, that Claimant had difficulty controlling his anxiety and his fear for his and his coworkers’ safety. Claimant testified that nothing had ever been done to Mr. English despite all the dangerous conduct he had engaged in at work. Claimant testified that he felt unsafe and in danger at work. Claimant testified that he still feared for his safety and the safety of his family leading up to and following the hearing date.

68. Mr. Fletcher testified that he decided to terminate Claimant, and did so on May 4, 2015. Claimant testified that he received a phone call from Mr. Fletcher while he was working asking him to meet in the office. When Claimant asked what the meeting was about, Mr. Fletcher said he would rather talk about it in person. Claimant testified that on the way into Mr. Fletcher’s office, he asked the head mechanic what he knew about the meeting, and that the mechanic had heard news that Employer was going to promote him to the shop job. Claimant testified that when he went to Mr. Fletcher’s office, he was expecting to receive a promotion. Claimant testified that Mr. Fletcher instead informed him that he was terminated.

69. Mr. Fletcher testified that he did not give Claimant the reason for his termination during their meeting. He testified he had spoken with Employer’s attorney, Victor Rouschar, prior to the termination meeting, and that the attorney advised Mr. Fletcher to not give a reason for Claimant’s termination. The attorney advised Mr. Fletcher to tell Claimant that Employer was an at-will employer, and Claimant was an at-will employee, and that Employer “really didn’t need a reason” to terminate Claimant.

70. Mr. Fletcher testified that Claimant specifically asked him why he was being fired, and Mr. Fletcher specifically told Claimant he did not have to give a reason. Mr. Fletcher testified that Claimant specifically asked whether his firing had anything to do with his complaints or his conversations about Mr. English, and that Mr. Fletcher declined to answer that question.

71. Claimant recorded parts of the termination meeting. See Claimant’s Exhibits 9(d) – (e). Claimant’s Exhibit 9(d) contains dialogue as follows:

Claimant: So, no reason why you're letting me go?

Mr. Fletcher: Like I said, I really don't need one, so.

Claimant: Not any of the discussions I've been having with English, has nothing to do with this?

Mr. Fletcher: I'm not going to comment.

72. Claimant testified that he asked for a reason in hopes that there was something he could do to save his job. Claimant testified that he was about to leave the office, but then realized he was still living in a house owned and provided by Employer. He returned to speak with Mr. Fletcher. Mr. Fletcher first gave Claimant two weeks to vacate the house, but agreed to allow Claimant and his family 30 days to vacate per Claimant's request. Mr. Fletcher did state that: "Technically, I don't need to." Claimant's Exhibit 9(e).

73. Claimant also asked if there was anything he could do to save his job, or to perform alternate work, per the dialogue on Claimant's Exhibit 9(e) as follows:

Claimant: Nothing I can do to try to make things right and keep my job? Possibly get in the shop for you, or anything like that?

Mr. Fletcher: Not right now.

Claimant: Ok.

Mr. Fletcher: [Inaudible]

Claimant: Well, I sure hate to lose my job. And I hate to leave this company. But I understand you guys have to make your choices.

74. Claimant testified that he said he hated to lose his job because the ditch rider position was the best job he had in his life. He testified that moving into the shop would be his "dream job," and that he would want to do it for the rest of his life.

75. Mr. Fletcher testified that prior to terminating Claimant he thought that Claimant was a good employee, and a very good mechanic. He testified he had "high hopes" to move Claimant into Employer's shop as the head mechanic.

76. Mr. Fletcher testified that a ditch rider setting off an explosion close to another employee could be a fireable offense. However, Mr. Fletcher acknowledged that Mr. English set off explosions many times, but was never terminated. Mr. Fletcher agreed that allowing some employees to act in a certain way, but not others, could result in a rift in the workplace.

77. Mr. Fletcher testified that Claimant's lack of communication with Mr. English was a fireable offense. He testified that setting off explosions close to employees could be a fireable offense, but that it depended on the "severity of the explosions." He testified that setting fires on purpose was not a fireable offense. When asked whether putting one's feces in a coworker's lunch was a fireable offense, Mr. Fletcher testified that "there [are] always pranks, and I have seen that happen before in different places." He testified that defecating into a coworker's lunch is not a fireable offense. He testified that defecating towards another employee in the field is not a fireable offense, but could be "if it continue[d]."

78. Mr. Fletcher agreed that course language was commonplace at Employer's facility. He testified that personal rivalries were also common. He testified that in the case of Claimant, his communication issues with Mr. English constituted a fireable offense, but that the conduct that Mr. English engaged in was not sufficient to warrant termination.

79. Mr. Fletcher testified that between his conversation with Claimant in September 2014 and Claimant's termination in May 2015, he did not give Claimant any other warnings about his communications with Mr. English. Mr. Fletcher testified in the months prior to Claimant's termination, there was a discussion about promoting Claimant to head mechanic.

80. Mr. Fletcher testified that he agreed that Claimant, on several occasions verbally and in writing, reported to Employer potentially illegal acts performed by Mr. English. Mr. Fletcher testified that Claimant asked for accommodation because of those complaints, but that the accommodation Claimant requested – not having contact with Mr. English – was denied.

81. Mr. Fletcher testified that several other employees made complaints about Mr. English when he was promoted to water master. Mr. Fletcher testified the list of employees included, but was not limited to, Nick Moore, Gary Cooper (an equipment boss), and Steve Martinez (former crew boss). Mr. Fletcher testified that no other employee that had complained about Mr. English had been terminated, but no employee other than Claimant complained in writing about Mr. English.

82. Mr. Fletcher testified that other employees who had complained about Mr. English were able to continue communicating with Mr. English at work, but that none of these employees requested to not have contact with Mr. English. Mr. Fletcher testified that Claimant was not able to deal with Mr. English as cleanly as those other employees. Mr. Fletcher testified that, in his practice as a manager, employees are not required to "just get over" dealing with coworkers' questionable or dangerous conduct. He did testify, however, that he wrote a letter regarding Claimant's termination indicating that Claimant was unable to "forgive and forget" with regard to Mr. English's conduct.

83. Claimant testified that he did not know why he was terminated at the time of his termination, and was not told why. Claimant testified he was surprised when he was terminated because he "did not see it coming at all." Claimant testified that, based

on earlier conversations with Mr. Fletcher, he believed that he was going to be promoted. Claimant testified that he did not receive notice of the reasons for his termination until he received a letter from Mr. Fletcher through his attorney, stating that he was fired for insubordination. Claimant testified he was never made aware of the reasons for his firing at any time before receiving the letter. Claimant testified that other than his meeting with managers in September 2014 about his communications with Mr. English, he was never given a verbal or written warning up to and including the date he was terminated. He testified that he did not believe that he was at fault for his termination because he was just asking Mr. English questions.

84. Considering the totality of the evidence, the ALJ credits Claimant's testimony and the testimony of the witnesses that Mr. English

- built and set off pipe bombs and acetylene bombs to explode when coworkers started company trucks,
- hid accelerants in areas where workers were using blow torches,
- shot coworkers with bee bees,
- used a potato gun to shoot golf balls and tubes of caulk at coworkers,
- added accelerants and explosives to warming fires used by coworkers,
- defecated into coworkers' lunches, and
- defecated above ditches where coworkers were working.

85. The ALJ credits Claimant's testimony that he did not use profanity in conversations with Mr. English and that he did not "flip off" Mr. English. The ALJ finds it more probably true that these events did not occur.

86. Considering the totality of the evidence, the ALJ finds that Claimant did not precipitated the employment termination by a volitional act, which he would reasonably expect to result in the loss of employment. This finding is supported by Employer's failure to warn or discipline Claimant for his conduct between September 2014 and May 4, 2015, and Employer's tolerance of far more egregious behavior from other employees.

87. The ALJ finds it more probably true than not that "insubordination" was a pretext for firing Claimant given that:

- The following were NOT fireable offenses: setting off explosions near coworkers, placing accelerants in areas where coworkers were using blowtorches, defecating into coworkers' lunches; but being unable to "forgive and forget" such activities was grounds for termination;

- No credible evidence was presented that would support a conclusion that Claimant was not satisfactorily performing all of his job duties;
- Terminating Claimant without warning and the delay in providing an explanation for such termination;
- Mr. Fletcher's testimony that he discussed promoting Claimant to head mechanic in the months before firing him, that Claimant was a good employee, a very good mechanic and that Mr. Fletcher had "high hopes" to move Claimant into Employer's shop as the head mechanic; and
- Mr. English's comments to Claimant about the size of his genitals causing his work injury when Claimant reported his February 14, 2015 admitted back injury.

88. Considering the totality of the evidence, the ALJ finds Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term “disability” connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant’s inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; Claimant’s testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant’s ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

To prove entitlement to temporary partial disability (TPD) benefits, a claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. (“the termination statutes”), provide that 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. Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for his termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

An employee is “responsible” if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Given the situation at Employer’s worksite and Claimant’s reasonable expectation that his conduct would not result in the loss of employment, the ALJ finds and concludes that Claimant was not responsible for his termination.

As found, Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment. Therefore, the ALJ determines that Claimant has established that he is entitled to TTD benefits and TPD benefits for the periods set forth in the Stipulations and in the Order.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant TTD benefits based on an average weekly wage of \$1,101.84 from for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015.

2. Respondents shall pay Claimant TPD benefits based on an average weekly wage of \$1,101.84 for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: November 12, 2015

Kimberly B. Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203