# CURRENT TRENDS IN PENALTIES

JP Moon –Assistant City Attorney

City and County of Denver

## TOPICS FOR DISCUSSION

- Analysis of penalties decided in the OAC over the last 2.5 years
- Law and procedure underlying penalties
- Current common penalty allegations and defenses
- Director's Orders
- Recent Industrial Claim Appeals Panel decisions
- Questions?

An analysis of all cases where an ALJ made findings and issued an Order on penalties

# PENALTIES DECIDED IN THE OAC OVER THE LAST 2.5 YEARS

## MOST COMMON PENALTIES

### FAILURE TO CARRY INSURANCE

- Most common penalty brought by injured workers.
- Claimants have a high probability of prevailing.
- Respondent wins stem from showing lack of employee employer relationship.

### FAILURE TO TIMELY ADMIT OR DENY LIABILITY

- Second most common penalty brought by injured workers.
- Claimant's have a high probability of prevailing.
- Penalties rage from $15 - $100 per day.
  - Delays in benefits will increase the award of penalties.

## OTHER COMMON PENALTIES

### UNTIMELY PAYMENT OF TTD/TPD BENEFITS

- Frequently brought due to errors in admissions.
- Can also result from miscommunications between employer and adjuster.
- Generally, respondents prevail at hearing or mitigate any damages.
- Penalties range from $10 - $50 per day.

### PROCEDURAL OR ADMINISTRATIVE ERRORS

- Usually stemming from errors or omissions in admissions of liability.
- Can also be seen following a late Final Admission of Liability.
- Respondents usually prevail.
- ALJs are not interested in assessing penalties for trivial errors.
- Claimant's only win was for $7 per day.

## OTHER COMMON PENALTIES

### VIOLATION OF A PREHEARING CONFERENCE ORDER

- Penalties were assessed against violating party in almost all instances.
  - Unless a valid appeal was pending.
- Both claimants and respondents held accountable.
- Penalties vastly different.
  - $5 per day or procedural sanctions against claimants.
  - $100 - $150 per day against respondents.

### PENALTY ALLEGATIONS BY PRO SE CLAIMANTS

- *Pro se* claimants frequently bring penalties without articulating the basis or citing to the correct provision in the Act.
- Respondents have seen a 100% success rate in defending against these allegations.

# RARE BUT IMPORTANT PENALTIES

## FAILURE TO PROVIDE BENEFITS OR COMPENSATION

- Usually brought following an Order of an ALJ requiring respondent to provide or reimburse for medical benefits.
- Success is mixed and highly fact dependent.
- When claimants prevail, penalties are significant, and as high as $400 per day.

## FAILURE TO PRODUCE THE CLAIM FILE

- Some claimant attorneys are bringing this penalty allegation as a matter of course.
- Claimants' success on this issue is mixed and depends on how clearly claimant's counsel is communicating and any delays created.
- Penalties are very low, ranging from $5 - $10 per day.

# LESS COMMON PENALTIES

## HEALTH CARE PROVIDER SEEKING REIMBURSEMENT

- Only instance of penalties being awarded against a 3rd party.
- Requires active pursuit, collections, damaged credit, before ALJs are awarding penalties.
- The only claimant win resulted in penalties of $750 per day.

## LATE REPORTING OF INJURY BY CLAIMANT

- Most common penalty brought by employers and insurers.
- Respondents' success rate was 50%.
  - ALJs show deference to claimant testimony that they verbally informed a supervisor.

# LAW AND PROCEDURE UNDERLYING PENALTIES

## PENALTIES GENERALLY

- Statutory sanction which can be imposed for a party's failure to obey an order or failure to comply with the Act or rules.
- Penalties are to deter misconduct and compel compliance.
- Whether statutory penalties may be imposed involves a two-step analysis.
  - First, whether the conduct constitutes a violation of the Act, a rule or an order.
  - Second, whether any action or inaction constituting the violation was objectively unreasonable.
    - There is no requirement that the party know that its actions were unreasonable
- If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances.
  - A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure.

## FORM OF PENALTIES

- A party "shall state with specificity the grounds on which the penalty is being asserted."
  - C.R.S. § 8-43-304(4)
- Failure to state with specificity the grounds on which a penalty is asserted subjects a claim for penalties to dismissal.
  - *See Young v. Bobby Brown Bail Bonds, Inc.*, W.C. No. 4-632-376 (April 7, 2010).
- Meanwhile, the "penalties" section of the OAC's form Application for Hearing states "describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended."
  - While this language is listed on the OAC's AFH form, this language is not required by the statute.

## TIMELINE FOR PENALTIES

- A penalty must be requested within one year of the date the party requesting the penalty first knew or reasonably should have known of the potential penalty.
  - C.R.S. § 8-43-304(5)
- The one-year limit for requesting a penalty is considered a statute of limitations.
- The one-year limitation on requesting a penalty applies even if the conduct is ongoing.
  - *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002).

## CURE

- An alleged violator has 20 days from the date of mailing of an Application for Hearing asserting penalties to cure the violation.
- If cured, the party seeking such penalty must now prove by clear and convincing evidence that the alleged violator knew or reasonably should have known of the violation.
  - Usually, the party seeking penalties must only prove the violator acted unreasonably under an objective standard.
  - Curing adds an extra element of proof. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable.
    - *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003).
- This is an affirmative defense that must be specifically pled.

## AMOUNT OF PENALTIES

- The Colorado Supreme Court has adopted the "gross disproportionality" test for determining whether a regulatory fine violates the Excessive Fines Clause.
  - *Colorado Dept. of Labor & Empl. v. Dami Hospitality, LLC,* 442 P.3d 94 (Colo. 2019).
- In assessing proportionality, a court should consider:
  - Whether the gravity of the offense is proportional to the severity of the penalty.
    - However, the amount of the fine considered is for each offense, not the aggregated total of fines for many offenses.
  - Whether the fine is harsher than fines for comparable offenses.
  - The ability of the regulated individual or entity to pay.
- ALJs retain wide discretion in the factors they can consider and the amount of penalties assessed.

# CURRENT COMMON PENALTY ALLEGATIONS AND DEFENSES

- Failure to admit or deny
- Untimely temporary indemnity benefits
- Failure to provide the claim file

## FAILURE TO ADMIT OR DENY

- Employers must admit or deny liability within 20 days after they learn of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days."
  - C.R.S. § 8-43-203(1)(a).
- An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division.
- The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation."
  - Fifty percent of this penalty goes to the Subsequent Injury Fund.
- The phrase "may become liable" makes the penalty discretionary.
- Mitigation
  - The purpose is to notify the claimant he is involved in a proceeding with legal ramifications.
    - Claimant's actual knowledge, or participation in the process, may mitigate penalties.
  - Payments of benefits, or modified duty at full wages, may also mitigate penalties.

## UNTIMELY TEMPORARY INDEMNITY BENEFIT PAYMENT OR TERMINATION

- Temporary indemnity benefits are paid and terminated under specific requirements.
  - The first installment of compensation shall be paid no later than the date that liability for the claim is admitted.
  - Benefits shall be paid at least once every two weeks.
  - Temporary total disability benefits shall continue until certain statutory conditions are met.
    - *See also* Rule 6.
- Penalties increase where respondents were aware that claimant was entitled to temporary indemnity benefits for lost time related to the work injury.
  - Miscommunications between the employer and insurer/adjuster are not mitigating.
  - Miscommunications or misperceptions related to claimant may mitigate.
- Respondents should offer an explanation for delays in payment if possible.
  - Explanations can be an admission of mistake or error by the adjuster.
  - Some respondents do have evidence to offer regarding ability to pay penalties.
- Judges do not appear to be issuing penalties for stop pay and reissue or payments getting off track from a biweekly schedule.

## FAILURE TO PROVIDE CLAIM FILE

- Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or insurance carrier shall provide to the claimant a complete copy of the claim file.
  - C.R.S. § 8-43-203(4)
- If the claim file is not timely submitted to claimant, this constitutes a prima facie showing that respondent failed to comply, and respondent bears the burden to prove their inaction was objectively reasonable.
- "Reasonable respondents who received multiple requests for an updated claim file would either provide the claim file by the requisite deadline, come to an agreement with the claimant for additional time to provide the claim file, timely object to the request, or timely request a prehearing conference to address any perceived issues."
  - ALJ Kara R. Cayce - August 25, 2022
- Mitigation
  - How many written requests/follow-ups did claimant's counsel submit?
  - How long did claimant's counsel wait to pursue litigation after the request for the claim file?
  - What benefits did claimant receiving while the request for the claim file was pending?
  - Is there any evidence of actual hardship or financial strain to claimant by the delay?
  - Is there evidence of a pattern of misconduct by the employer or insurer?

# DIRECTOR'S ORDERS

## DIRECTOR'S ORDERS – A VIOLATION OF RULE 16

- Claimant filed an Opposed Motion For Determination Of Law Under Rule 9.
  - Seeking prior authorization for a right total hip arthroplasty.
  - Respondent had timely denied the request pending an independent medical examination.
- Rule 16-7-2(E) requires the IME physician to serve the IME report concurrently to all parties within 20 days.
  - The IME physician served the report only on the adjuster.
  - The adjuster did not exchange the report with the counsel for either party until day 23.
- Claimant argued authorization due to non-compliance.
  - Respondent argued substantial compliance, that penalties under §8-43-304&5 were the appropriate remedy, and that respondent remained entitled to an evidentiary hearing before the ALJ on the issues of reasonableness and necessity.
- Director's Order - Authorized
  - Rule 16-7-2(E) requires strict compliance with the deadlines set forth in that rule. These deadlines exist precisely to assure the quick and efficient delivery of medical benefits.

## DIRECTOR'S ORDERS – EXPANDING AUTHORITY

- Director is seeing an increase in requests for penalties
  - Director considers himself to have broad authority to decide penalty requests and other issues raised under Rule 9.
  - The Director does not currently hold hearings on factual issues but will find facts where they appear undisputed.
    - If no response is received, the Director will consider assertions made undisputed and will resolve issues of fact accordingly.
    - The Director is not required to send disputes to the OAC, even where there is an assertion that issues of fact exist.
  - Director is presently concerned with preauthorization issues and the delays created by same.
  - You can send a request for assessment of penalties directly to the Director.
- Responding to requests for penalties under Rule 9.
  - It is critical to send a response before the deadline, even if just to request additional time.
  - Include exhibits - regardless of foundational issues.
  - Include an affidavit from your client if possible.
    - They will accept testimony by attestation.
  - Explain your client's actions and decision making.
  - Include copies of cases and citations to cases and rules.

## DIRECTOR'S ORDERS – AGAINST INSURERS AND DOCTORS

- Director is also issuing Penalty Orders at an increased rate
  - Against adjusters for:
    - Failure to state a position.
    - Failure to respond to error letters.
    - Improper termination of TTD/TPD.
  - Against physicians for:
    - Billing errors and omissions.
      - Especially if ongoing.
    - From Bill Dispute Resolution following a Show Cause Order.
    - Failing to provide DIME report.
  - By Coverage Enforcement:
    - Especially failure to report insurance to NCCI.
      - Carrier is required to report a new employer to NCCI within 30 days – Rule 4.
- Responding to Error Letters
  - The Division is not interested in penalties but compliance.
  - Communications, including informal phone calls, will help mitigate and delay imposition of penalties, and can show a desire to comply.
  - Extensions of time are routinely given.
  - Will consider training in lieu of penalties.

*Harper v. Dillon Companies*, W.C. No. 4-991-178 (ICAO December 4, 2023)

*Garcia v. Denver Convention Center*, W.C. No. 5-248-255 (March 5, 2024)

*Salerno v. Allied Universal*, W.C. No. 5-210-972 (ICAO January 2, 2024)

*Macey v. DHL Express*, W.C. No. 5-183-433 (ICAO April 1, 2024)

# RECENT INDUSTRIAL CLAIM APPEALS OFFICE DECISIONS

## HARPER V. DILLON COMPANIES, W.C. NO. 4-991-178 (ICAO DECEMBER 4, 2023)

**FACTS**

- Claimant sustained significant spinal injuries in July 2015, leading to surgery and major complications, including a collapsed lung and the need for supplemental oxygen, and received diagnoses that included tethered cord syndrome, urinary incontinence, and sleep apnea.
  - ALJ Goldman subsequently found claimant PTD
  - Maintenance care included urinary incontinence items, certain mobility devices, and some exercise equipment.
- Respondents denied liability for these recommended supplies, and the case eventually went to hearing in front of ALJ Nemechek who determined the items were reasonably necessary and related.
  - This was appealed, and the Panel affirmed.
- Respondents did not provide any of the materials included in the ALJ's Order.
- Claimant eventually prepared a spreadsheet calculating her reimbursements, to which respondents offered to reimburse based on prices for the various medical items as calculated by a medical supply vendor.
- Claimant filed an Application for Hearing requesting reimbursement for out-of-pocket expenditures related to the items ordered, and also seeking penalties for respondents' failure to comply with ALJ Nemechek's Order that they supply the maintenance medical materials specified.

## HARPER V. DILLON COMPANIES, W.C. NO. 4-991-178 (ICAO DECEMBER 4, 2023)

**ALJ DETERMINATION**

- At the hearing, Claimant testified as to her efforts to purchase the provisions, and respondents' failure to supply the materials or reimburse her, leading to frustration and depression.
- The ALJ concluded that the respondents did not provide persuasive evidence that they were in the process of acquiring the items to send to claimant through a vendor, and ordered respondents to reimburse claimant about $17,000.00.
- The ALJ also found that respondents had been aware of the nature and details of the maintenance medical benefits previously ordered, but had failed to abide by that Order in a reasonable manner, and assessed penalties of $150.00 per day totaling $37,000.00.
- The ALJ further directed that respondents either arrange for delivery of the items claimant required or prospectively send payment monthly.

## HARPER V. DILLON COMPANIES, W.C. NO. 4-991-178 (ICAO DECEMBER 4, 2023)

**ICAO HOLDING – AFFIRMED**

- Respondents asserted claimant did not timely nor adequately provide receipts for the purchases.
  - Respondents could not reasonably have reimbursed claimant due to faulty documentation.
  - Respondents only obligation for medical benefits was payment of bills past services rendered, and claimant made it impossible for respondent to meet this obligation.
- C.R.S. § 8-42-101(6) requires reimbursement only if respondent "fails to furnish reasonably and necessary medical treatment."
  - The implication is that respondents have the responsibility to first furnish the care, but if they failed to do so, reimbursement is required.
  - *See also* Rule 16-10, which states that an injured worker should never be required to directly pay for admitted or ordered medical benefits.
- It was respondents' duty to "make arrangements" for claimant's receipt of these medical supplies. The prior Order placed a duty on respondents to supply the benefits in a manner that did not require claimant to pay for them first.
- The penalty was reasonable as it was for both delays in reimbursement *and* for violation of an Order.

## GARCIA V. DENVER CONVENTION CENTER, W.C. NO. 5-248-255 (MARCH 5, 2024)

**FACTS**

- Claimant sustained 2 work injuries. The first was a 2015 medical-only claim. The second was a 2021 lost time claim with a W.C. No. assigned.
- The parties settled both claims, but in the settlement documents, since the first injury was medical-only, only its insurance claim number was listed.
- Settlement was approved in 2023.
- After the Order approving settlement, respondent filed a FROI for the first claim, causing the Division to assign a W.C. No.
  - The Division could not have known this claim had been settled.
- Division issued a letter requesting position statement.
- Carrier reached out to the Division advising of the situation.
  - Division responded with instructions to either file a position statement or submit a motion to amend the settlement documents.
  - Respondent took no action.
- Director issued a second letter threatening penalties if no position statement was filed.
  - Still no action by respondent.

## GARCIA V. DENVER CONVENTION CENTER, W.C. NO. 5-248-255 (MARCH 5, 2024)

**DIRECTOR'S ORDER**

- Director issued a Penalty Order for failure to comply.
- Respondent filed a Petition to Review, but not a position statement or motion to amend.
- Director rejected respondent's argument that the settlement was the position statement for the 2015 claim.
  - W.C. No. was not created until two weeks after settlement and respondent was on notice of what actions should be taken.
  - Penalties of $100 per day and ongoing.

**ICAO HOLDING - AFFIRMED**

- No error in the imposition of penalties.
  - Respondent reasonably should have known to comply with the Order, and that their conduct constituted disregard of the Director's lawful Order.
  - Footnote #2 - respondent did not assert that they have complied with the Director's Order, nor did respondent raise the issue of whether the penalties should continue to accrue, so the Panel could not address on appeal.

## SALERNO V. ALLIED UNIVERSAL, W.C. NO. 5-210-972 (ICAO JANUARY 2, 2024)

**FACTS AND ALJ DETERMINTION**

- Claimant filed a Worker's Claim for Compensation stating that she injured her neck and back following a collision with a deer jumping in front of her vehicle.
- The Division sent the insurer a copy of the claimant's Worker's Claim for Compensation with notice to state a position within 20 days.
  - A second notice followed stating "[t]he period for filing a position statement has expired and you are now in a potential penalty situation."
  - Then a Director's Order compelling respondent to file an admission of liability or a notice of contest within 15 days.
- Respondent filed an admission 15 days after the deadline to comply with the Director's Order.
- Claimant filed an Application for Hearing on penalties for failing to file a position statement and penalties for violation of a Director's Order.
- The ALJ found respondent was aware of the work injury, and that respondents offered no evidence as to why they failed to respond to the letters from the Division, or to the Director's Order.
- Penalties were assessed for both violations.
  - $730.00 for failure to state a position – 73 days total
  - $750 for violation of a director's order

## SALERNO V. ALLIED UNIVERSAL, W.C. NO. 5-210-972 (ICAO JANUARY 2, 2024)

**ICAO HOLDING - AFFIRMED**

- Although claimant did not state the dates on which the violation began and ended as required in the OCA form Application for Hearing, the requirement to specify dates is not in the Act.
- The issues endorsed by claimant provided respondent an opportunity to cure.
  - If penalty allegations provide respondent an opportunity to cure, then notice is adequate.
- Claimant satisfied her burden, by clear and convincing evidence, to show the respondents knew, or should have known, they were in violation of the statute and Order.
  - The insurer offered no explanation for its conduct, so the ALJ may infer that there was no reasonable explanation for the insurer's action.
  - Because the respondents knew about the claim and did not present any factual or legal argument that their actions did not violate the statute and the Director's Order, the record supports the determination respondents knew, or should have known, their actions violated the statute and the Director's Order.

## MACEY V. DHL EXPRESS, W.C. NO. 5-183-433 (ICAO APRIL 1, 2024)

**FACTS**

- Claimant sustained a work related low back injury after lifting boxes and bags.
- Claimant was initially taken completely off work for 45 days.
- When the claimant returned to work, for a period of almost a year, he did not receive his full hours he had been working prior to his back injury.
  - Claimant had not refused overtime hours after his return to work and took all overtime offered.
- After claimant filed an Application for Hearing, respondent filed a medical-only General Admission of Liability
- 113 days after claimant's Application for Hearing, respondent admitted to the period of TTD, but not for TPD benefits following claimant's return to work.
  - Respondent maintained that claimant's work injury did not cause his wage loss following his return to work.

**ALJ DETERMINATION**

- Claimant was entitled to TPD benefits following his return to work in the amount of $30,900.44.
- Respondent was aware of the lost time nature of the claim as the claim notes reflect that there was a "Type Change" from medical-only to an indemnity claim.
- Respondents failed to cure the violation

## MACEY V. DHL EXPRESS, W.C. NO. 5-183-433 (ICAO APRIL 1, 2024)

- Claimant established that he was entitled to penalties due to the respondent-insurer filing a medical only general admission of liability, despite the respondent-insurer having knowledge that the claimant sustained a lost-time claim.
  - $25 per day for a total of 478 days, resulting in a total penalty of $11,950.00

**ICAO HOLDING – AFFIRMED & REMANDED**

- Respondent did not address the issue of penalties in their brief, nor did respondent withdraw their appeal of the issue.
  - Although a failure to file a brief is not jurisdictional, the Panel will not search the record for potential errors so as to assume the role of advocate for an appealing party.
- Claimant requested attorney fees and costs due to respondent's abandonment of the penalty issue and the failure to present any evidence of a mistake or error and in the ALJ's penalty award.
  - Remanded

# QUESTIONS?

JP Moon – Senior Assistant City Attorney
Denver City Attorney's Office
720.913.3217 or john.moon@denvergov.org

**STATE OF COLORADO**
**DIVISION OF WORKERS' COMPENSATION**
**Division of Workers' Compensation No: 4[redacted]**

## DIRECTOR'S ORDER GRANTING MOTION FOR DETERMINATION OF LAW

In the Matter of the Claim of:

K[redacted] M[redacted], Claimant

vs.

[redacted] Self-Insured Employer

THIS MATTER comes before the Director of the Division of Workers' Compensation (Division) upon the filing of an Opposed Motion For Determination Of Law. The Director, having reviewed the file and accompanying information, finds as follows:

Background

On January 3, 2024, K[redacted] M[redacted] (claimant or injured worker) filed an Opposed Motion For Determination Of Law By The Director (Motion). The claimant alleges the following facts are undisputed:

- On August 3, 2023, the Authorized Treating Provider (ATP) requested prior authorization for a right total hip arthroplasty to Sedgwick Claims Management Services, an agent of [redacted] (self-insured employer or respondent).
- The respondent timely denied the request pending an independent medical examination (IME), pursuant to Rule 16-7-2(E) on August 18, 2023.
- The IME timely occurred on September 11, 2023 with Timothy O'Brien, M.D.
- Rule 16-7-2(E) requires the IME physician to serve the IME report concurrently to all parties within 20 days, in this case by October 3, 2023.
- On October 3, 2023, the IME physician served the report only on the adjuster and not on all parties as required by the rule.
- The adjuster did not exchange the report with the counsel for either party until October 4, 2023.

The claimant argues that the prior authorization request for the proposed surgery has been deemed authorized in accordance with Rule 16-7-2(E), due to non-compliance with one of the requirements

stated in that rule. The claimant adds that, because the relevant facts are undisputed, the Director can rule on the Motion without an evidentiary hearing. There is no application for hearing or any motion pending before the Office of Administrative Courts on the issue presented by the Motion.

The respondent timely filed a response under Rule 9-3(E). The respondent disputes that Rule 9-3 allows the Director to award medical benefits, such as the proposed surgery, to the claimant. The respondent also states that a request for penalties under §§ 8-43-304 and -305, C.R.S., is a more appropriate remedy for a Rule 16 violation and that there are disputed questions of fact.

The respondent does not dispute the IME physician only served his report on the respondent adjuster and that all parties did not receive it within the 20 days prescribed by Rule 16-7-2(E)(2).[1] However, the respondent argues it has substantially complied with Rule 16-7-2(E) because the IME physician served his report on October 4, 2023 (one day after the deadline) and the respondent served it on the claimant on October 6, 2023 (two days later). The respondent cites prior cases that apply the doctrine of substantial compliance to several notice requirements of the Colorado Workers' Compensation Act. *EZ Bldg. Components Mfg., LLC v. ICAO*, 74 P.3d 516 (Colo. App.2003); *Pinon v. U-Haul and Insurance Company of the State of Pennsylvania*, W.C. No. 4-632-044, 2007 Colo. Wrk. Comp. Lexis 76 (ICAO, 2007). The respondent argues the concept of substantial compliance applies here. The respondent adds that, even if the surgery is deemed authorized for payment, the parties remain entitled to an evidentiary hearing before the ALJ on the issues of reasonableness and necessity.

## Discussion

As a preliminary matter, it is true that Rule 9-3(A) does not list this type of Motion and the relief sought. That rule includes—but does not limit—the types of motions that may be filed before the Director. In addition, although the claimant could have requested penalties under §§ 8-43-304 and -305, C.R.S., for violation of Rule 16-7-2(E), she chose to seek a different type of relief.

Rule 16-7-2(E) states:

> Failure of the payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding.
>
> 1. The IME must occur within 30 days, or upon first available appointment, of the Prior Authorization request, not to exceed 60 days absent an order extending the deadline.
>
> 2. The IME physician must serve all parties concurrently with the report within 20 days of the IME.

[1] It appears there is a dispute as to whether the claimant's counsel received that report 1 or 2 days after the deadline set forth in Rule 16-7-2(E)(2), but both parties agree it was after the deadline.

3. The payer shall respond to the Prior Authorization request within 10 days of the receipt of the IME report.

4. If the injured worker does not attend or reschedules the IME, the payer may deny the Prior Authorization request pending completion of the IME.

5. The IME shall comply with Rule 8 as applicable.

In addition, Rule 18-7(G)(5), applies specifically to IMEs. The rule states, among other things:

> An IME is an objective medical examination of an injured worker performed by a Physician who has not previously treated the injured worker, in order to evaluate prior, current, or proposed treatment, or current condition.
>
> * * *
>
> All IME reports must be served concurrently to all parties no later than 20 days after the examination.

It is undisputed the IME physician did not serve his report concurrently on all parties within 20 days of the examination and thus failed to comply with Rules 16-7-2(E) and 18-7(G)(5). What is disputed is whether the doctrine of substantial compliance applies to these rules.

The legislative intent of the Colorado Workers' Compensation Act 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." See, § 8-40-102(1), C.R.S., Rule 18-1. Given this legislative intent, the undersigned interprets Rule 16-7-2(E) to require strict compliance with the deadlines set forth in that rule. These deadlines exist precisely to assure the quick and efficient delivery of medical benefits while permitting review of the reasonableness of proposed benefits.

This is especially the case in regards to the deadlines applicable to prior authorizations where the payer opts to respond by retaining an IME. The IME option—while appropriate for complex and invasive proposed treatment—also presents the highest risk of delaying care in contravention of the legislative intent. Therefore, the balance between determining reasonableness and necessity of proposed treatment and the need to do so quickly and efficiently is even more important. The undersigned finds that strict compliance with Rule 16-7-2(E) is required[2] and that the respondent failed to strictly comply in this case. The denial and the IME upon which that denial relies were invalid under Rule 16-7-2(E) and 18-7(G)(5). The respondent also failed to apply for a hearing. Consequently, the right total hip arthroplasty as requested by the ATP on August 3, 2023 is deemed authorized.

[2] In addition, Division Rules, including Rule 16-7-2(E), should be given their plain and ordinary meanings unless the result is absurd. *See, e.g., Moore v. Cobb Mechanical Contractors*, W.C. No. 4-599-920 2006 Colo. Wrk. Comp. LEXIS 52, (ICAO, 2006).

**IT IS ORDERED:** The Opposed Motion For Determination Of Law By The Director, filed on January 3, 2024 by K[redacted] M[redacted] is granted.

Dated: January 26, 2024.

DIVISION OF WORKERS' COMPENSATION

By _____
Paul Tauriello, Director

**STATE OF COLORADO**
**DIVISION OF WORKERS' COMPENSATION**
**Division of Workers' Compensation No: 4-[redacted]**

## DIRECTOR'S SUPPLEMENTAL ORDER

In the Matter of the Claim of:

K[redacted] M[redacted], Claimant

vs.

[redacted] Self-Insured Employer

THIS MATTER comes before the Director of the Division of Workers' Compensation (Division) upon the Petition to Review (Petition) filed by [redacted] (self-insured employer or respondent) on February 14, 2024. The Director, having reviewed the file and accompanying information, finds as follows:

Procedural Background

On January 3, 2024, K[redacted] M[redacted] (claimant) filed an Opposed Motion For Determination Of Law By The Director (Motion). The claimant argued that, because the respondent failed to comply with Rule 16-7-2(E), a prior authorization request for a surgery has been deemed authorized. The claimant alleged that the respondent scheduled an independent medical examination (IME) in response to the prior authorization request. However, the IME physician did not serve his report concurrently to all parties within 20 days, as required by Rule 16-7-2(E). Instead, according to the claimant, on October 3, 2023 (the date the report was due), the IME physician served the report only on the adjuster and not on all parties as required by the rule. The adjuster did not exchange the report with the counsel for either party until October 4, 2023.

The respondent timely filed a response to the Motion under Rule 9-3(E). The respondent disputed that Rule 9-3 allows the Director to award medical benefits, such as the proposed surgery, to the claimant. The respondent also stated that a request for penalties under §§ 8-43-304 and -305, C.R.S., is a more appropriate remedy for a Rule 16 violation and that there are disputed questions of fact.

The respondent did not dispute the IME physician only served his report on the adjuster and that all parties did not receive it within the 20 days prescribed by Rule 16-7-2(E)(2).[1] However, the respondent argued it has substantially complied with Rule 16-7-2(E) because the IME physician served his report on the respondent on October 4, 2023 (one day after the deadline) and the respondent served it on the claimant on October 6, 2023 (two days later). The respondent cited

[1] There was a dispute as to whether the claimant's counsel received that report 1 or 2 days after the deadline set forth in Rule 16-7-2(E)(2), but both parties agreed it was after the deadline.

prior cases that apply the doctrine of substantial compliance to several notice requirements of the Colorado Workers' Compensation Act, arguing it has substantially complied with Rule 16-7-2(E). The respondent added that, even if the surgery is deemed authorized for payment, the parties remain entitled to evidentiary hearing before the ALJ on the issues of reasonableness and necessity.

On January 26, 2024, the Director granted the Motion. The Director found that, while Rule 9-3(A) does not list this type of Motion and the relief sought, the rule does not limit the types of motions that may be filed before the Director. The Director also noted that, although the claimant could have requested penalties under §§ 8-43-304 and -305, C.R.S., for violation of Rule 16-7-2(E), she chose to seek a different type of relief.

The Director found it was undisputed that the IME physician did not serve his report concurrently on all parties within 20 days of the examination and therefore failed to comply with Rules 16-7-2(E) and 18-7(G)(5). The Director also found that strict compliance with Rule 16-7-2(E) was required and that the respondent failed to so comply. Therefore, the prior authorization denial and the IME upon which that denial relied were invalid under Rule 16-7-2(E) and 18-7(G)(5). The Director concluded the proposed surgery (right total hip arthroplasty) was deemed authorized.

On February 14, 2024, the respondent filed a Petition to Review the Order pursuant to § 8-43-301, C.R.S. The respondent filed a brief in support of the Petition on March 11, 2024. The claimant filed a brief in opposition to the Petition on March 28, 2024.

## Discussion

First, the respondent argues that the Director abused his discretion by awarding medical benefits under Rule 9-3, because an award of medical benefits is not listed in Rule 9-3(A)(1) through (9). The introductory sentence in Rule 9-3(A), which precedes the listing of the types of motions in subsections (1) through (9), states that "[m]atters for the Director's determination *include but are not limited to*[.]" Emphasis supplied. Thus, plain language of Rule 9-3(A) is clear that the nine types of motions listed are examples, but not the only ones that may be filed with the Director.[2]

Second, the respondent argues that remedies for a violation of Rule 16 should be sought under § 8-43-304 and -305, C.R.S. The respondent adds that there are questions of fact related to these statutory provisions and are not subject to adjudication by the Director under Rule 9-3(A)(1-9), but does not elaborate what those questions of fact are. The respondent cites no statute or rule that requires parties to pursue remedies for a Rule 16 violation under those statutes. The Director declines to construe any limitations on a party's choice of remedies that are not found in the plain language of the statute or the Division Rules.

[2] In interpreting statutes and procedural rules, the courts must begin with the commonly understood and accepted meanings of the words, otherwise known as their plain language. The courts also must endeavor to give effect to every word and render none superfluous. *See, e.g., Namaste Judgment Enforcement, LLC v. King*, 465 P. 3rd 78, 81 (Colo. App. 2020). *See also*, *Moore v. Cobb Mechanical Contractors*, W.C. No. 4-599-920 (ICAO April 12, 2006), 2006 Colo. Wrk. Comp. LEXIS 52 (Division Rules should be given their plain and ordinary meanings unless the result is absurd).

Third, the respondent makes several arguments based on interpretation of Rule 16 and due process. The respondent argues that the purpose of the prior authorization rule is to determine the reasonableness and necessity *in advance* of the treatment. Emphasis supplied.[3] The Director agrees. The purpose of Rule 16 is to protect a provider from providing treatment that the payer later challenges as non-compensable. *Bekkouche v. Riviera Electric*, W.C. 4-514-998 (ICAO 2007), 2007 Colo. Wrk. Comp. LEXIS 83. The Director thus rejects the later-and contradictory-argument made by the respondent, that the issue of authorization for payment is not ripe because the claimant has not yet undergone the treatment.[4] The Director also rejects a distinction between authorization for payment and authorization for treatment itself, since the insurers are not required to pay for any treatment that is not reasonable or necessary or related. Finally, the Director rejects the notion that a failure to comply with Rule 16 does not make a proposed treatment compensable, as that notion would render Rule 16-7-2(E) meaningless.

The respondent correctly states that an ALJ has a broad jurisdiction to resolve disputes arising under the Colorado Workers' Compensation Act following an evidentiary hearing. Section 8-43-201, C.R.S. The rules cannot limit the jurisdiction of an ALJ to hear and decide disputes. Section 8-43-107, C.R.S. However, the respondent did not apply for a hearing.

Due process is an *opportunity* to be heard at a meaningful time and manner. *Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003). Emphasis supplied. The respondent obtained due process by retaining an IME. It had an opportunity to have its agent, the retained IME physician, submit his IME report timely under Rule 16-7-2(E). It is undisputed that the IME physician has failed to do so.

Fourth, the respondent asserts that it has substantially complied with Rule 16-7-2(E) because the IME physician served his report one day after the deadline. The respondent notes the concept of substantial compliance has been applied to several notice requirements of the Colorado Workers' Compensation Act.

The Director reaffirms his finding that strict compliance with Rule 16-7-2(E) is required and that the respondent failed to strictly comply in this case. The legislative intent of the Colorado Workers' Compensation Act 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." *See*, § 8-40-102(1), C.R.S., Rule 18-1. The deadlines for responding to prior authorization requests assure that quick and efficient delivery of medical benefits while permitting a review of the reasonableness and necessity of proposed benefits. This is especially the case in regards to the deadlines applicable to prior authorizations where the payer opts to retain an IME. The IME option—while appropriate for complex and invasive proposed treatment—also presents the highest risk of delaying care in contravention of the legislative intent. Therefore, the balance between determining reasonableness and necessity of proposed treatment and the need to do so quickly and efficiently is even more important. Finally, the Colorado Workers' Compensation Act (and, by extension, the Division Rules) shall be construed liberally, to effectuate the humanitarian purpose of assisting injured workers. *See, e.g., Fed Express v. Indus. Claim Appeals Office*, 51 P.3rd 1107, 1108 (Colo. App. 2002).

---

[3] Paragraph 4, page 4 of the respondent's brief filed on March 11, 2024.
[4] *Id.*, paragraph 10, pages 7 and 8.

**IT IS ORDERED:** The Order granting Motion for Determination of Law, issued on January 26, 2024 is affirmed.

Dated: April 24, 2024.

DIVISION OF WORKERS' COMPENSATION

By _____
Paul Tauriello, Director

2023 WL 8606391 (Colo.Ind.Cl.App.Off.)

Industrial Claim Appeals Office

State of Colorado

IN THE MATTER OF THE CLAIM OF: SANDRA HARPER, CLAIMANT
v.
DILLON COMPANIES INC D/B/A KING SOOPERS, EMPLOYER
AND
SELF INSURED, INSURER, RESPONDENT

W.C. No. 4-991-178-006
December 4, 2023

***1** Adan Cerda & Associates LLC, Attn: Gregory B Cairns Esq, 4155 E Jewell Ave Ste 1018, Denver, CO, 80222 (for Claimant)
Hall & Evans LLC, Attn: Douglas J Kotarek Esq, c/o: Kendra G Garstka Esq, 1001 Seventeenth Street Suite 300, Denver, CO, 80202 (for Respondents)

FINAL ORDER

The respondents seek review of a supplemental order of Administrative Law Judge Martinez Tenreiro (ALJ) dated August 9, 2023, that ordered the respondents to pay for specified maintenance medical benefits and assessed a penalty pursuant to § 8-43-304(1) C.R.S. We affirm the decision of the ALJ.

The claimant sustained a work-related injury to her spine on July 23, 2015. The claimant worked for the respondent employer as an assistant produce manager. While pulling a pallet of potatoes the pallet began moving rapidly and pushed the claimant through a set of double doors. The claimant fell on her back and left hip. The fall caused a contusion to the claimant's sacral nerve in her spine. She developed symptoms of leg weakness and urinary incontinence. In 2017 the claimant underwent surgery including a lumbar laminectomy and spinal cord untethering. A side effect of the surgery involved a collapsed lung and the need for supplemental oxygen.

The claimant was placed at maximum medical improvement (MMI) on April 18, 2018, with a diagnosis of tethered cord syndrome, urinary incontinence, a need for supplemental oxygen and sleep apnea. In an order of June 11, 2020, ALJ Goldman ruled the claimant was permanently and totally disabled. It was deemed the claimant's back pain, incontinence and breathing difficulties were related to her 2015 work injury. The ALJ's order entitled the claimant to maintenance medical benefits after MMI to treat those conditions. The respondents filed a corresponding Final Admission of Liability on August 25, 2020.

The claimant continued to treat with Dr. Paulsen in Granby. On August 26, 2020, Dr. Paulsen wrote a letter that specified medical supplies the claimant required. The necessary items included:

I. Urinary Incontinence Supplies:
1. Urinary pads - 2 bags/week

2. Wipes - 10 bags/year

3. Cloth urinary pads for bed - 8 pads/year

  

II. Mobility Items:
4. Cane

5. 4-wheel walker

6. Wheelchair

7. Grabber

III. Exercise equipment including:
8. Large exercise ball

9. Small exercise ball

10. One and three pound weights

11. Treadmill

12. Exercise bands

13. Balancing pad

14. Recumbent bike

15. Suction handrails for bathroom

16. Pool therapy access

17. Annual pass to Durango Rec. Center

The respondents denied liability for these recommended supplies in a letter to the claimant's attorney dated October 6, 2020. The claimant applied for a hearing and requested the respondents be found liable for the supplies and devices suggested by Dr. Paulsen. Following a November 10, 2020, hearing before ALJ Nemechek, the ALJ submitted a summary order on November 29, 2021, and a full order on March 2, 2022.

***2** The order accepted a stipulation by the respondents and ordered the respondents to pay the claimant $360 in agreed-upon reimbursement for her previous expenditures for urinary incontinence pads. ALJ Nemechek also determined the medical items requested by the claimant were reasonable and necessary and related to the claimant's work injury. The March 2, 2022, decision ordered:

Respondent shall pay for the following:
• All medical supplies related to claimant's urinary incontinence (including catheters, small and large wipes).

• Oxygen concentrator (reimbursement for expenses previously incurred).

• CPAP machine and supplies (including cannula, tubing mask/headgear).

  

• The walking cane, 4-wheel walker, wheelchair.

• Exercise equipment (large and small exercise balls, 1-and 3-pound weights, treadmill, exercise bands, balancing pad, and recumbent bike),

• [reimbursement for expenses previously incurred].

The respondents appealed the March 2 order to the Industrial Claim Appeals Panel. In a decision of July 6, 2022, the ICAO Panel affirmed ALJ Nemechek's order.

In approximately 2020 the claimant moved from Granby to Farmington, New Mexico, to take advantage of the lower altitude that helped with her breathing difficulties.

The respondents did not provide any of the materials included in ALJ Nemechek's decision. In December 2022, the claimant prepared a spreadsheet document in which she set forth the amounts of money she had expended on the items included in ALJ Nemechek's order. She calculated she was owed $32,065 in reimbursable outlays. Her attorney sent this request along with some receipts to the respondents' counsel on January 13, 2023. On March 3, 2023, the respondents replied by offering to reimburse the claimant based on prices for the various medical items as calculated by a medical supply vendor, Optum. On March 29, 2023, the claimant agreed to the prices quoted by Optum and recomputed her reimbursement request to $14,534. A hearing in regard to the claimant's request for reimbursement and enforcement of ALJ Nemechek's March 2, 2022, decision was held on March 29, 2023, before ALJ Martinez Tenreiro.

In her application for hearing the claimant requested reimbursement for her out-of-pocket expenditures related to the items ordered by ALJ Nemechek. The claimant also asserted penalties pursuant to § 8-43-304(1) should be assessed against the respondents due to the respondents' failure to comply with ALJ Nemechek's order that they supply the maintenance medical materials specified.

The claimant testified to her efforts to purchase herself the periodic provisions represented by the urinary pads and wipes and the more durable items such as the oxygen concentrator, a cane, a walker, a portion of the cost for the CPAP machine and a portable oxygen purse. She had also purchased several of the exercise devices such as a treadmill, exercise balls and exercise bands. The claimant noted she had to divert the funds to purchase these devices from her grocery budget. She described how the respondents failed to supply these materials, to reimburse her for her outlays or even to pay the $360 they had stipulated to reimburse her in the hearing before ALJ Nemechek. Her testimony indicated she was frustrated and depressed over her inability to receive medically necessary materials. The absence of the items she said made her life more difficult and she faced a challenge accumulating the funds used to secure the limited purchases she had made. She stated she was still without a wheelchair, a recumbent stationary bicycle, and a cleaner for the oxygen concentrator.

***3** The ALJ concluded the respondents "... did not provide persuasive evidence that they were in the process of acquiring the items to send to Claimant through a vendor, which is commonly done within the workers' compensation system in cases like these, where Claimant has an ongoing disability that requires frequent refills, like medications, incontinence pads, or equipment."

Through reference to the claimant's spreadsheet listing the periodic and durable medical supplies she had paid for and presented to the respondents in January and March 2023, the Optum price list and the orders of ALJ Goldman and Nemechek, the ALJ compiled a spreadsheet to substantiate the amounts the respondents were required to pay the claimant as reimbursements or advances for purchases of medical supplies specified by ALJ Nemechek's order. The total was $16,753.40.

  

The ALJ found the respondents had been aware of the nature and details of the maintenance medical benefits ordered by ALJ Nemechek prior to his November 2021 summary order directing the provision of those medical supplies. Following the respondents' appeal of that order to the Industrial Claim Appeals Office and the resulting affirmance of the order, it became final as of July 27, 2022. The ALJ ruled the respondents had failed to abide by that order in a fashion that a reasonable insurer would have. Noting the reprehensibility of the respondents' conduct and the nature of the harm caused to the claimant, i.e. disability and depression, the ALJ assessed a daily penalty of $150 beginning July 27, 2022 and continuing until payment of the $16,753.40. The penalty was found to encompass 245 days between July 27, 2022, and the date of the March 29, 2023, hearing and was computed to be $36,750 as of that date.

The ALJ further directed that:

> Respondent shall either arrange for delivery of the monthly items Claimant requires which have previously been found to be reasonably necessary and related to the July 23, 2015, injury or send a payment based on the chart above on a monthly basis for Claimant's future supplies.

On appeal, the respondents contend there is no basis for the assessment of a penalty. The respondents also argue the ALJ was in error to require that the respondents supply the medical provisions ordered rather than requiring the claimant to purchase the items and submit reimbursement requests to the respondents. [1]

Insofar as the respondents object to the imposition of a penalty pursuant to § 8-43-304(1), it is asserted the claimant did not timely provide the respondents with receipts for the purchases she sought to be reimbursed. It is noted the claimant did not have receipts for many of the purchases, and the receipts she did have were not presented to the respondents until March 2023. Some of the reimbursement requests were revised as of the date of the March 2023 hearing. Without the benefit of purchase receipts, the respondents maintain they could not reasonably have reimbursed the claimant for her expenditures at any earlier date. Relying on the decision in *McDaniel v. Vail Associates*, W.C. No 3-111-363 (July 18, 2011), the respondents contend that the untimely submission of receipts by the claimant precludes the assessment of a penalty.

***4** The respondents' two objections to the ALJ's decision are both derived from the respondents' belief that they are not under an obligation to provide medical benefits in any other method than by paying a bill submitted for past services rendered. The respondents' objection to being ordered to provide the medical supplies is premised on the assertion the claimant stipulated that she would purchase the necessary items and submit receipts for reimbursement. It is argued the claimant did not testify she was unable to purchase the supplies and then request reimbursement. The respondents complain the ALJ's statement that it is common for respondents to arrange for vendors to provide medical supplies was not supported by any reference to the evidence or to case law.

Because the respondents deny an obligation to provide medical benefits through any means other than by payment in response to a billing, it is asserted they were not in violation of ALJ Nemechek's order and no penalty pursuant to § 8-43-304(1) applies. In the event the claimant does not provide the respondents with a receipt for her payment for a medical supply or service it is reasoned the respondents have no obligation to act. Accordingly, since the claimant herself did not purchase the recommended medical supplies and submit a reimbursement request with sufficient receipts for several years subsequent to the date they were prescribed, the ALJ is claimed to have erred in sanctioning the respondents for a violation of ALJ Nemechek's order.

The respondents' position is not supported by either the statute or by the rules. Section 8-42-101(6) provides:
(6) (a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, *fails to furnish reasonable and necessary medical treatment* to the injured worker for a claim that is admitted or

  

found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. ...

(b) If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full amount paid. ... (italics provided).

Subparagraph (6)(a) above, lists as a prerequisite to the direction to reimburse a claimant for medical expenditures the statement that the need for reimbursement will occur when a respondent "fails to furnish reasonable and necessary medical treatment." The implication is that it is the responsibility of the respondents to first 'furnish' the care. Only when the respondents "fail' to do so is reimbursement required. Here, the ALJ ruled the claimant was entitled to be reimbursed because the respondents had indeed 'failed' to provide specific medical benefits ordered by ALJ Nemechek.

***5** More directly on point is the provision in Workers Compensation Rules of Procedure 16. Rule 16-10(H) specifies:

> (H). *An injured worker shall never be required to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act*. In the event the injured worker has directly paid for medical treatment that is then admitted or ordered under the Workers' Compensation Act, the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill. (Italics provided).

The respondents' position is inconsistent with this requirement in Rule 16-10(H) to the extent the respondents contend the claimant *is* 'required to directly pay for ordered medical benefits' and then to be subsequently reimbursed.

The penalty in this matter was not imposed solely because the respondents were deemed to be tardy in reimbursing the claimant as the respondents contend. The respondents' failure that generated the penalty assessment was ruled to involve a more general condemnation:

Specifically, ALJ Nemechek issued an order that stated that Respondent "shall provide medical benefits to claimant required to treat the effects of her work injury and to maintain MMI ..." and that "Respondents shall pay" claimant for specific items, which he listed in his order. ... (Conclusions of Law, pg. 21) ...

What is clear is that respondents neither paid nor made arrangements to pay for what claimant paid for, what she could not pay for and/or failed to make arrangements for claimant's receipt of the items prescribed. Nothing in ALJ Nemechek's order could be confused. He specifically stated that claimant had established she was entitled to maintenance medical benefits and that "Respondents shall pay for the following items." The use of "shall" here is interpreted as mandatory. Nothing in ALJ Nemechek's order indicated that they only needed to pay for the items if claimant produced a receipt that respondent accepted as accurate or reasonable. (Conclusions of Law, pg. 16)

This analysis of the ALJ that the respondents are obligated to "make arrangements" for the claimant's receipt of the medical supplies is consistent with the direction in the WCRP 16-10(H).

The respondents also misread the decision in *McDaniel v. Vail Associates, supra*. In *McDaniel* it was noted: "The claimant does not have to pay out-of-pocket for prescriptions because she has a prescription card with a service that manages and pays for authorized prescriptions." Only when the prescription service missed payment of some prescriptions did the claimant seek out-

  

of-pocket reimbursements. Because the claims adjuster was found to have reasonably relied on the misinformation provided by the prescription service, the ALJ declined to impose a penalty for the late reimbursement. Here, unlike in *McDaniel*, the respondents had taken no steps to ensure the claimant did not need to pay for her medical benefits herself.

***6** In addition, the claimant's stipulation referenced by the respondents in their argument was not as the respondents recall. The stipulation of the claimant stated: "of course we prefer that—that the Respondents actually arrange for shipment to her of these items—but if she is buying them, she will submit receipts ..." (Tr. at pg. 29). This desire corresponds to the claimant's testimony that the financial requirement that she purchase the ordered medical supplies out-of-pocket was depressing. She had to defer buying groceries to make the purchases. She testified: "I can't do anything in life. I can't do nothing. I can just here and wait, because all—any extra dimes are all going towards paying for products that they should be paying for." (Tr. at 84).

The arguments of the respondents that they are not required to provide the ordered medical benefits and cannot be assessed a penalty for failing to do so is inconsistent with the statute and the rule. To achieve compliance with WCRP 16-10(H) the respondents would need to ensure the claimant "shall never be required directly to pay" for ordered medical benefits. The respondents' argument that this duty does not apply in this case is to no avail. ALJ Nemechek's order that the respondents "shall provide medical benefits" to the claimant and then listed the specific items required, placed a duty on the respondents to supply the benefits in a manner that did not require the claimant to pay for them first.

The use of vendors to arrange for medical supplies and services is not unusual in workers' compensation cases. See, WCRP 16-2(S) ("Provider means a person or entity providing authorized health care service, *whether involving treatment or not*, ...")*McDaniel v. Vail Associates, supra; Rogan v. United Parcel Service*, W.C. No. 4-314-848 (March 2, 1999); *Hagan v. Breckenridge Auto Body*, W.C. No. 4-713-572 (December 29, 2011);.

In *Holliday v. Bestop*, 23 P.3d 700, 707 (Colo. 2001), the Court noted that § 8-43-304(1) provided a penalty may be assessed when a violation of an "order' of the director or of an ALJ is sanctioned. Such an order included a "Rule.' *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176, 177 (Colo. App. 2002). Here, the ALJ deemed the respondents to have violated the order of ALJ Nemechek. The same conduct that ran afoul of ALJ Nemechek's order was also in violation of Rule 16-10(H).

An ALJ may impose a penalty under § 8-43-304(1), C.R.S. if it is shown that the insurer failed to take an action that a reasonable insurer would have taken to comply with a statute, rule, or order. The insurer's conduct is measured by an objective standard of reasonableness. The claimant bore the initial burden of proof to establish a prima facie case for the imposition of a penalty. That burden entailed establishing that the respondent insurer violated an order or statute and failed to take an action that a reasonable insurer would have taken. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995); *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97, 99 (Colo. App. 2005).

***7** The ALJ determined the order of ALJ Nemechek was sufficiently clear and unambiguous that a reasonable insurance carrier would not have understood the order to allow the carrier to avoid providing the specified medical benefits by waiting for the claimant to buy the medical supplies herself. We find the ALJ was not in error in arriving at that determination. See, *Pioneers Hospital, supra*.

The ALJ noted the respondents do not argue the penalty assessed was prohibited by the constitutional excessive fines prohibition discussed in *Colorado Division of Labor & Employment v. Dami Hospitality, LLC*, 442 P.3d 94, 2019 CO 47 (2019). That decision addressed the maximum penalty that might be imposed. Instead, the ALJ here was tasked with reviewing the record and structuring a penalty to further the purposes of § 8-43-304(1). We are to review the amount of a penalty in accordance with an abuse of discretion standard. *See Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986); *Brunetti v. Industrial Commission*, 670 P.2d 1246 (Colo. App. 1983). The amount of the penalty is to be based on consideration of several factors including the extent of harm to the claimant, the duration and type of violation, the insurer's motivation for the violation, the insurer's mitigation, and whether the misconduct is representative of a pattern of misconduct. *Ardon Gallego v. Wizbang Solutions*, 5-026-699 (May

  

31, 2023); *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (November 23, 2004): *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (September 16, 2005).

Here, the ALJ observed that the claimant described her personal frustration at the persistent failure of the respondents to comply with the specific list of medical supplies ordered by both ALJ Goldman and ALJ Nemechek. This delay was described by the claimant as a source of mental depression. The respondents' requirement that she pay for the supplies out-of-pocket led to difficulty in purchasing groceries necessary for her routine sustenance. The ALJ noted the time that had passed since the respondents were first advised of the recommended medical provisions by Dr. Paulsen in August 2020. The ALJ found the respondents had not paid the claimant even for the medical items for which she did present a receipt in December 2022. The respondents also failed to pay the claimant $360 in reimbursement funds after they informed ALJ Nemechek they agreed to do so at the November 2020 hearing. The ALJ deemed there was little mitigation attempted by the respondents and the pattern of a failure to comply with ALJ Nemechek's order was evident. A review of the record does not reveal that the ALJ abused her discretion when she assessed a $150 daily penalty for the period between July 27, 2022, and the date of the March 29, 2023, hearing. [2]

**IT IS THEREFORE ORDERED** that the ALJ's supplemental order issued August 9, 2023, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

***8** David G. Kroll
Brandee DeFalco-Galvin

**NOTICE**

• This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at: **Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203**; within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.. **Please Note**: The Industrial Claim Appeals Office cannot forward a copy of your appeal to the Court of Appeals.

• A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

• You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

• In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

• An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

***9** • Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.courts.state.co.us or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below**.

  

• The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150**.

**Colorado Court of Appeals**

2 East 14th Avenue

Denver, CO 80203

**Office of the Attorney General**

State Services Section

Ralph L. Carr Colorado Judicial Center

1300 Broadway 6th Floor

Denver, CO 80203

**Industrial Claim Appeals Office**

633 17th Street, Suite 200

Denver, CO 80202

## Footnotes

1 The ALJ's Supplemental order did amend the direction to state the respondents are to reimburse the claimant for any medical supplies she does pay for, allowing for the order to coincide with the direction in § 8-42-101(6)(a) and (b), and WCRP 16-10(H). Pursuant to § 8-43-301(6), C.R.S., the respondents' petition to review the ALJ's supplemental order was required to be accompanied by its brief in support. Section 8-43-301(6), C.R.S., specifically provides that a party dissatisfied with a supplemental order may file a petition for review, and the petition "shall be accompanied by a brief in support ...." However, OAC issued a briefing schedule referencing § 8-43-301(4), C.R.S., rather than the applicable § 8-43-301(6), C.R.S., regarding the time limit for filing a brief in support. That is, Section 8-43-301(4), C.R.S., provides that the petitioner shall have 20 days after the date of the certificate of mailing of the notice of completion of the record to file a brief in support of the petition. Under these circumstances, therefore, we will consider the arguments raised in the respondents' brief in support.

2 While the ALJ also ordered a continuing penalty in this daily amount, such an order sanctioning transgressions which have yet to occur is not final nor immediately enforceable, see § 8-43-306(1).

2023 WL 8606391 (Colo.Ind.Cl.App.Off.)

**End of Document**

2024 WL 2837319 (Colo.Ind.Cl.App.Off.)

Industrial Claim Appeals Office

State of Colorado

IN THE MATTER OF THE CLAIM OF: EMILIA GARCIA, CLAIMANT
v.
DENVER CONVENTION CENTER, EMPLOYER
AND
REDWOOD FIRE AND CASUALTY INS, INSURER, RESPONDENTS

W.C. No. 5-248-255
May 30, 2024

***1** Division of Workers Compensation, c/o: Directors Office, 633 17th Street Suite 400, Denver, CO, 80202 (for Claimant)
Ritsema Law, Attn: Keith D Orgel Esq, 999 18th Street Suite 1800, Denver, CO, 80202 (for Respondents)

FINAL ORDER

The respondents seek review of a supplemental order of the Director of the Division of Workers' Compensation (Director) dated February 27, 2024, that ordered the respondents to pay penalties of $100 per day to run from November 9, 2023 and continuing, for violation of a Director's October 24, 2023, order. We affirm the ALJ's order.

The Director made the following pertinent findings of fact. The claimant sustained an injury during the course and scope of her employment on September 30, 2015. The injury was not required to be reported to the Division and was not reported at that time. [1] On October 6, 2021, the claimant sustained another injury in the course and scope of employment. The respondent filed a first report of injury (FROI) on October 14, 2021, and the Division assigned the claim number W.C. No. 5-185-023. The respondents filed a general admission of liability on November 1, 2021, and the claimant underwent treatment.

On July 25, 2023, the parties entered into a settlement, which was approved by the Director on August 9, 2023. The settlement documents only listed W.C. No. 5-185-023 for the October 6, 2021 injury. The settlement documents also listed an internal carrier claim number for an injury occurring on or about September 30, 2015.

On August 22, 2023, after the settlement documents had been approved, the respondents filed a FROI for an injury occurring on September 30, 2015. The Division assigned the claim number W.C. No. 5-248-255. On September 18, 2023, the Division of Workers' Compensation sent correspondence to the respondents requesting that a position be filed in this claim. On September 21, 2023, the carrier reached out to Division staff regarding the correspondence. Division staff advised the respondents to submit a "motion to amend the settlement documents" to the Prehearing Unit to ensure both Division assigned W.C. numbers were listed in the settlement documents. The respondents were also specifically advised that the fact that carrier specific numbers for a September 30, 2015, date of injury and an October 6, 2021 date of injury were on the settlement documents was not relevant in the request for a position statement in W.C. No. 5-248-255. On September 22, 2023, the carrier responded and acknowledged receipt and understanding of the instructions.

On October 24, 2023, the Director ordered the respondents to file a position statement either by an admission of liability or an electronic notice of contest within 15 days or to submit an appropriate explanation as to why such a position statement was not required. The order also stated in bold, "**Failure to respond as ordered will result in imposition of penalties of up to $1,000.00 per day as permitted by § 8-43-304 for failure to comply with an order of the director**." There is no response to this order from the respondents in the record on review.

  

***2** On December 5, 2023, the Director issued a subsequent order finding the respondents failed to comply with the October 24, 2023, order and imposed penalties of $100 per day starting November 9, 2023 and continuing until they came into compliance. Division records indicate that the respondents contacted the Division on December 19, 2023, to inquire about the penalty order. On December 22, 2023, the respondents filed a petition to review and subsequently filed a brief in support of the petition to review. The respondents argued that the Division cannot impose penalties for failure to state a position in a claim which has already been settled on a full and final basis.

The Director then issued the February 27, 2024, Supplemental Order now before us on appeal. The Director rejected the respondents' contention that penalties cannot be imposed. As found by the Director, the respondents filed a FROI for the September 15, 2015 injury *after* the full and final settlement of the W.C. No. 5-185-023 (the October 6, 2021, date of injury), was approved. The claim number at issue, W.C. No. 5-248-255, was not listed on the settlement documents and the Division had no way to know that the newly filed FROI referenced a matter that the parties had already resolved.

The Director also rejected the respondents' argument that the settlement was the respondents' "position" on the 2015 injury. Although the settlement document referenced a September 15, 2015, date of injury and a carrier number with a description of an injury, the Division's workers' compensation number was not created until two weeks *after* the settlement was approved and the Division had no way to know that the claim was for the same incident. Moreover, prior to the issuance of the penalty order, the respondents were advised that listing internal carrier numbers on the documents was insufficient.

The Director found that the respondents received the October 24, 2023 and December 5, 2023 orders but failed to comply with the Division's instructions to file a position statement or the "recommendation to file a motion to amend the settlement documents." The Director, therefore, found that the respondents failed to comply with the Director's order and that the respondents' failure was unreasonable. The Director further stated that the issue has not been resolved because the respondents have not filed a position or moved to add this claim to their prior settlement agreement. The Director therefore awarded penalties in the amount of $100 per day and continuing. [2] The respondents now appeal.

Although the respondents filed a timely petition to review of the Director's Supplemental Order, the petition to review was not accompanied by a brief in support as required by § 8-43-301(6), C.R.S. The respondents state in the petition to review, "Respondents have already appealed the original Director's Penalty Order and that has already been briefed by the parties." While the failure to file a brief in support does not deprive us of jurisdiction, (*See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986), the respondents' arguments are, nonetheless, limited to the general allegations contained in the petition to review of the Supplemental Order and, as such, our review is limited. *See City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002)(issues not specifically raised are considered to have been waived). We find no error in the Director's imposition of penalties.

***3** Section 8-43-304, C.R.S., provides that an insurer who refuses to obey any lawful order made by the Director shall be punished by a fine of not more than one thousand dollars per day for each such offense. The imposition of penalties under § 8-43-304(1), C.R.S. requires a two-step analysis. The Director must first determine whether the disputed conduct constituted a violation of a lawful order. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). Where a violation is found, the violator is subject to a penalty if the violator's actions were objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

The reasonableness of the violator's actions depends on whether the actions were predicated on rational argument based in law or fact, and this determination is to be made by the Director. *See Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). Further, where the violator fails to offer a reasonable factual or legal explanation for its actions, it may be inferred that the violation was objectively unreasonable. *See Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999)

  

Here, the respondents' conduct warranting a penalty was its disregard of the Director's lawful October 24, 2023 order directing it to file a position statement *or* to provide a written explanation of why one was not required within 15 days. Because the issue is factual in nature, we must uphold the Director's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the Director's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The court of appeals has noted that in this context the scope of our review is "exceedingly narrow." *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Although the respondents assert that the Director cannot assess penalties against them for failing to take a position on a claim that has already been settled on a full and final basis, the Director did not impose penalties against the respondents for failing to state a position under § 8-43-203, C.R.S. Rather, the Director imposed penalties because the respondents failed, neglected, or refused to obey the October 24, 2023, lawful order made by the Director. As stated above, the October 24, 2023, order directed the respondents to file a position statement ***or provide a written explanation of why one was not required within 15 days***. The panel has previously held that a respondent has an independent duty to comply with the Director's order regardless of whether it believed it was required to file a position statement. *See Coatright v. Express Services, Inc.*, W.C. No. 4-744-728 (November 5, 2008). Such an interpretation furthers the legislative intent of the Act to assure quick and efficient delivery of disability and medical benefits to injured workers at reasonable cost, without litigation. *Id.*; Section 8-40-102, C.R.S. Thus, the imposition of penalties under § 8-43-304, C.R.S., for the disobedience of the Director's order deters misconduct and compels compliance with lawful order. *See Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001); *See also Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558, 562 (Colo. App. 2000) (purpose of penalty is to deter misconduct).

***4** The respondents do not dispute that they did not respond in writing to the Director's October 23, 2024, order until after the penalty order was issued and provide no explanation for its failure to respond in writing during this period. Consequently, under the circumstances of this case, it was proper for the Director to infer that the respondents' violation was objectively unreasonable. *Human Resource Co. v. Industrial Claim Appeals Office, supra*. We, therefore, perceive no error on the part of the Director for imposing penalties under § 8-43-304, C.R.S.

Moreover the respondents have not disputed the amount of the penalty imposed. Once the imposition of a penalty was proved, the respondents bore the burden to establish that the penalty was grossly disproportionate. *See Colorado Division of Labor & Employment v. Dami Hospitality, LLC*, 442 P.3d 94 ( Colo. 2019); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The Director's imposition of penalties is discretionary and we may not disturb his determination of the amount of the penalty to be imposed in the absence of fraud or an abuse of discretion. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *See Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986). The amount of the penalty here is well within the amount authorized by statute and we see no basis to disturb the order.

**IT IS THEREFORE ORDERED** that the Director's supplemental order dated February 27, 2024, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin
John A. Steninger

**NOTICE**

• This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at: **Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203**; within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing. **Please Note**: The Industrial Claim Appeals Office cannot forward a copy of your appeal to the Court of Appeals.

  

• A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

• You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

***5** • In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

• An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

• Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.courts.state.co.us or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below**.

• The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150**.

**Colorado Court of Appeals**

2 East 14th Avenue

Denver, CO 80203

**Industrial Claim Appeals Office**

633 17th Street, Suite 200

Denver, CO 80202

**Office of the Attorney General**

State Services Section

Ralph L. Carr Colorado Judicial Center

1300 Broadway 6th Floor

Denver, CO 80203

  

## Footnotes

1 *See* § 8-43-203(1), C.R.S. and § 8-43-101, C.R.S.

2 The respondents do not assert that they have complied with the October 24, 2023, order or raise the issue of whether penalties should continue to accrue. Since the respondents did not raise this issue on appeal, we will not address whether the continuing duration of the appeal is reversible error.

2024 WL 2837319 (Colo.Ind.Cl.App.Off.)

**End of Document**

2024 WL 102645 (Colo.Ind.Cl.App.Off.)

Industrial Claim Appeals Office

State of Colorado

IN THE MATTER OF THE CLAIM OF: ELIZABETH SALERNO, CLAIMANT
v.
ALLIED UNIVERSAL, EMPLOYER
AND
XL INSURANCE OF NORTH AMERICA, INSURER, RESPONDENTS

W.C. No. 5-210-972-001
January 2, 2024

***1** Mark a Simon Esq, 950 S Cherry St Suite 512, Denver, CO, 80246 (for Claimant)
Brown Gren Abraham & McCracken, LLC, Attn: M Frances McCracken Esq, 3801 E Florida Ave Suite 210, Denver, CO, 80210 (for Respondents)

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Lovato (ALJ) dated June 6, 2023, that assessed penalties against the respondents for a violation of § 8-43-203(1), C.R.S., for failing to file a position statement as requested by the Division on July 21, 2022, and, for the failure to comply with an October 18, 2022, Division of Workers' Compensation Director (Director) order to file a position statement. We affirm the ALJ's order. [1] Examiner Kroll Dissents.

This matter went to hearing on March 30, 2023, on the issues of whether the claimant was entitled to penalties for: the respondents' alleged violation of § 8-43-203, C.R.S. by failing to file a position statement within 20 days of receiving notice of the claimant's Worker's Claim for Compensation; the respondents' alleged violation of the Director's October 18, 2022 order; and, the respondents' alleged violation of WCRP 8-2 for failing to provide the claimant with a designated provider list. The respondents alleged that the claimant failed to set forth the alleged penalties with specificity by not including the dates the alleged violations began and ended on the application for hearing and asserted that they had cured any violation. After hearing, the ALJ entered the factual findings and conclusions of law that, for purposes of appeal, have been summarized below.

The claimant filed a Worker's Claim for Compensation on July 17, 2022, stating that she injured her neck, upper back and lower back on June 24, 2022, when a deer jumped in front of her moving vehicle. The claimant left the section "[d] ate employer notified" blank. The ALJ inferred that as of July 17, 2022, the claimant had not reported her injury to the employer.

On July 21, 2022, the Division of Workers' Compensation (Division) sent the respondent-insurer a copy of the claimant's Worker's Claim for Compensation and informed the respondent-insurer that pursuant to § 8-43-203, C.R.S. and WCRP 5-2, it had 20 days or until August 10, 2022, to either admit or deny liability. The correspondence was sent to respondent-insurer at 505 Eagleview Blvd., Suite 100, Exton, PA 19341.

On September 6, 2022, the Division sent the respondent-insurer another letter, again addressed to 505 Eagleview Blvd., Suite 100, Exton, PA 19341. This letter stated: "**URGENT NOTICE REQUIRING IMMEDIATE RESPONSE"** and notified the respondent-insurer that it had failed to admit or deny liability within 20 days and that "**[t]he period for filing a position statement has expired and you are now in a potential penalty situation."** Failure to respond immediately, "could result in issuance of a Director's order and imposition of penalties." The respondent-insurer did not respond to the Division by the September 26, 2022, deadline.

  

***2** On September 6, 2022, however, the respondent-insurer's third-party administrator (TPA), ESIS, wrote to the claimant. The communication is from Chris Stobb, Sr. Claims Representative at ESIS. According to the "cover page," the enclosures included a self-addressed envelope, authorization to disclose health information, and a medical treatment provider list. Based on this letter, the ALJ inferred that the stated enclosures, including but not limited to, a medical treatment provider list, were sent to the claimant. The ALJ further found that the respondent-insurer was aware of the claimant's Worker's Compensation Claim, as of September 6, 2022.

On October 18, 2022, the Director ordered the respondent-insurer to file an admission of liability or a notice of contest within 15 days, or by November 2, 2022. The Order notified the respondent-insurer that "**[f]ailure to respond as ordered will result in imposition of penalties of up to $1,000 per day as permitted by § 8-43-304 for failure to comply with an order of the director.**" The Order was sent to the respondent-insurer at 505 Eagleview Blvd., Suite 100, Exton, PA 19341. The Order also informed respondent-insurer that it had the responsibility of informing the TPA of the claim and informing the Division if the claim had been assigned to a TPA. The ALJ found no objective evidence in the record that the respondent-insurer notified the Division that the claim had been assigned to the TPA.

The respondents filed a general admission of liability on November 17, 2022. The ALJ found that the respondents filed the admission of liability more than 20 days after the Division sent the respondent-insurer a copy of the claimant's Worker's Claim for Compensation. The ALJ found that the admission of liability was filed more than 15 days after the deadline to respond to the Director's Order. The respondents offered no evidence as to why they failed to respond to the letters from the Division, or to the Director's Order prior to November 17, 2022. The ALJ found that the respondents violated the Act and failed to timely respond to a Director's Order and that the respondents' conduct was not objectively reasonable.

The ALJ further found that the respondents cured their violations on November 17, 2022, when they filed the general admission of liability. The ALJ, however, determined it was highly probable and free from substantial doubt that the respondents knew or should have known by September 6, 2022, that the claimant had filed a Worker's Claim for Compensation and that the respondent was required to comply with the requirements of the Act and the subsequent Director's Order. The ALJ cited to the fact that the respondent-insurer's TPA corresponded with the claimant regarding the claim on September 6, 2022.

The ALJ concluded:

> As found, Respondents violated § 8-43-304(1), C.R.S., by failing to file a position statement within 20 days after receiving Notice from the Division that Claimant filed a Worker's Compensation Claim. (Findings of fact ¶ 13). Respondents also violated this statute by failing to comply with a Director's Order requiring an admission of liability or a notice of contest within 15 days of October 18, 2022. (*Id.*). Respondents did not offer any evidence as to why they did not file a position statement with the Division or comply with the Director's Order. As found, Insurer knew by September 6, 2022 that Claimant had filed a Worker's Claim for Compensation. (Findings of fact ¶ 9). Respondents failed to establish that not timely filing a position statement with the Division when Respondents received notice that Claimant filed a Worker's Claim for Compensation is reasonable. Similarly, Respondents failed to establish that the failure to timely respond to the Director's Order was reasonable. As found, Respondents' violations were not objectively reasonable. (Findings of fact ¶ 14).

***3** ALJ Order at 8.

The ALJ assessed penalties against the respondents under the general penalty provision in § 8-43-304(1), C.R.S. for a violation of § 8-43-203(1), C.R.S. for failing to file a position statement as requested by the Division on July 21, 2022. The penalties were

  

awarded from September 6, 2022 to November 17, 2022, in the amount of $730.00, with fifty percent of the penalty payable to the claimant and fifty percent to the Colorado Uninsured Employer's Fund.

The ALJ also assessed penalties against the respondents under the general penalty provision in 8-43-304(1), C.R.S. "for a violation of § 8-43-203(1), C.R.S. for failing to respond to the October 18, 2022, Director's Order." Penalties were awarded from November 2, 2022 to November 17, 2022 in the amount of $750.00, with fifty percent of the penalty paid to the claimant and fifty percent of the penalty paid to the Colorado Uninsured Employer's Fund.

The only issues that the respondents have appealed are:
1. Whether the ALJ erred as matters of fact and law in holding the claimant asserted her penalty claims with specificity as required by § 8-43-304(4), C.R.S. and Rule 8(A), W.C.R.P. and;

2. Whether the ALJ erred as matters of fact and law in holding the claimant proved, by clear and convincing evidence, that the carrier knew, or reasonably should have known, they were in violation of the statute or order.

A. Specificity § 8-43-304(4), C.R.S.

The respondents contend that the ALJ erred in her determination that claimant stated the claims for penalties with the requisite specificity because the claimant did not state the dates on which the violation began and ended as required in the application for hearing. The requirement to specify dates, however, is not in the statute and is only on the application for hearing. We find no reversible error in the ALJ's determination on this issue.

The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990).

Section 8-43-304(4), C.R.S. provides that an application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." The purpose of requiring that an application for hearing on penalties specifically state the grounds on which the penalty is being asserted, is to provide notice of the alleged conduct which must be corrected so as to afford an opportunity to cure. *See Delta City Memorial Hospital v. Industrial Claim Appeals* office, 495 P.3d 984 (Colo. App. 2021)(broad statement of request for penalties sufficient to put hospital on notice); *Stilwell v. B & B Excavating Inc.*, W.C. No. 4-337-321 (July 28, 1999); *see Hendricks v. Industrial Claim Appeals Office, supra; Carson v. Academy School District* #20, W.C. No. 4-439-660 (April 28, 2003).

***4** Here, the claimant filed an application for hearing on December 5, 2022, endorsing multiple penalty allegations. As relevant for this appeal, the claimant listed:
1. Respondent's failure to file a position statement either admitting or contesting liability within 20 days after a workers' compensation claim is filed - C.R.S. § 8-43-203.

2. Respondents failure to comply with a Director's Order dated October 18, 2022 requiring an admission of liability or a notice of contest within 15 days.

...

5. General Penalty - C.R.S. § 8-43-304; and

  

6. Penalties - each day a separate offense. - C.R.S. § 8-43-305.

The ALJ determined, and we agree, that the claimant's penalty statement is sufficient pursuant to § 8-43-304(4), C.R.S., to place the respondents on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of § 8-43-203, C.R.S. and the Director's order, specifically that portion which required respondents to admit or deny the claim within 15 days. Thus, the respondents had notice of the legal and factual basis for the penalty claim so that their rights to present evidence, confront adverse evidence, and present argument in support of their position were protected. *See Ortega v. Industrial Claim Appeals Office, supra* (no due process violation where claimant permitted to cross-examine and confront witness).

It is true, as the respondents argue, that the "penalties" section of the application for hearing states, "[d]escribe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended." The ALJ, however, found that even though the claimant did not specify the dates the violations allegedly began and ended, the claimant, nonetheless, described her penalty claims with specificity as required by § 8-43-304(4), C.R.S. We find no error in the ALJ's conclusion in this regard.

As stated above, the claimant's description of the penalties at issue provided adequate notice to the respondents of the basis for the claims and afforded the respondents the opportunity to cure the violation which is the intent of § 8-43-304(4), C.R.S. To the extent that the specificity requirement on the application for hearing conflicts or requires more information than the statute, the statute controls. *See Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997)(rules are invalid if inconsistent with the underlying statute the rule is designed to enforce); *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Because the claimant's statement of penalties on the application for hearing states "with specificity the grounds on which the penalty is being asserted" the claimant's statement is sufficient to meet the requirement in § 8-43-304(4), C.R.S.

***5** We recognize that § 8-43-211(2)(b), C.R.S., states, in pertinent part:
Hearings shall be set by the office of administrative courts in the department of personnel within eighty to one hundred twenty days after any of the following occur:...

(b) Any party requests a hearing on issues ripe for adjudication by filing a written request with the office of administrative courts in the department of personnel on forms provided by the office.

Office of Administrative Courts Rule of Procedure (OACRP) 8(a), however, states that an application for hearing shall be on a form provided by the OAC *or* on a "substantially similar form." (emphasis added). Additionally, WCRP 9-7 does not require that the dates be specified on a penalty claim to the Director.

Even assuming that the claimant was required to specify dates for the penalties at issue, we conclude that the claimant substantially complied with this requirement. Based on the claimant's application for hearing, the respondents had knowledge that the claimant was seeking penalties for a violation of § 8-43-203, C.R.S., as early as 20 days after the claimant filed her workers' compensation claim, or in this case when the Division forwarded the claim to the respondents on July 21 2022, which would have been August 10, 2022. The respondents also had knowledge that the claimant was seeking penalties as of November 2, 2022, for the failure to comply within 15 days of the Director's October 18, 2022 order. The claimant's application for penalties also lists § 8-43-305, C.R.S., which notes that the claimant is seeking an ongoing penalty.

B. Cure provision § 8-43-304(4), C.R.S.

  

The respondents also contend that the ALJ erred as matters of fact and law in holding the claimant proved, by clear and convincing evidence, that the carrier knew or reasonably should have known, they were in violation of the statute or order. We find no reversible error on this issue.

The ALJ found that the respondents cured their violations by November 17, 2022, prior to the claimant's filing of an application for hearing. As such, the claimant had the burden of proving, by clear and convincing evidence, the respondents knew, or should have known, they were in violation of the statute and Order. Clear and convincing evidence has proven a fact or proposition if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Section 8-43-304(4), C.R.S. states that if a party cures a violation within 20 days and the "party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." Thus, the cure statute adds an element of proof to a claim for penalties in cases where a cure is proven.

The respondents argue that the ALJ improperly shifted the burden of proof to the respondents and bases her order on speculation and conjecture because in arriving at her order, the ALJ found as matters of fact and law, respondents failed to prove their conduct was objectively reasonable. And, because the respondents failed to prove their conduct was reasonable, the ALJ found the claimant had proven, by clear and convincing evidence, the respondents knew, or reasonably should have known, they were in violation of the statute and the Director's Order. We disagree that the ALJ improperly shifted the burden.

***6** The ALJ is not held to a crystalline standard in articulating the basis for her order. *George v. Industrial Commission*, 720 P.2d 624 (Colo. App. 1986). Here, the ALJ's order sufficiently recognizes and applies the burden of proof as it relates to the imposition of the penalties and the cure provision in § 8-43-304(4), C.R.S.

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S., involves a two-step process, which the ALJ recognized and applied in her order. That section provides for the imposition of penalties of up to $1,000 per day. The ALJ must first determine that the respondents' conduct constituted a violation of the Workers' Compensation Act, a rule, or an order. Section 8-43-304(1), C.R.S. However, the conduct constituting the violation must also have been objectively unreasonable. Therefore, if the ALJ finds that a violation occurred, penalties may only be imposed if the ALJ concludes that the respondents' conduct was not reasonable under an objective standard. *E.g., Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office, 907 P.2d* 676 (Colo. App. 1995). The reasonableness of the respondents' actions depends on whether they were predicated on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

Here, the respondents do not dispute that they violated both § 8-43-203, C.R.S. and the Director's October 18, 2022, Order by failing to timely file a position statement. The respondents did not offer any evidence as to why they did not file a position statement with the Division or comply with the Director's Order. If the insurer offers no explanation for its conduct, then the claimant has made a *prima facie* showing because the ALJ may infer that there was no reasonable explanation for the insurer's action. *See Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999)(imposition of penalties was proper where insurer failed to offer a reasonable factual or legal explanation for its actions); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005). Similarly, where an explanation is offered, the reasonableness of the insurer's conduct presents a question of fact for the ALJ. *Jiminez v. Industrial Claim Appeals Office, supra; Davis v. K-Mart*, W.C. No. 4-493-641 (April 28, 2004).

Section 8-43-304(4), C.R.S. requires "clear and convincing" evidence that the "violator knew or should have known that such person was in violation." As recognized by the ALJ in her order, the parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 64 Colo. 218, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). This presumption does not shift the burden of proof but aids

  

a party in meeting its burden of proof. *Union Ins. Co. v. RCA Corp.*, 724 P.2d 80 (Colo. App. 1986). Furthermore, C.R.E. 301 provides that the party against whom the presumption is directed must come forward with evidence to rebut the presumption.

***7** Here, there is no factual or legal dispute that the respondents did not comply with § 8-43-203, C.R.S. or the Director's Order to timely file a position statement. The respondent-insurer's TPA September 6, 2022, letter to the claimant shows that the respondents were aware of the claim. Further, in the absence of specific evidence to the contrary, the ALJ was required to presume that the respondents knew the requirements of the statute. *See Rogan v. United Parcel Service*, W.C. No. 4-314-848 (March 2, 1999). Because the respondents knew about the claim and did not present any factual or legal argument that their actions did not violate the statute or the Director's Order, the record compels the conclusion that the respondents knew or should have known that their actions violated the statute and the Director's Order. *See Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993)(where undisputed facts lead to only one conclusion the issue is a question of law).

Moreover, the record establishes that the respondent-insurer is in the business of adjusting workers' compensation claims and the statutory requirement to file a position statement is itself a statute concerning the adjustment of claims. Under these circumstances, we conclude that the ALJ made a reasonable inference from the record that the respondents knew or should have known that their failure timely file a position statement violated § 8-43-203(1), C.R.S. and the Director's October 18, 2022, Order. *See Federal Life Insurance Co. v. Wells*, 98 Colo. 455, 56 P.2d 936 (Colo. 1936) (insurance adjuster presumed to understand the meaning of the word “coverage” which is used generally in the insurance business and was used regularly by the adjuster).

Last, we briefly address the dissent. The dissent has raised arguments that never were raised before the ALJ below and have not been raised by the respondents to us on appeal. The dissent has also made factual findings that were never made by the ALJ. However, the Panel is not allowed to raise and address arguments that were not raised below and never have been raised by the parties on appeal and the Panel is not allowed to make factual findings. To do so, as the dissent has done here, is acting in excess of the authority granted to us under our governing statutes. Sections 8-1-102, 8-43-301, C.R.S.

The dissent asserts, sua sponte, that there is no basis to assess penalties against the respondents from September 6, 2022 to November 2, 2022, for the violation of § 8-43-203, C.R.S., because the claimant did not sustain a lost time claim pursuant to § 8-43-101, C.R.S.[2] The respondents, however, did not raise this issue in its pleadings, at hearing or on appeal. *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977)(A defense is lost if not raised in a timely manner).

Because the respondents did not address this issue below, we may not address it for the first time on review. *See Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895 (Colo. App. 2009)(reviewing court may not address issues that were not raised before the Panel). It is a long-established rule that an issue not raised before the ALJ, will not be considered on review.[3] An ALJ cannot be put in error for a matter that was never put before her for a decision. Where a party did not raise an issue before an ALJ or on appeal, the Panel cannot act as an advocate for one party to an appeal by raising the issue sua sponte. The scope of our review is limited by statute and the Panel is not permitted to parse “through the record and testimony presented and making its own findings of fact in lieu of those made by the” ALJ. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 303 (Colo. 2000).

***8** We note, however, that the claimant's July 17, 2022, Worker's Claim for Compensation stated that her last day of work was the date of injury, June 24, 2022 and that as of the date of filing the claim, she had not returned to work. The respondents also appear to concede that the claimant was off work in their position statement, stating:
3. The Claimant returned to the UC Health Emergency Room on June 30, 2022. The providers at UC Health advised the Claimant to follow-up with her primary care physician for physical therapy referrals and further time off work.

Respondent Position Statement at 5. (emphasis added).

Also, during the hearing, the respondents' counsel asked the claimant:
Q. The providers at UCHealth advised you to follow up with your PCP for a physical therapy referral and *further time off work, correct*?

A. I went to my own primary care myself. UCHealth — I went back to them because I was still having pain and issues going on, and I wanted to have x-rays and MRIs done.

Q. So the question to you, Ms. Salerno, was the providers at UCHealth advised you to follow up with your PCP for a physical therapy referral and *further time off work, correct*?

A. I'm guessing is — the way you're putting it, it's — that they would suggest me doing so. Like having to remember exactly what they said, I would not — I need to do that anyway, so — Tr. at 21-22 (Emphasis added).

**IT IS THEREFORE ORDERED** that the ALJ's order dated June 6, 2023, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin
Kris Sanko

**Examiner David Kroll submits the following dissent:**

***9** It has been the standard practice to require, before assessing penalties, that there be shown to be a violation of a statute, rule or order. That is one of the prerequisites specified in § 8-43-304(1). However, in this matter the ALJ has dispensed with such a requirement.

The ALJ assessed penalties against the respondents for $10 per day from September 6 through November 17, 2022, ($730 total) for failing to comply with § 8-43-203. The violation was said to be a failure to file a position statement as required by that statute. However, § 8-43-203 does not require that a position statement be filed in a no lost time case. The record indicates this is a no lost time case. There is then, no basis to assess a penalty.

Section 8-43-203(1) states a position statement is to be sent within 20 days of the date a report is required by § 8-43-101. That § 8-43-101 only requires a report in the case of more than three days lost time from work, permanent disability, death or 180 days of active medical care. *See, Madera v. Zak Dirt*, Inc. W.C. No. 5-085-650-003 (June 7, 2021); *Urtusuastegui v. JBS USA LLC*, W.C. No. 4-795-733 (November 8, 2010); *Marquez v. Patricia Dempsey* Trust, W.C. No. 5-054-279-01 (December 17, 2018); *Campbell v. IBM*, 867 P.2d 77, 79 (Colo. App. 1993).

Prior to November 17 when the respondents filed their General Admission of Liability the claimant was not at maximum medical improvement, was alive, less than 180 days had expired since the date of injury and there is no indication the claimant had missed three days of work. The respondents filed their General Admission on November 17 which stated: “Not admitting for temporary or permanent benefits at this time due to no lost time or impairment.” Ex. B. While the claimant filled out her July 17 Claim for Benefits by stating the date of injury was her last day of work, the employer knew she had not missed work, she did not inform the employer of her injury for four weeks, she did not request temporary benefits at any time, and her testimony at the hearing stated her only stress involving her claim was her need to receive some medical treatment. Tr. at 19-21. She did not indicate she had missed any time from work. The claimant has never stated anywhere that she had.

The respondents submitted two arguments in defense to the claim for penalties. Those arguments included the failure of the claimant to list a date that the penalty occurred and that the claimant did not establish by clear and convincing evidence that

  

the respondents reasonably should have known of a violation of § 8-43-203 before they cured the alleged violation by filing a GAL on November 17.

The claimant never specified a date the alleged violation occurred. This would be because it was impossible to do so. There was never a violation of 8-43-203 such that the claimant could ever submit a date that such a violation occurred. Similarly, the claimant was unable to demonstrate the respondents should have known they were in violation of 8-43-203 before the November 17 cure because they were not in violation of 8-43-203 before November 17. It would appear the respondents did raise defenses that required the claimant to sustain the claimant's burden of proof to show the date on which 8-43-203 required the respondents to file a position statement and to establish the respondents would have reasonably known they violated 8-43-203 prior to Nov. 17.

***10** While the ALJ was mistaken to have assessed penalties for a violation of § 8-43-203, the equities are not totally with the respondents. Because § 8-43-203(1) fails to apply to a number of claims by excluding those not involving significant lost time, the director provided in WCRP 5-2(D) that:
(D) The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation ...

The respondents were provided a copy of the claimant's Claim for Benefits when the division sent it to them on July 21. Rule 5-2 then, required them to submit their GAL by August 10. The second penalty assessed by the ALJ for disobeying the October 18 order of the director to submit a position statement within 15 days was warranted.

Nonetheless, in regard to the first penalty assessed from September 6, § 8-34-304(4) requires the party seeking penalties to plead "with specificity the grounds on which the penalty is being asserted." Section 8-43-211(2)(b) directs a party requesting a hearing do so "with the office of administrative courts ... on forms provided by the office." That form provided by the Office of administrative courts states that in regard to penalties: "Describe with specificity the grounds on which the penalty is asserted, including the order, rule or section of the statute allegedly violated, and the date on which you claim the violation began and ended." Similarly, when petitioning the Director for an assessment of penalties Rule 9-7 requires: "A party requesting that the Director assess penalties shall file a motion ... which states with specificity the grounds upon which penalties are being sought and includes all evidence upon which the questing party is basing the request." These rules of pleading are not optional. The claimant was not in compliance.

The claimant had the burden of proof to establish the asserted violation of 8-43-203 which she did not sustain. The assessment of penalties from September 6 to November 17 due to a failure to comply with § 8-43-203 is in error. The record does not support the ALJ's ruling.

I respectfully dissent.

**NOTICE**

• This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at: **Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203**; within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.. **Please Note**: The Industrial Claim Appeals Office cannot forward a copy of your appeal to the Court of Appeals.

• A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

  

***11** • You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

• In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

• An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

• Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.courts.state.co.us or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below**.

• The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150**.

**Colorado Court of Appeals**

2 East 14th Avenue

Denver, CO 80203

**Office of the Attorney General**

State Services Section

Ralph L. Carr Colorado Judicial Center

1300 Broadway 6th Floor

**Industrial Claim Appeals Office**

Denver, CO 80203

633 17th Street, Suite 200

Denver, CO 80202

## Footnotes

  

1 The respondents do not contest what appears to be the ALJ's imposition of a general penalty under § 8-43-304, C.R.S. for the violation of § 8-43-203, C.R.S. *See Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001) (Section 8-43-304(1), C.R.S. is a residual penalty clause which subjects a party to penalties when it violates a specific statutory duty, and the General Assembly has not otherwise specified a penalty for the violation); § 8-43-203(2)(a) C.R.S., provides a penalty of up to one day's compensation for each day's failure to timely admit or deny. Because the respondents do not raise this issue, we do not address it here.

2 Section 8-43-101(1) (a), C.R.S., provides that an employer must report injuries "that result in fatality, permanent physical impairment, lost time from work in excess of three shifts or calendar days, or active medical treatment for a period of more than one hundred eighty calendar days after the date the injury was first reported to the employer..."

3 *See also, City & County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002)(reviewing court declined to address specific issue that "was not encompassed in the argument raised before the Panel"); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997)(party must raise specific argument at administrative level to preserve it on appeal); *cf. Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005)(limiting consideration of issue to specific context in which it was raised before the Panel); *see, e.g., Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582 (Colo. App. 2007)(court of appeals will not address contentions that were not raised in the opening brief).

2024 WL 102645 (Colo.Ind.Cl.App.Off.)

**End of Document**

2024 WL 1550921 (Colo.Ind.Cl.App.Off.)

Industrial Claim Appeals Office

State of Colorado

IN THE MATTER OF THE CLAIM OF: MICHAEL MACEY, CLAIMANT
v.
DHL EXPRESS USA INC, EMPLOYER
AND
NEW HAMPSHIRE INSURANCE COMPANY, INSURER, RESPONDENTS

W.C. No. 5-183-433-002
April 1, 2024

***1** The Elliott Law Offices PC, Attn: Mark D Elliott Esq, c/o: Alonit Katzman Esq, 7884 Ralston Road, Arvada, CO, 80002-2434 (for Claimant)
Hall & Evans LLC, Attn: Douglas J Kotarek Esq, c/o: Svetlana V Como Esq, 1001 Seventeenth Street Suite 300, Denver, CO, 80202 (for Respondents)

FINAL ORDER

The respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated November 9, 2023, that ordered the respondents to pay temporary partial disability benefits and a penalty of $25 per day for 478 days for a total of $11,950 for violation of Workers' Compensation Rule of Procedure (WCRP) 5-5(B), 7 Code Colo. Reg. 1101-3. We affirm the ALJ's order and remand the matter to address the claimant's request for attorney fees and costs.

This matter went to hearing on the issues of temporary partial disability benefits and penalties against the respondents for the violation of WCRP 5-5(B). The parties stipulated to the claimant's average weekly wage and the issue of temporary total disability benefits. In an order dated November 9, 2023, the ALJ ordered the respondents to pay the claimant temporary partial disability benefits and imposed penalties.

The respondents filed a timely petition to review. In addition to the general allegations of error listed in § 8-43-301(8), C.R.S., the respondents also listed the issues:
4) The ALJ erred when he did not allow testimony of claimant's employer, Mr. James Bartz;

5) The Order finding that Claimant shall receive TPD benefits in the total amount of $30,900.44 is not supported by the evidence and applicable law; and

6) The Order finding that Respondents shall pay a penalty of $25 per day from March 29, 2022, through July 19, 2023, or 478 days, totaling $11,950, is not supported by the evidence and applicable law.

In the brief in support, the respondents only address the issues of temporary partial disability and the ALJ's alleged abuse of discretion in failing to allow the rebuttal testimony of the respondents' witness, Mr. Bartz.

I. Temporary Partial Disability Benefits

  

The claimant sustained a work-related injury to his lower back on August 21, 2021, after lifting boxes and bags. The claimant reported the injury to the employer, but the employer did not direct the claimant to a physician for treatment. The claimant visited his personal physician, Dr. Hindt at Kaiser Permanente, who became the claimant's authorized treating physician.

Dr. Hindt took the claimant off work until October 5, 2021, for severe pain when walking, standing, and resting. The claimant returned to Dr. Hindt on September 27, 2021. Dr. Hindt permitted the claimant to return to work but stated, "do think it is okay for him to return to work now cautiously. If he does have more pain upon return to work, I want him to stop and take a step back." Dr. Hindt commented that the claimant's work consists of heavy lifting in a dock, and he has been unable to perform his job since August. Subsequent visits to Kaiser reveal that the claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning positions, walking, and standing. The claimant underwent physical therapy and received injections for his lower back condition.

***2** The claimant underwent an independent medical examination (IME) with Dr. Burris on January 11, 2022. In Dr. Burris' opinion the claimant only suffered from multi-level degenerative changes. Dr. Burris testified at hearing and acknowledged that claimant's Kaiser physicians advised him to "watch what he lifts" and to "self-monitor his activities at work to avoid heavy lifting." Dr. Burris also agreed that the claimant reported he was following the advice of his Kaiser physicians to watch what he lifts. Moreover, the claimant told Dr. Burris that "this event had made him realize that he cannot continue to engage in such a physically demanding job." Dr. Burris also testified that he was not aware of any medical records that the claimant had symptoms, restrictions, or limitations in his activities before he was injured on August 21, 2021. Dr. Burris nonetheless concluded that the claimant could return to regular duty employment.

The claimant testified that since the August 21, 2021, injury, he has been performing his job differently and "being cautious." The claimant noted he cannot lift like he used to and must monitor his lifting activities. He uses the forklift more often and obtains help from coworkers for lifting heavy materials. The claimant remarked that he is only able to walk or stand for a certain amount of time before his back becomes tight and he must sit down. The claimant commented his back-injury limits bending and stooping because he must spread his legs to pick up items from the ground to relieve the pressure on his back. He summarized the injury has "really inhibited me from doing my work at 100 percent."

The claimant sought temporary partial disability benefits from October 5, 2021 through August 20, 2023 because his earnings were lower than his average weekly wage of $2,337.14. When the claimant returned to work for the time period October 5, 2021 through August 20, 2023, he did not receive his full hours he had been working prior to his lower back injury because he does not have control over how many overtime hours he receives. The claimant has not refused overtime hours after his return to work because of his back injury and takes the hours if offered.

The ALJ relied on claimant's Exhibit 9 that showed the differences between the claimant's average weekly wage and weekly earnings and the claimant's Exhibit 7 to outline the per week calculation of temporary partial disability benefits during the relevant period. [1]

Based on these facts the ALJ determined that the claimant demonstrated that he is entitled to recover temporary partial benefits in the amount of $30,900.44 for the period October 5, 2021 through August 20, 2023.

On appeal, the respondents do not assert any error in the calculation or amount of temporary partial disability awarded by the ALJ on appeal. As we understand the respondents' arguments, they assert that the claimant failed to demonstrate that the industrial injury caused the claimant's wage loss. The respondents contend that the claimant did not have any formal restrictions assigned by a treating physician, they challenge the credibility of the Kaiser physician's opinions and state that there was no determination made by the treating physician whether the August 21, 2021, work injury permanently worsened the claimant's pre-existing condition. We are not persuaded that there is any error in the ALJ's award of temporary partial disability benefits.

  

***3** To prove entitlement to temporary disability benefits, the claimant must prove the industrial injury caused a "disability." Sections 8-42-103(1), 8-42-106, C.R.S. By filing an admission of liability for the payment of temporary disability benefits the respondent admits the claimant established his burden to prove a compensable disability. Furthermore, admitted liability for temporary disability payments shall continue until terminated in accordance with WCRP 6-1, 7 Code Colo. Reg. 1101-3 or § 8-42-106, C.R.S. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

Here, the claimant filed an application for hearing on March 28, 2023, on the issue of temporary total disability and temporary partial disability. After the claimant filed the application for hearing, the respondents filed a general admission of liability on July 19, 2023, admitting for temporary total disability benefits from August 22, 2021 through October 4, 2021. The ALJ did not address whether the respondents properly terminated temporary total disability as of October 4, 2021, and consequently, the issue is not before us. We, like the ALJ, address the claimant's entitlement to temporary partial disability benefits as of October 5, 2021.[2] Tr. at 27-28.

The term "disability" as it is used in workers' compensation connotes two distinct elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant's inability "to resume his or her prior work." *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Disability may be evidenced by the complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly to perform his regular employment. *See Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998); *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991).

Whether the claimant has proved a disability, including proof that the injury has impaired the ability to perform the pre-injury employment, is a factual question for the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Here, the ALJ provided detailed findings concerning the evidence he found persuasive in reaching his conclusion that the claimant proved a disability for purposes of receiving temporary partial disability. The ALJ credited the claimant's testimony and the medical records from Dr. Hindt that the claimant was unable to perform his regular employment duties due to his work-related injury during the time period in question. The claimant's testimony alone is sufficient to support the ALJ's determination that the industrial disability contributed to the claimant's ongoing wage loss. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Further, the ALJ is the sole arbiter of the weight and credibility to be accorded expert medical opinion. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Where the evidence is subject to conflicting inferences, it is for the ALJ's to determine the inferences to be drawn. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Contrary to the respondents' assertion, the fact that Dr. Hindt is a Kaiser physician who does not normally issue work restrictions in workers' compensation cases, does not preclude the ALJ's reliance on Dr. Hindt's medical records. Rather, this is a factor that goes to the weight and credibility the ALJ chose to assign to Dr. Hindt's medical reports.

***4** To the extent the respondents continue to assert that the claimant's wage loss was due to economic factors rather than the work-related injury, we disagree. As stated in the ALJ's order, when disability is established and wage loss occurs due to economic circumstances of the company, the "economic unemployment or underemployment" does not serve to sever the causal relationship between the injury and the wage loss. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989); *Kaminski v. Grand County Roofing & Sheet Metal, Inc.*, W.C. No. 4-525-562 (March 21, 2003). This is true because the physical restrictions caused by the injury affect a claimant's prospects for finding alternative employment. Therefore, economic underemployment is irrelevant to the issue of temporary partial disability. *See In the Matter of the Claim of Chris Ashmore v. NU Horizon Window Systems, Inc.*, W.C. No. 4-593-027, (August. 25, 2004).

  

We are not persuaded by the respondents' remaining arguments on this issue. The existence of evidence which, if credited, might support a contrary determination does not afford us grounds to grant appellate relief. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It was for the ALJ to assess the evidence, and we decline the respondents' invitation to substitute our judgment for the ALJ's concerning the inferences to be drawn from the record. *See May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988). The claimant's testimony and the medical records provide substantial evidence and valid support for the ALJ's findings of fact. The ALJ's findings of fact, in turn, provide valid support for the determination that the claimant is entitled to temporary disability benefits. Section 8-43-301(8), C.R.S.

II. Penalties

The ALJ also determined that the claimant established that he is entitled to recover penalties under § 8-43-304(1), C.R.S. for the respondents' violation of WCRP 5-5(B), due to the respondent-insurer filing a medical only general admission of liability on March 29, 2022, despite the respondent-insurer having knowledge that the claimant sustained a lost-time claim.

On November 4, 2021, the respondent-insurer documented that the claimant's claim was a “medical only” for a lower back injury. On the following day the claims notes reflect that there was a “Type Change” from “Medical Only” to an indemnity claim. The respondent-insurer filed a medical only general admission of liability on March 29, 2022. The adjuster knew that the claimant had missed a number of weeks of work because of the work injury and promised to address it on the same day the medical only general admission of lability was filed. The respondent-insurer, however, did not admit for temporary total disability benefits until almost 16 months later on July 19, 2023.

The claimant filed an application for hearing on March 28, 2023, seeking penalties for the violation of WCRP 5-5(B). This rule provides that “[a]n admission filed for medical benefits only shall state the basis for denial of temporary and permanent disability benefits within the remarks section of the admission.” The respondents failed to cure the violation within 20 days and instead asserted that the claimant was not entitled to any temporary disability benefits.

***5** Based on these facts, the ALJ determined that the respondents violated WCRP 5-5(B) and the respondents' conduct was objectively unreasonable. The ALJ imposed a penalty pursuant to § 8-43-304(1), C.R.S. of $25 per day from March 29, 2022, through July 19, 2023, for a total of 478 days, resulting in a total penalty of $11,950.00, with 50 percent of the penalty paid to the claimant and 50 percent of the penalty paid to the Subsequent Injury Fund.

As stated above, the respondents do not address the penalty issue in the brief in support of petition to review. Although a failure to file a brief is not jurisdictional, in view of the respondents' failure to make any argument or allegation of error, we will not search the record for potential errors so as to assume the role of advocate for an appealing party. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986); *Munoz v. Industrial Claim Appeals Office*, 271 P.3d 547 (Colo. App. 2011); *Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708, 715 (Colo. App. 1985) (The burden is upon the party asserting error to establish it.); *see also Rego Co. v. McKown-Katy*, 801 P.2d 536, 540 (Colo. 1990) (The burden is on the party asserting error to show reversible error).

In the absence of any contrary argument, we are persuaded that conflicts in the evidence are resolved in the record, the findings of fact are supported by the evidence and the findings of fact support the supplemental order, and the award of penalties is supported by applicable law. Sections 8-43-304(1), 8-43-305, C.R.S. We therefore have no basis to disturb the ALJ's award of penalties on review. Section 8-43-301(8), C.R.S.

III. Abuse of Discretion

The respondents contend that the ALJ abused his discretion in denying the respondents the right to call Mr. Bartz as a rebuttal witness. The ALJ excluded Mr. Bartz because the respondents did not disclose this witness until a week prior to hearing and,

  

when the witness was disclosed, the respondents only made general statements as to his proffered testimony. Tr. at 74-76. We find no abuse of discretion in the ALJ's decision to exclude Mr. Bartz' testimony.

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). "The admission of rebuttal testimony is within the sound discretion of the ALJ and will not be disturbed absent an abuse of that discretion." *Youngs v. Indus. Claim Appeals Office*, 316 P.3d 50 (Colo. App. 2013)(*citing Rice v. Dep't of Corr.*, 950 P.2d 676, 681 (Colo. App. 1997). 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). Moreover, the party alleging an abuse of discretion must show sufficient prejudice before it is reversible error. C.R.E. 103(a); *Williamson v. School District No. 2*, 695 P.2d 1173 (Colo. App. 1984).

***6** Section 8-43-210, C.R.S., contains the basic evidentiary provisions applicable to workers' compensation claims in Colorado. It states, in pertinent part, that the Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings. *Department of Labor and Employment v. Esse*r, 30 P.3d 189 (Colo. 2001).

C.R.E. 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." *See Cherry Creek School District* # 5 v. *Voelker*, 859 P.2d 805 (Colo. 1993). The rule represents a balancing test between probative value and prejudice. Under this rule evidence may be excluded on the grounds of "surprise." Here, the ALJ correctly sustained the objection to the testimony of Mr. Bartz. Tr. at 75:6-7 ("It sounds like it was disclosed just one week ago, as well as for some of the arguments that Mr. Elliott has made. It's sort of a general - these are general, sort of, description of what this witness or Mr. Bartz would say. And Mr. Elliott wanted something more specific, which I think is certainly reasonable in this situation.").

Furthermore, the respondents' counsel did not specifically describe the relevance of Mr. Bartz' testimony other than to say that he would serve as a rebuttal witness to contradict what the claimant said. Tr. at 76. *See Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987) (statements made by counsel in a pleading may not substitute for evidence which is not in the record). Under these circumstances, the ALJ's implicit determination that the potential probative value of Mr. Bartz' testimony was outweighed by the unfair prejudice to the claimant does not exceed the bounds of reason. Consequently, we perceive no abuse of discretion in the ALJ's order excluding the evidence.

In any case, C.R.E. 103(a)(2) precludes a party from predicating a claim of error upon the exclusion of evidence unless the "substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Furthermore, the offer "must demonstrate that the evidence is admissible as well as relevant to the issues in the case." *Melton v. Larrabee*, 832 P.2d 1069, 1071 (Colo. App. 1992). An offer of proof not only allows an ALJ to make an informed ruling on the admissibility of evidence, it also preserves a party's right of appeal. CRE 103(a)(2); *Itin v. Ungar, P.C.*, 17 P.3d 129, 136 (Colo. 2000). Here, the respondents made no adequate offer of proof concerning Mr. Bartz' testimony.

## IV. Attorney Fees

In the claimant's brief in opposition to petition to review, the claimant requested attorney fees and costs pursuant to § 8-43-301(14), C.R.S., due to the respondents' abandonment of the penalty issue and the failure to present any evidence of a mistake or error and in the ALJ's penalty award.

***7** We conclude the respondents have not had an adequate opportunity to respond to the claimant's request for the imposition of fees and costs, and the request may involve issues of fact concerning respondents' counsel's reasoning and motivation for filing the petition to review. The statute requires that an appeal be well grounded in fact and law and that it not be imposed for some improper purpose. Consequently, under the particular circumstances presented here, we conclude it is necessary to remand the matter to the ALJ with instructions to conduct appropriate proceedings, including a hearing if necessary, to resolve

the claimant's request for attorney fees. *See Hernandez v. Swift Newspapers*, W.C. No. 4-570-620, March 8, 2004; *Candelaria v. Summer Property Services, Inc.*, W.C. No. 4-430-934 (January 10, 2001).

**IT IS THEREFORE ORDERED** that the ALJ's order dated November 9, 2023, is affirmed.

**IT IS FURTHER ORDERED** that the matter is remanded to the ALJ with instructions to conduct appropriate proceedings to resolve the claimant's request for attorney fees and costs.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin
Kris Sanko

**NOTICE**

• This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at: **Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203**; within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.. **Please Note**: The Industrial Claim Appeals Office cannot forward a copy of your appeal to the Court of Appeals.

• A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

• You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

***8** • In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

• An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

• Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.courts.state.co.us or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below**.

• The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150**.

**Colorado Court of Appeals**

2 East 14th Avenue

Denver, CO 80203

  

**Office of the Attorney General**

State Services Section

Ralph L. Carr Colorado Judicial Center

1300 Broadway 6th Floor

Denver, CO 80203

**Industrial Claim Appeals Office**

633 17th Street, Suite 200

Denver, CO 80202

## Footnotes

1 The claimant acknowledged that he is not entitled to receive benefits for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022 and withdrew the request for benefits for these dates.

2 To the extent the ALJ incorrectly placed the burden on the claimant to establish his entitlement to temporary partial disability benefits rather than placing the burden on the employer to establish proper termination of temporary disability benefits, we find no reversible error. If there was any error, in light of the ALJ's ultimate finding awarding the claimant temporary disability benefits, the error is harmless. *See* § 8-43-310, C.R.S. (harmless error to be disregarded).

2024 WL 1550921 (Colo.Ind.Cl.App.Off.)

**End of Document**