OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-259-225-001

PROCEDURAL MATTER

At the outset of the hearing, Claimant advised the Court that the issues surrounding his entitlement to medical benefits and a change of provider had been resolved. Consequently, he withdrew his request for determination of these issues.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits from May 20, 2024, and ongoing.

II. If Claimant failed to establish that he is entitled to TTD as of May 20, 2024, whether he established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning January 28, 2025, and ongoing.

III. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD, pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

IV. Whether Claimant established that Respondents are subject to penalties for its failure to file an Admission of Liability pursuant to W.C.R.P. Rule 5-5 (C) following the termination of Claimant's TTD on February 24, 2024.

V. A determination of Claimant's proper average weekly wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following findings of fact:

1. On November 13, 2023, Claimant was mopping a floor when he slipped and fell over a metal stool landing on the left side of his chest wall. He had persistent and worsening pain in the area, so he presented to Concentra Medical Centers (hereinafter "Concentra") later that same day. (RHE E). While at Concentra, Claimant was evaluated by Physician Assistant (PA) Mendy Peterson, who ordered chest x-rays. *Id*. at 21. X-rays revealed fractures of the left 8th, 9th and 10th ribs as well as a possible pulmonary contusion. (RHE F). Accordingly, Claimant was advised to proceed to the Emergency Room.

2. Claimant presented to the emergency room (ER) at Grandview Hospital where CT imaging revealed displaced fractures of the 8th, 9th, and 10th ribs, a questionable fracture of the sternum, and a small basilar pneumothorax and pulmonary contusion. (RHE H, p.41). Transfer to Memorial Hospital was recommended. *Id.*

3. Claimant was transported by ambulance to Memorial Central Hospital. (RHE G). Upon arrival, Claimant complained of difficulty breathing. (RHE H, p. 51). Claimant's diagnostic imagining was reviewed by Dr. Michelle Buehner from the Trauma & Acute Care Surgery (TACS) Team. *Id.* at 52. After review of Claimant's CT scan, Dr. Buehner opined that Claimant had multiple displaced rib fractures that appeared to have penetrated his lung. *Id.*

4. Claimant was admitted to the hospital, a chest tube was inserted, and he underwent rib plating performed by Dr. Nathan Schmoekel on November 14, 2023. (RHE H, pp. 67-68). Claimant was discharged from the hospital to recuperate from home on November 19, 2023. He then presented to Peak Vista Community Health Center (hereinafter "Peak Vista") on November 30, 2023.[1] (RHE I, pp. 122-126).

5. During the November 30, 2023, appointment, Dr. Paul Cump made small adjustments to Claimant's medication regimen and counseled him on appropriate activity levels as he recovered from his injuries. (RHE I, p. 122, 125).

6. Respondents filed a General Admission of Liability (GAL), which is undated but based upon the evidence was probably filed on or about December 23, 2023. The GAL admitted liability for medical and TTD benefits at a rate of $351.59, based upon an average weekly wage of $527.36, commencing November 14, 2023, and continuing. (CHE 1, p. 2).

7. Claimant returned to Peak Vista for follow-up care on December 28, 2023, January 30, 2024, and February 20, 2024. (RHE I, pp. 127-137). Claimant testified that Employer asked him to return to work in February 2024, so he went to Peak Vista on February 20, 2024, to obtain a release to return to work. As part of this February 20th appointment, Dr. Cump drafted correspondence advising Employer that Claimant was able to return to work on February 26, 2024, with the following work restrictions, "no climbing and no lifting over 30 pounds." (RHE I, p. 137).

8. Claimant returned to work with the aforementioned restrictions, albeit earning full wages on or about February 26, 2024. (RHE L). Per Dr. Cump's stated work

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[1] Claimant had established a treatment relationship with the providers at Peak Vista dating back to January 9, 2019. (See RHE I, p. 110).

restrictions, the ALJ finds that Claimant was to be working modified duty. Regardless, Claimant testified that Employer was not honoring his work limitations. Thus, Claimant testified that he was performing his duties like he had prior to his injury. Claimant added that when he returned to work, his TTD checks were stopped. According to Claimant, he has not received any TTD checks since February 24, 2024.

9. Claimant testified that he did not receive an admission of liability after his TTD benefits were stopped. As presented, the evidence persuades the ALJ that Claimant's TTD benefits were terminated after his February 24, 2024, check and that a GAL reflecting the termination of his disability benefits was not filed until March 3, 2025. (See RHE B). In fact, Respondents concede that a GAL reflecting the termination of TTD benefits following Claimant's return to work was mistakenly not filed until March 3, 2025.

10. Claimant returned to Peak Vista on May 8, 2024, where he was once again evaluated by Dr. Cump. (RHE I, pp. 138-142). After evaluating Claimant, Dr. Cump drafted a work status note indicating that Claimant was released to return to work in a medium duty capacity, meaning that Claimant could lift a maximum of 50 pounds and frequently lift/carry items weighing up to 25 pounds. *Id*. at 142. Dr. Cump also made the following comment regarding management of Claimant's November 13, 2023, injury: "This injury should be handed (*sic*) by a Work Comp doctor as that is the LAW! Please advise me when [Claimant] is under the care of a Work Comp physician." *Id.* (emphasis in original).

11. Regarding the purpose of the May 8, 2024, appointment, Claimant testified that his foreman, John Ortega had requested that he go to his provider to see if he could obtain a release to return to full duty work. Based upon the evidence presented, the ALJ infers that for Claimant to continue working and be of service to Employer, they needed him to be able to perform a more exhaustive list of his duties, including those that exceeded the 30-pound lifting restriction imposed by Dr. Cump on February 20, 2024. As presented, the evidence persuades the ALJ that contrary to Claimant's assertions Employer was probably following Claimant's restrictions but was finding it difficult to justify his continued employment given the nature of his position. Thus, Mr. Ortega probably asked Claimant to obtain a full duty work release.

12. According to Claimant, he was willing to go to his doctor to try to obtain a full duty release as he wanted to continue working. As evidence of this, Claimant sent the following email message to his employer on April 27, 2024:

> Hello this is only to let you know that I can get the document from the doctor that allows me to go back to work. The only thing I want is to

> [continue] working for the company. I am a good person, hardworking and honest. Please give me another chance [as] this is the only thing I want. I am not going to create problems [for] your company like liability issues. I am not that kind of person and thank you.

(CHE 6). After sending the above referenced email message to his employer, Claimant returned to Dr. Cump on May 8, 2024, where he asked to be released from care. According to Claimant, Dr. Cump refused to provide him with a full duty release. Instead, Dr. Cump updated Claimant's work restrictions allowing for medium duty capacity work to include a maximum lifting capacity of 50 pounds and a frequent lift/carrying limit of up to 25 pounds. (RHE I, p. 142).

13. Claimant testified that after he saw Dr. Cump, he took the work status paperwork to his employer that same day. He added that after sharing the note with Employer he was scheduled to be seen at Concentra the next day, i.e. May 9, 2024. Claimant testified that after eating lunch in his truck, he proceeded to the shop to clock into work for the afternoon. On his way to the shop, Claimant ran into Employer's General Manager, Benjamin James. Claimant testified that he asked Mr. James for permission to miss work to attend the scheduled appointment at Concentra and that Mr. James granted his request.

14. After speaking with Mr. James, Claimant went to the shop to inform Mr. Ortega about the approved time off to attend the upcoming Concentra appointment. Claimant testified that after telling Mr. Ortega about needing time off to attend the Concentra appointment, Mr. Ortega immediately began to verbally berate him. According to Claimant, Mr. Ortega then abruptly terminated his employment. Claimant testified that after this verbal exchange, he proceeded to the office to discuss his termination, but nobody there would talk to him about it. Claimant then collected his tools and turned in his radio and keys before leaving Employer's premises. Claimant never returned to work for Employer after May 8, 2024.

15. Mr. James contacted Claimant via text message the next day to inform him that he had not been terminated and that he should report for work. Claimant admitted that after receipt of this original message he received subsequent messages advising him that he still had a job and to return to work. Claimant testified that he was still under restrictions at the time and that Employer never offered him a job in writing that would accommodate his restrictions. Claimant did not report for work on May 21, 2024, nor did he report on May 22nd or May 23rd. Accordingly, his employment was terminated for

"voluntary job abandonment" on May 23, 2024, after this three day no call, no show period. (RHE N, p. 232).

16. Mr. James testified as Employer's General Manager. He testified that there was a verbal dispute between Claimant and Mr. Ortega prompting Claimant to turn in his keys and leave Employer's premises. He understood that Mr. Ortega, whom he referred to as the Maintenance Supervisor, did not fire the Claimant but had instead sent him home for the day. He added that Mr. Ortega did not have the authority to terminate Claimant and that the Human Resources (HR) team must review and guide all termination decisions.

17. Mr. James testified that he sent a text message to Claimant after learning that he had turned in his keys and left the premises the day before. According to Mr. James, he advised Claimant that he was not fired, and he needed to come back to work. In his text messages, Mr. James reiterated to Claimant that his job was secure, and he had merely been sent home for the day after arguing with Mr. Ortega. Mr. James testified that he reached out to Claimant at least three or four times on separate days to let him know his job was open and to return to work. Mr. James testified that in response to his text messages, Claimant adamantly expressed that Mr. Ortega had fired him. Because Claimant was not retuning to work as requested, Mr. James reached out to HR to see what to do about the situation. According to Mr. James, Claimant's employment was terminated for job abandonment three days after he was given a deadline to report and failed to do so.

18. Employer has a written attendance policy requiring all employees to report promptly for their designated work shifts. (RHE M). The attendance policy specifically addresses unexcused absences from work. *Id*. at 227. The attendance policy provides: "Excessive tardiness or unexcused absenteeism will not be tolerated. Failure to follow the proper call-in procedures or poor attendance will result in disciplinary action, up to and including termination of employment. *Absence from work for three consecutive days without notifying the employee's supervisor will be considered job abandonment and a voluntary resignation"*. *Id*. (emphasis added).

19. Claimant's employment was terminated on May 23, 2024, by Thomas Gwynne, Employer's Regional Vice President, in accordance with Employer's attendance policy. (RHE N, p. 232). The termination letter was sent to Claimant via email and mailed to his physical address. *Id*. Claimant confirmed both addresses where the letter was sent during his testimony. Based upon the evidence presented, the ALJ finds Claimant's assertion that he did not receive the termination letter unconvincing. Because Claimant never returned to work following the incident with Mr. Ortega, he was paid for his

accumulated, but unused leave time and 19.40 hours of work that predated his May 23, 2024, termination. (RHE N). Claimant was paid on May 31, 2024. (RHE L, pp. 218-219).

20. Claimant was evaluated by Dr. John Raschbacher on November 19, 2024. Dr. Raschbacher is not an authorized treating physician. Rather, he performed an independent medical evaluation (IME) of Claimant at Respondents' request. As part of his IME, Dr. Raschbacher opined that Claimant had reached maximum medical improvement (MMI) by May 8, 2024. (RHE J, p. 158). He opined further that it was not necessary to restrict Claimant's physical activity, noting instead that Claimant "should be at regular work status." *Id*. at 159.

21. The parties reached an agreement to resolve the dispute regarding selection of the authorized provider to attend to Claimant's November 13, 2023, injuries. In furtherance of that agreement, Claimant was evaluated by Dr. Miguel Castrejon on January 28, 2025. (RHE K). After completing a records review and a physical examination, Dr. Castrejon noted that Claimant had not "returned to work since he was fired on 5/8/24". (CHE 5, p. 128). Dr. Castrejon opined that Claimant was able to "[r]eturn to temporary light duty." Dr. Castrejon assigned work restrictions including sit, stand and walk as "tolerated", no lifting over 15 pounds, no overhead work and no repetitive bending/stooping. While Dr. Castrejon's report contains information regarding identity of Employer and the insurance carrier, no persuasive evidence was presented to establish that the report outlining Claimant's work restrictions was presented to Employer.

22. During cross-examination, Mr. James addressed the question of whether a job was extended to Claimant in writing, at any time, after he was sent home on May 8, 2024. In response, Mr. James testified that he personally sent a text message to Claimant indicating that the job Claimant was working was open, that he had not been terminated and that he needed to return to work. Mr. James added that Employer would accommodate Claimant's work restrictions as they had when he returned to work initially on February 26, 2024. Mr. James testified that Employer's assumption at the time the messages to come back to work were sent to Claimant was that he would return to the same modified job he was performing prior to the May 8, 2024, altercation with Mr. Ortega. Regardless, Mr. James conceded that he was unaware of any modified job approved by a physician being sent to Claimant after he was sent home on or about May 8, 2024.

23. Claimant concedes that the wage records submitted by Respondents at Exhibit L are a more accurate reflection of his earnings and average weekly wage than the records he submitted at CHE 7. Review of the records contained at Exhibit L reflect payment for regular and overtime wages on a reoccurring basis for 26 weeks (May 13, 2023 – November 10, 2023) prior to the date of Injury as follows:

05/13/23	05/26/23	$1,215.20
05/27/23	06/09/23	$1,288.80
06/10/23	06/23/23	$1,294.40
06/24/23	07/07/23	$1,290.40
07/08/23	07/21/23	$1,309.60
07/22/23	08/04/23	$1,932.80
08/05/23	08/18/23	$2,477.60
08/19/23	09/01/23	$1,476.80
09/02/23	09/15/23	$1,285.60
09/16/23	09/29/23	$1,294.40
09/30/23	10/13/23	$1,287.20
10/14/23	10/27/23	$1,333.23
10/28/23	11/10/23	$1,362.08

(RHE L, pp. 191-204). In addition to the above referenced pay periods, the wage records admitted into evidence reflect a $1,000.00 bonus check, which the ALJ did not consider when calculating Claimant's average weekly wage. (See RHE L, p. 202). Although the wage records admitted into evidence reflect Claimant's earnings over a period greater than six months, the ALJ finds that the above 26-week period best reflects the Claimant's average earnings. The total earned during this period equals $18,848.11, which results in an average weekly wage of $724.93. ($18,848.11 ÷ 26 weeks = $724.93/week).

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., 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 litigation. C.R.S. § 8-40-102. Generally, the claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more properly true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on the merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant's Entitlement to Temporary Disability Benefits and his May 23, 2024, Termination

C. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss to be entitled to TTD benefits. C.R.S. § 8-42-103(1)(a); *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P. 3d 872 (Colo. App. 2001).

D. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in C.R.S. § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claims Appeals Office, supra*.

E. In this case, the evidence presented supports a conclusion that Claimant's November 13, 2023, industrial injury caused a disability lasting more than three work shifts and that this disability caused an actual wage loss as demonstrated by Claimant's complete inability to resume his prior employment between November 14, 2023, and February 26, 2024. Indeed, Respondents admitted liability for TTD benefits as of November 14, 2023, and continued to pay those benefits through February 24, 2024.

(CHE 1, p. 2; RHE B, p. 7). Thereafter, the evidence supports a conclusion that Claimant returned to modified duty work, at full wages, on or about February 26, 2024. (RHE L). Therefore, Respondent's terminated Claimant's TTD benefits.[2]

F. Claimant now contends that he is entitled to collect TTD benefits beginning May 20, 2024, and continuing because his wage loss on and after this date is causally related to his November 13, 2023, injury. The ALJ is not persuaded. In this case, the persuasive evidence demonstrates that while Claimant was temporarily disabled as of May 20, 2024[3], Employer had been accommodating the work restrictions imposed on him by Dr. Cump following Claimant's February 20, 2024, appointment. Moreover, the ALJ is convinced that Claimant worked modified duty, at full duty pay, under these restrictions from February 26, 2024, to May 8, 2024, when he engaged Mr. Ortega in what the ALJ concludes was probably an emotionally charged verbal argument. Based upon the evidence presented, the ALJ is not convinced that Claimant's modified employment was terminated by Mr. Ortega on May 8, 2024. Rather, the ALJ credits the testimony of Mr. James to find and conclude that Claimant was probably sent home for the day on May 8, 2024, for quarreling with his foreman. Moreover, the ALJ is convinced that Mr. James, as Employer's General Manager, informed Claimant, on multiple occasions after the May 8th altercation, that he had not been terminated and to return to work. As presented, the evidence supports a conclusion that Mr. James' messages were either ignored or outright challenged by Claimant who stubbornly refused to return to work on the erroneous belief that he had been terminated. Only after refusing to return to work and the passage of a three day no-call, no-show period, was Claimant's employment terminated, which resulted in further wage loss. Thus, while Claimant was temporarily disabled and he suffered a wage loss after May 8, 2024, Respondents argue that the request for TTD should be denied on the grounds that he is responsible for that wage loss.

G. Sections 8-42-105(4), C.R.S., and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *See William Holsonback v. Brand Scaffold Builders*, W.C. No. 4-724-509 (June 12, 2008). Because the injury in this case occurred after July 1, 1999, the aforementioned statutory provisions, collectively referred to as the "termination statutes", apply to Respondents' assertion that Claimant is responsible for his wage loss. Under the termination statutes, a claimant who is responsible for the

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[2] An analysis regarding the asserted penalties for failing to timely file an Amended General Admission of Liability reflecting the termination of Claimant's TTD benefits is set out below.

[3] As evidenced by restriction of bodily function following Claimant's February 20 and May 8, 2024, medical appointments with Dr. Cump at which he assigned physical restrictions limiting the scope of Claimant's work.

termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). Simply put, a claimant who is responsible for his/her wage loses the right to temporary disability benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994).

H. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo. App. 2000). The dispositive question in these cases is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in his/her discharge. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993). Respondents do not have to prove that the claimant knew or should have known that his/her conduct would result in termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is only necessary for Respondents to establish that the claimant is “responsible” for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

I. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). “Fault” does not require “willful intent” on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d

414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, the ALJ is convinced that Claimant committed a number of volitional acts and exercised a degree of control over the circumstances leading to his termination. Indeed, the evidence supports a conclusion that Claimant either deliberately ignored multiple messages from Mr. James, whom he knew to be Employer's General Manager, to return to work or utterly refused to report for work despite knowing that he had not been fired by Mr. Ortega. As presented, the evidence supports a conclusion that Claimant's conscious decision not to return to work ultimately lead to his termination for violating Employer's attendance policy after he was a no-call, no-show for three consecutive workdays, i.e. on May 21st, 22nd, and 23rd.

J. Claimant's volitional refusal to follow Employer's reasonable requests and established attendance policies exhibits a significant degree of contempt for Mr. James and Employer. Based upon the evidence presented, it is not surprising that his employment was terminated. Indeed, the ALJ concludes that any employee acting in a similar fashion as Claimant would reasonably expect such behavior to result in the loss of employment. Accordingly, the ALJ is convinced that Claimant is responsible for the termination of his employment. Pursuant to C.R.S. § 8-42-103 (1) (g), § 8-42-105 (4) (a), and § 8-42-105(4) (a), any wage loss beginning May 8, 2024, and extending through January 28, 2025, is not attributable to Claimant's November 13, 2023, work-related injury but rather the termination of his employment. Accordingly, Claimant's request for TTD benefits for the period extending from May 20, 2024, to January 28, 2025 is denied and dismissed. Alternatively, Claimant asserts entitlement to TTD beginning January 28, 2025, and ongoing, presumably on the basis that he experienced a worsening of condition based on the restrictions assigned by Dr. Castrejon. As presented, the evidence fails to convince the ALJ that Claimant has proven that his condition has worsened. More importantly, the ALJ credits the testimony of Mr. James to find and conclude that had Claimant been interested in returning to work and had Dr. Castrejon's restrictions been presented to Employer, those restrictions, more probably than not, would have been accommodated and Claimant would have been returned to modified duty. Thus, Claimant's request for TTD benefits commencing January 28, 2025, and ongoing is denied and dismissed.

Claimant's Entitlement to Penalties for Failure to File an Amended General Admission of Liability Following Claimant's Return to Work on February 26, 2024

K. Section 8-43-304(1), of the Act identifies four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial*

Claim Appeals Office, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1) requires a two-step analysis. First, the ALJ must determine whether the complained of conduct constitutes a violation of the Act, a rule or an order. If the ALJ finds a violation, the ALJ must secondly determine whether the action or inaction resulting in the violation were objectively unreasonable or beyond the control of the insurer. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). Examples include sudden illness of the responsible individual, power outages, faulty information, insufficient notice, unsound official advice, or horrific weather conditions, among others. *Madera v. Zak Dirt, Inc.*, WC 5-085-650-003 (ICAO, June 7, 2021). The reasonableness of Insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that Insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

L. Division of Workers' Compensation Rules of Procedure, Rule 5-5 (C) provides: "Upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation on or prior to the next scheduled date of payment regardless of the reason for the termination or reduction". In this case, the last disability benefit was paid through February 24, 2024, and the next disability benefit would have been due on March 10, 2024. As presented, the evidence supports a conclusion that Insurer did not file an amended GAL, reflecting the termination of Claimant's TTD, until March 3, 2025. Indeed, Counsel for Respondents admitted that the GAL required by Rule 5-5 (C) was not filed timely. Accordingly, the ALJ concludes that there has been a violation of a procedural rule in this case. Nonetheless, Respondents argue that no penalty should be imposed because the violation was technical in nature and Claimant suffered no harm because he had returned to work at full wages.

M. The imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation of the Act, a rule or an order and the violation was not reasonable under an objective standard. See, C.R.S. § 8-43-304(1). An ALJ errs as a matter of law in refusing to impose a penalty when these elements have been proven. *Varga v. A1 Sewer Master Mountain Water,* W.C. No. 4-508-548 (ICAO July 1, 2004); *Castro v. FBG Service Corporation*, W.C No. 4-739-748 (ICAO Dec. 31, 2008). *See also, Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24, 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004). In this case, Insurer offered no defense to the asserted violation of the rule other than to claim that the violation was inadvertent, and that Claimant was not harmed by Insurer's failure to file the required admission. It is well settled that an adjuster's "mistaken beliefs" and poor claims handling procedures are not predicated on a rational argument based on law or fact, and thus have

been determined to be objectively unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312, 1314 (Colo. App. 1997). In concluding that Insurers conduct in failing to file the necessary admission was objectively unreasonable in this case, the ALJ finds the case of *Arnhold v. UPS,* W.C. No. 4-979-20802 (ICAO Feb. 24, 2017) instructive. In *Arnhold*, respondents were ordered to pay back-due TTD within fifteen days of the order. The adjuster testified she miscalculated the due date mandated by order. The ALJ concluded this was a "human error," was not unreasonable, and declined to award penalties. The ICAO reversed. In reversing, the Panel noted, "Respondents cannot be both negligent in miscalculating the date the TTD payment was due and also be deemed reasonable in doing so." *Arnhold* *4. Also in *Kerr v. Costco,* W.C. No. 5-076-601 (ICAO June 2, 2021), respondents were required by WCRP 5-6(c) to timely issue permanent partial disability (PPD) benefits. The ALJ found respondents violated the rule but declined to issue penalties. In refusing to assess penalties, the ALJ found that respondents forgot to update claimant's address, "inadvertently" mailed the check to a wrong address, and this "clerical error" was not unreasonable. Again, ICAO reversed noting that late payment of PPD due to a 'clerical error' and 'inadvertence' does not denote the conduct of a reasonable employer or insurer. Thus, the Panel remanded the case to the ALJ for assessment of penalties. Here, inadvertently failing to file the required admission for months after it was due constitutes negligent and unreasonable conduct on the part of insurer whether or not Claimant was harmed. Accordingly, penalties must be assessed.

N. The purpose of penalties is to address and dissuade similar ongoing conduct. However, the ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). Any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Off.*, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020); *Colorado Dep't of Labor & Employment v. Dami Hosp., LLC*, 442 P.3d 94 (Colo. 2019) (hereinafter *Dami Hospitality*). When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility or culpability of the party and the relationship between the penalty and the harm to the victim caused by the other party's actions. *Associated Business Products*, 126 P.3d at 324. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, WC 4-981-806 (ICAO, July 1, 2019). In this case, the evidence presented supports a conclusion that the delay in filing an amended admission of liability following Claimant's return to work probably resulted from isolated, albeit negligent and unreasonable adjusting practices. While Claimant had returned to work earning full wages and was subsequently responsible for the termination of his employment, Respondents failed to file the required admission for 358 days (March

10, 2024 - March 3, 2025) after it was due. Thus, while the harm to the Claimant in this case may be considered minimal, it is noted that failure to comply with the procedural rules adopted by the Division of Workers' Compensation for 358 days is serious and must result in a meaningful consequence so that Insurer understands that they may not ignore their claims adjusting responsibilities. Based on the evidence presented, the ALJ determines that the appropriate penalty for the above referenced violation is $10/per day for each day of the Respondents failure to file an admission of liability after terminating benefits commencing March 10, 2024, and continuing until March 3, 2025, when the required admission was filed. In imposing this penalty, the ALJ has considered the holding in *Dami Hospitality* regarding gross disproportionality. The amount of the penalty imposed is not excessive and serves the purpose of gaining Respondents' compliance with the procedural rules adopted by the Division of Workers' Compensation without unduly creating a financial hardship for Insurer. Simply put, the fine is proportional to the offending conduct and appropriate under the circumstances presented.

Claimant Average Weekly Wage

O. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* Sections 8-42-102(3) and (5)(b), C.R.S. give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. As found, the best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity is based on the earnings from May 13, 2023, through November 10, 2023. The total earned during this period equals $18,848.11, which results in an average weekly wage of $724.93. ($18,848.11 ÷ 26 weeks = $724.93/week). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his November 13, 2023, work related injury.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment after May 8, 2024. Accordingly, his claim for TTD benefits between May 20, 2024, and January 28, 2025, is denied and dismissed.

2. Claimant failed to establish his entitlement to TTD benefits commencing January 28, 2025, and ongoing. Thus, this claim for benefits is denied and dismissed.

3. Claimant's request for imposition of penalties against Insurer is granted. Insurer shall pay penalties of $3,580.00. The amount apportioned to Claimant shall be 50% of the penalty and the remaining 50% is apportioned to the Colorado uninsured employer fund as set forth in C.R.S. § 8-43-304(1).

4. Claimant's average weekly wage is $724.93.

5. Any issue not resolved by this order is reserved for future determination.

DATED: April 25, 2025

/s/ Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms