APPENDIX

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APPENDIX A

ADVANCE SHEET HEADNOTE

June 3, 2019

AS MODIFIED [JUNE 17, 2019]

2019 CO 47M

No. 17SC200, *Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*—Eighth Amendment—Corporations—Excessive Fines—Workers' Compensation Noncompliance.

The supreme court considers whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations. Concluding that this Eighth Amendment protection does apply to corporations, the supreme court holds that the proper test to assess the constitutionality of government-imposed fines requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed, as articulated in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The court of appeals' ruling is thus

reversed and the case is remanded to that court for return to the Division of Workers' Compensation to determine whether the per diem fines at issue are proportional to the harm or risk of harm caused by each day of the employer's failure to comply with the statutory requirement to carry workers' compensation insurance.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2019 CO 47M

Supreme Court Case No. 17SC200
Certiorari to the Colorado Court of Appeals
Colorado Court of Appeals Case No. 16CA249

[Modified June 17, 2019]
[Filed June 3, 2019]

Petitioner:	)
Colorado Department of Labor	)
and Employment, Division of	)
Workers' Compensation,	)
	)
v.	)
	)
Respondents:	)
Dami Hospitality, LLC; and	)
Industrial Claim Appeals Office.	)
	)

Judgment Reversed
en banc
June 3, 2019

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

June 17, 2019

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No appearance on behalf of Industrial Claim Appeals Office.

JUSTICE HART delivered the Opinion of the Court.
JUSTICE SAMOUR concurs in part and dissents in part.
JUSTICE HOOD does not participate.

¶1 This case requires us to consider whether the Eighth Amendment's prohibition on the government imposition of "excessive fines" applies to fines levied on corporations.[1] We conclude that the purpose of the

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[1] We granted certiorari to review the following issues:

1. Whether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations;

2. Whether the court of appeals applied the correct test to determine the constitutionality of a civil fine; and

3. Whether the court of appeals reasonably concluded that the fine at issue violated the Eighth Amendment.

Excessive Fines Clause is to prevent the government from abusing its power to punish by imposing fines, and nothing in that purpose or in the text of the Eighth Amendment limits its reach to fines imposed on individuals. We further conclude that the proper test to assess the constitutionality of government fines under the Eighth Amendment is that set forth by the United States Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), which requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed. We thus reverse the court of appeals' ruling and remand to that court for return to the Division of Workers' Compensation with instructions to, as appropriate and necessary, develop an evidentiary record sufficient to determine whether the $250–$500 fine that a business was required to pay for each day that it was out of compliance with Colorado's workers' compensation law is proportional to the harm or risk of harm caused by each day of noncompliance.

I. Facts and Procedural History

¶2 Dami Hospitality, LLC ("Dami") is the owner-operator of a Denver motel located on Peoria Street. Dami employs between four and ten people at any given time. As an employer, Dami is required by statute to maintain workers' compensation insurance. *See* § 8-43-409, C.R.S. (2018).

¶3 Dami allowed its workers' compensation coverage to lapse on or about July 1, 2005. Upon receiving notification of the lapse from the Division of Workers' Compensation ("DWC"), Dami conceded the violation and paid a corresponding settlement in June 2006.

¶4 Approximately two months later, Dami again allowed its workers' compensation coverage to lapse. This time, Dami went without coverage from August 10, 2006, through June 8, 2007.

¶5 From June 9, 2007, to September 11, 2010, Dami carried the proper insurance, but the company's workers' compensation coverage again lapsed on September 12, 2010. Dami was without such insurance from that time until July 9, 2014.

¶6 On February 19, 2014, the DWC discovered that Dami had allowed its workers' compensation insurance to lapse for these periods of time and issued a notice to Dami regarding this. That written correspondence was dispatched to Dami's Peoria Street address, which was the address on file with the Colorado Secretary of State for both the limited liability company and its registered agent, Soon Pak. The DWC notice advised Dami that it had twenty days to return an enclosed compliance questionnaire and to submit documents either establishing that it had maintained coverage during the relevant periods or demonstrating an exemption from the coverage requirement. It also specified that Dami could "request a prehearing conference on the issue of default."

¶7 After Dami failed to respond to the notice of subsequent violation, the DWC mailed a second notice to Dami on June 25, 2014, this time sending it to an East Dartmouth Place address.[2] For the second time,

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[2] It is not clear from the record why the DWC mailed an additional subsequent violation notice to the East Dartmouth Place address. However, the record includes documentation from the Colorado

Dami was given twenty days to return the same compliance questionnaire and to submit documents either establishing coverage during the relevant periods or demonstrating an exemption from the coverage requirement. The DWC also specified, again, that Dami could request a prehearing conference on the issue of default.

¶8 On July 11, 2014, the DWC received a faxed certificate of workers' compensation insurance for Dami effective from July 10, 2014, through July 10, 2015. Dami did not offer any other documentation or any explanation for the extended periods of noncompliance.

¶9 Having received no claim of exemption or proof of coverage for the second and third periods of noncompliance, and no request for a prehearing conference, the DWC concluded its legally mandated investigation into Dami's noncompliance on October 29, 2014. The applicable statutory framework provides that the DWC shall:

> For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage: impose a fine of: (I) Not more than two hundred

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Secretary of State's website indicating that the East Dartmouth Place address appears in Dami's May 11, 2000 Articles of Incorporation for both the "principal place of business" and its organizer, Soon Pak. Elsewhere, Pak identifies the East Dartmouth Place address as her personal residence.

> fifty dollars for an initial violation; or (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and subsequent violation.

§ 8-43-409(1)(b), C.R.S. (2018). In implementing this provision, the DWC promulgated Rule 3-6(D), 7 CCR 1101-3, which provides that:

> For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from $250/day up to $500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or until further order of the Director:
>
> Class VII 1-20 Days $250/Day
>
> Class VIII 21-25 Days $260/Day
>
> Class IX 26-30 Days $280/Day
>
> Class X 31-35 Days $300/Day
>
> Class XI 36-40 Days $400/Day
>
> Class XII 41 Days $500/Day

¶10 The DWC applied this statutory and regulatory regime in calculating the fine for Dami's second and third periods of noncompliance with the Workers' Compensation Act. On October 30, 2014, the DWC sent its "Specific Findings of Fact, Conclusions and Order to Pay Fine–Subsequent Violation" (the "Order") to Dami.

This document categorized the fine amounts owed by Dami by the six classes of violation defined in DWC Rule 3-6(D), noting the per diem amount owed for each of the corresponding date ranges. The final paragraph of the order explained that the total amount Dami owed as a result of the 1,698 per diem fines was $841,200.

¶11 On November 18, 2014, the DWC received correspondence from Soon Pak, Dami's registered agent. In a letter written on Dami's behalf, Pak conceded that the business had failed to maintain workers' compensation insurance during the noticed periods. Pak explained that Dami's failure to consistently maintain coverage was a result of her reliance on others to maintain "business coverage." Pak stated that Dami's annual payroll is less than $50,000, and that the aggregate fine proposed by the DWC exceeded the business's gross annual income. Pak informed the DWC that Dami was thus unable to pay the aggregated per diem fines and requested leniency in the form of a penalty "that is more reasonable to the size of [the] business." Pak also asserted that there had never been a worker-related accident or injury at the motel, either when coverage was in place or during any period of Dami's noncompliance. Pak did not request a hearing on the issue of Dami's default on its workers' compensation insurance obligation.

¶12 The DWC construed Pak's correspondence as a petition to review the Order. The DWC then made settlement overtures, offering to decrease the fine by nearly half, to $425,000 (the aggregated minimum per diem fines permissible under section 8-43-409(1)(b)(II)).

Dami did not accept the settlement, and instead submitted a brief in furtherance of the petition to review. Dami argued that (1) it had "reasonably believed that it was in compliance with the statute" at all relevant times; (2) the DWC failed to provide adequate and timely notice of Dami's noncompliance; (3) because Dami promptly cured its default upon receiving notice, it should be assessed no penalty or at least a much smaller penalty; and (4) the assessed per diem fines were constitutionally excessive in violation of the Excessive Fines Clause of the Eighth Amendment.

¶13 The DWC issued an order upholding the fines. The DWC began by noting that the per diem fines were "not discretionary" and were properly calculated pursuant to section 8-43-409 and Rule 3-6(D)'s assessment classification schedule. Next, the DWC observed that the law places the responsibility for knowing whether workers' compensation coverage is consistently maintained on the employer and not on the DWC. Further, the order explained that Dami's policy was cancelled in 2006 due to nonpayment of required premiums and "its 2010 policy was cancelled for failure to comply with terms & conditions or audit failure." The DWC determined that both of those reasons for cancellation were within Dami's control. The DWC stated that Dami's procurement of coverage after receiving actual notice of its subsequent violation did not relieve it of responsibility to pay the statutory fines imposed for the prior 1,698 days of noncompliance. Finally, the DWC declined to address Dami's constitutional arguments, concluding that

administrative agencies are not authorized to "pass on the constitutionality of statutes."

¶14 Dami appealed to the Industrial Claim Appeals Office ("ICAO"). The ICAO rejected all but Dami's excessive fines argument. The ICAO remanded the matter to the DWC, directing it to review the constitutionality of the aggregated per diem fines assessed in accordance with the test established by the court of appeals in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). That test, borrowed from United States Supreme Court Fourteenth Amendment jurisprudence, requires consideration of "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." *Id.* at 326 (citing *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001)).

¶15 Without holding a hearing, the DWC ultimately issued a supplemental order concluding that "Rule 3-6(D) incorporates and addresses all of the elements of the *Associated Business Products* test, and thus that the fine of $841,200.00 assessed against [Dami] according to that Rule is appropriate." The DWC explained that the graduated nature of the daily fines, increasing as the length of the period of noncompliance increases, accounted for the degree of reprehensibility of the conduct. The potential harm caused by noncompliance, according to the DWC, was in line with

the fines because each day of noncompliance presents a risk that an employee will be injured and insurance will not be in place to cover that injury. And because the penalties are statutorily imposed and apply to all violators equally, Rule 3-6(D) ensures that there is no disparity between the fines imposed on Dami and fines imposed on any other noncompliant employer.

¶16 Dami again appealed to the ICAO, which affirmed the DWC's supplemental order.

¶17 Dami then appealed to the court of appeals. The division set aside the assessment of aggregated per diem fines. *Dami Hosp., LLC v. Indus. Claim Appeals Office*, 2017 COA 21, ¶ 110, __ P.3d __. It assumed without deciding that the Excessive Fines Clause could be applied to challenge regulatory fees imposed on a corporation. *Id.* at ¶ 57. It determined that the *Associated Business Products* test was the correct test to apply in assessing the constitutionality of the fee and that consideration of Dami's ability to pay the fine was a relevant factor in that assessment. *Id.* at ¶¶ 71–81. And it concluded that DWC abused its discretion by failing "to apply the *Associated Business Products* factors . . . to Dami's specific circumstances." *Id.* at ¶ 110. The division remanded the Order to the DWC for recalculation in accordance with its opinion. *Id.* The DWC petitioned for certiorari, and we granted the petition.

II. Analysis

¶18 We first consider whether the Excessive Fines Clause affords corporations protection against constitutionally excessive fines. We conclude that it

does. Next, we hold that the proper test for determining whether a fine is unconstitutionally excessive is whether it is grossly disproportional to the gravity of the subject offense. *See Bajakajian*, 524 U.S. at 334. We explain that the evaluation of disproportionality should include consideration of the company's ability to pay the fine. We then consider whether the gross disproportionality analysis should be applied to each per diem fine or to the aggregate amount imposed for 1,698 days of noncompliance. We hold that where, as here, a statute expressly states that each day a party fails to comply with a legal obligation "shall constitute a separate and distinct violation" of the law, the Eighth Amendment analysis must focus on each per diem fine imposed by statute. § 8-43-305, C.R.S. (2018). We then remand the case to the court of appeals with instructions to return it to the DWC for the development, as appropriate and necessary, of an evidentiary record to facilitate application of the proportionality analysis.

A. Applicability of the Excessive Fines Clause to Corporations

¶19 Whether a particular constitutional guarantee applies to both natural persons and corporations "depends on the nature, history, and purpose" of the provision. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).[3]

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[3] After oral argument in this case, the United States Supreme Court held that the Excessive Fines Clause is incorporated against the States by the Due Process Clause in *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687 (2019). The prohibition against imposing excessive fines thus does apply to Colorado's DWC.

¶20 Guarantees that are "purely personal" or "limited to the protection of individuals" will not apply to corporations. *Id.* The established personal guarantees include the Fifth Amendment privilege against self-incrimination and the right to privacy. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."); *United States v. White*, 322 U.S. 694, 698–701 (1944) (Fifth Amendment); *NW Nat. Life Ins. v. Riggs*, 203 U.S. 243, 255 (1906) (noting that the "liberty" referred to in the Fourteenth Amendment is the liberty of natural persons).

¶21 On the other hand, when a guarantee is against certain government overreach, and is a "constitutional immunit[y] appropriate to [a corporate] body," this constitutional limitation on government power can apply to protect a corporation just as it may protect a natural person. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Thus, corporations have been recognized to have First Amendment rights to free speech and Fourteenth Amendment rights to due process and equal protection of the law. *See Metro. Life Ins. v. Ward*, 470 U.S. 869, 880 (1985) (equal protection); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984) (due process); *First Nat'l Bank*, 435 U.S. at 783–84 (free speech). Similarly, corporations are protected from unreasonable searches and seizures, cannot have their property taken without just compensation, and cannot be tried twice for the same offense. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (takings); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–13 (1978) (unreasonable searches and

seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568–69 (1977) (double jeopardy).

¶22 With these cases as guideposts, in considering whether the Excessive Fines Clause applies to corporations we must evaluate both the purpose of the clause and the appropriateness of applying it to corporations.[4]

¶23 The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. On its face, the text of the Excessive Fines Clause does not suggest that its protections are limited to natural persons. The clause is a directive to the government not to impose excessive fines. It does not include any limitation on who merits protection from the imposition of excessive fines.

¶24 The DWC argues that the other clauses of the Eighth Amendment offer an important textual clue to the meaning of the Excessive Fines Clause. Wielding the maxim of *noscitur a sociis*, which provides that the meaning of a phrase should be informed "by the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008), it asserts that (1) the prohibitions of excessive bail and cruel and unusual punishment can only be applied to protect

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[4] Contrary to the court of appeals' suggestion that there has been a "tidal shift" toward favoring the application of constitutional guarantees to corporations, *Dami*, ¶ 58, this nature and purpose-based approach to evaluating the question has been applied by the United States Supreme Court since at least 1906, *see Hale*, 201 U.S. at 76.

natural persons, and, therefore (2) the Excessive Fines Clause must be limited in application to natural persons.

¶25 Unfortunately for the DWC, the United States Supreme Court has already abandoned *noscitur a sociis* in interpreting the Eighth Amendment. In *Austin v. United States*, 509 U.S. 602, 610 (1993), the Court concluded that the Excessive Fines Clause applied to prohibit excessive *civil* fines as well as excessive *criminal* fines when the purpose of the civil fine was, at least in part, to impose punishment. The Court reached that conclusion despite the fact that it had previously held that the Cruel and Unusual Punishment Clause applied only to criminal punishment. *See Ingraham v. Wright*, 430 U.S. 651, 666–68 (1977). In so holding, the *Austin* Court moved away from its earlier suggestion that the three clauses of the Eighth Amendment must all be interpreted to have the same reach. *See id.* at 664; *see also Austin*, 509 U.S. at 608–09 & n.5. Instead, the Court focused on the purpose of the Excessive Fines Clause itself—which is to prevent the government from abusing its power to punish through the imposition of fines, whether those fines are part of a criminal scheme or a civil one. *Austin*, 509 U.S. at 610–11.

¶26 The question we face, then, is whether there is justification to conclude that the purpose of the Excessive Fines Clause supports its application to protect corporations even if the other clauses in the Eighth Amendment do not. We conclude that there is. The bail clause is necessarily limited to natural persons because corporations cannot be jailed, and therefore cannot be subject to bail. Similarly, cruel and unusual

punishment cannot be imposed upon a corporation. In short, these two guarantees are not "appropriate to [a corporate] body." *Hale*, 201 U.S. at 76. By contrast, "[t]he payment of monetary penalties . . . is something that a corporation can do as an entity." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989) (O'Connor, J., concurring in part and dissenting in part). Moreover, the government regularly imposes a wide array of monetary penalties, both civil and criminal, on corporations for the purposes of punishing corporate misconduct and regulatory violations. And when the government imposes these punitive sanctions, we hold that it must do so in compliance with the Excessive Fines Clause.

B. The Proportionality Standard for Determining Whether a Fine is Constitutionally Excessive

¶27 Having determined that corporations are entitled to assert claims that fines imposed by the government for punitive purposes are excessive in violation of the Eighth Amendment, we next consider what standard a corporation must meet to succeed in such a claim. The United States Supreme Court articulated that standard in *Bajakajian*, where it explained that "[i]f the amount of the [fine] is grossly disproportional to the gravity of the . . . offense, it is unconstitutional." 524 U.S. at 337.

¶28 In adopting this proportionality standard, the Court in *Bajakajian* relied on two "particularly relevant" considerations. *Id.* at 336. The first is that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature."

Id. at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983), and *Gore v. United States*, 357 U.S. 386, 393 (1958)). The second is that judicial determinations as to the gravity of an offense are inherently imprecise. *Id.* These considerations, explained the Court, "counsel against requiring strict proportionality" between the amount of a punitive fine and the gravity of the underlying offense, and for adopting the test previously articulated in cases interpreting the Cruel and Unusual Punishment Clause. *Id.* (citing *Solem*, 463 U.S. at 288 and *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). Under that test, courts evaluating proportionality must consider whether the defendant was treated more harshly (1) than others within the same jurisdiction and (2) than he would have been in any other jurisdiction. *Solem,* 463 U.S. at 303.

¶29 Neither the court of appeals nor the ICAO hearing panel in this case applied the United States Supreme Court's "gross disproportionality" test to evaluate the fines imposed on Dami for its protracted failure to maintain workers' compensation insurance. Instead, both relied on the test articulated by the court of appeals in *Associated Business Products.* This test is inconsistent with *Bajakajian.* Today, we bring Colorado law into conformity with federal law and hold that the proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly disproportional to the gravity of the underlying offense.

¶30 The United States Supreme Court has not addressed whether the Eighth Amendment

proportionality assessment can or should include consideration of the ability of the person being fined to pay that fine. The only reference to the issue in *Bajakajian* itself was a footnote observing that: "respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." 524 U.S. at 340 n.15. The Court has, however, in a number of cases observed that the historical precursor to the Eighth Amendment, the English Magna Carta, limited the power of government to impose punitive fines by, among other things, requiring that a penalty "not be so large as to deprive [a person] of his livelihood." *Browning-Ferris*, 492 U.S. at 271; *see also Bajakajian*, 524 U.S. at 335 (same). And the Court's most recent Excessive Fines Clause decision cited with approval a statement from Blackstone's Commentaries on the Laws of England that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Timbs*, ___ U.S. ___, 139 S. Ct. at 688 (citing 4 W. Blackstone, Commentaries on the Laws of England 372 (1769)). We see in the Court's citation to these historical predecessors of the Excessive Fines Clause, and their consideration of ability to pay, persuasive evidence that a fine that is more than a person can pay may be "excessive" within the meaning of the Eighth Amendment.

¶31 The concept of "proportionality" itself also persuades us that ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis. A fine that would bankrupt

a person or put a company out of business would be a substantially more onerous fine than one that did not. For some types of criminal or regulatory infractions, a penalty that would have that kind of grave consequence might be warranted, whereas for others the severity of that outcome may be out of proportion to the gravity of the offense for which the fine is imposed. We thus conclude that courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.

C. The Proportionality Analysis Must Consider Each Individual Per Diem Fine

¶32 Dami argues that the proportionality analysis should be applied to the aggregate $841,200 that the company was assessed, and not to each of the $250-$500 daily fines. We disagree. The workers' compensation statutory regime explicitly states that "[e]very day during which an employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." § 8-43-305. Moreover, the statute directs the DWC to impose a daily fine of $250–$500 for each day of noncompliance. The statute thus puts every employer on notice that it will be fined between $250 and $500 per day for each day that it is out of compliance with its legal obligations. While the assessment for the 1,698 per diem fines may have reflected a lump sum total owed by Dami, the fines were clearly imposed at a daily rate as a result of many daily violations.

¶33 In the criminal context, we have refused to aggregate sentences that were assessed individually for

purposes of evaluating the proportionality of the sentences. In *People v. Lucero*, 2017 CO 49, ¶ 23, 394 P.3d 1128, 1133–34, we rejected the defendant's argument that his four consecutive sentences totaling eighty-four years for four separate crimes amounted in the aggregate to a sentence of life without the possibility of parole. We concluded instead that "[t]he question of whether Lucero's consecutive term-of-years sentences meet the dictates of the Eighth Amendment's proportionality principle requires consideration of each individual crime and each sentence imposed." *Id.* at 1134; *see also Close v. People*, 48 P.3d 528, 538–40 (Colo. 2002) (holding that, because each sentence is a separate punishment for a separate offense, the proper question is whether each sentence is appropriate for its related offense and not whether the aggregate of the sentences is disproportional in the abstract). We see no principled justification for taking a different approach in the context of the regulatory fines at issue here.

¶34 We recognize that, under the circumstances, the fact that Dami did not receive notice of noncompliance regarding its subsequent violations from the DWC for several years resulted in a staggeringly high-dollar aggregate total of per diem fines.[5] However, responsibility for that unfortunate circumstance rests squarely on the shoulders of Dami, and perhaps its

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[5] Indeed, this case featured prominently in the legislature's decision to amend section 8-43-409 in 2017 to limit the maximum period for which fines can be imposed to "three years prior to the date an employer is notified by the division of a potential violation." § 8-43-409(c). *See* David Gallivan, *HB 17-1119 Brings Reform to Workers' Compensation*, 46 Colo. Law., Nov. 2017, at 58, 59.

business advisors. Dami was in fact well aware that it had an obligation to carry workers' compensation insurance and that it would be subject to daily fines for noncompliance; at the very moment that the company allowed its insurance to lapse in 2006 it was in the process of settling with the DWC for a year-long period of noncompliance during 2005 and 2006. Moreover, under the workers' compensation statutes, it is the employer who is responsible for ensuring that it is in compliance with the obligation to carry insurance. The statute makes plain—by excluding any mens rea element and imposing a daily fine for each day that an employer fails to have insurance or allows its insurance to lapse—that the legislature intended that a violation of section 8-43-409(1)(b)(II) be a strict-liability offense.

¶35 There are good and practical reasons for putting the burden on the employer, and not on the DWC, to ensure compliance. First, workers' compensation insurance is not paid to or by the DWC. Instead, it is private insurance coverage that an employer purchases from an insurance company. *See* Division of Workers' Compensation, *Employer's Guide* 2 (Dec. 2015).[6] The employer is therefore in a better position than the DWC to know whether it has obtained the required coverage. Second, the lack of a mens rea element in the requirement to maintain coverage discourages both negligent noncompliance (where an employer should have known that coverage was lacking) on the one

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[6] We take judicial notice of this official publication, as it appears on the Colorado Department of Labor and Employment's website. *See* https://www.colorado.gov/pacific/sites/default/files/Employers_Guide_2015.pdf [https://perma.cc/6TVT-DS7J].

hand, and gamesmanship (where an employer knew coverage was lacking but willfully failed to procure or maintain a compliant policy) on the other. Adopting a rule that focuses on the proportionality of the aggregate of daily fines, rather than the proportionality of each daily fine, would actually incentivize employers to forego workers' compensation coverage for as long as possible, hoping that the DWC would not notice until the fines had accrued for an extended period of time so that they could then argue that the fine for noncompliance was excessive.

¶36 We thus cannot allow the size of aggregated per diem fines in this case to distort our Eighth Amendment jurisprudence more generally.[7] When a fine is imposed on a per diem basis, with each day constituting an independent violation, the evaluation of whether a fine is excessive must be done with reference to each individual daily fine.

III. Remand

¶37 There is scant evidence in the record before us, particularly about Dami's ability to pay the daily fines. Dami asserted in a letter to the DWC that it could not pay without going out of business. Dami did not request the evidentiary hearing to which it was entitled in order to develop a record supporting that claim.

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[7] Dami's arguments about lack of notice and the consequent length of the period of noncompliance are more properly understood as supporting a due process claim that is outside the scope of the issues upon which we granted certiorari. The fact that the DWC did not catch Dami's noncompliance for a number of years is not relevant to the Eighth Amendment argument.

Moreover, because the test we announce today is a new one in Colorado, we remand to the court of appeals so that it can return the case to the DWC. Assuming it is appropriate or necessary to conduct an evidentiary hearing at this stage, the DWC should permit the parties to develop a record that permits a complete evaluation of whether the $250-$500 fine imposed on Dami each day that it violated the workers' compensation laws was constitutionally excessive in accordance with this opinion.

III. Conclusion

¶38 In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

¶39 We therefore reverse the ruling of the court of appeals and remand this case for return to the DWC so that the DWC can, as necessary and appropriate, permit the development of an evidentiary record

sufficient to allow the application of this Excessive Fines Clause analysis.

JUSTICE SAMOUR concurs in part and dissents in part.

JUSTICE HOOD does not participate.

JUSTICE SAMOUR, concurring in part and dissenting in part.

¶40 My colleagues in the majority and I are generally on the same page in this case. I write separately because I disagree that the proportionality analysis must be conducted with regard to each individual per diem fine, as opposed to the total fine of $841,200. Like the court of appeals, I would focus on the aggregate fine that the Director imposed, which is what triggered Dami's appeal. Dami has never argued that the daily fine of $250 to $500 is unconstitutionally excessive; rather, Dami has contended all along that the $841,200 fine is.

¶41 I agree that section 8-43-409(1), C.R.S. (2018), required the Director to impose a penalty on Dami, and that once Dami obtained insurance coverage (after receiving the notice from the Director), the only available penalty was a fine of between $250 and $500 for every day Dami was noncompliant.[1] But the penalty

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[1] The statute also contemplates a cease-and-desist order and an order for injunctive relief as potential penalties. *See* § 8-43-409(4) ("The issuance of an order to cease and desist, the imposition of a fine . . . , or the issuance of an order for injunctive relief . . . shall be the penalty . . . ."). However, issuing such an order after Dami

imposed in October 2014—the state action Dami complains about—was the $841,200 fine, not the per diem rate of $250 to $500. As the majority acknowledges, the Director did not send Dami a notice at the beginning of the violation period to inform it that he intended to impose a prospective fine of $250 to $500 every day until it obtained the required insurance. Maj. op. ¶ 34. Had he done so, I might accept looking at the daily fine to determine constitutional proportionality. Instead, he waited *more than seven years* to contact Dami about a purported violation and then imposed a *retroactive* fine of almost a million dollars.[2] To be sure, Dami, as an employer, was responsible for complying with section 8-43-409(1). *Id.* But I nevertheless find it troubling that, under today's decision, if the Director retroactively imposes a "staggeringly high-dollar aggregate" fine, *id.*, simply because he delayed taking action to correct a potential violation, the employer's only recourse is to argue that the daily fine amount is excessive.

¶42 The majority today holds that the Eighth Amendment offers Dami protection against excessive fines. *Id.* at ¶¶ 18, 26, 38. I wholeheartedly agree. Unfortunately, the majority opinion, at least in this context, has no teeth because it says that Dami is

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had come into compliance with the insurance mandate wouldn't have made sense.

[2] Dami went without coverage between August 10, 2006 and June 8, 2007, and again between September 12, 2010 and July 9, 2014. The Director did not attempt to notify Dami about a potential violation until February 19, 2014. He then waited until June 25, 2014, to mail a second notice to a different address.

restricted to challenging the daily fine amount. That's where the majority and I part company. I would conclude that, to be meaningful, the proportionality analysis has to focus on the total fine the Director required Dami to pay ($841,200), not the daily fine amount ($250 to $500) used to calculate the total fine. In my view, to focus on the daily fine amount instead of the total fine Dami must pay renders the entire constitutional analysis an exercise in futility.

¶43 Notably, under the majority's analytical framework, if the Director had waited twelve years to contact Dami and then imposed a retroactive fine of over two million dollars ($500 × 4,380 days), the outcome would be identical: Dami would still be limited to challenging whether the daily fine amount of $250 to $500 is excessive. The same would be true if the Director had contacted Dami within a month of a potential violation and imposed a total fine of only $15,000 ($500 × 30 days). Stated differently, whether a fine of over two million dollars is excessive and whether a fine of $15,000 is excessive both depend on whether the daily fine amount of $250 to $500 is excessive. Hence, in evaluating the constitutionality of a section 8-43-409 fine under the Eighth Amendment's Excessive Fines Clause, the majority renders the total amount of the fine imposed completely inconsequential. To my mind, that greatly risks immunizing the Director and the statute from constitutional attack under the Eighth Amendment.[3] So long as the daily

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[3] In some circumstances, such as when a fine is the only feasible penalty, the Director is required by the statute to impose a retroactive fine, the total amount of which is calculated by

fine amount is not excessive, it matters not whether the Director imposes a $1,000 fine or a $10,000,000 fine.

¶44 The reality here is that the Director imposed a one-time, aggregate fine retroactively when he advised Dami in October 2014 that it was required to pay $841,200. He did not impose a fine in the amount of $250 to $500 1,698 times (a fine each day Dami was in violation of section 8-43-409(1)).[4] Given that the Eighth Amendment's Excessive Fines Clause applies, Dami should be allowed to challenge the constitutionality of the Director's action—i.e., the one-time, aggregate fine imposed after the fact in October 2014.

¶45 Accordingly, like the majority, I would reverse the judgment of the court of appeals and remand the case with instructions to have it returned to the Division of Workers' Compensation. However, I would do so on slightly different grounds. For this reason, I respectfully concur in part and dissent in part.

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multiplying the number of days an employer was noncompliant times $250 to $500.

[4] I understand that section 8-43-305, C.R.S. (2018), provides that "[e]very day during which any employer . . . fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof." But the fact remains that the Director imposed a one-time, aggregate, retroactive fine in the amount of $841,200.

APPENDIX B

COLORADO COURT OF APPEALS

2017 COA 21

Court of Appeals No. 16CA0249
Industrial Claim Appeals Office of the State of Colorado
W.C. No. 84-1545878

[Filed February 23, 2017]

Dami Hospitality, LLC,	)
	)
Petitioner,	)
	)
v.	)
	)
Industrial Claim Appeals Office of the State of Colorado and Division of Workers' Compensation,	)
	)
Respondents.	)
	)

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE WEBB
Dunn and Davidson[*], JJ., concur

Announced February 23, 2017

Law Offices of Daniel T. Goodwin, Daniel T. Goodwin, Caroline R. Kert, Paige Orgel, Broomfield, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Cynthia H. Coffman, Attorney General, Emmy A. Langley, Assistant Attorney General, Denver, Colorado, for Respondent Division of Workers' Compensation

¶ 1 Is a fine of $841,200 imposed by the Division of Workers' Compensation (the division) on a small employer for having failed over several years to maintain workers' compensation insurance excessive under the Eighth Amendment?[1] On the particular facts presented, which include a failure to perform the required fact-specific constitutional analysis, we answer this novel question "yes."

¶ 2 The employer, Dami Hospitality, LLC, appeals the fine as unconstitutional, challenging the underlying

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[*] Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

[1] Because the wording of Colorado Constitution article II, section 20 is identical, we do not address it separately.

statute both facially and as applied; as contrary to other provisions of the Workers' Compensation Act of Colorado, sections 8-40-101 to 8-47-209, C.R.S. 2016 (the Act); and as a procedural due process violation.

¶ 3 We uphold the facial constitutionality of section 8-43-409, C.R.S. 2016, the statute underlying the fine. But on an as-applied basis, we conclude that because the Director of the division (Director) failed to apply the excessive fine factors adopted under the Eighth Amendment to the particular facts that Dami presented, the fine must be set aside as excessive. We reject Dami's remaining contentions.

¶ 4 Therefore, we set aside the decision of the Industrial Claim Appeals Office (Panel) affirming the Director's decision and remand the case to the Panel with directions to order the Director to reconsider imposing a fine calculated according to this opinion.

I. Background and Procedural History

¶ 5 Dami operates a motel in Denver, Colorado. For a period in 2006, Dami failed to carry workers' compensation insurance as required by section 8-43-409. It was fined approximately $1200 for that violation, paid the fine, and obtained the necessary insurance.

¶ 6 In 2014, the division notified Dami that it was again without workers' compensation insurance and had been for periods during 2006 and 2007, as well as from September 2010 through the date of the division's notice. The Director's "Notice to Show Compliance" advised Dami that within twenty days it had to answer an attached questionnaire, had to submit documents

establishing coverage, and could "request a prehearing conference on the issue of default." Dami admits that it received this notice on June 28, 2014, but denies having received a notice the division said had been sent four months earlier. Although Dami obtained the necessary insurance by July 9, 2014, it neither submitted a response to the Notice to Show Compliance nor requested a prehearing conference.[2]

¶ 7 Information provided by the division's coverage enforcement unit — which Dami does not contest — showed that Dami had been without coverage from August 10, 2006, through June 8, 2007, and again from September 12, 2010, through July 9, 2014. On this basis, the Director fined Dami from $250 to $400 per day, through September 18, 2006. From September 19, 2006, through June 8, 2007, and from September 12, 2010, through July 9, 2014, Dami was fined $500 per day. The Director calculated the fine based on the formula adopted by the division under section 8-43-409(1)(b)(II) in Department of Labor & Employment Rule 3-6, 7 Code Colo. Regs. 1101-3 (Rule 3-6), discussed in Part III.B below.

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[2] Section 8-43-409, C.R.S. 2016, requires the Director to notify an employer "of the opportunity to request a prehearing conference on the issue of default." However, the statute does not define "default." Such a request must be made within twenty days of the notice. And an employer is not entitled to a hearing as a matter of right. Rather, "*if necessary*, the [D]irector *may* set the issue of the employer's default for hearing." § 8-43-409(1) (emphasis added). The statute is also silent whether the division may request a hearing or the Director may hold one sua sponte.

¶ 8 Dami's owner, Soon Pak, sent a letter to the Director captioned "Petition to Review," asking the Director to reconsider the fine. The Director treated the letter as a petition to review his findings of fact, conclusions of law, and order.

¶ 9 In the letter/petition, Ms. Pak explained that she "believed" the insurance policies she obtained for the motel had "included the required coverage." She blamed her insurance agent for the lapse in coverage, asserting that her trust "in insurance professionals to quote and secure . . . competitive workmen's compensation insurance" was "obviously" misplaced. The petition also asked the Director to reduce the penalty because "$842,000 is more that [sic] my business grosses in one year. . . . My payroll each year is less than $50,000 per year. . . . If the penalty stands as presented, I have no choice but to declare personal and business bankruptcy and go out of business."

¶ 10 In a letter that Ms. Pak's insurance agent submitted to the Director, the agent accepted responsibility for the lack of workers' compensation insurance: "I think I feel part of responsibility for this matter that I did not tell about Worker's Compensation and I will be managing my client in the future. . . . Actually she confused Property Insurance and Worker's Compensation." Later, Dami's counsel filed a brief in support of the petition to review. Attached to the brief was Ms. Pak's affidavit reiterating her reliance on the insurance agent.

¶ 11 In a supplemental order following Dami's petition and brief, the Director again ordered Dami to pay the fine. He found that because of the earlier fine,

Dami had been aware of the need to maintain insurance and failure to do so was within its control. As for Dami's asserted inability to pay, the Director concluded that neither section 8-43-409 nor Rule 3-6(D) contains "an exclusion or exemption from incurring and paying a fine based upon a Respondent's financial inability to pay."

¶ 12 On Dami's appeal of the supplemental order, the Panel remanded the case to the Director. It held that the Director had failed to consider the factors set out in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), to protect against constitutionally excessive fines or penalties. The Panel summarized those factors as follows:

- the degree of reprehensibility of the defendant's misconduct;
- the disparity between the harm or potential harm suffered and the fine to be assessed; and
- the difference between the fine imposed and the penalties authorized or imposed in comparable cases.

¶ 13 Without taking additional evidence, the Director issued an order on remand. Still, the Director did not analyze the factors that Dami had presented under *Associated Business Products*. Instead, he concluded that because Rule 3-6 inherently incorporates these factors, no further consideration was necessary. Then for the third time, the Director ordered Dami to pay a fine of $841,200.

¶ 14 Again, Dami appealed. But this time the Panel agreed with the Director's analysis and affirmed the order on remand. The Panel's decision is now before us.

II. Was Dami Deprived of Procedural Due Process?

¶ 15 Although procedural due process is not Dami's primary argument, we begin there because if Dami is correct, the fine must be set aside and the broader constitutional issues would no longer be ripe for decision. Courts "have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *Cty. Court v. Allen*, 442 U.S. 140, 154 (1979); *see also People v. Montour*, 157 P.3d 489, 503-04 (Colo. 2007) (Under "the doctrine of constitutional avoidance, . . . courts have a duty to interpret a statute in a constitutional manner where the statute is susceptible to a constitutional construction."). However, we discern no due process violation.

¶ 16 On procedural due process grounds, Dami challenges the method by which it was notified that it lacked workers' compensation insurance, explaining "common sense indicates that simple notice by mail is not reasonable." Alternatively, it argues that a hearing should have been held before the fine was imposed. Neither of these assertions provides a basis for setting aside the Panel's order.

¶ 17 The "fundamental requisites of procedural due process are notice and the opportunity to be heard."

Kuhndog, Inc. v. Indus. Claim Appeals Office, 207 P.3d 949, 950 (Colo. App. 2009).

¶ 18 The Director's Notice to Show Compliance, informing Dami of its "subsequent violation" of section 8-43-409 for failure to carry workers' compensation insurance, appears to have been mailed to the address the division had on file for Dami. Dami does not point to any evidence in the record that it had ever advised the division of a new mailing address.

¶ 19 More importantly, despite Dami's argument that notice was inadequate, Ms. Pak admitted in her affidavit to the Director that she had received a second notice in June 2014, just four months after the first notice of subsequent violation had been mailed. Dami does not assert that the passage of these four months created constitutional prejudice. And when a party has received actual notice of an agency's action, the party cannot claim a procedural due process violation based on an alleged defect in the method of giving notice. *See Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶¶ 1, 20 ("We conclude that when the parties received actual notice which afforded them an opportunity to present their objections and no prejudice resulted, we will not disturb a completed foreclosure sale."); *see also Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995) ("If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, the due process clause is not offended.").

¶ 20 Dami's assertion that a hearing should have been held fares no better. In responding to the Notice to Show Compliance, Dami never asked for a

prehearing conference.[3] Nor did Dami request a remand hearing in its first appeal to the Panel. And Dami does not offer any supporting authority or legal argument for the assertion that despite its own inaction, a hearing should have been held.

¶ 21 Instead, Dami argues only that, "reading between the lines," the division failed to follow the Panel's "suggestion" that the Director hold a hearing. But "[g]iven the dearth of legal grounds offered," we decline to address this issue on its merits. *Meza v. Indus. Claim Appeals Office*, 2013 COA 71, ¶ 38; *see also Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007) (declining to address "underdeveloped arguments").

¶ 22 For these reasons, we conclude that Dami has not articulated a cognizable claim for due process violations based on either inadequacy of the notice or failure to hold a hearing.

III. Was the Fine Imposed on Dami Constitutionally Excessive?

A. Dami's Excessive Fine Arguments

¶ 23 Dami challenges the $841,200 fine on three grounds.

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[3] Dami did not contest the wording of the notice below and does not do so on appeal. For that reason, we do not address what "you may request a prehearing conference on the issue of default" would mean to a reasonable person. Be that as it may, lack of a hearing at which the record could have been more fully developed plagues this appeal.

¶ 24 First, Dami argues that section 8-43-409 is unconstitutional on its face. According to Dami, the General Assembly's removal of a penalty cap from the statute in 2005, plus the absence of any statutory deadline within which the Director must notify an employer that it is in violation of the mandate to carry workers' compensation insurance, effectively grants the Director "complete discretion regarding the timing of notice and thus the size of the fine." Dami points out that this lack of any deadline — combined with the Director's formulaic approach in imposing the fine — resulted in a penalty grossly disproportionate both to the fines anticipated by the legislature and to the risk of harm to Dami's employees.

¶ 25 Second, arguing unconstitutionality as applied, Dami asserts that because the Director wrongly deemed the *Associated Business Products* factors for weighing excessive fines incorporated into Rule 3-6, the Director abused his discretion in failing to apply the factors to Dami's particular situation.

¶ 26 Third, Dami argues that the fine is grossly disproportionate both to its ability to pay and to the harm caused by the lack of workers' compensation insurance. It asserts the Director should also have considered its ability to pay when weighing the constitutionality of the fine.

¶ 27 Although we do not discern a facial flaw in the statute, we conclude that its application violated Dami's constitutional protections against excessive fines. In so concluding, we agree with Dami that because the constitutional factors are not sufficiently incorporated into Rule 3-6, the Director abused his

discretion in failing to consider facts specific to Dami — including Dami's ability to pay — when he reimposed the fine after the Panel had directed him to address the *Associated Business Products* factors.

B. Statutory and Regulatory Provisions at Issue

¶ 28 Dami was fined under section 8-43-409, which requires the Director to order the violating employer "to cease and desist immediately from continuing its business operations during the period such default continues," or

> (b) For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage, impose a fine of:
>
> . . . .
>
> (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation.

§ 8-43-409(1).

¶ 29 To implement this provision, the division adopted Rule 3-6. As pertinent here, the rule provides:

> 3-6 FINES FOR DEFAULTING EMPLOYER
> (A) Following the Director's determination that an employer has

> failed to obtain the required insurance or has failed to keep such insurance in force or has allowed the insurance to lapse or has failed to renew such insurance, the Director will impose fines on the defaulting employer and/or will compel the employer to cease and desist its business operations.
>
> . . . .
>
> (D) For the Director's finding of an employer's second and all subsequent defaults in its insurance obligations, daily fines from $250/day up to $500/day for each day of default will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance or until further order of the Director:
>
> | | | |
> |---|---|---|
> | Class VII | 1-20 Days | $250/Day |
> | Class VIII | 21-25 Days | $260/Day |
> | Class IX | 26-30 Days | $280/Day |
> | Class X | 31-35 Days | $300/Day |
> | Class XI | 36-40 Days | $400/Day |
> | Class XII | 41 Days | $500/Day |

C. Facial Challenge to Section 8-43-409

¶ 30 "A law is void for vagueness where its prohibitions are not clearly defined." *People v. Baer*,

973 P.2d 1225, 1233 (Colo. 1999). "Vague laws are unconstitutional and 'offend due process because they (1) fail to give fair notice of the conduct prohibited, and (2) do not supply adequate standards for those who apply them in order to prevent arbitrary and discriminatory enforcement.'" *Denver Health & Hosp. Auth. v. City of Arvada*, 2016 COA 12, ¶ 14 (quoting *Baer*, 973 P.2d at 1233) (*cert. granted in part* Sept. 12, 2016). Even so, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). And at least in Colorado, "[t]he party challenging the facial constitutionality of a statute has the burden of showing the statute is unconstitutional beyond a reasonable doubt." *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007).[4]

¶ 31 First, we reject Dami's assertion that the absence of a penalty cap renders the statute unconstitutional.[5]

¶ 32 For purposes of the Eighth Amendment, "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the

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[4] In *Tabor Foundation v. Regional Trans. Dist.*, 2016 COA 102, our supreme court has granted certiorari to consider this standard. 16SC639, 2017 WL 280826 (Colo. Jan. 23, 2017).

[5] Section 8-43-409 was amended in 2005 to remove the cap that had prohibited any penalty from "exceed[ing] the annual cost of the insurance premium that would have been charged for such employer." Ch. 49, sec. 1, § 8-43-409, 2005 Colo. Sess. Laws 199.

criminal law." *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

¶ 33 Numerous sentencing cases have held that the absence of a maximum cap does not invalidate a statute. For example,

> [s]uch a statute is not subject to the attack that it is void because it is vague and indefinite. There are many laws such as this upon the statute books of the Federal Government, as well as of the various states, fixing a minimum sentence and leaving it within the power of the court to fix the maximum sentences. In every instance the validity of such statutes has been upheld.

Binkley v. Hunter, 170 F.2d 848, 849 (10th Cir. 1948); *see also United States v. Kuck*, 573 F.2d 25, 26 (10th Cir. 1978) ("A sentencing statute is not unconstitutional because of failure to provide a maximum term.").

¶ 34 In contrast, Dami has not cited authority holding a statute that imposes a fine or penalty facially unconstitutional for lack of a cap. Nor have we found any such authority in Colorado.

¶ 35 Looking outside of Colorado, the notion that the absence of a maximum fine renders a statute facially unconstitutional "represents the clear minority rule on the issue. In fact, the majority of courts considering this issue have upheld the constitutionality of statutes which set a minimum fine or punishment but which do

not prescribe a maximum fine or punishment." *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002); *see, e.g.*, *United States v. Hayes*, 589 F.2d 811, 825 (5th Cir. 1979) ("While the statute does not provide for a specific maximum sentence in situations of life imprisonment for the principal, failure to provide a clearer maximum possible sentence does not render the statute constitutionally infirm. Leaving the determination of maximum sentences to the court is not uncommon.") (citation omitted); *Ex parte Robinson*, 474 So. 2d 685, 686 (Ala. 1985); *State v. Nelson*, 11 A.2d 856, 862 (Conn. 1940); *Mannon v. State*, 788 S.W.2d 315, 322 (Mo. Ct. App. 1990) ("A statute which fixes a minimum punishment but provides no maximum term is neither constitutionally invalid nor void because of indefiniteness.").

¶ 36 Second, we reject Dami's assertion that the absence of a deadline for division action against an employer lacking insurance — which allows the fine to ratchet up — renders the statute facially unconstitutional. Again, Dami has not offered any cases supporting its position. To the contrary, substantial authority suggests the opposite.

¶ 37 To begin, the Supreme Court has upheld a court's authority to impose daily fines under a statute that lacked both a cap and a deadline for notifying the offending parties of accumulating fines. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 243 (1975) (remanding for recalculation of daily fines under the Clayton and Federal Trade Commission Acts).

¶ 38 Likewise under Colorado law, daily penalties that accumulated for continuing violations have been

upheld. *See Crowell v. Indus. Claim Appeals Office*, 2012 COA 30, ¶ 15 ("[W]hen there is ongoing conduct, the continuation of the penalty is mandatory, rather than discretionary."); *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094, 1100 (Colo. App. 1996) (mandating imposition of the penalty at a "daily rate" where violation was continuing).

¶ 39 Some lower federal courts have taken the same approach. In *Center for Biological Diversity v. Marina Point Development Associates*, 434 F. Supp. 2d 789 (C.D. Cal. 2006), for example, the defendants were found to have been in violation of the Clean Water Act from at least October 2002 to 2006. Because they were subject to daily penalties of $27,500 to $32,500 over the course of their violations, "the maximum penalty" could have been as high as "$15,445,000." *Id.* at 799. The court imposed a penalty of $2500 for each day of violation "from October 7, 2002 to April 16, 2004," totaling $1,312,500. *Id.* at 800. Similarly, in *Honey v. Dignity Health*, 27 F. Supp. 3d 1113 (D. Nev. 2014), daily penalties were imposed against an employer for violating the notice provision in the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §§ 1161-1169 (2012). The court noted that it "ha[d] discretion to impose a penalty and to set its amount, subject only to a $110 per day statutorily set maximum." *Honey*, 27 F. Supp. 3d at 1124.

¶ 40 None of the courts in these cases pondered whether the fines should be tempered because the underlying statutes did not require the regulating authorities to provide timely notice of a violation. Instead, at least as best we can determine, like Rome

burning as Nero fiddled, fines mounted while the regulators said nothing.[6]

¶ 41 Given all this, we conclude that Dami has not met its burden of showing that section 8-43-409 is facially unconstitutional beyond a reasonable doubt. Even so, our inquiry does not end, as the statute's application in this case could still be unconstitutional.

D. As-Applied Constitutional Challenges to Fines

¶ 42 Dami's as-applied challenge to section 8-43-409 differs from its facial challenge to the statute.

> A plaintiff bringing an "as-applied" challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. If a statute is held unconstitutional "as applied," the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative.

Sanger v. Dennis, 148 P.3d 404, 410 (Colo. App. 2006). "For as-applied constitutional challenges, the question

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[6] To be sure, Dami might distinguish some of these cases on the basis that the party fined could not dispute its knowledge of the conduct triggering the fine. For example, *Crowell v. Industrial Claim Appeals Office*, 2012 COA 30, involved the employer's affirmative action. In contrast, Dami maintains that it did not know the insurance coverage had lapsed. But Dami's alleged ignorance can be addressed under reprehensibility, one of the factors from *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), as discussed in Part III.D.4.a below.

is whether the challenging party can establish that the statute is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011) (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008)). Yet again, "the burden of establishing the unconstitutionality of a statute, as applied, [is] beyond a reasonable doubt." *People v. Gutierrez*, 622 P.2d 547, 555 (Colo. 1981).

¶ 43 Statutory penalties, like those assessed under section 8-43-409, are subject to the constitutional prohibition against excessive fines. *See Associated Bus. Prods.*, 126 P.3d at 326; *Wolford v. Pinnacol Assurance*, 81 P.3d 1079, 1084 (Colo. App. 2003), *rev'd on other grounds*, 107 P.3d 947 (Colo. 2005). The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

¶ 44 As a division of this court noted, the Supreme Court first applied this provision to "civil cases where the government seeks, at least in part, to punish a party" in 1993, when it announced *Austin v. United States*, 509 U.S. 602 (1993). *Toth*, 924 P.2d at 1099-1100. In *Austin*, the Supreme Court applied the Eighth Amendment to an in rem civil forfeiture, noting that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, 509 U.S. at 610. After *Austin*, fines assessed for non-criminal statutory violations have been subject to the Eighth Amendment's protections against excessive fines.

¶ 45 More recently, Colorado courts have applied the constitutionally excessive limitation to civil fines. *See Associated Bus. Prods.*, 126 P.3d at 326; *Boulder Cty. Apartment Ass'n v. City of Boulder*, 97 P.3d 332, 338 (Colo. App. 2004). But exactly when is a fine excessive?

¶ 46 The Supreme Court has held that a civil fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Likewise, a division of this court has said that a penalty "is excessive if the amount is so disproportionate to a defendants [sic] circumstances that there can be no realistic expectation that the defendant will be able to pay it." *Boulder Cty. Apartment Ass'n*, 97 P.3d at 338.

¶ 47 This much is clear: the principle of proportionality encompassed in the constitutional protection against excessive fines "is that the punishment should fit the crime." *Id.* at 337. Yet, "[i]f this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult." *Lovejoy v. Denver & Rio Grande R.R. Co.*, 59 Colo. 222, 229, 146 P. 263, 265 (1915). Taking up that task, we start with the standard of review.

1. Standard of Review

¶ 48 The party challenging a fine bears the "the burden of proving the fine is 'grossly disproportionate.'" *Associated Bus. Prods.*, 126 P.3d at 326 (quoting *Toth*, 924 P.2d at 1100). But deciding whether that burden

has been met implicates conflicting standards of appellate review.

¶ 49 On the one hand, "when a punitive damages award is reviewed for excessiveness under the Due Process Clause and the Eighth Amendment, a de novo standard of review should be applied." *Id.* at 325. And as discussed in Part III.D.4 below, courts have applied de novo the punitive damages criteria in deciding whether a civil fine or penalty is excessive.

¶ 50 On the other hand, "[a] trial court enjoys considerable discretion in assessing a penalty." *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 787 (Colo. App. 2002). Similarly, "[a]n [administrative law judge] has discretion to determine the amount of the penalty, provided that the amount does not exceed the legislatively enacted penalty range." *Crowell*, ¶ 17. And as explained in the prior subsection, the statute before us no longer caps the fine.

¶ 51 Likewise, as to statutes underlying civil penalties, "legislatures have extremely broad discretion in setting the range of permissible punishments for statutorily enumerated offenses and . . . judicial decisions operating within the legislatively enacted guidelines are typically reviewed for abuse of discretion." *Associated Bus. Prods.*, 126 P.3d at 325 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp.,* 23 *Inc.*, 532 U.S. 424, 432 (2001)). And here, because the rule that the Director applied tracks the statute, his decision enjoys the same protection.

¶ 52 True, this case does not involve a punitive damages award, as in *Cooper Industries*. But like the

challenge in *Associated Business Products*, Dami asks us to examine the excessiveness of a "legislatively enacted penalt[y]," which is also reviewed de novo. *Associated Bus. Prods.*, 126 P.3d at 325.

¶ 53 An abuse of discretion occurs when the fact finder enters an order that is unsupported by the evidence or misapplies or is contrary to the law. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). As has been so often stated, discretion is abused when the decision "is manifestly arbitrary, unreasonable, unfair, or misapplies the law." *Patterson v. BP Am. Prod. Co.*, 2015 COA 28, ¶ 67.

¶ 54 *Associated Business Products* recognized — but did not resolve — the tension between de novo review and review for an abuse of discretion. And where a constitutional interest is in play, sometimes the latter bleeds into the former. *Cf. People v. Dunham*, 2016 COA 73, ¶ 13 ("Ordinarily, we review a defendant's preserved contention that the trial court erred in limiting cross-examination of a witness for an abuse of discretion. But where, as in this case, a defendant contends that the trial court so excessively limited his cross-examination of a witness as to violate the Confrontation Clause, *see* U.S. Const. amend. VI, we review that contention de novo.") (citations omitted). In any event, we avoid reconciling this tension because ultimately we conclude that the Director abused his discretion by misapplying the law.

2. Constitutional Protections Afforded Corporations

¶ 55 In its answer brief, the division preliminarily questions whether the Eighth Amendment's excessive

fines protections even apply to corporations. The answer to this question is unresolved in Colorado and unclear elsewhere. We conclude that corporations enjoy these protections.

¶ 56 To begin, the cases relied on by the division, as well as the opinions of several other courts, have assumed that corporations are entitled to the Eighth Amendment's protections. *See, e.g.*, *United States v. Pilgrim Mkt. Corp.*, 944 F.2d 14, 22 (1st Cir. 1991) ("We will assume for purposes of our discussion that the eighth amendment proscription against excessive fines applies to corporations, although this is a very tenuous assumption."); *United States v. Seher*, 686 F. Supp. 2d 1323, 1327 n.2 (N.D. Ga. 2010) ("The Court assumes that the corporate Defendants are entitled to raise an Eighth Amendment challenge. Whether the protections of the Eighth Amendment extend to a corporation is an open question that remains unaddressed by this Circuit or the Supreme Court."), *aff'd sub nom. United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011) ("Our analysis assumes, but does not hold, that the Eighth Amendment applies to corporations. The Supreme Court has never held that this amendment applies to corporations.").[7]

¶ 57 But despite these cases, we decline to reach the as-applied Eighth Amendment question by the expedient of assuming without deciding the

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[7] Other courts have ignored the question altogether. *See United States v. Bucuvalas*, 970 F.2d 937, 946 (1st Cir. 1992) ("We bypass the unresolved question whether a corporation may assert an Eighth Amendment claim."), *abrogated on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000).

preliminary constitutional question of whether Dami is entitled to constitutional protection against excessive fines. Doing so would be contrary to the doctrine of constitutional avoidance. *Cf. Allen*, 442 U.S. at 154; *Montour*, 157 P.3d at 503-04. For the following reasons, we conclude that despite Dami's corporate status, it enjoys the Eighth Amendment's protection.

¶ 58 Other divisions of this court that have examined the constitutionality of fines imposed against corporate entities are silent on this issue. *See Associated Bus. Prods.*, 126 P.3d at 325-27; *Boulder Cty. Apartment Ass'n*, 97 P.3d at 337-38. The opinions do not indicate whether the issue was raised. But since these cases were decided, the Supreme Court has extended other constitutional protections to corporations. This tidal shift in constitutional law leads us to resolve the issue for Dami.

¶ 59 In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court extended First Amendment protection for political speech to corporations. *Id.* at 342-43. The Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Declining to follow prior precedent that had permitted limitations on corporate speech, *Citizens United* held that "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest

justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 365.

¶ 60 Like the First Amendment, the Second Amendment, and the Fourth Amendment, the wording of the Eighth Amendment is not restricted to "natural persons." *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 761 (N.D. Ill. 2015) (corporations may assert both First and Fourth Amendment challenges); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 428 (W.D. Pa. 2013) ("[A] for-profit, secular corporation has standing to assert the religious exercise claims of its owners in certain circumstances . . . .").

¶ 61 In sum, we are unable to discern a reason for limiting the Eighth Amendment protection against excessive fines to natural persons. After all, such fines adversely impact both corporations and natural persons, and the financial condition of some persons may be stronger than that of some corporations. Nor does the division present one. Thus, we conclude that Dami's status as a corporation does not deprive it of Eighth Amendment protection.

3. Director's Discretion

¶ 62 In his supplemental order, the Director assumed that section 8-43-409 and Rule 3-6 require a formulaic calculation of any fine. Notwithstanding Dami's claimed inability to pay such a large fine, the Director concluded that neither the statute nor the rule permitted consideration of an employer's economic situation and that fines imposed under the statute and rule were "not discretionary."

¶ 63 The Panel rejected the Director's view in part. In its final order, the Panel observed that Rule 3-6 mandates that fines "will be assessed in accordance with the following schedule of fines until the employer complies with the requirements of the Workers' Compensation Act regarding insurance *or until further order of the Director*." (Emphasis added.) Embracing this language, the Panel held that Rule 3-6 grants the Director authority to modify a fine which would otherwise be "calculated solely on the basis of the number of days involved."

¶ 64 In its brief, the division acknowledges but does not contest the Panel's interpretation. Instead, the division argues that the Director used his discretion "to determine which factor to prioritize" and to consider "mitigating and aggravating factors" before reimposing Dami's fine in the supplemental order.

¶ 65 We give "due deference to the interpretation of the statute adopted by the Panel as the agency charged with its enforcement." *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 273 (Colo. App. 2005). In general, "an administrative agency's interpretation of its own regulations is generally entitled to great weight and should not be disturbed on review unless plainly erroneous or inconsistent with such regulations." *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090, 1093 (Colo. App. 2002). "The Panel's interpretation will therefore be set aside only 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 37 (quoting *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998)).

¶ 66 We conclude that the Panel's interpretation of the regulatory language is reasonable. *See id.*; *Support, Inc.*, 968 P.2d at 175. Thus, the Director can modify a penalty under section 8-43-409 and Rule 3-6, although no reason for doing so is identified in the rule or was addressed by the Panel.

¶ 67 At the same time, we disagree that Rule 3-6 adequately incorporates the three factors articulated in *Associated Business Products*. On remand, the Director concluded — and the Panel agreed — that Rule 3-6 sufficiently incorporated these factors. He explained as follows:

- as to the first factor, Rule 3-6 reflects reprehensibility because the fine increases for a second violation;
- as to the second factor, because the risk to employees increases the longer an employer is without insurance, the rule recognizes the potential magnitude of the harm by increasing the amount of the fine based on how long an employer remains uninsured; and
- as to the third factor, by providing a uniform formula for fining all noncomplaint employers, the rule assures uniformity in its application while penalizing employers with longer periods of noncoverage more heavily.

(Those factors are discussed fully in the following subsection of this opinion.)

¶ 68 But these observations go only so far. For example, an employer's reasons for a second lapse of

coverage may affect its reprehensibility. The duration of that lapse will often be determined by how much time passes between the lapse beginning and notice of noncompliance from the division. And this timing dimension — not addressed in either the statute or any regulation that has been called to our attention — could erode uniformity.[8]

¶ 69 As addressed in the following subsection, to pass constitutional muster the factors that the Panel ordered the Director to consider must be applied on a case-by-case basis, with due consideration given to each employer's unique situation. For this reason, we reject the Director's and the Panel's contrary interpretations. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001) (rejecting doctrine of agency deference "[w]here an administrative interpretation of a statute would raise serious constitutional problems").[9]

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[8] Disuniformity is not the only potential problem resulting from the absence of a statutory or regulatory limitation of fines based on the failure to afford an employer prompt notice of noncompliance. Lack of such a limitation also invites future disputes over excessive fines.

[9] The Panel's interpretation also suffers from lack of consistency. If Rule 3-6 already and adequately encompasses the *Associated Business Products* factors, as the Panel ultimately held after remand, then the Panel had no reason to remand to the Director for him to consider those factors. *See, e.g.*, *Turney v. Civil Serv. Comm'n*, 222 P.3d 343, 352 (Colo. App. 2009) ("Although courts extend deference to an agency's interpretation of its own rules, they are not bound by it, particularly where the agency's interpretation is not uniform or consistent.").

¶ 70 With these conclusions in mind, we turn to the propriety and proportionality of the fine imposed on Dami.

4. Applying the *Associated Business Products* Factors in Weighing Whether a Fine Is Grossly Disproportionate and Thus Constitutionally Excessive

¶ 71 Because the constitutional line demarcating an excessive fine is "inherently imprecise" and "not marked by a mathematical formula," determining whether a fine is "grossly disproportionate" can be difficult. *Associated Bus. Prods.*, 126 P.3d at 326 (first quoting *Cooper Indus.*, 532 U.S. at 425; then quoting *Toth*, 924 P.2d at 1100). But cases addressing the constitutional limitations on punitive damages awards — from which the three *Associated Business Products* factors evolved — provide context for doing so.

¶ 72 In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 580, 583 (1996), the Supreme Court first articulated factors that should be considered when weighing the "reasonableness of a punitive damages award." In deciding whether the constitutional line for an excessive fine "has been crossed," the Court later condensed these factors by instructing lower courts to "focus[] on the same three criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Cooper Indus.*, 532 U.S. at 425.

¶ 73 Although *Gore* and *Cooper* addressed only punitive damages, the factors have been more broadly applied. As pertinent here, a statutory damage award could be "devastatingly large . . . out of all reasonable proportion to the actual harm suffered," which could be a "sufficiently serious case [that] the due process clause might be invoked." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *see also St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (Although states have wide latitude in setting penalties for statutory violations, states cannot impose penalties "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."). Not surprisingly, *Associated Business Products*, 126 P.3d at 326, adopted the *Gore* factors and applied them to statutory penalties and civil fines.[10]

¶ 74 Dami asserts that the Director did not adequately apply these factors in his supplemental decision. True, the Director discussed the factors in his order on remand, although only after having been directed to do so by the Panel. But recall the Director determined that because the factors were incorporated into section 8-43-409 and Rule 3-6, no further fact-specific analysis was required. In our view, this approach sells the necessary constitutional inquiry short.

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[10] *Associated Business Products*, 126 P.3d at 326, quoted the recitation of the factors in *Cooper Industries*, 532 U.S. at 425; *Cooper Industries* summarized and compiled the factors articulated in *Gore*, 517 U.S. at 575, 580, 583.

¶ 75 When the *Gore*/*Cooper Industries* analysis has been applied by divisions of this court and by courts in other jurisdictions, the factors were examined in the context of the fined party's actual behavior. No less is required here.

¶ 76 Consider *Associated Business Products*, 126 P.3d at 324, where an employer and its insurer were fined $24,900 for delaying or failing to pay $107.79 in medical bills incurred by an injured worker. A division of this court upheld the fine. In applying the *Gore* factors, it noted that the employer's and its insurer's actions met the reprehensibility factor because they had (1) previously been fined for failing to pay bills; (2) showed a pattern of delaying payment of the worker's bills; (3) failed to adhere to orders requiring them to pay for attendant care services, medical supplies, and prescriptions; and (4) disobeyed an order requiring them to identify the claims adjuster handling the file and provide a complete copy of the claims file and payment records. *Id.* at 326. The division went on to compare the fine to the range of penalties allowed under the statute and found it to be "well below the maximum" daily fine. *Id.* at 327.

¶ 77 Next consider *Blood*, 252 P.3d at 1094, where the Colorado Supreme Court applied the *Gore* factors to decide whether an $18 million punitive damages award assessed against Qwest was "excessive and disproportionate." A jury had awarded the punitive damages to a lineman who suffered grave injuries when the pole he was climbing — owned by Qwest — collapsed and fell to the ground. The court examined Qwest's behavior de novo. It noted that Qwest

(1) lacked "a periodic pole inspection program," which demonstrated a "conscious indifference to the safety of linemen"; (2) had failed to implement such an inspection program for five decades; and (3) should have foreseen the plaintiff's injuries caused by the collapse of a pole due to rot as the natural result of never inspecting its poles. *Id.* at 1095-97. Based on these particular facts, the court affirmed the award.

¶ 78 Similarly, courts in other jurisdictions have applied the *Gore*/*Cooper Industries* factors using a fact-specific analysis. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1065-73 (10th Cir. 2016) (reducing a punitive damages award against an apartment management company for tenant's carbon monoxide poisoning injuries on grounds that, under *Gore* factors, the amount was excessive when compared to other carbon monoxide poisoning cases); *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (rejecting a $5 billion punitive damages award against Exxon in part because "there was no violence, no intentional spilling of oil (as in a 'midnight dumping' case), and no executive trickery to hide or facilitate the spill"); *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463, 475-81 (Cal. Ct. App. 2002) (upholding a civil penalty because it did not violate the *Gore* factors); *In re Marriage of Miller*, 860 N.E.2d 519, 523-24 (Ill. App. Ct. 2006) (comparing the $1,172,100 penalty imposed against an employer for failure to garnish the wages of an employee who owed child support against the maximum fine for the criminal offense of failing to pay child support and concluding that the penalty was excessive), *rev'd*, 879 N.E.2d 292 (Ill. 2007)

(reconsidering the factors in light of the evidence and reinstating the $1,172,100 penalty).

¶ 79 We consider these decisions well reasoned and apply them here. Thus, when Dami challenged the fine as constitutionally excessive, the Director should have weighed the facts specific to Dami. By failing to do so, the Director misapplied the law and abused his discretion. *See Patterson*, ¶ 6; *Heinicke*, 197 P.3d at 222.

¶ 80 Even so, could we set aside the Panel's final order upholding the fine unless the Director's failure to make a fact-specific inquiry harmed Dami? After all, as the Director recognized, the formula in Rule 3-6 gives limited voice to the *Gore* factors.

¶ 81 The record contains Dami's written assertions and Ms. Pak's affidavit.[11] In his supplemental order and order on remand, the Director accepted these assertions as true. The division did not controvert any of this information before the Panel, nor does it do so on appeal. And "a legal conclusion drawn by the Panel from undisputed facts is a matter for the appellate

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[11] As indicated, Ms. Pak's affidavit explained that she relied on her insurance agent to obtain and maintain all necessary insurance coverages, but she asserted inability to pay the fine only in her separate letter to the division, which served as Dami's initial petition to review. Of course, appellate courts may only consider assertions that are supported by record evidence, *McCall v. Meyers*, 94 P.3d 1271, 1272 (Colo. App. 2004), and mere arguments of counsel must be disregarded. *Lucero v. People*, 166 Colo. 233, 237, 442 P.2d 820, 822 (1968). But exactly what must be included in such a petition to make a sufficient record is not resolved by statute, regulation, or case law.

court." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993). So, we apply the *Gore*/*Cooper Industries* factors to those undisputed facts as follows.

a. Reprehensibility

¶ 82 In a punitive damages case, our supreme court has adopted the Supreme Court's criteria for assessing reprehensibility:

> The [United States Supreme] Court has analyzed the *Gore* reprehensibility guidepost according to the following five criteria:
>
> > the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.
>
> "The existence of any one of these [criterion] weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."

Blood, 252 P.3d at 1094-95 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

¶ 83 Dami said that it was unaware of the lapses of workers' compensation insurance. The Director found that Dami should have known about the lapses, but relied only on the prior violation in doing so. Instead, the uncontroverted evidence provided in Ms. Pak's affidavit indicates she trusted her insurance agent to maintain the necessary coverages. In turn, the agent agreed that Ms. Pak was likely confused, that she did not realize she lacked the insurance, and that he "did not tell" her Dami lacked workers' compensation insurance.

¶ 84 These facts put Dami at the low end of the reprehensibility scale. By any fair reading of *Blood*, Dami did not act with "indifference to or reckless disregard for the safety of others," nor did it act with intentional malice, trickery or deceit.

b. Disparity Between Actual or Potential Harm to Employees and the Fine

¶ 85 Dami submitted its unemployment records showing that it had fewer than ten employees and its annual payroll was less than $50,000. Dami also said that a workers' compensation claim has never been filed against it. The division could easily have controverted the latter statement, but has not done so. This information is significant in two ways.

¶ 86 First, because no claims have been filed against Dami, the lack of workers' compensation insurance did not actually harm any of Dami's employees.

¶ 87 Second, as for potential harm, Dami has few employees. *Cf. Blood*, 252 P.3d at 1079, 1098 (noting that Qwest's failure to inspect any of its 157,000 poles

for five decades endangered "linemen and the public"). And Dami's lengthy history with no reported claims also suggests that the risk of injury to those few employees is low.

¶ 88 Yes, as the Director observed, "an employer that continues to operate without insurance for a lengthy period of time creates an ever-growing risk that a worker will be injured and be forced to rely solely on the employer to pay for the injury." Because the record does not include any evidence of particular risks arising from the nature of Dami's operations, however, this observation paints an incomplete picture. Of course, all employees working for an employer without workers' compensation coverage are at financial risk should an injury occur and the employer be unable or unwilling to compensate the injured worker. But the magnitude of that risk depends on the likelihood of severe or fatal injury.

¶ 89 As to that likelihood, the Director observed only that housekeeping and maintenance work involved potentially heavy lifting, which could lead to injury. But he did not refer to industry-specific data from Colorado. Nor have we found any.

¶ 90 To fill this void, we have taken judicial notice of federal government reports. *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 359 n.7 (Vt. 1994) ("The Court in *Nyquist* took judicial notice of enrollment data from publicly available government reports, exactly the type of information we have used here. *See Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 n. 23 (1973)."). According to the United States Department of Labor's most recent

reports, the "leisure and hospitality" industry ranks below the midpoint of other industries for incidence of nonfatal workplace injuries and well below that point for fatal injuries.[12]

c. Comparable Penalties

¶ 91 The record is barren of any evidence comparing Dami's fine against fines imposed on other uninsured employers. We cannot fault Dami for this void because it would lack access to such information. Nor has the division provided it.

¶ 92 Instead, Dami identifies a 2005 "State Fiscal Impact Statement" related to the amendment of section 8-43-409, which estimated that the total fines collected from all violators of the statute in 2006-2007 would be "$200,000." Further, Dami points out that the General Assembly anticipated the average fine would be $28,500, and that its fine exceeds this estimate by 2900%.[13]

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[12] The reports are released by the Bureau of Labor Statistics and can be found at Bureau of Labor Statistics, *Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2015* (Nov. 10, 2016), https://perma.cc/G4QQ-FM7V (nonfatal injuries); and Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Summary, 2015* (Dec. 16, 2016), https://perma.cc/Q7DF-XK7U (fatal injuries).

[13] Dami's brief refers to a January 18, 2005, "State Fiscal Impact Statement" and attaches a "Summary of Legislation under State Revenues." The Summary does not state from where it derived the figures. In any event, the division does not contest the accuracy of this information.

¶ 93 Even so, according to the Director, the fines imposed on different employers must be similar because all of them were imposed solely by applying the formula in Rule 3-6. This assertion, even if accurate, accounts for only one-half of the process. Although we have rejected Dami's vagueness argument, we agree that the more time that lapses before the division gives notice to an uninsured employer, the more the fine will have mounted. Due to this variable, significantly disparate fines could be imposed, despite the Director's formulaic approach.

5. Ability to Pay

¶ 94 Dami next argues that the Director should have considered its ability to pay before imposing the penalty. As indicated, the Director did not do so, asserting lack of statutory or regulatory authority.

¶ 95 No Colorado case that Dami has cited, or that we have found, requires that ability to pay be considered before imposing a civil fine. However, Colorado courts consider ability to pay before imposing criminal fines. *See, e.g.*, *People v. Stafford*, 93 P.3d 572, 574 (Colo. App. 2004) ("[A] sentencing court must consider the defendant's financial status in determining the appropriate amount of any fine to be levied."); *People v. Pourat*, 100 P.3d 503, 507 (Colo. App. 2004) ("[I]n imposing a fine, a trial court must consider a defendant's ability to pay.").

¶ 96 As well, the United States Supreme Court has held that a defendant's ability to pay must be considered before a monetary civil contempt sanction may be imposed. *See United States v. United Mine*

Workers of Am., 330 U.S. 258, 304 (1947) ("It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.").

¶ 97 Other states have required that ability to pay be considered before imposing a civil penalty. *See Parisi v. Broward Cty.*, 769 So. 2d 359, 366 (Fla. 2000) ("[I]n imposing both criminal fines or coercive civil contempt fines, the court must consider the financial resources of the contemnor in setting the amount of the fine.").

¶ 98 In a case remarkably similar to this one, the Minnesota Court of Appeals listed ability to pay as one of the factors to be considered before a fine could be imposed against an employer for failing to carry workers' compensation insurance. *See State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 555 N.W.2d 908, 913 (Minn. Ct. App. 1996) (citing *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896-97 (Minn. Ct. App. 1992)), *modified*, 558 N.W.2d 480 (Minn. 1997). *Wintz Parcel Drivers* upheld a penalty against a trucking firm in excess of $1.2 million for failure to carry workers' compensation insurance. Although the opinion does not say how many employees Wintz had or describe its financial status, the court mentions that Wintz's workers' compensation insurance premium for

the uncovered period would likely have been over $1 million. *Id.*[14]

¶ 99 Guided by these authorities, we conclude that ability to pay should be considered when determining whether a penalty imposed against an employer for failure to carry workers' compensation insurance is constitutionally excessive.

¶ 100 Ms. Pak's letter asserted that Dami cannot afford to pay a fine of $841,200, which would put it — and her — into bankruptcy. The record does not include any contrary information. Nor does the division argue otherwise.

¶ 101 Thus, although the Director did not exercise his statutory power to seek a cease and desist order putting Dami out of business, which Dami could have opposed, the fine indirectly achieved this result. Still, the record does not fully describe Dami's financial condition, such as its net worth. For this reason, we are unable to say whether Dami could pay a reduced fine.

¶ 102 Based on all of these facts, we conclude that the present record shows the $841,200 fine to be excessive. In saying this much, however, we take care to emphasize what we are not saying — that a lower fine against Dami would necessarily also fail a constitutional challenge. To the contrary, the constitutionality of such a fine can be addressed only when that fine has been imposed and any additional record is before us.

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[14] The record does not contain any comparable information for Dami.

IV. Incorporating Provisions of Section 8-43-304 into Section 8-43-409

¶ 103 Dami next contests the fine by contending that provisions of section 8-43-304, C.R.S. 2016, must be read into section 8-43-409. In particular, Dami focuses on provisions in section 8-43-304 that (1) grant a violator twenty days to cure a violation and thus avoid a penalty, § 8-43-304(4); (2) require a party charging an opponent with a violation to prove by clear and convincing evidence that the violation occurred, § 8-43-304(4); and (3) mandate that a party alleging a violation file a claim within one year of when it knew or reasonably should have known of the alleged violation, § 8-43-304(5).

¶ 104 Based on these provisions, Dami argues that the fine must be set aside because (1) it cured its failure to carry workers' compensation insurance within twenty days; (2) the division did not prove Dami's violation by clear and convincing evidence; and (3) the division did not file its notice of violation within one year of when Dami's violation should reasonably have been discovered. But Dami's conclusion fails because its premise that the provisions of section 8-43-304 must be read into section 8-43-409 is flawed.

¶ 105 As with any statute, the provisions of the Act must be read "harmoniously, reconciling conflicts where necessary." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 327 (Colo. 2004). But that general principle does not give a reviewing court license to read provisions from one statute into a different statute. To the contrary, courts are expressly prohibited from reading provisions into the Act. *See Kraus v. Artcraft*

Sign Co., 710 P.2d 480, 482 (Colo. 1985) ("We have uniformly held that a court should not read nonexistent provisions into the Colorado Workmen's Compensation Act.").

¶ 106 Relying on *Holliday v. Bestop, Inc.*, 23 P.3d 700, 705 (Colo. 2001), Dami argues that nothing in section 8-43-304 prohibits its provisions from being read into section 8-43-409. Then Dami insists that because the limiting phrase in section 8-43-304 — "for which no penalty has been specifically provided" — only applies to one of the four different acts giving rise to penalties under that statute, the other three types of actions leading to penalties may be read broadly and into section 8-43-409.

¶ 107 *Holliday* held as follows:

> The legislature's use of the disjunctive conjunction "or" in section 8-43-304(1) plainly demarcates four different acts giving rise to penalties. The legislature's use of "or" makes clear that the statute penalizes the person who: (1) "violates any provision of [the Workers' Compensation Act]," (2) "does any act prohibited thereby," (3) "fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided," or (4) "fails, neglects, or refuses to obey any lawful order made by the director or panel or any

> judgment or decree made by any court as provided by said articles."

23 P.3d at 705 (citation omitted) (quoting § 8-43-304(1)).

¶ 108 Thus, *Holliday* does not carry the weight that Dami places on its shoulders. Had the General Assembly intended to incorporate a cure provision, a limitation period, or a clear and convincing burden of proof into section 8-43-409, it would have done so expressly. Because it did not, we are not free to do so by judicial fiat. *See City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 954-55 (Colo. App. 2006) ("If [the General Assembly] intended to limit death benefits where the death results from mental impairment, we conclude it would have done so expressly.").

¶ 109 For these reasons, we decline to incorporate the provisions of section 8-43-304 into section 8-43-409. Therefore, the Director was not obligated to credit Dami for curing the violation, was not required to prove by clear and convincing evidence that Dami violated section 8-43-409, and did not have to file notice of Dami's violation within one year of Dami's lapse.

V. Conclusion

¶ 110 The fine must be set aside because the Director abused his discretion when he failed to apply the *Associated Business Products* factors — derived from *Gore* and *Cooper Industries* — to Dami's specific circumstances. Facts relevant to that application include Dami's ignorance that the required insurance had lapsed. While not mandated by *Gore*, the failure to

notify Dami of the lapse for almost half a decade and Dami's ability to pay are also relevant. On remand, the fine may be recalculated, but only after these facts have been weighed.

¶ 111 We conclude that Dami's other contentions — challenging the facial constitutionality of section 8-43-409, seeking to incorporate the provisions of section 8-43-304 into section 8-43-409, and alleging procedural due process violations — do not provide a basis for setting aside the Panel's final order affirming the Director's remand order.

¶ 112 The Panel's order is set aside and the case is remanded to the Panel with directions to return it to the Director for recalculation of Dami's fine in accordance with this opinion.

JUDGE DUNN and JUDGE DAVIDSON concur.

APPENDIX C

INDUSTRIAL CLAIM APPEALS OFFICE

FEIN 84-1545878

[Filed January 20, 2016]

IN THE MATTER OF THE CLAIM OF	)
	)
DIVISION OF WORKERS' COMPENSATION,	)
	)
Petitioner,	)
	)
v.	)
	)
DAMI HOSPITALITY, LLC,	)
	)
Respondent Employer,	)
	)

CORRECTED FINAL ORDER

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

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

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

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

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

Thereafter, on June 25, 2014, the Director issued another Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice

also directed the respondent to complete and return a compliance questionnaire. The respondent was given 20 days to respond to the Director's Notice. The Director notified the respondent that if it was in default of its insurance obligations, fines would be assessed from a minimum of $250 per day up to $500 per day for its second or subsequent violation. The respondent also was advised of and afforded the opportunity to request a prehearing conference regarding the issue of default. The record does not disclose that the respondent requested a prehearing conference.

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

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

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

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

The Director subsequently issued his supplemental order on April 21, 2015. The Director assumed the allegations contained in the respondent's appeal were true. After weighing the evidence presented by the respondent, the Director determined that it was the responsibility of the insurance carrier, not the Division, to notify the respondent that its policy had lapsed, and in any event, it is the respondent's responsibility to maintain its insurance coverage. Section 8-44-110, C.R.S. The Director also noted that pursuant to the National Council on Compensation Insurance, Inc., the

respondent's 2006 workers' compensation insurance policy was cancelled for nonpayment of premium, and its 2010 policy was cancelled for "failure to comply with the terms & conditions or audit failure." Thus, the Director concluded that both of these circumstances were within the respondent's control. The Director further determined that the letter from the insurance agent failed to indicate that the respondent was unaware of the absence of a policy of workers' compensation insurance, and it did not indicate the agent failed to secure the insurance despite the request of the respondent. Also, the Director found that there is no indication in the letter that the respondent continued to pay for workers' compensation insurance even though no policy was in place. The Director further held that even if the respondent's reliance on the agent was reasonable, it still was not relieved of its obligation to maintain workers' compensation insurance under the Workers' Compensation Act (Act). The Director also decided he had no basis for addressing the constitutionality of §8-43-409, C.R.S. The Director, therefore, concluded that the respondent was in default of its insurance obligation during the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014, and ordered the respondent to pay a fine totaling $841,200.00. Section 8-43-409, C.R.S.; WCRP 3-6.

The respondent again appealed the Director's order, arguing, in part, that under §8-43-304(4), C.R.S. the Director failed to prove by clear and convincing evidence the respondent knew or reasonably should have known it was in violation of the Act, that its reliance on the advice of its insurance agent

demonstrated it did not have reasonable knowledge of the lack of insurance, and that the penalty assessed by the Director was "absurd," and the amount of the fine assessed was unconstitutional.

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

On August 27, 2015, the Director issued his order on remand. In his order, the Director stated that the factors in *Associated Business Products* were incorporated in Rule 3-6. The Director held that the

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

fact made in his prior supplemental order dated April 21, 2015.

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

approach with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes.

The Attorney General has not filed a Petition to Review, but instead has filed a Brief In Opposition on behalf of the Director. In the Brief In Opposition, the Attorney General argues that the Panel has erred in requiring the Director to apply the factors set forth in *Associated Business Products* when determining a constitutionally permissible fine. The Attorney General contends that the constitutional analysis set forth in *Associated Business Products* is inapplicable to §8-43-409, C.R.S. and to this case because that case instead addressed the discretionary application of penalties under §8-43-304, C.R.S., which applies to a violation for which no penalty has been specifically provided elsewhere in the Act. The Attorney General goes on to argue that since this case instead involves §8-43-409, C.R.S., and that statute mandates that the Director impose a fine on the respondent for its subsequent violation of failing to meet its statutory obligation to maintain workers' compensation insurance, the Director has no discretion to determine the amount of the fine to be imposed. Brief In Opposition at 13. The Attorney General concedes, however, that the fine the Director is required to impose against the respondent must range between a minimum of $250 per day and a maximum of up to $500 per day. The Attorney General then contends that requiring the Director to apply the *Associated Business Products* factors would require compliance with nonexistent statutory provisions.

We disagree with the Attorney General's argument that the constitutional analysis set forth in *Associated*

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

In numerous contexts, Colorado appellate courts have identified factors a court should consider when exercising its discretionary authority. *See Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 570 (Colo. 2009); *Ingold v. AIMCO/Bluffs*, L.L.C. Apartments, 159 P.3d 116, 125-26 (Colo. 2007); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 948 (Colo. App. 2009); *Dubray v. Intertribal Bison Cooperative*, 192 P.3d 604, 608 (Colo. App. 2008)(reasonable amount of attorney fees); *RMB Services, Inc. v. Truhlar,* 151 P.3d 673, 676

(Colo. App. 2006); *Kennedy v. King Soopers Inc*., 148 P.3d 385, 389 (Colo. App. 2006)(concerning an award of certain costs); *Clark v. Farmers Ins. Exchange*, 117 P.3d 26, 29-30 (Colo. App. 2004). As we stated in our prior order, while the opinion in *Associated Business Products* addressed a fine under §8-43-304, C.R.S., we nevertheless view the factors enunciated in that case as most applicable to the facts and circumstances presented here.

In *Associated Business Product*s, the Colorado Court of Appeals discussed the considerations necessary to the exercise of the ALJ's discretion to prevent any fine so imposed from violating the excessive fines prohibition. The Court relied on the decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). That case required three criteria to be considered when fashioning a constitutionally appropriate level for a fine. These include the following: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d at 326. Because the General Assembly has charged the Director with exercising similar authority and discretion in regard to fines pertinent to §8-43-409, C.R.S., these factors must also be applied by the Director when assessing a fine here. *See In the Matter of El Nuevo Time Out Corp*., FEIN No. 01-0801734 (March 20, 2008)(recognizing consideration of three criteria announced in *Associated Business Products v.*

Industrial Claim Appeals Office, supra when determining constitutionally appropriate level of a fine). Consequently, the Attorney General's argument notwithstanding, the excessive fines prohibition of the Eighth Amendment and of Article II, section 20, of the federal and state constitutions require the factors in *Associated Business Products* to be applied to determine whether the fine imposed by the Director is excessive. We also note that our July 30, 2015, order was not the first time we have remanded a penalty assessment of the Director for the reason that the assessment did not include reference to the criteria designed to avoid a constitutionally excessive fine. See, *Division of Worker's Compensation v. Silva Floor Solutions*, W.C. No. 2002-50381 (January 8, 2004) and *Division of Workers' Compensation v. Sundance Equestrian Center*, W.C. No. 2002-110238 (January 13, 2004). Accordingly, in our first order we were required to remand this matter for the Director to apply the factors in *Associated Business Products*. On remand, the Director determined that Rule 3-6 does, in fact, incorporate the applicable factors enunciated in *Associated Business Products*.

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

must, where possible, construe the Rule consistent with the enabling statute. *Id.; Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

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

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

Here, based on the plain language of Rule 3-6(D), the Director's order on remand, and the Director's findings of fact from his supplemental order dated April 21, 2015, we conclude that the Director has, in fact, considered the facts of this case and exercised his discretion when imposing the fine on the respondent. As noted above, in his order on remand, the Director stated that the factors in *Associated Business Products* already have been incorporated in Rule 3-6. He held that Rule 3-6 requires a greater fine for the second violation, which reflects the degree of reprehensibility of the defendant's misconduct. The disparity between the harm or potential harm suffered and the fine to be assessed is shown in Rule 3-6(D) because the fine increases the longer the employer is without insurance, which corresponds with the greater the risk that a non-insured injury will occur. The difference between the

fine imposed and the penalties authorized or imposed in comparable cases is shown in Rule 3-6(D) because the fine increases depending on the length of time each employer fails to carry insurance. Further, pursuant to Rule 3-6(D) and the Director's supplemental order dated April 21, 2015, which is incorporated in his order on remand, it is clear that the Director considered and weighed the evidence submitted by the respondent in its appeal. The Director accepted, as true[1], the allegations presented by the respondent, he weighed this evidence, considered the mitigating and aggravating factors which reflected the degree of reprehensibility, the potential harm suffered, and the differences between the fines imposed in comparable cases. The Director then issued his supplemental order or "further order" which determined that the evidence presented by the respondent in its appeal did not provide him with sufficient grounds to modify the amount of the fine imposed.

For example, the Director assumed, as true, the respondent's contention that it had relied on its

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

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

Moreover, the respondent argues, on appeal, that Rule 3-6(D) is unconstitutional because it only considers the amount of time of the default. According to the respondent, such an approach by the Director with regard to Rule 3-6(D) allows totally unjust and unconstitutional outcomes. Section 8-43-409, C.R.S. was amended in several respects in 2005 by House Bill 05-1139. Those amendments added a minimum $250 per day fine for a repeat violation of an employer's duty to maintain workers' compensation insurance. It also

added to §8-43-304(1.5), C.R.S. That subsection instructed the Director to promulgate rules setting forth the circumstances pursuant to which the Director may impose a fine and "criteria for determining the amount of the fine." The Director thereupon drafted and implemented Rule 3-6. As noted above, we interpret this rule as one setting forth criteria. The Rule discusses primarily the effect the number of days in which an employer goes without insurance has on the amount of the penalty. However, the Rule also provides that a fine calculated solely on the basis of the number of days involved is made subject to modification through "further order of the Director." The Director then, may consider other mitigating and aggravating factors in the record in addition to the number of days specified in the Rule when assessing the final penalty. As discussed above, we note the Director has considered several other specific details of the respondent's case. After reviewing the impact of those factors, the Director determined the penalty calculated through reference to the number of days listed in Rule 3-6 remained an appropriate assessment. Consequently, we conclude that the respondent is mistaken in characterizing Rule 3-6 to be dependent solely on the amount of time represented by the default in coverage.

Otherwise, the respondent's remaining arguments raise a facial constitutional challenge to Rule 3.6 and to whether the Rule sufficiently addresses the constitutional requirements. We lack jurisdiction, however, to address a facial constitutional challenge to a statute or to a Rule of the Director. *See Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 485 P.2d 721

(1971); *Zarlingo v. Safeway*, W.C. No. 4-427-756 (Nov. 16, 2000) (insofar as Dr. Janssen argues the Rule is unconstitutional, we lack jurisdiction to consider the issue). The respondent's arguments are matters left for the judicial branch of government.

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

INDUSTRIAL CLAIM APPEALS PANEL

/s/David G. Kroll
David G. Kroll

/s/Kris Sanko
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 the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.
- 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.

- 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.colorado.gov/cdle/CTAPPFORM 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 600
Denver, CO 80202

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[*Certificate of Mailing Omitted in the Printing of this Appendix*]

APPENDIX D

STATE OF COLORADO
BEFORE THE DEPARTMENT OF
LABOR AND EMPLOYMENT
DIVISION OF WORKERS' COMPENSATION

FEIN: 84-1545878

[Filed August 27, 2015]

In the matter of:	)
Dami Hospitality, LLC	)
Respondent	)
	)

ORDER

THIS MATTER comes before the Director of the Division of Workers' Compensation ("Director") under an Order of Remand from the Industrial Claim Appeals Panel ("the Panel") dated July 30, 2015, in which the Panel remanded this matter to the Director for a consideration of the three factors set forth in *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005) in regard to the determination of Respondent's fine for failing to maintain workers' compensation insurance coverage for its employees.

1. It is undisputed that Respondent was previously determined to be in violation of the requirements of the Colorado Workers' Compensation Act (the "Act") and was previously fined for such violation in accordance

with the provisions of the Act. Section 8-43-409 C.R.S. was amended effective July 1, 2005, and currently provides that the Director shall impose fines of not less than $250.00 or more than $500.00 per day for a second and any subsequent violation. The Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3, were also revised following the 2005 amendment of §8-43-409, and Rule 3-6(D) provides an escalating scale of fines to be assessed for each day of default depending upon the length of time the employer remains in default. Neither the Act nor the Workers' Compensation Rules of Procedure, including the schedule of fines, contain an exclusion or exemption from incurring and paying a fine based upon a Respondent's financial inability to pay.

2. In its Order of Remand, the Panel indicated that it was inappropriate for the Director to use only the schedule of escalating fines contained in Rule 3-6(D) to determine the fine amount for Respondent because, the Panel indicated, the schedule was based solely on the length of time the employer was out of compliance. The Panel then indicated that the appropriate analysis was the test contained in *Associated Business Products* which consists of three parts: 1.) the degree of reprehensibility of the defendant's misconduct; 2.) the disparity between the harm or potential harm suffered and the fine to be assessed; and 3.) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. The Director notes that *Associated Business Products* involved a penalty for untimely payment of workers' compensation benefits issued under the general penalty statute, § 8-43-304, C.R.S., rather than a fine for failing to

maintain workers' compensation insurance issued according to the provisions of § 8-43-409, C.R.S., which is the statute at issue here. Nevertheless, the Director finds that all of the *Associated Business Products* factors are already incorporated into Rule 3-6(D).

3. Section 8-43-409, C.R.S., provides for two levels of fines to be imposed on employers that fail to maintain the mandatory workers' compensation insurance coverage for their employees. In § 8-43-409(1)(b)(I), the legislature authorized fines of up to $250.00 per day for initial defaults. However, the fines increase drastically for second and subsequent defaults, with § 8-43-409(1)(b)(II) providing for fines of $250.00 to $500.00 per day, which indicates a clear intent by the legislature to delineate the serious nature of an employer's repeated failure to maintain workers' compensation protection for its employees. Rule 3-6(B), which provides a schedule of fines for initial violations, as well as Rule 3-6(D), which provides the schedule of fines for subsequent violations, were created within the scope of the statutory limitations and with the legislature's intent in mind.

4. In regard to the first prong of the *Associated Business Products* test, the degree of reprehensibility of the defendant's misconduct, Rule 3-6(D) mirrors the statutory intent regarding subsequent violations in that an employer that has previously been determined to be in default is on notice that workers' compensation insurance is both mandatory and vitally important to the protection of its employees as well as its own financial security in the event of a workplace injury. This is different from an initial violation, where the

employer may have misunderstood or been unaware of its insurance obligations, and to that end Rule 3-6(C) grants the Director the discretion to reduce the fine for an initial violation to $5/day until the date the Notice to Show Compliance is issued. However, the lack of such discretion in Rule 3-6(D) emphasizes that after an initial violation an employer is aware both that the insurance is required and of the importance of maintaining that insurance. By allowing the insurance to lapse after the initial default, the employer shows a pattern of putting its workers at risk of being injured without the financial protection afforded by workers' compensation insurance, as well as a pattern of ignoring the legal requirement of maintaining the required coverage. Thus, Rule 3-6(D) reflects that the degree of reprehensibility of a second lapse of workers' compensation insurance coverage is substantially greater than that of an initial default.

5. Rule 3-6(D) also incorporates the second prong of the *Associated Business Products* test, the disparity between the harm or potential harm suffered and the fine to be assessed. By providing an escalating scale of fines based on the length of time the employer remains uninsured, Rule 3-6(D) recognizes that the longer the employer is without insurance, the greater the risk that a non-insured injury will occur. Since Colorado has no state monetary fund to pay for injuries sustained by workers whose employers do not have insurance, an employee working for a non-insured employer must rely solely on the limited financial resources of the employer for the payment of all costs associated with the injury, including lost wages. For this reason, an employer that obtains insurance quickly

in the event of a lapse in coverage, thus minimizing the chance of having a non-insured injury, will receive a relatively low fine per day under the schedule of fines contained in Rule 3-6(D). However, an employer that continues to operate without insurance for a lengthy period of time creates an ever-growing risk that a worker will be injured and be forced to rely solely on the employer to pay for the injury. Thus, the escalating nature of the fine structure accounts for the potential harm and the fine assessed.

6. Finally, as to the third prong, the difference between the fine imposed and the penalties authorized or imposed in comparable cases, Rule 3-6(D) creates a system by which any employer that has committed a subsequent violation is subject to the same table of fines. Although the total amount of the fine can differ between employers, such difference is dependent on the length of time the employer fails to carry insurance, a factor entirely within the employer's control. *See In the matter of Z Stores, Inc. d/b/a Crown Market d/b/a Z-Mart 102,* FEIN 84-1599355/26-4667847 (ICAO, September 15, 2014) (employer's responsibility to maintain workers' compensation insurance). Also, fines imposed under Rule 3-6(D) have been upheld by the Panel previously. See *In the matter of El Nuevo Time Out Corp.,* FEIN No. 01-0801734 (ICAP March 12, 2008) (finding that the constitutionality of fine cannot be addressed, but assessment of subsequent offense fine using only Rule 3-6(D) was not an abuse of discretion); *In the matter of Cullen R. Honeycutt d/b/a Colorado Gun Works n/k/a Colorado Gun Works, LLC,* FEIN 11-3661626 & 26-4640556, (ICAO, April 13, 2012) (Use of Rule 3-6(D) to assess a $642,700 fine for

a subsequent lapse of workers' compensation insurance affirmed; "It is not the function of the Panel to rewrite the Workers' Compensation Rules of Civil [sic] Procedure", pp. 3-4).

7. The Director determines that Rule 3-6(D) incorporates and addresses all of the elements of the *Associated Business Products* test, and thus that the fine of $841,200.00 assessed against Respondent according to that Rule is appropriate.

WHEREFORE, IT IS NOW ORDERED THAT:

1. A fine in the total amount as set out below and in Exhibit A enclosed, is imposed for the period(s) noted in the Exhibit and incorporated here as part of this order. To the extent not modified by this order, the findings of fact and conclusions contained in the Director's supplemental order of April 21, 2015, are hereby incorporated as part of this order.

2. Respondent is ordered to pay by **cashier's check**, payable to the Treasurer, State of Colorado, a fine in the initial amount of **$841,200.00 (Eight Hundred Forty-One Thousand Two Hundred Dollars)** determined in accordance with the provisions of Rule 3-6 and calculated as is more fully set out in Subsequent Violation Exhibit A enclosed and incorporated herein by reference.

3. Respondent is to mail or otherwise deliver the total amount of $841,200.00 (Eight Hundred Forty-One Thousand Two Hundred Dollars) **ALONG WITH A COPY OF THIS ORDER** to the Director, Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 immediately, but in no event

later than twenty (20) days from the date of this ORDER.

4. Respondent is to provide to the Director upon the Director's request, proof of workers' compensation insurance coverage (or evidence satisfactory to the Director supporting exemption there from) for any period or periods requested by the Director for which the Director has cause to believe that coverage was or may have been required.

DIVISION OF WORKERS' COMPENSATION

BY /s/Paul Tauriello
Paul Tauriello Director

This Order of the Director is final and not subject to appeal unless a petition to review, meeting the requirements of and in compliance with the provisions of §8-43-301(2) is filed with the Director and mailed or delivered as required in that statute to the Director, Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 within twenty (20) days after the date this Order is mailed.

A copy of this **ORDER** was mailed to the following at the addresses shown below on August 27, 2015 by Nikki Gwin.

Dami Hospitality, LLC FEIN: 84-1545878
2341 East Dartmouth Place
Englewood, CO 80110

Daniel T. Goodwin
Daniel T. Goodwin Law Offices

8001 Arista Pl., Ste. 400
Broomfield, CO 80021

BY FACSIMILE ONLY TO: (303) 457-1175
(Attorney for Respondent)

EXHIBIT A

In the matter of August 27, 2015
Dami Hospitality, LLC
2341 East Dartmouth Place
Englewood, CO 80110
FEIN: 84-1545878

Records show that on and/or after July 1, 2005, the Respondent employed one or more persons in the State of Colorado and that Respondent was not exempt from but was subject to the provisions of the Act on and during the times noted immediately below:

August 10, 2006 through June 8, 2007
And
September 12, 2010 through July 9, 2014

$250.00 per day for each day for the period from August 10, 2006 through August 29, 2006 in the amount of $5,000.00 (Five Thousand Dollars).

$260.00 per day from August 30, 2006 through September 3, 2006 in the amount of $1,300.00 (One Thousand Three Hundred Dollars).

$280.00 per day from September 4, 2006 through September 8, 2006 in the amount of $1,400.00 (One Thousand Four Hundred Dollars).

$300.00 per day from September 9, 2006 through September 13, 2006 in the amount of $1,500.00 (One Thousand Five Hundred Dollars).

$400.00 per day from September 14, 2006 through September 18, 2006 in the amount of $2,000.00 (Two Thousand Dollars).

$500.00 per day from September 19, 2006 through June 8, 2007 in the amount of $131,500.00 (One Hundred Thirty-One Thousand Five Hundred Dollars).

$500.00 per day from September 12, 2010 through July 9, 2014 in the amount of $698,500.00 (Six Hundred Ninety-Eight Thousand Five Hundred Dollars).

The total amount of the fine for the periods noted above is $841,200.00 (Eight Hundred Forty-One Thousand Two Hundred Dollars).

APPENDIX E

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 84-1545878

[Filed July 30, 2015]

IN THE MATTER OF THE CLAIM OF	)
	)
DIVISION OF WORKERS' COMPENSATION,	)
	)
Petitioner,	)
	)
v.	)
	)
DAMI HOSPITALITY, LLC,	)
	)
Respondent Employer,	)
	)

ORDER OF REMAND

The respondent seeks review of a supplemental order of the Director of the Division of Workers' Compensation (Director) dated April 21, 2015, that assessed and ordered the respondent to pay a fine for failing to meet its statutory obligation to maintain workers' compensation insurance. We set aside the decision and remand the matter for additional findings and a new order.

On February 19, 2014, the Director issued a Notice to Show Compliance – Subsequent Violation directing the respondent to provide evidence of workers' compensation insurance or, alternatively, to provide a written explanation of an exemption for the period from July 1, 2005, to the present. The Notice also directed the respondent to complete and return a compliance questionnaire. This Notice was delivered to the respondent's address of record in Denver, Colorado as provided in the respondent's Articles of Incorporation filed with the Colorado Secretary of State on May 11, 2000, and the address provided by the respondent on its unemployment insurance reports. The record does not disclose that the respondent submitted a response to the Director's Notice.

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

disclose that the respondent requested a prehearing conference.

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

The respondent appealed the Director's order, arguing that it was unaware its workers' compensation insurance coverage had lapsed because it had relied on its insurance broker to follow its instructions to obtain the required insurance coverage, and that the Division of Workers' Compensation (Division) had failed to notify the respondent in a timely manner that its insurance coverage had been cancelled. The respondent also argued that the Director's Notice was improper

because it was sent to an incorrect business name, or to "Dami Hospitality LLC d/b/a Motel 8." The respondent alleged that "Motel 8" had not been an active name since August 2006. The respondent finally contends the Director has imposed an "absurd fine," essentially arguing that the Director had not exercised any discretion regarding the amount of the fine, and that the fine is unconstitutional.

The Director subsequently issued his supplemental order. The Director determined that it was the responsibility of the insurance carrier, not the Division, to notify the respondent its policy had lapsed, and in any event, it is the respondent's responsibility to maintain its insurance coverage. Section 8-44-110, C.R.S. The Director also noted that pursuant to the National Council on Compensation Insurance, Inc., the respondent's 2006 workers' compensation insurance policy was cancelled for nonpayment of premium, and its 2010 policy was cancelled for "failure to comply with the terms & conditions or audit failure." Thus, the Director concluded that both of these circumstances were within the respondent's control. The Director also determined that pursuant to the respondent's Articles of Incorporation filed with the Colorado Secretary of State on May 11, 2000, the legal name for the respondent's business is "Dami Hospitality L.L.C." The Director's Notice was mailed to "Dami Hospitality LLC d/b/a Motel 8" at its address of record in Denver, Colorado under a certificate of mailing dated February 19, 2014. Further, the Director's Notice also was sent on June 25, 2014, to "Dami Hospitality LLC d/b/a Motel 8" at the owner's home address in Englewood, Colorado. The Director determined that since the

respondent admitted it received the June 25, 2014, Notice to Show Compliance – Subsequent Violation, it reasonably should have understood that the Notice addressed to "Dami Hospitality LLC" was directed to the respondent's business. The Director also decided he had no basis for addressing the constitutionality of §8-43-409, C.R.S. The Director, therefore, concluded that the respondent was in default of its insurance obligation during the periods of August 10, 2006, through June 8, 2007, and September 12, 2010, through July 9, 2014, and ordered the respondent to pay a fine totaling $841,200.00. Section 8-43-409, C.R.S.; WCRP 3-6.

I.

On appeal, the respondent argues that the Director failed to prove by clear and convincing evidence that it knew or reasonably should have known it was in violation of Colorado's Workers' Compensation Act (Act). The respondent contends the fine that the Director imposed under §8-43-409, C.R.S., is a penalty within the meaning of §8-43-304(1), C.R.S. According to the respondent, under subsection (4) of §8-43-304, C.R.S., no penalty can be imposed unless the Director has proven by clear and convincing evidence that the respondent knew or reasonably should have known it was in violation of the Act. The respondent also contends that under §8-43-304, C.R.S., no penalty should be imposed since it ultimately obtained workers' compensation insurance coverage within 20 days of the Notice. We disagree.

Section 8-43-409, C.R.S., the statutory provision governing defaulting employers, provides in pertinent part as follows:

> (4) The issuance of an order to cease and desist, the imposition of a fine pursuant to subsection (1) of this section, or the issuance of an order for injunctive relief against an employer for failure to insure or to keep insurance in force as required by articles 40 to 47 of this title shall be the penalty for such failure within the meaning of section 8-43-304 (1) and such penalty shall be in addition to the increase in benefits that section 8-43-408 requires.

Additionally, §8-43-304(1), C.R.S., the statutory provision governing violations and penalties for violations of the Act, provides in pertinent part as follows:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, *for which no penalty has been specifically provided,* or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense,

> to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112 (7) (a) .... (emphasis added)

Section 8-43-409(4), C.R.S. references §8-43-304(1), C.R.S. for the purpose of stating that the one thousand dollars per day fine contained within that section is inapplicable to defaulting employers under §8-43-409, C.R.S. This is because §8-43-304(1), C.R.S. specifically states that the one thousand dollars per day fine applies only where no penalty is elsewhere specifically provided in the Act. Section 8-43-409, C.R.S., however, specifically provides the fine to be imposed against employers that fail to maintain workers' compensation insurance. *See Pena v. Industrial Claim Appeals Office,* 117 P.3d 84 (Colo. App. 2004); *see generally Holliday v. Bestop,* 23 P.3d 700 (Colo. 2001). Section 8-43-409, C.R.S. does not reference or attempt to apply any other section of §8-43-304, C.R.S., including the heighted burden of proof standard set forth in §8-43-304(4), C.R.S. Thus, the respondent's argument notwithstanding, the clear and convincing standard set forth in §8-43-304(4), C.R.S. is inapplicable and does not set forth the burden of proof governing a case involving an employer's default of its mandatory workers' compensation insurance obligations. Section 8-43-409, C.R.S. Similarly, we also reject the respondent's argument that pursuant to §8-43-304(4), C.R.S., no penalty should be imposed because it obtained workers' compensation insurance coverage and timely cured its default within 20 days of the Director's Notice. Consequently, we will not disturb the

Director's supplemental order based on these arguments.

II.

The respondent next contends it lacked knowledge that it was in violation of the Act. According to the respondent, it reasonably believed it was in compliance with the statute. The respondent also argues it relied upon its insurance agent to maintain adequate insurance coverage, and the Director failed to timely notify the respondent of the default. We are not persuaded to disturb the Director's supplemental order.

Employers that are subject to the terms and provisions of Colorado's Workers' Compensation Act (Act), §§ 8-40-101 to 8-47-209, C.R.S., are required to have insurance in compliance with the Act. Section 8-43-409(1), C.R.S. Pursuant to §8-43-409(1), C.R.S., an employer that "fails to insure or to keep the insurance required . . . allows the insurance to lapse, or fails to effect a renewal of the insurance shall not continue business operations while such default in effective insurance continues." The Director may impose fines for every day that the employer fails to comply with the insurance requirements. Section 8-43-409(1)(b)(I), C.R.S. Further, for subsequent violations, the amount of the daily fine must be, at least, $250 and may be as high as $500. Section 8-43-409(1)(b)(II), C.R.S. Additionally, Rule 3-6(D), 7 Code Colo. Reg. 1101-3 provides for an escalating scale of fines to be imposed upon a finding of an employer's second default of its insurance obligations. For example, pursuant to the schedule of fines listed in Rule 3-6(D), for days 1-20 of

default, the fine is $250 per day, and for days 41 or over of default, the fine is $500 per day.

The respondent's lack of intent with regard to its violation of the mandatory workers' compensation insurance requirements is not a factor that relieves the respondent from the imposition of a fine or that precludes a finding of being in default under §8-43-409(1)(b)(II), C.R.S. *See Humane Society of the Pikes Peak Region v. Industrial Claim Appeals Office,* 26 P.3d 546 (Colo. App. 2001)(court may not read non-existent provision into statute). Similarly, the fact that the respondent used and relied on an insurance agent to maintain its insurance obligations also is not a factor that relieves the respondent from the imposition of a fine or that precludes a finding of being in default under §8-43-409(1)(b)(II), C.R.S. Neither factor relieves the respondent of its burden to comply with its mandatory insurance obligations. Section 8-44-101, C.R.S.; §8-47-111, C.R.S. As stated above, employers, such as the respondent, that are subject to the terms and provisions of the Act, §§ 8-40-101 to 8-47-209, C.R.S., are required to have insurance in compliance with the Act. Section 8-43-409(1), C.R.S. We further note that since the respondent previously was in default of its insurance obligations in 2006, it should have been aware of the necessity to ensure that a policy of workers' compensation insurance was in place during the time period it employed one or more persons. Section 8-44-101, C.R.S.

III.

The respondent again argues that it did not receive adequate notice. The respondent contends that the

Director's Notice to Show Compliance – Subsequent Violation was not provided to the correct business entity because it was sent to "Dami Hospitality, LLC, d/b/a Motel 8." The respondent asserts that "Motel 8" has not been its proper trade name since August 2006. The respondent further argues that the Director's service by mail of a fine totaling $841,200.00 is not reasonable. We are not persuaded by the respondent's arguments.

Generally, statutory and due process protections require that all parties receive notice of administrative proceedings which may result in the deprivation of a significant property interest. *Colorado State Board of Medical Examiners v. Palmer,* 157 Colo. 40, 400 P.2d 914 (1965); *Hall v. Home Furniture Co.,* 724 P.2d 94 (Colo. App. 1986). Further, Colorado's Department of Labor and Employment Rule 1-4(1), 7 Code Colo. Regs. 1101-3, provides that proper service is to be made by mail. *See Kuhndog, Inc. v. Industrial Claim Appeals Office,* 207 P.3d 949, 950 (Colo. App. 2009); *Bowlen v. Munford,* 921 P.2d 59, 60 (Colo. App. 1996)(acknowledging rule that whenever a document is filed with the Division, a copy of the document shall be mailed "to each party to the claim" and attorneys of record). Moreover, a properly executed certificate of mailing creates a presumption that a notice was received, but the presumption may be overcome by competent evidence. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993).

Here, in its brief in support, the respondent does not contend it did not receive the Director's Notice to Show Compliance – Subsequent Violation that was sent by

the certificate of mailing on June 25, 2014, to the home address of its owner/registered agent. In fact, the respondent specifically acknowledges in its Brief In Support that its owner/registered agent did receive the Director's Notice to Show Compliance – Subsequent Violation on approximately June 28, 2014. Brief In Support at 8 ¶ 48, and 14. Consequently, we reject the respondent's contention that it failed to receive adequate notice merely because the Notice incorrectly listed "Motel 8" as part of the respondent's business name. *See also Huskinson v. Metro Construction, Inc.,* W.C. No. 4-918-495 (Feb. 7, 2014). Additionally, to the extent the respondent argues that the Director's service by mail of a fine totaling $841,200.00 is not reasonable, Rule 1-4 specifically provides for the service of such a document by mail. Thus, we will not disturb the Director's supplemental order on these grounds.

IV.

The respondent argues at different points in its Brief In Support that the penalty assessed by the Director is too large. The respondent characterizes it as "absurd." It contends that a penalty in the amount of $841,200.00 will cause the respondent to become insolvent. The respondent observes it sustained no worker's injury claims during the period of the penalty, or ever, and that it produced statements from its owner and insurance brokers explaining that the workers' compensation insurance coverage was not clearly explained to the owner due to her language barrier since her first language is Korean. The respondent then asserts the fine assessed is unconstitutional. While the respondent's Brief In Support does not specify precisely

which section of the constitution is being referenced, it is apparent from the respondent's argument that the penalty is excessive and so would be in violation of the Eighth Amendment to the federal constitution or Article II, section 20 of the Colorado constitution. Both prohibit the imposition of "excessive fines."

The respondent asserts it did not include extensive argument in regard to this issue in its Brief in Support for the reason that administrative agencies have been held to be without jurisdiction to consider constitutional attacks pertinent to the statute they are charged with implementing. It is true that we lack jurisdiction to address a facial constitutional challenge to a statute. *Kinterknecht v. Industrial Commission,* 175 Colo. 60, 485 P.2d 721 (1971); *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). In *Horrell v. Department of Administration,* 861 P.2d 1194, 1196 (Colo. 1993), however, the Colorado Supreme Court indicated that administrative agencies have the authority to determine whether "an otherwise constitutional statute has been unconstitutionally applied." *See also Pepper v. Industrial Claim Appeals Office,* 131 P.3d 1137, 1139 (Colo. App. 2005).

As noted above, the pertinent statutory section, §8-43-409(1)(b)(II), C.R.S., provides that "for every day" an employer fails to maintain insurance coverage, the Director is instructed to impose a fine of "[n]ot less than two hundred fifty dollars or more than five hundred dollars .... " In this matter, the statute is mandating a minimum fine of $425,000 ($250 per day) and a maximum fine of $850,000 ($500 per day). To the

extent the respondent complains a fine of $425,000 is unconstitutional, we have no authority to rule on such a facial challenge. However, insofar as the respondent contends the Director has failed to adequately exercise his statutory discretion to impose a fine of more than that amount but less than the $841,200.00 assessed, we may review the matter in regard to its constitutional validity. *See Horton v. Wal-Mart Stores,* W.C. No. 4-583-068 (November 5, 2004).

Section 8-43-304(1), C.R.S. is similar to §8-43-409(1)(b)(II), C.R.S. when it allows the Director or an Administrative Law Judge to impose a fine for violations of a statute, rule, or an order. That section provides for a range of daily penalties from a low of 1¢ to a maximum of $1,000. In *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005), the Court discussed the considerations necessary to the exercise of the ALJ's discretion to prevent any fine so imposed from violating the excessive fines prohibition. The Court relied on the decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). That case required three criteria to be considered when fashioning a constitutionally appropriate level for a fine. These include the following: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered and the fine to be assessed; and (3) the difference between the fine imposed and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d at 326. Because the General Assembly charged the Director with exercising similar

authority and discretion in regard to fines pertinent to §8-43-409(1)(b)(II), C.R.S., these factors must also be applied by the Director when assessing fines. *In the Matter of El Nuevo Time Out Corp.,* FEIN No. 01-0801734 (March 20, 2008)(recognizing consideration of three criteria announced in *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005) when determining constitutionally appropriate level of a fine).

Here, in his supplemental order, the Director based the $841,200.00 fine solely on the basis of Rule 3-6. That rule considers only the length of time involved in the violation and no other factor or criteria. Section §8-43-409(1)(b)(II), C.R.S., however, does not limit the Director's discretion to this single factor. Nor does the constitutional prohibition on excessive fines allow the Director to avoid consideration of other factors or criteria when imposing penalties or fines. Instead, as detailed above, when imposing a fine, the holding in *Associated Business Products* mandates consideration of the three factors in addition to the length of time involved of the violation as announced in Rule 3-6. Consequently, we are required to remand this matter to the Director for the purpose of considering the three factors addressed in *Associated Business Products* when determining the permissible fine to be imposed against the respondent. Section 8-43-409(1), C.R.S. provides that the Director may refer the matter to a prehearing Administrative Law Judge or an Administrative Law Judge to hold a hearing to provide the respondent with the opportunity to present supporting evidence on the pertinent factors or criteria enunciated in *Associated Business Products.* Section 8-

43-409(1), C.R.S. indicates that such a hearing may address the respondent's "default." The Court in *Kuhndog,* however, described how a hearing pertinent to the issue of default also may address issues besides simply default, including discovery matters and evidentiary disputes. *See also* §8-43-207.5, C.R.S.

V.

The respondent has offered to settle the matter. However, the Industrial Claim Appeals Office has no authority regarding an offer of settlement. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the Director's supplemental order dated April 21, 2015, is set aside and the matter is remanded for further findings as addressed in section IV above.

INDUSTRIAL CLAIM APPEALS PANEL

/s/David G. Kroll
David G. Kroll

/s/Kris Sanko
Kris Sanko

* * *

[*Certificate of Mailing Omitted in the Printing of this Appendix*]

APPENDIX F

STATE OF COLORADO
BEFORE THE DEPARTMENT OF
LABOR AND EMPLOYMENT
DIVISION OF WORKERS' COMPENSATION

FEIN: 84-1545878

[Filed April 21, 2015]

In the matter of:	)
Dami Hospitality, LLC	)
Respondent	)
	)

SUPPLEMENTAL ORDER -
SUBSEQUENT VIOLATION

THIS MATTER comes before the Director of the Division of Workers' Compensation ("Director") on Respondent's Petition to Review the order entered by the Director on October 30, 2014. That order imposed fines for Respondent's failure to have workers' compensation insurance in place from August 10, 2006 through June 8, 2007 and September 12, 2010 through July 9, 2014. Respondent has submitted a Petition to Review that was received by the Division of Workers' Compensation ("Division") on November 18, 2014 and a brief dated March 6, 2015. Therefore, having reviewed this correspondence, relevant statutes and case law, as well as other information contained in the records of the Colorado Department of Labor and

Employment ("COLE") and, being otherwise further advised, the Director issues the following Supplemental Order.

1. Respondent's petition to review does not contain a certificate of mailing or service, but contains an internal date of November 15, 2014. The petition was received by the Division on November 18, 2014 as an attachment to an e-mail as evidenced by the time and date stamp on the printout of the e-mail to which the petition was attached.

2. Section 8-43-301(2), C.R.S., requires that a petition to review be filed within twenty (20) days from the date of the certificate of mailing of the order appealed. It further provides that the petition "may be filed by mail, and shall be deemed filed upon the date of mailing, *as determined by the certificate of mailing."* (Emphasis added.) Workers' Compensation Rules of Procedure 1-2 (7 CCR 1101-3) provides that "unless a specific rule or statute states to the contrary, the date a document or pleading is filed is the date it is mailed or hand delivered to the Division of Workers' Compensation or the Office of Administrative Courts." Accordingly, a petition to review must either be "delivered" or the certificate of mailing must demonstrate mailing within 20 days of the certificate of the mailing of the order under appeal. *Buschmann v. Gallegos Masonry Inc.,* 805 P.2d 1193 (Colo. App. 1991). Although the petition did not contain a certificate of mailing, it contained an internal date of November 15, 2014, and was received by the Division on November 18, 2014, within the 20 days afforded by statute. Therefore, the Director determines that, under the totality of the

circumstances presented here, Respondent's petition to review was timely filed.

3. Respondent does not dispute that it operated with employees and without workers' compensation insurance. Section 8-47-111, C.R.S., establishes the Colorado General Assembly's intention that Colorado employers who fall under the provisions of Articles 40 to 47 of Title 8 provide workers' compensation insurance coverage for their Colorado employees through a current policy of workers' compensation insurance or through regulated self-insurance. Section 8-44-101, C.R.S., provides that an employer "shall secure compensation in one or more of the following ways, which shall be deemed to be compliance with the insurance requirements" of the Act, and specifies that employers may meet their insurance obligations either by obtaining insurance from a company authorized to write such insurance in Colorado or by procuring a self-insurance permit from the appropriate authority as indicated in the statute. Thus, an employer that is required to have insurance that does not obtain an authorized workers' compensation insurance policy or a self-insurance permit, does not meet the statutory insurance requirement and is in default of its statutory obligation. Respondent does not deny that it had employees and operated without insurance during the periods from August 10, 2006 through June 8, 2007, and September 12, 2010 through July 9, 2014. Thus, Respondent was required under § 8-44-101 to obtain and maintain coverage for those employees.

4. Respondent contends that it was not aware that the workers' compensation insurance coverage had lapsed

and that the Division should have contacted the Respondent sooner to notify the Respondent that the policy had cancelled. Initially, the Director notes that the responsibility of notifying Respondent of the cancellation was that of the insurance carrier, not the Division. Section 8-44-110, C.R.S. However, it was the Respondent's responsibility to maintain its insurance coverage. Section 8-44-101(1), C.R.S. provides that employers "shall secure compensation for all employees" either by obtaining insurance from a company authorized to write such insurance in Colorado or by procuring a self-insurance permit from the appropriate authority as indicated in the statute. Thus, it was Respondent's obligation to maintain workers' compensation for its employees. *In the matter of Cullen R. Honeycutt d/b/a Colorado Gun Works n/k/a Colorado Gun Works, LLC,* FEINS 11-3661626 & 26-4640556, (ICAO, April 13, 2012). Although Respondent argues that it was not aware that the 2006 and the 2010 insurance policies had cancelled, proof of coverage records of the National Council on Compensation Insurance, Inc. ("NCCI"), the organization designated and required by the Division to receive notification of insurance coverage status under Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3, Rule 3-1(A), shows that Respondent's 2006 workers' compensation insurance policy cancelled for nonpayment of premium on August 10, 2006, and Respondent's 2010 policy cancelled on September 12, 2010 for "failure to comply with the terms & conditions or audit failure". (Documents entitled "Proof of Coverage Inquiry – Cancellations / Reinstatements / NonRenewals" printed on "5/2/2014" and "10/3/2014".) Both of those circumstances were

within Respondent's control. Since Respondent was aware of the requirement to have workers' compensation insurance, it was Respondent's responsibility to take appropriate measures to ensure that such coverage remained in place. *Id.*

5. Respondent further asserts that it relied on its insurance agent to continue all insurance coverage and that Respondent believed that adequate workers' compensation insurance was maintained. However, as noted previously, Respondent's policies cancelled because of nonpayment and the Respondent's failure to comply with or complete an insurance audit. Those actions were within Respondent's control. Respondent points to a letter from Young Kim, Respondent's insurance agent, as proof that Respondent was unaware that its workers' compensation insurance was not in place. The letter from the agent states: "I think I feel part of responsibility for this matter that I did not tell about Worker's [sic] Compensation and I will be managing my client in the future. Actually, she confused Property Insurance and Worker's [sic] Compensation." (Letter from Young Kim, Farmers Insurance Agent, dated November 25, 2014.) However, the letter does not indicate that Respondent was unaware of the absence of a policy of workers' compensation insurance, nor does it indicate that the agent failed to secure workers' compensation insurance despite the request of Respondent. There is also no indication in the letter that Respondent continued to pay for workers' compensation insurance even though no policy was in place. Moreover, even if Respondent's reliance on the agent was reasonable and the Respondent acted quickly to obtain a new insurance

policy, Respondent was not relieved of its obligation to maintain workers' compensation coverage under the Act; indeed, Respondent's Petition appears to acknowledge its awareness that coverage was required for its employees. Nevertheless, Respondent continued its business operations without such coverage in violation of § 8-43-409, C.R.S., and § 8-44-101.

6. Respondent next contends that notice was improper because it was sent to an incorrect business name, in that the notice was sent to "Dami Hospitality LLC d/b/a Motel 8". Respondent contends that "Motel 8" has not been a trade name for respondent since August 2006, and thus that notice was improper. However, Respondent's Articles of Incorporation filed with the Colorado Secretary of State on May 11, 2000, state that the legal name for Respondent's business is "Dami Hospitality L.L.C." The record shows that the Director's Notice to Show Compliance containing the Employer's Compliance Questionnaire for Respondent's completion was mailed to "Dami Hospitality LLC d/b/a Motel 8" at its address of record, 3850 Peoria St., Denver, CO 80239-3314, under Certificate of Mailing dated February 19, 2014. The Director notes that 3850 Peoria St., Denver, CO 80239, is the current address listed for "Dami Hospitality LLC" in Secretary of State records, the address provided by Respondent on its Unemployment Insurance reports, and the address provided for the business in Respondent's brief. The record also does not indicate that the February 19, 2014 notice was returned to the Division. Moreover, Respondent admits that it received the June 25, 2014 notice sent to "Dami Hospitality LLC d/b/a Motel 8" at 2341 East Dartmouth Place, Englewood CO 80110,

which Respondent indicates is the owner's home address. Therefore, the Director finds that Respondent reasonably should have understood that a notice addressed to "Dami Hospitality LLC", was directed to Respondent's business.

7. Respondent also argues that service by mail was inappropriate and unreasonable considering the possible magnitude of the fine. However, Respondent concedes that Rule 1-4 provides that service by mail is proper. *Bowlen v. Munford,* 921 P.2d 59 (Colo. App. 1996). Also, at the time the notice was mailed, it was unknown whether a fine would actually be assessed, or if so, how much it would be. Although Division records did not show current coverage for Respondent at the time the notice was mailed, that does not necessarily mean coverage did not exist. Rule 3-1(A) provides that insurance carriers are to report coverage information electronically to the National Council on Compensation Insurance ("NCCI"), the Division's designated agent to receive such information. Various problems can arise in the course of this data transmission. An employer's insurance information may contain errors when it is reported to NCCI by the insurance carrier, the carrier may fail to report the policy information altogether, or there may be a failure on the part of NCCI to correctly transmit policy information to the Division. The Notice to Show Compliance requests that the Respondent provide certificates of insurance or declaration pages from its workers' compensation insurance policies for the period from July 1, 2005 to present so that the Respondent has an opportunity to provide policy information unavailable to the Division which would affect not only the amount of the fine, but whether a

fine is applicable at all. Therefore, it was not unreasonable for the notice to be delivered by mail to Respondent insofar as the notice was requesting the Respondent's information regarding a *potential* default. Moreover, as noted previously, Respondent concedes that it received the June 25, 2014 notice.

8. Respondent next asserts that because Respondent was unaware that the insurance policy had cancelled, and because Respondent obtained worker's compensation insurance within 20 days of the Notice to Show Compliance, no penalty should be assessed. Respondent argues in its brief that § 8-43-409(4) provides that a fine imposed under that section "shall be a penalty for such failure within the meaning of C.R.S. § 8-43-304(1) ... ", but that § 8-43-304(4), C.R.S. provides that "the party seeking such penalty [Director] fails to prove by clear and convincing evidence that the alleged violator [Petitioner] knew or reasonably should have known such person was in violation, no penalty shall be assessed."

9. Section 8-43-304(1) authorizes the imposition of penalties of up to $1,000 per day on an employer that:

> "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, *for which no penalty has been specifically provided,* or fails, neglects, or refuses to obey any lawful order made by the director or panel . . . " (Emphasis added).

In *Pena v. Industrial Claim Appeals Office,* 117 P.3d 84 at 88 (Colo. App. 2004), the court held that the limiting clause "for which no penalty has been specifically provided" applies to "acts and omissions that are contrary to articles 40 through 47 of the Act." Section 8-43-409(1) creates a duty on employers to cease business operations if the employer "fails to insure or to keep the insurance required by [the Act] in force, allows the insurance to lapse, or fails to effect a renewal of the insurance", and § 8-43-409(1)(b) sets forth specific penalties should an employer fail to do so, including a fine of up to $250.00 for an initial violation, and fines of "not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation." Moreover, as Respondent noted, § 8-43-409(4) provides that a fine imposed under § 8-43-409(1) is the penalty within the meaning of 8-43-304(1).

10. In interpreting § 8-43-409 and 8-43-304, the ordinary rules of statutory construction are appropriate. The purpose of statutory construction is to effect the legislative intent, and the best indicator of legislative intent is the language of the statute. Thus, words and phrases in a statute should be given their plain and ordinary meaning, and phrases should be read in context and construed according to the rules of grammar and common usage. Section 2-4-101, C.R.S; *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). However, statutory language should not be construed in a manner which produces an absurd result. *Humane Society of the Pikes Peak Region v. Industrial Claim Appeals Office,* 26 P.3d 546 (Colo. App. 2001).

11. Section 8-43-409(4) states:

> The issuance of an order to cease and desist, the imposition of a fine pursuant to subsection (1) of this section, or the issuance of an order for injunctive relief against an employer for failure to insure or to keep insurance in force as required by articles 40 to 47 of this title shall be the penalty for such failure within the meaning of section 8-43-304 (1) and such penalty shall be in addition to the increase in benefits that section 8-43-408 requires.

The statute's plain language is unambiguous. The three actions listed in § 8-43-409(1) are each listed using the distinctive conjunction "or", followed by the proclamation that such penalty shall be the penalty for failing to insure under the Act "within the meaning of" § 8-43-304(1). Accordingly, any of the actions taken by the Director pursuant to § 8-43-409(1), including the imposition of a fine, are in lieu of the penalty directed by § 8-43-304(1). This is because an employer who fails to secure and maintain the required workers' compensation insurance is in violation of two statutes; § 8-43-409(1), which prohibits an employer from operating while uninsured and contains specific penalties for an employer that operates in spite of the prohibition, *and* § 8-44-101, which requires employers to secure insurance for their employees but does not itself contain specific penalties and thus would be subject to the penalty provisions of §8-43-304(1). Section 8-43-409(4) therefore prevents an employer from being punished twice for the same incidence of failing to maintain workers' compensation insurance by

removing the potential for the employer to be penalized up to $1,000 per day under the provisions of § 8-43-304(1). However, although § 8-43-409(4) specifically references § 8-43-304(1) and § 8-43-408, it does not refer to the remaining provisions of § 8-43-304. Therefore, it is clear that § 8-43-409 is a stand-alone statute containing the complete consequences for an employer's failure to maintain workers' compensation insurance.

12. Even if the additional provisions of § 8-43-304 were applicable, § 8-43-304(4) states:

> *"In any application for hearing for any penalty pursuant to subsection (1) of this section,* the applicant shall state with specificity the grounds on which the penalty is being asserted. *After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation.* If the violator cures the violation within such twenty-day period, 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. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation." (Emphasis added).

Here, no application for hearing was filed. A Notice to Show Compliance was mailed to the Respondent's address of record on February 19, 2014 and a second Notice to Show Compliance was mailed to the home address for Respondent's owner on June 25, 2014.

However, the Notice to Show Compliance is not an application for hearing, but rather a request for the employer to provide documentation of insurance or reasons why the employer believes that it is exempt from the insurance requirements of the Act. Although §8-43-409(1) provides that the Director may, if necessary, set the matter for hearing, this language is permissive and no hearing was scheduled in this matter, rendering § 8-34-304(4) inapplicable. Also, the sanction issued in this matter was not a penalty issued pursuant to § 8-43-304(1), but rather was a fine pursuant to § 8-43-409(1).

13. The Director further notes that the legislature changed § 8-43-409 effective July 1, 2005. Prior to that date, § 8-43-409 contained a provision that did essentially what Respondent contends; suspend the fine if insurance was obtained. Section 8-43-409(1)(b)(III), C.R.S. 2004, stated:

> The director shall suspend any fine imposed pursuant to this paragraph (b) if the employer provides proof suitable to the director that the employer has in force insurance for so long as the employer has any obligation under articles 40 to 47 of this title, and is not otherwise in violation of articles 40 to 47.

The legislature's removal of this language from § 8-43-409 indicates that the intent was to disallow the nullification of fines once a workers' compensation policy was obtained. Respondent's interpretation would reinstitute what the legislature removed in 2005 and create a scenario by which any employer who obtained a policy within 20 days of receiving a notice from the

Division would not be subject to fines. An employer could then repeatedly allow its workers' compensation insurance policy to lapse, and when noticed by the Division, quickly get a new policy and avoid all responsibility. Construing the Act as a whole, giving consistent, harmonious, and sensible effect to all its parts, and considering the consequences of alternative constructions, the Director concludes that the cure provisions of § 8-43-304(4) do not apply to fines or cease and desist orders imposed pursuant to § 8-43-409(1).

14. Likewise, the provisions of § 8-43-304(5) are also inapplicable. Section 8-43-304(5) states: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party knew or reasonably should have known the facts giving rise to a possible penalty." However, § 8-43-409(1)(b) provides that fines are to be assessed "[*f]or every day* that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage..." (Emphasis added). This section was also changed by the legislature as of July 1, 2005. Section 8-43-409(b)(I) and (II), C.R.S. 2004, stated that the Director was to:

> "(I) Impose a fine of not more than five hundred dollars for every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, or allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage; *except that the director shall not*

> *impose a fine that exceeds the annual cost of the insurance premium that would have been charged for such employer.*
> (II) Any fine imposed pursuant to subparagraph (I) of this paragraph (b) shall be imposed *only for those days that occur after the employer receives a notice from the director* that the employer has failed to insure or to keep in force the insurance required by articles 40 to 47 of this title in force, or has allowed the insurance to lapse, or has failed to effect a renewal of such coverage." (Emphasis added).

The legislature's removal of the limitation of the fine to the equivalent of one year of workers' compensation insurance premium, as well as the removal of the limitation of fines to the time period after the employer received notice from the Division, indicates that the intent was *not* to limit the time period for which the employer was to be fined for its default. Thus, the Director concludes that the provisions of § 8-43-304(5) do not apply to fines or cease and desist orders imposed pursuant to § 8-43-409(1).

15. Respondent also indicates that it is unable to pay the fine amount. Section 8-43-409 C.R.S. was amended effective July 1, 2005, and currently provides that the Director shall impose fines of not less than $250.00 or more than $500.00 per day for a second and any subsequent violation. Here, it is undisputed that Respondent was previously determined to be in violation of the requirements of the Act and was previously fined for such violation in accordance with the provisions of the Act. The Workers' Compensation

Rules of Procedure, 7 Code Colo. Reg. 1101-3, were also revised following the 2005 amendment of §8-43-409, and Rule 3-6(D) provides an escalating scale of fines to be assessed for each day of default depending upon the length of time the employer remains in default. Neither the Act nor the Workers' Compensation Rules of Procedure, including the schedule of fines, contain an exclusion or exemption from incurring and paying a fine based upon a Respondent's financial inability to pay. Moreover, the fine here was imposed within the limitations contained in §8-43-409(1)(b)(II), C.R.S. and as directed by Rule 3-6.

16. Respondent asserts that "(t)he Division later agreed to reduce the fine to $425,000". Respondent's brief at 8. However, the fines imposed under §8-43-409, and Rule 3-6(D) are not discretionary. The Director notes that the amount of $425,000.00 cited in Respondent's brief was part of a settlement discussion, which is outside the scope of this proceeding. Likewise, Respondent's settlement offer on page 14 of its brief is not appropriately before the Director in this order.

17. Finally, to the extent that Respondent argues that the fine imposed under § 8-43-409, C.R.S. is unconstitutional, the Director has no basis for addressing this issue. Administrative agencies do not have the authority to pass on the constitutionality of statutes. That function may be exercised only by the judicial branch of government. *Arapahoe Roofing & Sheet Metal, Inc. v. Denver,* 831 P.2d 451 (Colo. 1992).

18. Based upon the foregoing and the totality of the circumstances presented, the Director concludes that Respondent employed one or more employees during

the periods from August 10, 2006 through June 8, 2007, and September 12, 2010 through July 9, 2014, was not exempt from the provisions requiring workers' compensation insurance coverage, and that Respondent was in default of its insurance obligation during those periods.

THEREFORE, IT IS NOW ORDERED:

1. As the Respondent is now in compliance with the insurance provisions of the Act, the Director determines that, under the totality of circumstances presented, it is appropriate to impose fines on Respondent.

2. Workers' Compensation Rule of Procedure 3-6 provides schedules of fines for periods when coverage should have been in place but was not. The fines to be imposed are to be in accordance with the schedules of fines contained in Rule 3-6. Consequently, a fine in the total amount as set out below and in Subsequent Violation Exhibit A enclosed, is now hereby imposed for the period(s) noted in the Exhibit and incorporated here as part of this order.

3. A fine in the total amount as set out below and in Exhibit A enclosed, is imposed for the period(s) noted in the Exhibit and incorporated here as part of this order. To the extent not modified by this order the findings of fact and conclusions contained in the Director's order of October 30, 2014 are affirmed and incorporated here.

4. Respondent is ordered to pay by **cashier's check,** payable to the Treasurer, State of Colorado, a fine in the initial amount of **$841,200.00 (Eight Hundred**

Forty-One Thousand Two Hundred Dollars) determined in accordance with the provisions of Rule 3-6 and calculated as is more fully set out in Subsequent Violation Exhibit A enclosed and incorporated herein by reference.

5. Respondent is to mail or otherwise deliver the total amount of $841,200.00 (Eight Hundred Forty-One Thousand Two Hundred Dollars) ALONG WITH A COPY OF THIS SUPPLEMENTAL ORDER – **SUBSEQUENT VIOLATION** to the Director, Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 immediately but in no event later than twenty (20) days from the date of this SUPPLEMENTAL ORDER – SUBSEQUENT VIOLATION.

6. Respondent is to provide to the Director upon the Director's request, proof of workers' compensation insurance coverage (or evidence satisfactory to the Director supporting exemption there from) for any period or periods requested by the Director for which the Director has cause to believe that coverage was or may have been required.

DIVISION OF WORKERS' COMPENSATION

BY /s/Paul Tauriello
Paul Tauriello, Director

This Supplemental Order – Subsequent Violation of the Director is final and not subject to appeal unless a petition to review meeting the requirements of and in compliance with the provisions of section 8-43-301(6) C.R.S. is filed. A petition to review, along with any supporting

brief, must be mailed or delivered to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 within twenty (20) days after the date this Supplemental Order – Subsequent Violation is mailed.

A copy of this **SUPPLEMENTAL ORDER - SUBSEQUENT VIOLATION** was mailed to the following at the address shown below on April 21, 2015 by Erin M. J[].

Dami Hospitality, LLC FEIN: 84-1545878
2341 East Dartmouth Place
Englewood, CO 80110

Daniel T. Goodwin
Daniel T. Goodwin Law Offices
8001 Arista Pl., Ste. 400
Broomfield, CO 80021
BY FACSIMILE ONLY TO: (303) 457-1175
(Attorney for Respondent)

SUBSEQUENT VIOLATION EXHIBIT A

In the matter of April 22, 2015
Dami Hospitality, LLC
2341 East Dartmouth Place
Englewood, CO 80110
FEIN: 84-1545878

Records show that on and/or after July 1, 2005, the Respondent employed one or more persons in the State of Colorado and that Respondent was not exempt from but was subject to the provisions of the Act on and during the times noted immediately below:

August 10, 2006 through June 8, 2007
And
September 12, 2010 through July 9, 2014

$250.00 per day for each day for the period from August 10, 2006 through August 29, 20016 in the amount of $5,000.00 (Five Thousand Dollars).

$260.00 per day from August 30, 2006 through September 3, 2006 in the amount of $1,300.00 (One Thousand Three Hundred Dollars).

$280.00 per day from September 4, 2006 through September 8, 2006 in the amount of $1,400.00 (One Thousand Four Hundred Dollars).

$300.00 per day from September 9, 2006 through September 13, 2006 in the amount of $1,500.00 (One Thousand Five Hundred Dollars).

$400.00 per day from September 14, 2006 through September 18, 2006 in the amount of $2,000.00 (Two Thousand Dollars).

$500.00 per day from September 19, 2006 through June 8, 2007 in the amount of $131,500.00 (One Hundred Thirty-One Thousand Five Hundred Dollars).

$500.00 per day from September 12, 2010 through July 9, 2014 in the amount of $698,500.00 (Six Hundred Ninety-Eight Thousand Five Hundred Dollars).

The total amount of the fine for the periods noted above is $841,200.00 (Eight Hundred Forty-One Thousand Two Hundred Dollars).

APPENDIX G

STATE OF COLORADO
BEFORE THE DEPARTMENT OF
LABOR AND EMPLOYMENT
DIVISION OF WORKERS' COMPENSATION

FEIN#: 84-1545878

[Filed October 10, 2014]

In the matter of:	)
Dami Hospitality, LLC	)
DBA Motel 8	)
	)
Respondent	)
	)

SPECIFIC FINDINGS OF FACT, CONCLUSIONS AND ORDER TO PAY FINE SUBSEQUENT VIOLATION

THIS MATTER comes before the Director of the Division of Workers' Compensation following the Director's issuance of a Notice to Show Compliance with the insurance requirements of the Colorado Workers' Compensation Act (the "Act") and a directive to complete an Employer's Compliance Questionnaire directed to the Respondent and dated June 25, 2014. Having reviewed employment information received by and available to the Colorado Department of Labor and Employment (CDLE), investigative information, and affidavit(s) if applicable (the "records") as well as any

direct response to the Director's Notice to Show Compliance and directive to complete the Employer's Compliance Questionnaire and, being otherwise fully advised, the Director finds and concludes as follows:

1. Records show that on and/or after July 1, 2005 the Respondent employed one or more persons in the State of Colorado and that Respondent was not exempt from but was subject to the provisions of the Act on and during the times noted in Subsequent Violation Exhibit A enclosed herein and made a part hereof.

2. The records further show that Respondent did not have a policy of workers' compensation insurance in effect during the time(s) noted in Subsequent Violation Exhibit A and was not insured for workers' compensation during such times as required by the Act. The Respondent employer operated its business despite the absence of such insurance.

3. Respondent was directed by the Director's Notice to Show Compliance – Subsequent Violation dated June 25, 2014 to provide proof of insurance coverage or, in the alternative, to demonstrate its exemption from the requirements of the Act within twenty (20) days from the date of the Director's Notice to Show Compliance – Subsequent Violation and was advised of its opportunity to present evidence to the Division regarding the issue of insurance coverage or exemption and on default. The Respondent was also advised of and afforded the opportunity to request a prehearing conference regarding these issues.

4. Respondent has failed to provide satisfactory proof of workers' compensation insurance coverage to the

Division for the period(s) noted in Subsequent Violation Exhibit A of this order, did not request a prehearing conference, and has failed to satisfactorily demonstrate why Respondent was exempt from the insurance requirements of the Act. However, the record also shows that Respondent, following receipt of the Director's Notice to Show Compliance – Subsequent Violation, did obtain a policy of insurance that became effective on July 10, 2014.

5. The Respondent was and is in default of its insurance obligations. Moreover, in an order issued on May 24, 2006, the Director previously found Respondent to be in default of its insurance obligations during the period(s) noted in that order and any exhibit referenced in the order. The Respondent's previous period of default ended on June 9, 2006 when Respondent obtained a workers' compensation insurance policy from Employers Compensation Insurance Company

6. Section 8-43-409 C.R.S. provides that in instances of default, the Director shall take one or both of the following actions: order a defaulting employer to immediately cease and desist business operations until workers' compensation insurance is obtained, *or* impose daily fines of not less than Two Hundred Fifty Dollars ($250.00) or more than Five Hundred Dollars ($500.00) upon an employer for each day that the employer failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allowed such insurance to lapse, or failed to renew such coverage. The Respondent has not provided a satisfactory reason or explanation nor produced evidence of why a cease and

desist order and/or a fine of $250/day to $500/day for each day of its default is not warranted.

THEREFORE, IT IS NOW ORDERED:

1. As the Respondent is now in compliance with the insurance provisions of the Act, the Director determines that, under the totality of circumstances presented, it is appropriate to impose fines on Respondent.

2. Workers' Compensation Rule of Procedure 3-6 provides schedules of fines for periods when coverage should have been in place but was not. The fines to be imposed are to be in accordance with the schedules of fines contained in Rule 3-6. Consequently, a fine in the total amount as set out below and in Subsequent Violation Exhibit A enclosed, is now hereby imposed for the period(s) noted in the Exhibit and incorporated here as part of this order.

3. Respondent is ordered to pay by **cashier's check,** payable to the Treasurer, State of Colorado, a fine in the initial amount of **$841,200.00 (Eight Hundred Forty One Thousand Two Hundred Dollars)** determined in accordance with the provisions of Rule 3-6 and calculated as is more fully set out in Subsequent Violation Exhibit A enclosed and incorporated herein by reference.

4. Respondent is to mail or otherwise deliver the total amount of **$841,200.00 (Eight Hundred Forty One Thousand Two Hundred Dollars) ALONG WITH A COPY OF THIS SPECIFIC FINDINGS OF FACT, CONCLUSIONS AND ORDER TO PAY FINE – SUBSEQUENT VIOLATION** to the Director,

Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 immediately, but in no event later than twenty (20) days from the date of this SPECIFIC FINDINGS OF FACT, CONCLUSIONS AND ORDER TO PAY FINE – SUBSEQUENT VIOLATION.

5. Respondent is to provide to the Director upon the Director's request, proof of workers' compensation insurance coverage (or evidence satisfactory to the Director supporting exemption there from) for any period or periods requested by the Director for which the Director has cause to believe that coverage was or may have been required.

DIVISION OF WORKERS' COMPENSATION

BY /s/Paul Tauriello
Paul Tauriello, Director

This Order of the Director is final and not subject to appeal unless a petition to review, meeting the requirements of and in compliance with the provisions of §8-43-301(2) is filed with the Director and mailed or delivered as required in that statute to the Director, Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202 within twenty (20) days after the date this Order is mailed.

A copy of this **SPECIFIC FINDINGS OF FACT, CONCLUSIONS AND ORDER TO PAY FINE – SUBSEQUENT VIOLATION and SUBSEQUENT VIOLATION EXHIBIT A** was mailed to the following

at the address shown below on October 30, 2014 by Nikki G..

Dami Hospitality LLC FEIN: 84-1545878
DBA Motel 8
2341 East Dartmouth Place
Englewood CO 80110

SUBSEQUENT VIOLATION
EXHIBIT A

In the matter of
Dami Hospitality LLC
DBA Motel 8
2341 East Dartmouth Place
Englewood CO 80110
FEIN: 84-1545878

October 30, 2014

Records show that on and/or after July 1, 2005 the Respondent employed one or more persons in the State of Colorado and that Respondent was not exempt from but was subject to the provisions of the Act on and during the times noted immediately below:

August 10, 2006 through June 8, 2007
And
September 12, 2010 through July 9, 2014

$250.00 per day for the period from August 10, 2006 through August 29, 2006 in the amount of $5,000.00 (Five Thousand Dollars).

$260.00 per day for the period from August 30, 2006 through September 3, 2006 in the amount of $1,300.00 (One Thousand Three Hundred Dollars).

$280.00 per day for the period from September 4, 2006 through September 8, 2006 in the amount $1,400.00 (One Thousand Four Hundred Dollars).

$300.00 per day for the period from September 9, 2006 through September 13, 2006 in the amount of $1,500.00 (One Thousand Five Hundred Dollars)

$400.00 per day for the period from September 14, 2006 through September 18, 2006 in the amount in the amount of $2,000.00 (Two Thousand Dollars).

$500.00 per day for the period from September 19, 2006 through June 8, 2007 in the amount of $131,500.00 (One Hundred Thirty One Thousand Five Hundred Dollars).

$500.00 per day for the period from September 12, 2010 through July 9, 2014 in the amount of $698,500.00 (Six Hundred Ninety Eight Thousand Five Hundred Dollars).

The total amount of the fine for the periods noted above is $841,200.00 (Eight Hundred Forty One Thousand Two Hundred Dollars)

APPENDIX H

Colo. Rev. Stat. § 8-43-409. Defaulting employers--penalties--enjoined from continuing business--fines--procedure--definition

(1) An employer subject to the terms and provisions of articles 40 to 47 of this title who fails to insure or to keep the insurance required by such articles in force, allows the insurance to lapse, or fails to effect a renewal of the insurance shall not continue business operations while such default in effective insurance continues. Upon receiving information that an employer is in default of its insurance obligations, the director shall investigate and, if the information can be substantiated, shall notify the employer of the opportunity to request a prehearing conference on the issue of default. As part of the director's investigation, the director may verify that all employees of that employer are insured through the employer's workers' compensation plan. The director may forward any workers' compensation coverage issue to the employer's workers' compensation carrier for further investigation by the carrier. Thereafter, if necessary, the director may set the issue of the employer's default for hearing in accordance with hearing time schedule and procedures set forth in articles 40 to 47 of this title and rules promulgated by the director. Upon a finding that the employer is in default of its insurance obligations, the director shall take either or both of the following actions:

(a) Order the employer in default to cease and desist immediately from continuing its business operations during the period such default continues;

(b) For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage, impose a fine of:

(I) Not more than two hundred fifty dollars for an initial violation; or

(II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation. For purposes of this subparagraph (II) only, if an employer has been fined pursuant to subparagraph (I) of this paragraph (b) and the director determines that substantially the same people or entities were involved in forming a subsequent employer, the initial violation referred to in subparagraph (I) of this paragraph (b) shall be deemed to have already occurred with regard to violations committed by the subsequent employer.

(2) A cease-and-desist order issued or fine imposed by the director under subsection (1) of this section shall include specific findings of fact that reflect:

(a) The employer received notice of a hearing, when applicable;

(b) The employer employs employees for whom it must carry workers' compensation insurance under the provisions of articles 40 to 47 of this title;

(c) The employer does not or did not have a policy of workers' compensation insurance in effect; and

(d) The employer continues or continued to operate its business in the absence of such coverage.

(3) Notwithstanding any other provision of articles 40 to 47 of this title, after the entry of a cease and desist order and upon the request of the director, the attorney general shall immediately institute proceedings for injunctive relief against the employer in the district court of any county in this state where such employer does business. In any such district court proceeding, a certified copy of any cease and desist order entered by the director in accordance with the provisions of subsection (1) of this section based upon evidence in the record shall be prima facie evidence of the facts found in such record. Such injunctive relief may include the issuance of a temporary restraining order under rule 65 of the Colorado rules of civil procedure, which order shall enjoin the employer from continuing its business operations until it has procured the required insurance or has posted adequate security with the court pending the procurement of such insurance. The court, in its discretion, shall determine the amount that shall constitute adequate security.

(4) The issuance of an order to cease and desist, the imposition of a fine pursuant to subsection (1) of this section, or the issuance of an order for injunctive relief against an employer for failure to insure or to keep insurance in force as required by articles 40 to 47 of this title shall be the penalty for such failure within the meaning of section 8-43-304(1) and such penalty shall

be in addition to the increase in benefits that section 8-43-408 requires.

(5) The director or administrative law judge shall report to the division each time a fine is imposed pursuant to subsection (1) of this section. Each such report shall include the amount of the fine and the name of the offending party.

(6) A certified copy of any final order of the director ordering the payment of a fine imposed pursuant to subsection (1) of this section may be filed with the clerk of the district court of any county in this state at any time after the period of time provided by articles 40 to 47 of this title for appeal or seeking review of the order has passed without appeal or review being sought or, if appeal or review is sought, after the order has been finally affirmed and all appellate remedies and all opportunities for review have been exhausted. The party filing the order shall at the same time file a certificate to the effect that the time for appeal or review has passed without appeal or review being undertaken or that the order has been finally affirmed with all appellate remedies and all opportunities for review having been exhausted. The clerk of the district court shall record the order and the filing party's certificate in the judgment book of the court and entry thereof made in the judgment docket, and it shall thereafter have all the effect of and constitute a judgment of the district court, and execution may issue thereon from said court as in other cases. Any such order may be filed by and in the name of the director.

(7) Fines collected pursuant to this section shall be transmitted to the state treasurer, who shall credit

twenty-five percent of such fine to the workers' compensation cash fund, created in section 8-44-112, which shall be used to offset the premium surcharge. The state treasurer shall credit the remainder of the fine to the general fund.

(8) For the purposes of this section, "construction site" means a location where a structure that is attached or will be attached to real property is constructed, altered, or remodeled.