SUMMARY
April 7, 2022

2022COA40

No. 21CA0288, *Macaulay v. ICAO* — Limitation of Actions; Workers' Compensation — Review Procedures — Reopening — Violations — Request for Penalties

For the first time, a division of the court of appeals considers the interplay between two limitations periods set forth in the Workers' Compensation Act — the limitation period for reopening a case and the limitation period for asserting a penalty claim. The division concludes that both limitation periods apply when a claimant whose case has closed seeks to assert a penalty claim. Under these circumstances, the claimant must reopen his or her case before the claimant may pursue a claim for penalties. Thus, where, as in this case, the limitation period for reopening the case has expired, the claim for penalties is untimely.

Judge Taubman concurs in part and dissents in part. He concludes that the two limitation periods operate independently and that, in this case, only the limitation period for penalty claims applies. Therefore, he would hold that the claimant's penalty claims are not time-barred.

COLORADO COURT OF APPEALS **2022COA40**

Court of Appeals No. 21CA0288
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-889-298

Dr. Hugh Macaulay,

Petitioner-Appellant and Cross Appellee,

v.

Allen Villegas,

Respondent-Appellee and Cross Appellant,

and

Industrial Claim Appeals Office of the State of Colorado, Denver Water, and Travelers Indemnity Co.,

Respondents.

ORDER AFFIRMED IN PART, SET ASIDE IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE LIPINSKY
Brown, J., concurs
Taubman*, J., concurs in part and dissents in part

Announced April 7, 2022

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., David J. Dworkin, Denver, Colorado, for Petitioner

Chris Forsyth Law Office, LLC, Chris Forsyth, Denver, Colorado for Respondent Allen Villegas

No Appearance for Respondent Industrial Claim Appeals Office

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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. 2021.

¶ 1 The Workers' Compensation Act (Act) is intended to ensure that injured workers receive the "quick and efficient delivery" of benefits "at a reasonable cost to employers." § 8-40-102(1), C.R.S. 2021. The statutes of limitations incorporated into the Act help achieve this goal by limiting "inherent administrative and practical difficulties" that arise when claims age, "such as the proof problems associated with old injuries, the need to preserve full case records indefinitely, and the inability of insurance carriers to predict their future liability and compute appropriate reserves." *Calvert v. Indus. Claim Appeals Off.*, 155 P.3d 474, 476 (Colo. App. 2006). But the Act does not carry one blanket statute of limitations across all of its provisions. Instead, different sections of the Act are subject to disparate deadlines.

¶ 2 In this appeal, we examine the interplay of two of those statutes of limitations: the six-year statute of limitations within which a closed claim can be reopened under section 8-43-303, C.R.S. 2021; and the one-year statute of limitations within which a party must assert a penalty claim under section 8-43-304(5), C.R.S. 2021. To preserve the Act's cohesiveness, the two sections must work together. We conclude that harmony between the two sections

can only be achieved by limiting the assertion of penalty claims to open or reopened claims. Once the statute of limitations for reopening has expired, a party can no longer pursue penalties in that claim.

¶ 3 Claimant, Allen Villegas, appeals several issues relating to his claims for recovery of penalties from his employer, Denver Water; Denver Water's insurer, Travelers Indemnity, Co.; and the physician who oversaw his workers' compensation examination, Dr. Hugh Macaulay. Villegas asserts that Denver Water and Macaulay violated section 8-43-203(3)(b)(IV), C.R.S. 2021, of the Act by permitting "nurse case managers" —nurses skilled in administering an insurer's case management program for injured workers — to attend his medical examinations without his knowledge or permission.

¶ 4 However, because Villegas brought the penalty claims after the window to reopen his case closed, Denver Water and Dr. Macaulay sought dismissal of his claims on statute of limitations grounds. An administrative law judge (ALJ) agreed with Denver Water and Dr. Macaulay and dismissed Villegas's action. The Industrial Claim Appeals Office (Panel) affirmed the ALJ's order with respect to

Denver Water but set aside the ALJ's dismissal of penalty claims against Dr. Macaulay because it concluded that the statute of limitations did not apply to him.

¶ 5 We conclude that the statute of limitations applies to Villegas's claims asserted against both Denver Water and Dr. Macaulay. We therefore affirm the Panel's order upholding the dismissal of penalty claims against Denver Water and set aside that portion of the Panel's order reinstating penalty claims against Dr. Macaulay.

I. Background

¶ 6 On February 15, 2012, while working for Denver Water, Villegas sustained an admitted work-related back injury. He received treatment for his injuries at Denver Water's in-house medical clinic. Eventually, he was placed at maximum medical improvement (MMI) and, in September 2015, Denver Water filed a final admission of liability (FAL) admitting to an impairment rating of 17% of the whole person. Villegas sought permanent total disability (PTD) benefits, but an ALJ denied and dismissed the PTD claim, leaving Villegas with a permanent partial disability (PPD) award based on the 17% whole person impairment rating. The Panel upheld the ALJ's order, and a division of this court affirmed.

See Villegas v. Indus. Claim Appeals Off., (Colo. App. No. 17CA1619, Sept. 20, 2018) (not published pursuant to C.A.R. 35(e)). Villegas petitioned for a writ of certiorari to the Colorado Supreme Court, which was denied. *See Villegas v. Indus. Claim Appeals Off.*, (Colo. No. 18SC770, Jan. 7, 2019) (unpublished order). The parties agree that Villegas's claim subsequently closed.

¶ 7 In his opening-answer brief, Villegas states that "[s]ometime after April 5, 2018," he learned that a supervisor at Denver Water's clinic testified in an April 5, 2018, hearing that "staff members at the clinic serve as nurse case managers, and not in a treating capacity, when employees are injured at work." Villegas does not dispute that the case in which the supervisor testified did not involve him. The information became pertinent because the Act requires employers and insurers to advise claimants of their right to refuse to be examined in the presence of a nurse case manager. *See* § 8-43-203(3)(b)(IV).

¶ 8 The Act requires employers or their insurers to offer managed care services to injured workers. § 8-42-101(3.6)(p)(II), C.R.S. 2021. The Act defines case management as "a system developed by the insurance carrier in which the carrier shall assign a person

knowledgeable in workers' compensation health-care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." § 8-42-101(3.6)(p)(I)(A). A "nurse case manager" is "a highly skilled nurse who specializes in managing workers' compensation injuries, whether it is a catastrophic injury or an injury that requires surgery." *Workers' Compensation Guide* § 2:14, Westlaw (database updated Apr. 2018).

¶ 9 Nearly one year after learning that some of the nurses at Denver Water's clinic may have served as nurse case managers, on April 4, 2019, Villegas filed an application for hearing in which he asserted claims for penalties against Denver Water and Dr. Macaulay because they allegedly permitted nurse case managers to attend his appointments with Dr. Macaulay without his knowledge or consent. Villegas asserted sixty-five separate grounds for penalties, including allegations that Denver Water and Dr. Macaulay violated sections 8-42-101(3.6)(p)(II), 8-43-203(3)(b)(IV), and 8-47-203(1), C.R.S. 2021. He also petitioned to reopen his closed claim "on the basis of fraud, treatment after MMI, [and] MMI."

¶ 10 Denver Water and Dr. Macaulay moved to strike the application for hearing, but a prehearing administrative law judge (PALJ) only partially granted their request. The PALJ permitted some claims to continue but dismissed others. Denver Water and Dr. Macaulay also moved to add a statute of limitations defense, which, they informed the PALJ, they had inadvertently omitted. The PALJ denied the request to add a statute of limitations defense, finding that Denver Water and Dr. Macaulay had failed to establish good cause for its late inclusion.

¶ 11 As Villegas explains in his opening-answer brief, "[d]ue to ongoing discovery" he "was ordered to withdraw and refile his application for hearing." In a new application for hearing filed on October 14, 2019, Villegas again endorsed sixty-five separate grounds for penalties despite the PALJ's order striking the "penalty claims 1 through 3 and 18 through 58" in his initial application for hearing because such penalty claims concerned allegations that "predate[d] the date of injury." In their responses to Villegas's October 14, 2019, application for hearing, Denver Water and Dr. Macaulay endorsed the statute of limitations as a defense.

¶ 12 Denver Water later moved for summary judgment, seeking the dismissal of Villegas's application for hearing. An ALJ granted Dr. Macaulay's request to join the motion. Denver Water and Dr. Macaulay's primary contention was that the applicable statute of limitations barred Villegas's penalty allegations. They argued that Villegas could not assert any penalty claims unless his case — which had been closed after the supreme court denied his petition for writ of certiorari — was reopened under section 8-43-303. Reopening, they pointed out, must be sought within the later of six years of the date of injury or two years of the last indemnity payment. But Villegas's injury occurred in February 2012, more than seven years before he filed his April 2019 application for hearing. And according to Denver Water and its FAL, his PPD payments "were scheduled to be paid until October 17, 2016," because Villegas would reach the statutory benefits cap at that time. Villegas does not dispute this timeline.

¶ 13 The ALJ agreed that the period for filing a petition to reopen had expired. Further, the ALJ rejected Villegas's assertions that Denver Water and Dr. Macaulay had withheld information about nurse case managers from him. To the contrary, the ALJ noted that

Denver Water had notified Villegas of his right to refuse the presence of a nurse case manager by sending him "the statutorily required brochure" with Denver Water's notice of contest (NOC).

¶ 14 The ALJ referred to the affidavit of Denver Water's insurance adjuster, Theresa Manshardt, who stated that she "filed a [NOC] on July 9, 2012, with an information brochure attached. The brochure was sent to [Villegas] with the July 9, 2012[,] NOC. The NOC state[d], 'Brochure sent.'" She further noted that the brochure sent to Villegas advised him that "he had the right to discuss with his doctor who should be present during an appointment and the right to refuse to have a nurse case manager present."

¶ 15 Based on his findings, the ALJ concluded there was no basis for equitable tolling of the statute of limitations. He therefore granted summary judgment in favor of Denver Water and Dr. Macaulay, holding that the applicable statute of limitations barred Villegas's penalty claims.

¶ 16 On review, the Panel upheld the ALJ's grant of summary judgment in favor of Denver Water. Like the ALJ, the Panel rejected Villegas's equitable tolling argument. It held instead that there was insufficient evidence that Denver Water's or Dr. Macaulay's actions

"prevented [Villegas] from asserting a timely reopening claim." Likewise, the Panel disagreed with Villegas's contention that penalties are governed only by the statute of limitations in section 8-43-304(5), which permits a penalty claim to proceed so long as the claim is asserted within one year of a party's actual or constructive discovery of the alleged violative act. The Panel reasoned that, although the penalty statute required assertion of a penalty claim within one year of discovery of the alleged violative act, a party must still move to reopen a claim to pursue penalties in a closed matter. The Panel concluded that, because the claim had been closed and the period to reopen had expired, Villegas was barred from pursuing his penalty claims against Denver Water. However, the Panel concluded that any penalty claims asserted against Dr. Macaulay could proceed because the "closure of issues" only pertained to the parties to the FAL. Because Denver Water — not Dr. Macaulay — filed the FAL, the Panel determined that Dr. Macaulay was not subject to the claim's closure.

¶ 17 Dr. Macaulay and Villegas now appeal.

II. The Record Is Adequate to Conduct the Necessary Review

¶ 18 Before we turn to the primary contentions raised in this appeal, we must first address Villegas's contention that the record was insufficient for appellate review of the statute of limitations issue both before the Panel and here. Villegas asserts that the record "fails to include [his] responses to the motion for summary judgment and affidavits, a transcript[,] and arguments showing contested issues of material fact." He further asserts that he "suffers great prejudice from the insufficient record." We are not persuaded.

A. Evidence Not Necessary to Resolve Legal Issues

¶ 19 The primary issues we have been asked to address — the applicability of the statute of limitations in the reopening statute, section 8-43-303, and the necessity of first reopening closed cases before asserting penalty claims under section 8-43-304 — require legal analysis and statutory interpretation. Neither the missing transcript nor Villegas's response to the motion for summary judgment will assist us in analyzing these legal questions. Indeed, our analysis would not change even if the record contained the filings that Villegas asserts are missing. Although we must examine

the Panel's and the ALJ's summary judgment orders, these orders are contained in the record, amply satisfying our reviewing needs.

¶ 20 Despite his protestations of an insufficient record, Villegas never explains how the missing information would illuminate our analysis. He conflates an incomplete record with an inadequate one. Although we acknowledge that some documents and pleadings are not in the record, that does not mean the record is inadequate to permit appellate review. *See, e.g.*, *Nova v. Indus. Claim Appeals Off.*, 754 P.2d 800, 801 (Colo. App. 1988) (Where transcript was not part of record, "we presume that the hearing officer's resolution of this issue is supported by the evidence."). Where, as here, our decision is not dependent on a review of underlying facts but rather on statutory interpretation and legal conclusions, our analysis is not undermined even though some documents have been omitted from the record. *See Gilbert v. Julian*, 230 P.3d 1218, 1221 (Colo. App. 2009) (Although the agency failed to include certain documents in record on appeal, "the remainder of the record is sufficient for us to reach the merits of licensee's arguments."); *Shafron v. Cooke*, 190 P.3d 812, 813 (Colo. App. 2008) ("Although review of the Department's determination calls for a review of the

record, the absence of a complete transcript, standing alone, does not mandate the reversal of an administrative order.").

B. Incomplete Record Did Not Violate Due Process

¶ 21 As a corollary to his claim that the record was inadequate for appellate review, Villegas also asserts that the Panel "denied [him] due process by ruling on motions for summary judgment when it did not have [his] response to the motions." Citing *Werth v. Heritage International Holdings, PTO*, 70 P.3d 627, 629 (Colo. App. 2003), which did not address due process, he contends that no court may rule on a motion without first permitting the opposing party to respond to it. We construe this argument as one based on procedural due process.

¶ 22 We agree with this general principle. *See id.* at 629 ("[T]he trial court should have allowed defendant to file a written reply pursuant to the provisions of C.R.C.P. 121 § 1-15(1) before taking any further action."). But the principle does not apply here because, contrary to Villegas's contention, the ALJ, and not the Panel, ruled on Denver Water and Dr. Macaulay's summary judgment motion; the Panel merely reviewed the ALJ's ruling. In his order, the ALJ expressly said that he had reviewed and

considered Villegas's late response to the motion before issuing his ruling. And, importantly, although the Panel did not have Villegas's affidavit and response to the summary judgment in the record before it, Villegas had submitted two briefs to the Panel in support of his petition to review in which he asserted and discussed that reopening was "not required to award penalties." Because the Panel had the benefit of Villegas's arguments when it reviewed the ALJ's grant of summary judgment to Denver Water and Dr. Macaulay, Villegas was not prejudiced. Moreover, his right to due process was not violated because he received "notice and an opportunity to be heard in a meaningful manner" before the ALJ ruled on the summary judgment motion. *See Nichols v. DeStephano*, 70 P.3d 505, 507 (Colo. App. 2002), *aff'd*, 84 P.3d 496 (Colo. 2004); *see also Bradshaw v. Cherry Creek Sch. Dist. No. 5*, 98 P.3d 886, 890 (Colo. App. 2003) (rejecting claim of due process violation for allegedly failing to provide time to respond to evidence at hearing where committee members presented and considered evidence).

¶ 23 As noted above, however, a complete record is not a prerequisite to appellate review. *See Gilbert*, 230 P.3d at 1221; *Shafron*, 190 P.3d at 813. Conversely, an incomplete record cannot

form the basis of a procedural due process claim, which requires only notice and the opportunity to be heard. *See Delta Cnty. Mem'l Hosp. v. Indus. Claim Appeals Off.*, 2021 COA 84, ¶ 28, 495 P.3d 984, 992 ("The fundamental requisites of [procedural] due process are notice and the opportunity to be heard." (quoting *Franz v. Indus. Claim Appeals Off.*, 250 P.3d 755, 758 (Colo. App. 2010))). Moreover, Villegas's assertions were fully heard and considered at each stage of these proceedings. His procedural due process rights were consequently thoroughly protected despite the incomplete record. *Cf. People in Interest of M.P.*, 690 P.2d 1300, 1302 (Colo. App. 1984) (no due process violation where party afforded full hearing even though it went late into the night).

¶ 24 Accordingly, we reject Villegas's contention that the record was inadequate for our appellate review or that his procedural due process rights were violated because the record was incomplete. We therefore proceed with our analysis of the issues raised.

III. Statute of Limitations

¶ 25 Dr. Macaulay and Denver Water contend that Villegas's penalty claims are barred by the applicable reopening statute of limitations. They point out that Villegas filed his application for

hearing asserting penalty claims on April 4, 2019, but that his injury dates back to February 15, 2012, seven years earlier. Likewise, Dr. Macaulay and Denver Water point out, and Villegas does not dispute, that before filing his application for hearing, he had not received any indemnity payments since October 17, 2016. They contend that, under the statute of limitations in the reopening statute, the latest Villegas could have filed a petition to reopen seeking penalties was October 2018. Because Villegas did not file his petition to reopen and claims for penalties until six months after October 2018, Dr. Macaulay and Denver Water assert his claims were barred.

¶ 26 The Panel agreed with this analysis as it pertains to Denver Water, but, with respect to Dr. Macaulay, concluded that the limitation did not apply because "only an employer and its insurance carrier may file a [FAL]." Therefore, the Panel reasoned, the automatic closure of issues raised in a FAL applies "only in respect to those parties," leaving open the possibility of asserting claims against another individual not a party to the FAL, like Dr. Macaulay.

¶ 27 Dr. Macaulay argues that this reading of the Act leads to absurd results. He points out that the Act provides for the automatic closure of "cases," not just closure of issues. Moreover, he asserts, permitting claims to be filed against individuals at any time would lead to uncertainty for parties, an outcome the General Assembly sought to avoid.

¶ 28 Villegas responds that the reopening statute and the penalty statute do not conflict but, rather, address different issues. He asserts that, even if the statutes conflict, they can be harmonized. As explained further below, Villegas specifically contends that the only limitation period applicable to penalty claims is the one-year period set forth in the penalty statute.

¶ 29 We agree with Dr. Macaulay and Denver Water that the applicable reopening statute of limitations bars Villegas's penalty claims.

A. Governing Statutes and Law

¶ 30 The Act provides finality through automatic case closure if a party does not challenge an admission or has exhausted his or her legal remedies. It states: "the case will be automatically closed as to the issues admitted in the final admission if the claimant does not,

within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing . . . ." § 8-43-203(2)(b)(II)(A) (emphasis added).

¶ 31 The Act clarifies that "[o]nce *a case* is closed pursuant to [section 8-43-203(2)], *the issues closed* may only be reopened pursuant to section 8-43-303." § 8-43-203(2)(d) (emphasis added); *see also Berg v. Indus. Claim Appeals Off.*, 128 P.3d 270, 272 (Colo. App. 2005) ("Once a case has closed, *the issues resolved by the FAL* are not subject to further litigation unless they are reopened pursuant to [section] 8-43-303.") (emphasis added). The automatic closure applies to all issues which are necessarily resolved by the admissions enumerated in a FAL, even if those issues are not expressly set out in the FAL. *See Olivas-Soto v. Indus. Claim Appeals Off.*, 143 P.3d 1178, 1180 (Colo. App. 2006) (holding that issue of PTD benefits automatically closed because the employer's admission of PPD benefits necessarily constituted the employer's denial of PTD benefits; the claimant was therefore required to seek reopening of the claim to pursue PTD benefits). Denver Water's FAL expressly stated that "[a]ny benefits and penalties not specifically

admitted herein are denied." This catch-all language included any penalty claims Villegas had or may have had.

¶ 32 Because the issues encompassed in Denver Water's FAL had automatically closed, the case had to be reopened before any further action could be taken. That reopening provision specifies:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment . . . , an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all rights to reopen an award . . . .

§ 8-43-303(1). Likewise,

> [at] any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable, the director or an administrative law judge may, after notice to all parties, review and reopen an award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award . . . .

§ 8-43-303(2)(a). Thus, reopening must be requested within the later of six years of a claimant's date of injury or two years after the last disability or medical benefit becomes due or payable.

¶ 33 The parties do not dispute that Villegas asserted his penalty claims more than six years after his date of injury and more than two years after receiving his last benefit payment. Thus, Villegas's reopening petition is barred under the express provisions of section 8-43-303.

¶ 34 But Villegas insists that, because he asserted penalty claims, he need not have reopened his case, and the statute of limitations contained in section 8-43-304(5) controls. That provision says, in relevant part:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, . . . for which no penalty has been specifically provided, . . . shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105[, C.R.S. 2021] . . . .

§ 8-43-304(1). "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." § 8-43-304(5).

¶ 35 Villegas argues that he timely filed his April 4, 2019, application for hearing because less than one year had elapsed since he or his counsel learned of the potential presence of a nurse case manager at his medical appointments with Dr. Macaulay.

B. Standard of Review

¶ 36 To address Villegas's contention, we must examine the interplay of the reopening and penalty provisions. We review the Panel's interpretation of these statutes de novo. *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005).

¶ 37 "When interpreting a statute, we must determine and give effect to the legislature's intent." *Fisher v. Indus. Claim Appeals Off.*, 2021 COA 27, ¶ 15, 484 P.3d 816, 819. If the statutory language is clear, we interpret the statute according to its plain and ordinary meaning. *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). In addition, we "look also to the beneficent purposes" of the Act, "reading it as a whole," giving meaning and

effect to every word, and construing the Act "harmoniously, if possible, and, if not, reconciling conflicts." *Colo. Dep't of Lab. & Emp. v. Esser*, 30 P.3d 189, 195 (Colo. 2001).

¶ 38 Likewise, because the ALJ entered summary judgment for Denver Water and Dr. Macaulay, we review that decision, as well as the Panel's order concerning it, de novo. *Fera v. Indus. Claim Appeals Off.*, 169 P.3d 231, 233 (Colo. App. 2007). ALJs are authorized to enter summary judgment when there are no disputed issues of material fact. *See* Dep't of Pers. & Admin. Rule 17, 1 Code Colo. Regs. 104-3; *Fera*, 169 P.3d at 233; *see also* § 8-43-308, C.R.S. 2021. We may only "set aside the grant of summary judgment in an employer's favor if we determine that conflicts in the evidence are not resolved in the record or the order is not supported by applicable law." *Baum v. Indus. Claim Appeals Off.*, 2019 COA 94, ¶ 34, 487 P.3d 1079, 1087 (quoting *Fera*, 169 P.3d at 233).

C. The Statute of Limitation in Section 8-43-303 Applies

¶ 39 Since asserting his penalty claims against Dr. Macaulay and Denver Water, Villegas has maintained that such claims are not subject to the statute of limitations contained in the reopening statute. *See* § 8-43-303(1), (2). Instead, he argues, the one-year

statute of limitations in the penalty provision takes precedence. *See* § 8-43-304(5). Paraphrasing his contention, he asserts that reopening is not required to assert penalties under the penalty statute. We disagree.

¶ 40 As noted above, the Act must be read harmoniously as a whole, giving effect to all its provisions and ensuring that no provision is rendered superfluous. *See Wolford v. Pinnacol Assurance*, 107 P.3d 947, 948 (Colo. 2005).

¶ 41 Although section 8-43-304(5) states that requests for penalties must be filed "within one year after the date the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty," *Wolford* makes clear that we cannot read the provision in a vacuum. Nothing in the Act indicates that a worker may assert a penalty claim years after the worker's case closed, as Villegas's argument, taken to its logical extreme, suggests. The provisions must work in concert and cannot be viewed independently.

¶ 42 Contrary to Villegas's assumption, the applicable closure provision in section 8-43-203(2)(b)(II) makes clear that a "case" will automatically close if a FAL is not challenged or remedies have been

exhausted. The definition of "case" has been refined over decades and is now generally understood to refer to the entirety of a proceeding. *See, e.g.*, *People v. Owens*, 219 P.3d 379, 384 (Colo. App. 2009) ("The word 'case' . . . refers to the entirety of an individual criminal proceeding."); *Messenger v. Bd. of Comm'rs*, 117 P. 126, 130 (Wyo. 1911) ("A 'civil case' is defined as a suit at law to redress the violation of some contract, or to repair some injury to property, or to the person or personal rights of individuals."); *see also* Black's Law Dictionary 266 (11th ed. 2019) (broadly defining a "case" as a "civil or criminal proceeding, action, suit, or controversy at law or in equity"). Black's derived its definition from *Smith v. City of Waterbury*, which held that "a case" means "a contested question before a court of justice; a suit or action; a cause." 7 A. 17, 19 (Conn. 1886) (citation omitted). And Merriam-Webster defines a "case" as "a suit or action in law or equity." Merriam-Webster Dictionary, https://perma.cc/83HT-TA87. "Case" is thus an expansive term.

¶ 43 Section 8-43-203(2)(b)(II) does not carve out an exception for penalties. It does not say a "case will automatically close" except for any penalties that may later be discovered. Instead, it provides

for the closure of the entire case. Giving the term its plain meaning, we must, then, interpret section 8-43-203(2)(b)(II) as closing all portions of a workers' compensation case, including any penalty requests. *See Esser*, 30 P.3d at 195.

¶ 44 Our interpretation is supported by the reopening statute itself, which lists multiple grounds for reopening an "award." *See* § 8-43-303(1), (2). "Award" is broadly defined as "[a]n order, whether resulting from an admission, agreement, or a contested hearing, which addresses benefits and which grants or denies a benefit." *Burke v. Indus. Claim Appeals Off.*, 905 P.2d 1, 2 (Colo. App. 1994). Taken together, we have long interpreted sections 8-43-203 and 8-43-303 as mandating reopening before any action can be taken in a closed case. *See Berg*, 128 P.3d at 272 (reopening required before claimant could challenge validity of the MMI determination of the division-sponsored independent medical examination (DIME)); *see also Feeley v. Indus. Claim Appeals Off.*, 195 P.3d 1154, 1157 (Colo. App. 2008) (reopening required before claimant could further challenge DIME, seek additional temporary total disability benefits, or request penalties); *Leewaye v. Indus. Claim Appeals Off.*, 178 P.3d 1254, 1256-57 (Colo. App. 2007)

(objections to FAL must be filed within thirty days or the issues asserted therein close, necessitating reopening before further litigation may be pursued). We perceive no reason to depart from this general construction.

¶ 45 Reviewing the grounds upon which Villegas sought penalties requires us to closely analyze the language in sections 8-43-303 and -304. In his applications for hearing, Villegas identified "fraud" as the basis for his penalty claims. In essence, he asserted that Denver Water misrepresented the role or identity of nurses present in his examination room. He argued that they were, or at least may have been, nurse case managers rather than clinical nurses and that he was neither informed of their role nor given an opportunity to decline their presence under section 8-43-203(3)(b)(IV).

¶ 46 Both section 8-43-303 and 8-43-304 expressly address fraud claims. The identification of "fraud" in both statutes suggests that the General Assembly anticipated that pursuing a later penalty claim for fraud required reopening a case.

¶ 47 The reopening statute lists "fraud" as a ground for reopening a case. *See* § 8-43-303(1), (2). In other words, if a party discovers that its adversary has committed fraud after a case has closed, the

party may seek reopening under section 8-43-303 for redress of the fraud. A reopening based on fraud is unquestionably subject to the statute of limitations contained in the reopening provisions. *See* § 8-43-303(1), (2). If, as Villegas contends, a penalty for such fraud could be asserted years after any benefits had been paid and the claim had closed, why would the General Assembly have enumerated fraud among the grounds for reopening?

¶ 48 Fraud is also included as a ground for penalties in section 8-43-304(2). Specifically, if an insurer discovers that an injured worker has made a fraudulent claim for benefits, the insurer "may take a credit or offset of previously paid workers' compensation benefits." § 8-43-304(2). This subsection specifically targets fraud committed by injured workers and penalizes them for fraud by reducing their benefits. Clearly, then, the General Assembly viewed reducing an injured worker's benefits *as a penalty*. Under Villegas's proposed construction, workers could be accused of fraud by their employers and insurers decades after the alleged injury occurred. Such an outcome — exposing workers to fraud allegations long after a claim has closed, thereby depriving them of the certainty of closure — seems to us to cause workers more harm than good.

¶ 49 Contrary to Villegas's assertion, penalties are not separate from or entirely independent of benefits. Rather, penalties directly affect benefits. And the General Assembly recognized this interdependence when it made a reduction in benefits the penalty imposed on a worker who commits fraud. *See* § 8-43-304(2). Cases applying this provision further clarify that penalties are inextricably linked to benefits. *See Wolford*, 107 P.3d at 954 (A worker's conviction for workers' compensation insurance fraud "required the forfeiture of the [temporary total disability] benefits she received while working fulltime as a secretary because there exists a nexus between that compensation and her false statements."); *Lewis v. Sci. Supply Co., Inc.*, 897 P.2d 905, 908 (Colo. App. 1995) (ALJ could "terminate all future benefits payable under the award" as penalty against worker who admitted he "faked" his auto accident.). At least one other jurisdiction — where, like Colorado, penalties are calculated as a percentage of compensation — has expressly held that penalties are "properly characterized as part and parcel of the original compensation award." *Anderson v. Workers' Comp. Appeals Bd.*, 172 Cal. Rptr. 398, 401 (Ct. App. 1981); *see also California v. Workers' Comp. Appeals Bd.*, 51 Cal. Rptr. 2d 606, 613 (Ct. App.

1996) ("Accordingly, it is clear the penalty is a part of the compensation provided for in Division 4" of the California Labor Code.).

¶ 50 A consistent approach, then, requires reopening a closed case *before* a claimant may pursue penalties. *See Esser*, 30 P.3d at 195. Put differently, a party seeking to recover a penalty must assert the penalty claim, within one year of discovering another's improper actions, in an open or reopened case. This means that the party seeking reopening to pursue a penalty claim must do so before the expiration of the statute of limitations in the reopening statute, section 8-43-303. Although Villegas characterizes the two statutes of limitations in sections 8-43-303 and 8-43-304(5) as conflicting irreconcilably, in our view they are consistent. Interpreted as discussed above, the statutes work in concert by requiring that penalty claims be brought within one year of discovery of the violative behavior and asserted within the context of an open or reopened claim.

¶ 51 Examining the interplay of the statutes from the opposite perspective illustrates their harmoniousness. For example, when a party discovers another's allegedly fraudulent conduct, the party

must pursue a claim for penalties within one year of that discovery, even if the reopening statute of limitations will not expire for two or more years. In other words, if a party whose case has closed learns of allegedly fraudulent conduct three years after the date of injury, that party must seek penalties within one year of that discovery, even though he or she has two more years beyond the penalty deadline to petition for reopening of the claim. The time period for pursuing penalties in the closed claim is not extended just because time remains to reopen the case. Conversely, if the time allotted for reopening has expired, a worker can no longer pursue penalties in the permanently closed claim.

¶ 52 We therefore agree with the Panel's interpretation, which mandates reopening this closed case before Villegas could pursue penalty claims against Denver Water and Dr. Macaulay. Consequently, we perceive no error in the Panel's, and the ALJ's, conclusion that Villegas's failure to seek reopening within the time limits set out in section 8-43-303(1) and (2) barred his claim.

¶ 53 We are not persuaded otherwise by Villegas's argument that imposing the reopening statute of limitation on him would have culminated in the "absurd" and "illogical" result that he would have

"had to request penalties in 2015 when he was unaware of the facts giving rise to the penalty violation." Because Villegas received his last indemnity payment in October 2016, his window within which to seek reopening to pursue a penalty did not close until October 2018. He states that he learned of Denver Water's and Dr. Macaulay's alleged deception "[s]ometime after April 5, 2018." Accepting this representation as true, he had six months within which to pursue reopening before the expiration of the statute of limitations but did not do so. We are consequently confused by Villegas's assertion that he would have "had to request penalties in 2015" and perceive no absurdity or illogic in the result here.

¶ 54 (Villegas's statement in his opening appellate brief that he learned the factual bases for his penalty claims "[s]ometime after April 5, 2018," logically means that he could have asserted his penalty claims as early as April 6, 2018. If Villegas did not learn the factual bases for his penalty claims as early as April 6, 2018, then he should have said so and provided a more specific date. As the party opposing the entry of summary judgment, Villegas had the burden of presenting "*specific facts* demonstrating the existence

of disputed facts." *See Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1218 (Colo. App. 2009) (emphasis added).)

¶ 55 Accordingly, we conclude that the Panel's interpretation of the statute of limitations in section 8-43-303 is consistent with the General Assembly's intent that the workers' compensation system "assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers." § 8-40-102(1). A conclusion that a worker may assert a penalty claim years after the closing of his or her workers' compensation case would be contrary to the General Assembly's intent that workers' compensation matters be resolved quickly. We therefore uphold this portion of the Panel's order.

D. The Statute of Limitations Applies to Dr. Macaulay

¶ 56 However, we disagree with the Panel's determination that the statute of limitations in the reopening statute did not apply to Dr. Macaulay. The Panel interpreted the statute of limitations as follows:

> However, only an employer and its insurance carrier may file a [FAL]. [§] 8-43-203[2](b)(I). The closure of issues through that admission[,] therefore, are only in respect to those parties. Here, [Villegas] has made a claim for penalties

> not only against the employer and insurer, but also against a third party, Dr. Macaulay. [Villegas] is not barred by [section] 8-43-203(2)(d) from asserting a penalty pertinent to Dr. Macaulay. The limitation that applies is that of the one-year limitations provided in [section] 8-43-304(5). It begins to run after the requesting party first becomes aware of the circumstances that support the imposition of a penalty.

Except for its mention of the applicable statutory provisions, the Panel cited no authority for its interpretation of the statute of limitations as it applies to nonparty individuals "or any other person." *See* § 8-43-304(1). We conclude that the Panel read the statute too narrowly, disregarding other provisions in the Act and failing to read the relevant provisions of the Act harmoniously.

¶ 57 Unquestionably, section 8-43-304(5) imposes a one-year statute of limitations on penalty claims. Any requests for penalties arising out of a violation of the Act or any order must be filed within one year of the date on which "the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." *See* § 8-43-304(5). As detailed above, in our view, this limitation must be read in concert with the Act's closure and reopening provisions.

¶ 58 The automatic closure provisions of section 8-43-203(2)(b)(II) and -203(2)(d) address the closure of "the case," not closure only with respect to the parties to the FAL. Section 8-43-203(2)(b)(II)(A) requires employers and insurers to notify claimants that "*the case* will be automatically closed *as to the issues admitted in the final admission*." (Emphasis added.) Likewise, section 8-43-203(2)(d) provides that "[o]nce *a case* is closed pursuant to this subsection (2), *the issues closed* may only be reopened pursuant to section 8-43-303." (Emphasis added.) Both subsections expressly state that the *case* is closed automatically. Nowhere does the provision permit leaving open portions of a case that may involve other individuals or persons beyond the parties to the FAL.

> In analyzing a provision of the Act, "we interpret the statute according to its plain and ordinary meaning." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). "[W]e give effect to every word and render none superfluous because we 'do not presume that the legislature used language idly and with no intent that meaning should be given to its language.'" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008).

SkyWest Airlines, Inc. v. Indus. Claim Appeals Off., 2020 COA 131, ¶ 31, 487 P.3d 1267, 1274.

¶ 59 The General Assembly's use of the term "case" was not inadvertent. *See Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003) ("We do not 'presume that the legislature used language "idly and with no intent that meaning should be given to its language."'" (quoting *People v. J.J.H.*, 17 P.3d 159, 162 (Colo. 2001))). To fulfill the General Assembly's intent in adopting this statutory provision, we must give "case" its plain, ordinary meaning. As discussed above, the definition of "case" is broad. Its reach is sufficiently expansive to encompass whatever issues may arise in a workers' compensation claim, including penalty claims against nonparty individuals "or any other person" such as Dr. Macaulay. *See Owens*, 219 P.3d at 384; § 8-43-304(1).

¶ 60 We therefore conclude that the Panel's interpretation of sections 8-43-203(2), -303, and -304(5) excluding Dr. Macaulay from the statute of limitations in the reopening provision is inconsistent with the clear legislative intent that cases will be closed automatically. Accordingly, we set aside that portion of the Panel's order determining that the reopening statute of limitations does not apply to Dr. Macaulay. *See Town of Castle Rock v. Indus. Claim Appeals Off.*, 2013 COA 109, ¶ 11, 373 P.3d 609, 612 ("The Panel's

interpretation will . . . be set aside 'if it is inconsistent with the clear language of the statute or with the legislative intent.'" (quoting *Support, Inc. v. Indus. Claim Appeals Off.*, 968 P.2d 174, 175 (Colo. App. 1998))), *aff'd*, 2016 CO 26, 370 P.3d 151.

E. Equitable Tolling Does Not Apply

¶ 61 Villegas contends, essentially in the alternative, that even if the reopening statute of limitations applies, his claims should have been permitted to proceed under the doctrine of equitable tolling. As we understand his argument, he contends that the statute of limitations should have been equitably tolled because "Denver Water and [its insurer] withheld the fact" that staff members at the clinic were serving as case managers. In other words, he asserts that, because Denver Water allegedly failed to disclose the presence of nurse case managers during one or more of his examinations at the Denver Water clinic, the ALJ erred by failing to toll the statute of limitations. He argues that the ALJ "apparently determined that the statute only requires an insurer to send a brochure advising [Villegas] of the right to refuse the presence of a nurse case manager." And he suggests that he does not recall receiving any

such brochure. Denver Water counters that it sent the requisite brochure.

¶ 62 We note first that the provision in the Act mandating employers and/or insurers to advise claimants of their rights states:

> [T]he employer or insurance carrier *shall provide to the claimant a brochure* . . . describing the claims process and informing the claimant of the claimant's rights. . . . The brochure shall, at a minimum, contain the following information:
>
> . . . .
>
> (b) The claimant's right to receive medical care for work-related injuries or occupational diseases paid for by the employer or the employer's insurance carrier including:
>
> . . . .
>
> (IV) *The claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a nurse case manager employed on the claimant's claim present at the claimant's medical appointment*.

§ 8-43-203(3) (emphases added). As the provision makes clear, sending a brochure advising a claimant of these and other enumerated rights complies with the statutory mandate. Thus, if

Denver Water sent Villegas a brochure outlining his rights, it fully complied with section 8-43-203(3).

¶ 63 We acknowledge the apparent discrepancy between Denver Water's and Villegas's positions; however, this factual dispute is irrelevant to our equitable tolling analysis. Focusing on it, as Villegas does, ignores other factors germane to the applicability of equitable tolling here.

¶ 64 A court may consider equitably tolling the applicable statute of limitations if the record shows that "plaintiffs did not timely file their claims because of 'extraordinary circumstances' or because defendants' wrongful conduct prevented them from doing so." *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004); *see also Damian v. Mountain Parks Elec., Inc.*, 2012 COA 217, ¶ 14, 310 P.3d 242, 245. "The reasoning underlying these . . . cases is that it is unfair to penalize the plaintiff for circumstances outside his or her control, so long as the plaintiff makes good faith efforts to pursue the claims when possible." *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 149 (Colo. 2007).

¶ 65 For purposes of Villegas's equitable tolling claim, the only relevant inquiry is what actions, if any, did Denver Water take to

prevent Villegas from timely filing his petition to reopen *after* he learned the facts supporting his penalty claims. *See Morrison*, 91 P.3d at 1053. But Villegas does not argue that Denver Water took any action that prevented him from asserting his penalty claims *after* he learned the factual bases for those claims. Villegas points to his affidavit — in which he disputed receiving the brochure or being made aware of his right to decline the presence of a nurse case manager at his medical examination — to demonstrate the existence of disputed facts that, he argues, should have precluded summary judgment. But even if these allegations are true, they are irrelevant because they do not show how Denver Water prevented Villegas from timely filing his petition to reopen after he learned the facts supporting his penalty claims.

¶ 66 Significantly, Villegas does not assert that Denver Water, its insurer, or Dr. Macaulay took any actions after he learned of the allegedly fraudulent conduct, but before the expiration of the statute of limitations, that stymied his ability to file a timely petition to reopen. In the absence of such evidence, we cannot say that the ALJ or the Panel erred by refusing to equitably toll the statute of limitations.

¶ 67 The cases Villegas cites to support his claim that the statute of limitations had been equitably tolled in similar situations do not convince us to reach a different conclusion. In *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850 (Colo. 1992), the supreme court held that fairness may require the tolling of a statute of limitations. There, the employer withheld from the claimant a medical report indicating that the claimant's condition had worsened, which the claimant needed to support his petition to reopen. *Id.* at 852. The claimant eventually filed an untimely petition to reopen with the notation that he was "waiting for a report" from the authorized treating physician. *Id.* The supreme court remanded the matter for additional factual findings, noting that if additional findings showed that, because the employer withheld the relevant medical report, the claimant "lacked information regarding the medical diagnosis that his condition had worsened, equity would remove the bar of the statute of limitations." *Id.* at 855.

¶ 68 Unlike the claimant in *Garrett*, Villegas admittedly knew the facts underlying his potential penalty claims as early as April 6, 2018 — before the expiration of the statute of limitation — yet made

no attempt to file a timely petition to reopen. In our view, the circumstances here are analogous to those in *Brodeur*, upon which Villegas also relies to support his equitable tolling contention.

¶ 69 In *Brodeur*, the supreme court refused to equitably toll the statute of limitations because, like Villegas here, the plaintiffs in that case had "not alleged that Respondents' wrongful conduct prevented her from filing her bad faith tort claims in a timely manner" nor "presented any facts under which principles of equity might toll the statute of limitations." *Brodeur*, 169 P.3d at 149, 151. Instead, the plaintiffs argued that their bad faith claim should have been equitably tolled during the pendency of their related workers' compensation action. *Id.* at 145. The court noted that prior case law found the need for such equity only "where the plaintiff was truly precluded from bringing a claim by circumstances outside of his or her control." *Id.* at 149-50. Equitable tolling was not appropriate because a pending workers' compensation case was not outside the plaintiff's control and was not caused by any wrongful conduct on the part of the insurer or the employer. *Id.*

¶ 70 Likewise, no circumstances outside of Villegas's control prevented him from timely filing his petition to reopen. Despite his assertions, nothing in the record suggests Denver Water or Dr. Macaulay prevented him from timely filing his petition to reopen.

¶ 71 We therefore conclude that neither the ALJ nor the Panel erred by refusing to equitably toll the statute of limitations. They properly found Villegas's petition to reopen to seek penalties to be time barred.

F. Additional Time to Respond to the Summary Judgment Motion

¶ 72 Villegas also asserts that the ALJ abused his discretion by failing to grant him additional time to respond to the motion for summary judgment. He argues that the ALJ should have granted him an extension to allow him to obtain certain requested discovery.

¶ 73 Grants or denials of extensions of time are entirely discretionary, however. *See* § 8-43-207(1)(i), C.R.S. 2021; *Speier v. Indus. Claim Appeals Off.*, 181 P.3d 1173, 1176 (Colo. App. 2008) ("[S]ection 8-43-207(1)(i) provides ALJs discretionary authority to grant 'reasonable extensions of time' if 'good cause [is] shown.'"). We can only set aside such discretionary acts if it is shown that the

ALJ abused his or her discretion. *See Youngs v. Indus. Claim Appeals Off.*, 2012 COA 85M, ¶ 42, 297 P.3d 964, 972 (refusing to set aside ALJ's discretionary evidentiary ruling absent a showing of abuse of discretion).

¶ 74 We conclude that Villegas has not met this burden. Although he contends that an extension of time would have provided him the opportunity to receive and review discovery before responding to the motion for summary judgment, he does not explain how the expected evidence would have impacted the ALJ's application of the statute of limitations to his untimely petition to reopen. Instead, he asserts that the "documents ordered to be produced by the PALJ include[d] communication with the supervisor of Denver Water's clinic and the claims representative during the time that a fraud was being committed." But, even if Villegas had obtained this evidence before responding to the motion for summary judgment, it would have provided no insight into the timeliness of his petition to reopen. Events that occurred between 2012 and 2016, when Villegas received treatment for his injuries, have no bearing on his failure to timely file a petition to reopen between learning of the

alleged fraud as early as April 6, 2018, and the October 2018 expiration of the statute of limitations.

¶ 75 Given that the documents Villegas sought in discovery did not pertain to the period immediately before the expiration of the statute of limitations, we cannot say that the ALJ abused his discretion by failing to grant Villegas an extension of time to respond.

IV. The ALJ's Jurisdiction to Rule

¶ 76 Villegas next asserts that the ALJ lacked jurisdiction or authority to rule on Denver Water's and Dr. Macaulay's motion for summary judgment. He argues that the ALJ exceeded his jurisdiction by permitting Denver Water and Dr. Macaulay to challenge the timeliness of Villegas's petition to reopen despite a ruling by a PALJ denying their request to add the statute of limitation defense. Relatedly, he also contends that the ALJ should not have overturned a PALJ's order permitting Villegas to add a physician to his witness list. He contends that the ALJ "cannot reverse or disregard the orders of PALJ[]s via a motion process." Villegas also claims the ALJ lacked authority to rule on the summary judgment motion because he "lost jurisdiction" when he

vacated the originally scheduled hearing. None of these arguments persuades us to set aside the order granting summary judgment to Denver Water and Dr. Macaulay.

A. The ALJ's Review of PALJ's Orders

¶ 77 Villegas essentially argues that an ALJ cannot revisit orders issued by a PALJ. Relying on *Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998), he argues that, "absent a merits hearing, an ALJ has no power to affect a prehearing order." But Villegas misreads *Orth*. *Orth* held that a PALJ's statutorily granted authority "to approve settlements pursuant to section 8-43-204[, C.R.S. 2021,]" rendered a PALJ's order approving a settlement final and appealable. *Id.* at 1254, 1256 ("[A] PALJ's order approving a settlement agreement is final for purposes of review."). In contrast, the supreme court held that other orders issued by a PALJ are interlocutory. *Id.* at 1252 ("[T]he General Assembly intended the PALJ's prehearing orders to be interlocutory.").

¶ 78 *Orth* does not suggest that a PALJ's order must be followed in all circumstances. Indeed, to the contrary, *Orth* observed that "the propriety of a PALJ's prehearing order *may* be addressed at the subsequent hearing." *Id.* at 1254 (emphasis added). We do not

read *Orth* as mandating that PALJ orders be reviewed only at a hearing. Nor do we read it as prohibiting an ALJ from revisiting a PALJ's orders.

¶ 79 None of the legal authority Villegas cites supports the principle he advances. Rather, the law holds to the contrary: "[A] PALJ's order 'may be addressed at the subsequent hearing,' and . . . an ALJ has authority to override a PALJ's ruling, [but] the statute authorizing PALJs to decide certain issues does not make ALJ review a prerequisite for appellate review." *Kilpatrick v. Indus. Claim Appeals Off.*, 2015 COA 30, ¶ 15, 356 P.3d 1008, 1013.

¶ 80 Further, Villegas's contention is inconsistent with his own disregard of the PALJ's order. Specifically, the PALJ struck numerous bases for penalties he asserted in his April 2019 application for hearing. Yet, Villegas reasserted all sixty-five grounds when he refiled his application for hearing several months later. Under his own reasoning, he should not have been permitted to do so.

B. The ALJ Did Not Lose Jurisdiction

¶ 81 Villegas also challenges the ALJ's jurisdiction over the matter after the hearing was vacated. As we understand his argument, he

contends that the ALJ could not rule on the summary judgment motion because an ALJ is only empowered to rule "in connection with hearings." He argues that, once the hearing had been vacated, the ALJ lost jurisdiction "because there was no longer a hearing to issue orders in connection with." We reject this contention.

¶ 82 The Act grants ALJs broad discretion to issue orders and make rulings in pending matters. *See* § 8-43-207. Villegas offers no legal authority, save for this broad statutory grant of authority, to support this contention. We know of no authority that limits an ALJ's ability to issue orders in this manner.

¶ 83 Moreover, in our view, such a limitation would be both harmful to the workers' compensation system and counterproductive. As Denver Water points out, Villegas himself filed motions after the hearing was vacated, including a motion for an extension of time. Hearings are set and vacated regularly. To hold that an ALJ loses jurisdiction to rule on a motion because a hearing is not pending at that moment seems to us illogical at best and unsupported by legal authority.

V. The ALJ Was Not Required to Recuse Himself

¶ 84 Villegas suggests that the ALJ should have recused himself from hearing the matter because Villegas had listed the ALJ as a witness on the ground that, in an unrelated workers' compensation matter, the ALJ had allegedly heard statements about the presence of nurse case managers at examinations conducted at Denver Water's medical clinic. He relies upon *People v. Roehrs*, 2019 COA 31, 440 P.3d 1231, for the principle that a judge who witnesses pertinent behavior should recuse himself or herself from a subsequent proceeding centered on that behavior. We agree with Denver Water and Dr. Macaulay, however, that Villegas has not offered any basis for requiring the ALJ's recusal.

¶ 85 "In Colorado, the Code of Judicial Conduct requires disqualification of a judge 'in any proceeding in which the judge's impartiality might reasonably be questioned.'" *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011) (quoting C.J.C. 2.11(A)). "In other words, a judge must recuse whenever the judge's involvement with a case might create the appearance of impropriety." *Id.* Further, the Code of Judicial Conduct has been held to apply to ALJs. *See Kilpatrick*, ¶ 29, 356 P.3d at 1015 ("The C.J.C. thus

unambiguously and expressly applies to PALJs, ALJs, and Panel members, contrary to claimant's assertion.").

¶ 86 In *Roehrs*, a judge presiding over a dependency and neglect hearing witnessed and overheard one of the parties threaten a witness. *Id.* at ¶ 2, 440 P.3d at 1233. The party was later charged with retaliation, harassment, and witness intimidation. *Id.* at ¶ 3, 440 P.3d at 1234. A division of this court ruled that the judge who heard these statements and witnessed the party's behavior could not later preside over the witness intimidation trial because the judge's knowledge of the underlying facts created a "substantial appearance of impropriety." *Id.* at ¶ 31, 440 P.3d at 1239. As pertinent here, though, the division expressly declined to rule that the judge should have recused herself because she was a possible material witness. *Id.* at ¶ 29, 440 P.3d at 1239. The basis for seeking the recusal of the judge in *Roehrs* consequently is not analogous to the ALJ's situation.

¶ 87 Nor are we persuaded that the principle articulated in *Roehrs* mandated the ALJ's recusal here. Unlike in *Roehrs*, the ALJ merely heard testimony that could have been revisited in Villegas's later hearing. He did not hear any statements that could have formed

the basis of Villegas's penalty allegations. None of the testimony Villegas highlights addressed whether nurse case managers were present during *his* medical examinations. We note, too, that Villegas could have identified and called as witnesses other individuals with actual knowledge of the role nurse case managers played in Denver Water's clinic and at Villegas's appointments specifically or offered for admission relevant portions of the transcripts of the hearings. But, instead, he only listed the ALJ as a witness on this point in a notice of additional witnesses attached to his case information sheet filed in advance of a hearing that was later vacated. Perhaps most tellingly, Villegas could not have viewed the ALJ as a critical witness to his case because he did not list the ALJ on his subsequent October 2019 application for hearing. That application for hearing led to the hearing and order at issue here. Thus, the pertinent application for hearing omitted the ALJ as a witness.

¶ 88 We therefore conclude that Villegas has not offered sufficient evidence establishing that the ALJ's knowledge, if any, could have impaired his impartiality. Accordingly, we reject his contention that the ALJ should have recused himself.

VI. The Dismissal of the Penalty Allegations

¶ 89 Having determined that Villegas's claims were barred by his failure to timely file his petition to reopen, we need not address Villegas's contention that the ALJ and the PALJ improperly dismissed certain penalty allegations.

VII. Conclusion

¶ 90 Based on the foregoing, we hold that, because the case had been closed, Villegas was required to reopen it to assert penalty claims against Denver Water and Dr. Macaulay. Because he failed to do so within the time allowed by the reopening statute, the Panel properly upheld the ALJ's grant of summary judgment in Denver Water's favor. We therefore affirm the Panel's order dismissing Villegas's penalty claims against Denver Water as time barred.

¶ 91 We further conclude that, because the General Assembly intended closure to apply to an entire "case," the Panel erred by concluding that Villegas's claims against Dr. Macaulay could proceed. Rather, we hold that Villegas's penalty claims against Dr. Macaulay are also time barred. We therefore set aside that portion of the Panel's order permitting penalty claims against Dr. Macaulay

to proceed and remand the case to reinstate the ALJ's order dismissing the claims asserted against Dr. Macaulay.

JUDGE BROWN concurs.

JUDGE TAUBMAN concurs in part and dissents in part.

JUDGE TAUBMAN, concurring in part and dissenting in part.

¶ 92 The principal issue in this appeal is the relation between two statutes of limitation in the Workers' Compensation Act (the Act) — one applicable to penalties and the other pertaining to reopening of cases. Because I disagree with the majority that the two statutes can be harmonized in a manner that shortens the penalty statute of limitations, I respectfully dissent in part. Rather, I conclude that the two statutes of limitation operate independently of one another, and, therefore, the request for penalties by claimant, Allen Villegas, was timely filed. I also conclude, but for somewhat different reasons, that the Industrial Claim Appeals Office (the Panel) correctly determined that Villegas's penalty claim against Dr. Hugh Macaulay, the physician who oversaw his workers' compensation examinations, was timely filed. Accordingly, I would remand Villegas's penalty claims against Dr. Macaulay, and Villegas's employer, Denver Water, and its insurer, Travelers Indemnity Co., for further proceedings.

¶ 93 Nevertheless, I concur with the majority's determination that the record is adequate for appellate review (Part II), that the administrative law judge (ALJ) did not abuse his discretion by not

granting Villegas additional time to respond to the motion for summary judgment (Part III.F), that the ALJ had jurisdiction to rule (Part IV), and that the ALJ was not required to recuse himself (Part V). I would not reach the issue of equitable tolling (Part III.E), which is predicated on the applicability of the reopening statute of limitations because, as discussed below, I do not believe that that statute of limitations applies.

I. Background

¶ 94 Because the majority sets forth the factual and procedural background in some detail, I will do so only briefly. Following a work-related injury in February 2012, Villegas began receiving permanent partial disability (PPD) workers' compensation benefits. In September 2015, Denver Water filed a final admission of liability (FAL). An ALJ denied his request for permanent total disability benefits, and that denial was upheld by the Panel and a division of this court. *See Villegas v. Indus. Claim Appeals Off.*, (Colo. App. No. 17CA1619, Sept. 20, 2018) (not published pursuant to C.A.R. 35(e)). It is undisputed that Villegas received PPD benefits until October 17, 2016.

¶ 95 On April 4, 2019, Villegas filed a claim for penalties against Denver Water and Dr. Macaulay, alleging that they permitted nurse case managers — nurses skilled in administering an insurer's case management program for injured workers — to attend his appointments with Dr. Macaulay without Villegas's knowledge or consent, in violation of the Act. Subsequently, an ALJ granted the summary judgment motion of Denver Water and Dr. Macaulay on the ground that Villegas's petition was filed after the expiration of the reopening statute of limitations in section 8-43-303, C.R.S. 2021. The Panel affirmed the ALJ's decision regarding Denver Water but reversed as to Dr. Macaulay, concluding that the reopening statute of limitations applied only to the parties to the FAL.

¶ 96 Villegas and Dr. Macaulay appeal the decisions against them.

II. Statutory Framework

¶ 97 The Act sets forth two statutes of limitation, whose interaction is at issue here. Under the Act, once a case is closed, the reopening of the case must be accomplished in accordance with section 8-43-303. The reopening statute of limitations contains two pertinent subsections. The first, section 8-43-303(1), states, in

relevant part: "At any time within six years after the date of injury, the director or an [ALJ] may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment . . . , an error, a mistake, or a change in condition . . . ." Section 8-43-303(2) provides that an award may be reopened within two years of the date the last temporary or permanent disability benefits become payable on the same grounds stated in subsection (1).

¶ 98 In contrast, the penalty statute of limitations, section 8-43-304(5), C.R.S. 2021, provides: "A request for penalties shall be filed with the director or an 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."

III. Standard of Review

¶ 99 We review de novo the Panel's statutory interpretations. *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005). If the statutory language is clear, we interpret the statute according to its plain and ordinary meaning. *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010). In addition, we must construe the Act "as a whole to give effect and meaning to all its parts, and we avoid interpretations that render provisions superfluous." *City of*

Littleton v. Indus. Claim Appeals Off., 2016 CO 25, ¶ 27, 370 P.3d 157, 166.

IV. Analysis

¶ 100 I disagree with the majority's analysis of the interplay between the reopening and penalty statutes of limitation for three reasons:

(1) the meaning of the words "award," "benefits," and "penalties," as used in the Act and the statutes of limitation at issue here, demonstrates that the General Assembly intended the two statutes of limitation to operate independently of one another;

(2) the majority's encapsulation of the penalty statute of limitations within the reopening statute of limitations does not give meaning and effect to a significant provision of the penalty statute of limitations and, thus, does not properly harmonize them; and

(3) even if the reopening and penalty statutes of limitation conflict, special rules applicable to conflicting statutes of limitation militate in favor of the penalty statute of limitations applying in the circumstances here.

¶ 101 As the majority notes, Villegas's application for hearing was filed more than six years after his injury and more than two years after the date he last received PPD benefits. Consequently, if the reopening statute of limitations applies, his penalty request is time barred. If only the penalty statute of limitations applies, however, Villegas's penalty request is timely because he filed it on April 4, 2019 — less than a year after he says that he or his attorney first learned of the possible presence of nurse case managers at his examinations with Dr. Macaulay. As I explain below, I do not believe the two statutes of limitation can be harmonized by combining them, as the majority does in a manner not done by the Panel nor argued by any of the parties.

A. The Meaning of "Award," "Benefits," and "Penalties"

¶ 102 As the majority notes, an award under the Act is defined as "an order, whether resulting from an admission, agreement, or a contested hearing, which addresses benefits, and which grants or denies a benefit." *Burke v. Indus. Claim Appeals Off.*, 905 P.2d 1, 2 (Colo. App. 1994); *see also Bolton v. Indus. Claim Appeals Off.*, 2019 COA 47, ¶ 23, 487 P.3d 999, 1004-05. In the same vein, the supreme court explained that an award under the Act designates

"only a decision on the merits." *Indus. Comm'n v. Kokel*, 108 Colo. 353, 356, 116 P.2d 915, 916 (1941).

¶ 103 Significantly, a division of our court held in another workers' compensation case, "We have no hesitancy in concluding that an order, whether resulting from an admission, an agreement, or a contested hearing, which addresses each of the three types of benefits (medical, temporary disability, and permanent disability) and which grants or denies each type of benefits. constitutes an 'award.'" *Brown & Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780, 783 (Colo. App. 1991) (citation omitted).

¶ 104 The thrust of these decisions is that an award concerns medical, temporary disability, or permanent disability benefits, rather than penalties. This conclusion is supported by analysis of the Act's framework. Article 42 of the Act is titled "Benefits." It describes the above categories of benefits, as well as death benefits. Significantly, it does not address penalties. In contrast, the statutory provisions for penalties are set forth in sections 8-43-304(1) and 8-43-401(2)(a), C.R.S. 2021. According to the Colorado Practice Series on workers' compensation, these provisions are referred to as the general penalty statute and the

specific penalty statute, only the former of which is at issue here. *See* 17 Douglas R. Phillips & Susan D. Phillips, *Colorado Practice Series: Workers' Compensation Practice & Procedure* § 9.3, Westlaw (2d ed. database updated Nov. 2021).

¶ 105 That benefits differ from penalties is clear from other sections of the Act. For example, section 8-42-126, C.R.S. 2021, which concerns monetary benefits and penalties, refers to "monetary benefits or penalties required to be paid to an injured worker." Similarly, section 8-43-301(2)(a)(I), C.R.S. 2021, concerning petitions to review, refers to orders requiring a party to pay "a penalty or benefits" or denying a claimant "any benefit or penalty."

¶ 106 Additionally, section 8-43-203(2)(B)(II)(A), C.R.S. 2021, makes clear that an FAL, which triggers the reopening provision in section 8-43-303, applies to "final payment of compensation." Accordingly, an FAL does not apply to a request for imposition of penalties.

¶ 107 If penalties were encompassed within benefits, these statutes would not use this disjunctive language. Based on the differences between benefits and penalties in the Act, several conclusions follow:

(1) section 8-43-303(1) and (2), the reopening statutes of limitation, do not apply to requests for penalties;

(2) the Act's goal of providing "quick and efficient delivery" of benefits "at a reasonable cost to employers" expresses the General Assembly's intent concerning only benefits, not penalties, § 8-40-102, C.R.S. 2021;

(3) the breadth of the word "case" in section 8-43-203(2)(b)(II)(A) and (2)(d) applies to reopening a closed case, but these statutes do not apply here if the reopening statute of limitations does not apply to penalties;

(4) thus, Denver Water's FAL stating that "[a]ny benefits and penalties not specifically admitted herein are denied" is a nullity with respect to Villegas's request for penalties; and

(5) sections 8-43-203 and 8-43-303 do not require reopening before any action can be taken in a closed case, *see Bolton*, ¶¶ 23-24, 487 P.3d at 1005 (reopening statute does not apply to employer's request to discontinue future medical benefits); *Brown & Root*, 833 P.3d at 879

(reopening statute does not apply when ALJ reserves jurisdiction over permanent disability benefits); *cf. Feeley v. Indus. Claim Appeals Off.*, 195 P.3d 1154, 1157 (Colo. App. 2008) (reopening required before claimant could request further benefits or request penalties, but penalty statute of limitations not addressed).

¶ 108 Viewing the reopening and penalty statutes of limitation as addressing separate subjects shows why they both address fraud. Because the reopening statute of limitations addresses awards and therefore benefits, it lists fraud together with overpayments, errors, mistakes, and changes of condition as grounds for seeking a modification of an initial award of benefits. In contrast, the penalty statute, section 8-43-304(1), applies specifically to violations of the Act. That statute provides for penalties when a party or any other person violates the Act, does any act prohibited under the Act, refuses to perform any duty lawfully prescribed by the director or the Panel, or fails or refuses to obey any lawful order of the director, the Panel, or a court. *See Holliday v. Bestop, Inc.*, 23 P.3d 700, 705 (Colo. 2001). Here, Villegas sought penalties on the basis that Denver Water and Dr. Macaulay violated section 8-43-203(3)(b)(IV)

of the Act by not informing him of the presence of nurse case managers and his right to decline their presence at his appointments with Dr. Macaulay.

¶ 109 While section 8-43-304(2) expressly references fraud claims, it does so only regarding fraud claims by an employer and only as an offset against future payments an employee is due. Thus, nothing in that statute suggests, much less expressly requires, that a claim for penalties is subject to the reopening statute of limitations.

B. Can the Reopening and Penalty Statutes of Limitation Be Harmonized?

¶ 110 Unlike the majority, I conclude that the reopening and penalty statutes of limitation cannot be harmonized by requiring the reopening of a closed claim before a claimant may pursue penalties. In my view, such analysis must occur at the expense of disregarding salient language in section 8-43-304(5).

¶ 111 As noted, the penalty statute of limitations states that a request for penalties must be filed "within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." By requiring a claimant to file a reopening request before a claimant may pursue

penalties, the accrual language of that statute — that the one-year period begins when "the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty" — is rendered superfluous, contravening a significant rule of statutory construction. *See City of Littleton*, ¶ 27, 370 P.3d at 166.

¶ 112 Let's suppose a claimant learns of a basis for filing a request for penalties three years after an injury and more than two years after his or her last receipt of benefits and seeks to file a claim for penalties five years after the date of injury. In such circumstance, the claimant's request for penalties would be time barred under the proposed harmonization of the reopening and penalty statutes of limitations. In that situation, the request for penalties would be timely under the reopening statute of limitations (since it would be filed within six years of the date of injury) but would be time barred under the proposed harmonization because it would be filed two years after first learning the basis for a possible penalty claim. This would have the anomalous result of giving the claimant less time to seek reopening than if the claimant sought reopening based on an overpayment, an error, a mistake, or change of condition. In my view, this attempted harmonization is inconsistent with the plain

statutory language in section 8-43-304(5) and renders superfluous the language that a request for penalties is timely if it is filed within one year of the date a claimant knew or reasonably should have known the basis for a possible penalty claim.

¶ 113 Significantly, neither section 8-43-303 nor section 8-43-304(5) cross-references the other. If the General Assembly had intended that the two statutes should work in tandem, it could easily have so provided. In *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002), the division interpreted section 8-43-304(5) without referencing the reopening statute of limitations. It stated that the purpose of that provision, "like any limitations period, is to ensure the prompt litigation of penalty claims once the underlying violation is first discovered."[1] *Id.* at 177.

¶ 114 Indeed, providing an accrual period that begins when a party first knew or reasonably should have known the facts giving rise to a possible penalty makes sense. In some situations, a claimant

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[1] Similarly, a Colorado treatise on workers' compensation discusses the penalty statute of limitations without any reference to the reopening statute of limitations. *See* 17 Douglas R. Phillips & Susan D. Phillips, *Colorado Practice Series: Workers' Compensation Practice & Procedure* § 9.3, Westlaw (2d ed. database updated Nov. 2021).

may not discover the basis for a possible penalty claim within the period contained in the reopening statute of limitations, as is alleged to be the case here.

¶ 115 Any concern that the independent application of the penalty statute of limitation could lead to the filing of penalty claims years after the closure of a workers' compensation case, contrary to the General Assembly's intent that such cases be resolved quickly, misses the mark for several reasons. First, the Act specifies several circumstances in which a case may be reopened "at any time." For example, section 8-43-303(1) states in part that "a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact." Similarly, section 8-43-303(3)(a) states in pertinent part that, "[w]hen a claimant has been awarded permanent total disability benefits, the award may be reopened at any time to determine if the claimant has returned to employment."

¶ 116 Second, under the circumstances here, Villegas's request for penalties was filed less than one year after he or his attorney learned of the possible presence of nurse case managers at his appointments with Dr. Macaulay. Thus, in this case, at least, there

is no issue of penalty claims being filed years after the periods contained in the reopening statutes of limitation.

¶ 117 Third, although the parties do not refer to section 8-43-304(5) as an accrual statute of limitations, that is what it is. To determine the meaning of when the penalty statute of limitations begins to run, it is helpful to look at the primary accrual statute of limitations, section 13-80-108, C.R.S. 2021. That statute states when statutes of limitation begin to run for numerous categories of civil action. Significantly, section 13-80-108(1) states, with an exception not relevant here, that "a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known *by the exercise of reasonable diligence*." (Emphasis added.) Subsections (3), (6), (7), (8), (12), and (13) also expressly require the exercise of reasonable diligence. *See Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489, 492 (Colo. App. 2008) ("Plaintiffs are required to exercise reasonable diligence in discovering the relevant circumstances of their claims. § 13-80-108(8). They are judged on an objective standard that does not reward denial or self-induced ignorance.").

¶ 118 If a claim for penalties in a workers' compensation case were filed years after a case had been closed, a court might consider the equivalent of a reasonable diligence requirement to the accrual language in section 8-43-304(5) in the absence of such express language in that statute by applying the doctrine of laches. *See Hickerson v. Vessels*, 2014 CO 2, ¶ 3, 316 P.3d 620, 622 (holding that laches can apply to shorten a statute of limitations period and does not violate the separation of powers doctrine).

¶ 119 Accordingly, I conclude that a claimant need not reopen a case in order to pursue a claim for penalties. I further determine that the reopening and penalty statutes of limitation cannot be harmonized by shoehorning the latter into the former. Finally, I believe that applying the accrual provision of the penalty statute of limitations will not lead to the filing of stale claims years after a workers' compensation case has been closed.

C. What If the Reopening and Penalty Statutes of Limitation Conflict?

¶ 120 Even if the reopening and penalty statutes of limitations conflict — which I do not believe is the case — the application of special statute of limitations rules leads to the conclusion that the

penalty statute of limitation prevails over the reopening statute of limitations.

¶ 121 In *Jenkins v. Panama Canal Railway Co.*, 208 P.3d 238 (Colo. 2009), the supreme court explained that when statutes of limitation conflict (1) the specific statute prevails over the general statute (subject to an exception not relevant here) and (2) the statute with the more recent effective date prevails.

¶ 122 Villegas argues that if reopening is required to pursue a penalty claim, his request for penalties was timely because otherwise the position of Denver Water and Dr. Macaulay would lead to absurd results. Although Villegas does not address the application of the special rules to determine which of two conflicting statutes of limitation prevails, I conclude that their application would lead to the prevalence of the penalty statute of limitations.

¶ 123 Here, the more specific statute is the penalty statute of limitations. Its focus is narrower than the reopening statute of limitations, which addresses a wide variety of reasons for reopening a case. Additionally, the penalty statute of limitations is the more recent; it was enacted in 1994, as opposed to the reopening statute of limitations enacted in 1990.

¶ 124 Accordingly, if the statutes of limitation conflict, then the penalty statute of limitations should apply here, and Villegas's claim for penalties is timely.

D. Villegas's Claims Against Dr. Macaulay

¶ 125 Although the Panel determined that Villegas's penalty claims against Denver Water were untimely based on the reopening statute of limitations, it held that his claim against Dr. Macaulay could proceed because the closure of issues under the reopening statute applied only to the parties to the FAL. The Panel then determined that section 8-43-304(5), the penalty statute of limitations, was the applicable statute of limitations.

¶ 126 I agree that Villegas's claim against Dr. Macaulay should proceed under the penalty statute of limitations. However, as discussed above, I disagree with the Panel's determination that the reopening statute of limitations applies at all to this case.

¶ 127 Under these circumstances, I would affirm the Panel's determination that the penalty claims against Dr. Macaulay are not time barred, but for somewhat different reasons that those expressed by the Panel.

V. Conclusion

¶ 128 I conclude that Villegas's penalty claims are not time barred by the reopening statute of limitations and that they are timely under the penalty statute of limitations. Accordingly, I would remand the case for further proceedings to determine whether any of Villegas's claims should be dismissed, and for any claims not dismissed to be determined on the merits. Of course, I express no opinion as to whether the penalty claims against Denver Water and Dr. Macaulay are meritorious.